No. 18-2143

# In the Supreme Court of the United States

ELMORE LANSFORD,
PETITIONER,

*V.*

SILVIA COURTIER,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF STATE OF TENLEY

## BRIEF FOR THE PETITIONER

Oral Argument

October 25-26, 2019

Team #219547

*Attorneys for Petitioner*,

Elmore Lansford.

## QUESTIONS PRESENTED

I. Whether an individual is libel-proof given that she has an extensive past criminal record relating to the challenged statements and, taken as a whole, the challenged statements are significantly less harmful to her reputation than the unchallenged statements?

II. Whether hyperbolic statements that lack defamatory meaning and falsity are afforded First Amendment protection?

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## JURISDICTIONAL STATEMENT

A Formal Statement of Jurisdiction has been omitted in accordance with the Rules of the Washington College of Law's Burton D. Wechsler First Amendment Moot Court Competition.

## STATEMENT OF THE CASE

### Statement of Facts

Elmore Lansford ("Petitioner") is the current mayor of Silvertown and a former city council member. (J.A. at 16.) He is committed to making Silvertown a safe community and encouraging economic development in the city. (J.A. at 16.) Unfortunately, Silvia Courtier, ("Respondent") did not welcome Petitioner's "tough-on-crime" platform nor his success in creating an economic boom. (J.A. at 17.)

Though now reformed, Courtier admittedly has a long history of criminal misconduct that directly contravenes Petitioner's aims for a safe community. (J.A. at 15-16.) As a juvenile, she committed a series of offenses including assault, possession of marijuana, indecent exposure, vandalism, and possession of cocaine. (J.A. at 15.) A juvenile court declared Respondent delinquent and she was incarcerated at a boot camp for young female offenders. (J.A. at 15.)

After leaving the boot camp, Courtier maintained her life of crime. (J.A. at 15.) She developed a cocaine habit and sold cocaine. (J.A. at 5.) Respondent was arrested and charged with two felonies for drug dealing and ultimately pled her charges down to possession – earning her two years in state prison. (J.A. at 5, 16.) Upon her release, Respondent opened a line of clothing stores that cater to the wealthy. (J.A. at 16.) Her stores sell products from Fendi, Chanel, Gucci, Louis Vuitton, and other high-end designers. (J.A. at 16.) She married Raymond Courtier, her primary investor. (J.A. at 5.)

In recent years, Respondent has become a vocal critic of Petitioner. (J.A. at 16-17.) She has campaigned fervently against Petitioner's efforts to reduce the Silvertown crime rate and combat growing levels of poverty. (J.A. at 17.) She has also attacked his efforts to promote economic stability in the community. (J.A. at 17.) At the height of Lansford's most recent reelection campaign, Respondent published a column on her website distastefully criticizing him

as a "relic of the past," "a divisive leader," "someone who cares little for social justice issues" and accused him of "engag[ing] in a war on the economically-strapped denizens of Cooperwood." (J.A. at 3-4.) Her words were especially venomous, considering Courtier's late husband had been one of Lansford's earliest supporters and had even helped him enter into politics. (J.A. at 3-4.) After enduring years of Respondent's name calling, Lansford finally spoke out. (J.A. at 18.) He issued an emotional statement criticizing Petitioner for her hypocritical lifestyle and citing to her colorful past. (J.A. at 18.)

Procedural History

Respondent filed a defamation and false light action against Lansford in the Tenley District Court. (J.A. at 1.) Lansford responded by filing a special motion to strike/dismiss the defamation claim under the Tenley Public Participation Act § 5 – 1 – 701 et seq (Tenley's anti-SLAPP statute). (J.A. at 6.) Petitioner contends that the defamation lawsuit was filed as an attempt to punish or silence his freedom of expression. (J.A. at 6.) Both the lower courts agreed that the lawsuit implicated Lansford's First Amendment rights and subjected the claim to the anti-SLAPP statute. (J.A. at 14-15.) Thus, under the anti-SLAPP statute, the burden shifted to Courtier to demonstrate a prima facie case for defamation. (J.A. at 15.)

Lansford further argues that Respondent's defamation claim is fatal for two reasons: First, he urges that Respondent is a libel-proof plaintiff and second, that the First Amendment protects the challenged statements because they were rhetorical hyperbole. (J.A. at 9.) The Tenley District Court held that Respondent was not libel-proof, but granted Petitioner's special motion to strike/dismiss the defamation claim. (J.A. at 11, 13.)

Courtier appealed to the Supreme Judicial Court of State of Tenley. (J.A. at 14.) The Tenley Supreme Court affirmed in part and reversed in part, holding that she was not libel-proof

and that the case should not be dismissed. (J.A. at 19, 23.) Lansford then petitioned this Court for relief. (J.A. at 24.) This Court granted the petition for writ of certiorari to address the constitutional issues raised and scheduled the case for the October 2019 Term. (J.A. at 24.)

Standard of Review

The decision of the Tenley Supreme Court involves questions of law and is reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF ARGUMENT

Respondent's defamation claim is hopelessly deficient. First, her claim fails because she is libel-proof under both formulations of the libel-proof plaintiff doctrine. Second, the First Amendment protects the challenged speech because it is rhetorical hyperbole. To warrant a reversal of the lower court's decision, Petitioner must only win on one of the two issues presented. Respondent, on the other hand, must convince the Court as to both issues to prevail.

Courtier's claim fails because she has not established all the essential elements of defamation. At a minimum, she has failed to establish damages because she is libel-proof. Her defamation claim fails under the incremental harm formulation because the challenged statements do not further contribute to her reputational harm. Rather, the reputational harm she suffered stems from the truthful, uncontested statements. Moreover, Courtier is libel-proof under the issue-specific approach to the doctrine because, in context, her extensive criminal history riddled with drug-related and violent offenses leaves her with little reputation left to protect.

Regardless of whether the Court labels her libel-proof, Courtier's claim fails because she has not met her burden of establishing two other critical defamation elements. She was unable to establish defamatory meaning because the First Amendment protects loose and figurative language as rhetorical hyperbole. Even if the Court holds that the statements had defamatory meaning, Courtier failed to establish the element of falsity. Finally, allowing her frivolous claim

to survive diminishes Lansford's free speech rights and threatens a chilling effect on public discourse. Accordingly, this Court should reverse the decision of the Tenley Supreme Court.

## ARGUMENT

Freedom of expression is the bedrock of the United States Constitution, without which individual liberty crumbles. The First Amendment, incorporated to the states through the Fourteenth Amendment, prohibits infringement on an individual's free speech rights. U.S. Const. amend. I. Fundamental to this right is the right to express critical speech. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) ("the fact that society may find speech offensive is not a sufficient reason for suppressing it"). If this Court permits Respondent's claim for defamation to proceed, this paramount right will be dangerously threatened.

Libel law was developed to allow an injured plaintiff to "vindicate his good name" and to obtain redress for harm caused by false statements. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990). Damages in a defamation claim are awarded on a sliding scale, apportioned by the relative reputational harm that the plaintiff suffered. Joshua M. Greenburg, *The Privacy-Proof Plaintiff: But First, Let me Share your #Selfie*, 23 J.L. & Pol'y 689, 698 (2015).

State libel laws give way to several complete defenses including the libel-proof plaintiff doctrine, protected rhetorical hyperbole, and substantial truth. Kevin L. Kite, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine*, 73 N.Y.U. L. Rev. 529, 534 (1998) (libel-proof plaintiff and substantial truth); *Milkovich*, 497 U.S. at 20 (hyperbolic speech). Thus, where a defamation defendant is able to demonstrate that *either* the plaintiff is libel-proof or the speech was protected rhetorical hyperbole, the plaintiff's claim is barred and the recovery on the sliding scale is zero.

Here, the complete defenses apply. First, Courtier is libel-proof as a matter of law under both formulations of the libel-proof plaintiff doctrine. Second, Lansford's speech is not defamatory because it was mere hyperbolic name-calling. If this Court agrees with either argument, Respondent's claim for defamation cannot survive and this Court should remand the case with instructions to grant Petitioner's special motion to strike/dismiss.

## I. THE LIBEL-PROOF PLAINTIFF DOCTRINE DEFEATS RESPONDENT'S DEFAMATION CLAIM BECAUSE SHE HAS FAILED TO DEMONSTRATE THAT THE CHALLENGED STATEMENTS CAUSED HER REPUTATIONAL HARM.

Libel law occupies a "murky ground" between federal constitutional law and state tort law. *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1072 (3d Cir. 1988). Compensating private individuals for injury to reputation must be balanced against the First Amendment's aim of fostering public discussion that is "uninhibited, robust, and wide-open." *Gertz v. Welch*, 418 U.S. 323, 340 (1974); *Wynberg v. Nat'l Enquirer*, 564 F. Supp. 924, 928 (C.D. Cal. 1982). By disqualifying baseless defamation claims where the plaintiff is incapable of demonstrating reputational harm, the libel-proof plaintiff doctrine strikes this exact balance.

In essence, the doctrine allows courts to dismiss libel actions when it appears that the plaintiff has not suffered reputational harm. David Marder, *Libel Proof Plaintiffs – Rabble Without a Cause*, 67 B.U. L. Rev. 993 (1987). Courts arrive at this result by applying one of two variations of the doctrine: the issue-specific formulation or the incremental harm doctrine. *Id.* The issue-specific brand recognizes that the plaintiff's own previous conduct in a specific area caused the reputational harm. James A. Hemphill, *Libel-Proof Plaintiffs and the Question of Injury*, 71 Tex. L. Rev. 401, 406 (1993) (citing *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1913 (1985)). The incremental harm category compares the truthful—or otherwise uncontested—statements of a communication with the challenged statements. *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. at 1912-13. If the challenged statements harm the plaintiff's

reputation significantly less than the unchallenged statements, the incremental harm doctrine bars the plaintiff's defamation claim. *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. at 1913. Though they apply different means, both formulations work toward the same end: to dismiss frivolous libel claims where a plaintiff fails to establish reputational harm.

Applying the libel-proof plaintiff doctrine in this instance would not, as Respondent may lead this Court to believe, bar a plaintiff's defamation claims indefinitely. *See, e.g.*, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. at 1923 ("if the contested statements concern a part of the plaintiff's reputation entirely distinct from the conviction—such as a bank robber being called a murderer—then the plaintiff should not be considered libel-proof"). Nor does it cast certain plaintiffs as outlaws "beyond the scope of the law." Evelyn A. Peyton, *Rogues' Rights: The Constitutionality of the Libel-Proof Plaintiff Doctrine*, 34 Santa Clara L. Rev. 179 (1993). Rather, both formulations are narrowly applied and depend on the unique juxtaposition of the potentially libelous statements with the plaintiff's reputation in a specific area. As such, even applying this doctrine narrowly, this Court should determine that Courtier—under the facts accepted as true—is unable to demonstrate reputational harm in her claims against Lansford.

### A. The Widely Adopted Libel-Proof Plaintiff Doctrine Is a Necessary Check on the Protection of Free Expression and an Essential Tool for Ensuring Judicial Expediency.

The libel-proof plaintiff doctrine was adopted to protect First Amendment rights of speakers, like Lansford, whose speech may be chilled by having to defend against frivolous defamation claims. Patricia C. Kussmann, *Construction and Application of Libel-Proof Doctrine*, 54 A.L.R. 6th 165, *2. Today, it functions as an important armor for the First Amendment, promotes judicial expediency, and is a workable solution for courts to sift through meritless claims where plaintiffs are unable to establish more than nominal damages. Though

Respondent may argue that this Court's decision in *Masson v. New Yorker Magazine, Inc.* has severely restricted the incremental harm doctrine, application of the doctrine in this instance—where Tenley has expressly adopted it—is in line with precedent.

1. Thwarting the threat of chilled speech, courts have often adopted the libel-proof plaintiff doctrine.

Admittedly, the libel-proof plaintiff doctrine has not been uniformly adopted. In fact, courts are divided as to whether it is appropriate to dismiss a frivolous defamation action entirely when the plaintiff is unable to demonstrate reputational harm. *Compare Mattheis v. Hoyt*, 136 F. Supp. 119 (W.D. Mich. 1955) (determination that plaintiff was libel-proof was sufficient to dismiss defamation action) *with Church of Scientology Int'l. v. Time Warner, Inc.*, 932 F. Supp. 589 (S.D.N.Y. 1996), *aff'd sub nom.* 238 F.3d 168 (2d Cir. 2001) (denying motion to dismiss libel action stating that question of reputation creates factual question for the jury). Whether a court employs the issue-specific or incremental harm approach varies by jurisdiction rather than the facts of a given case. Greenburg, *The Privacy-Proof Plaintiff: But First, Let me Share your #Selfie*, 23 J.L. & Pol'y at 705; *See, e.g., Wynberg*, 564 F. Supp. at 924 (adopting issue-specific); *Simmons Ford, Inc. v. Consumers Union of U.S., Inc.*, 516 F. Supp. 742 (S.D.N.Y. 1981) (adopting incremental harm). However, the issue of whether someone is libel-proof is a question of law for the courts to decide. *Stern v. Cosby*, 645 F. Supp. 2d 258, 270 (S.D.N.Y. 2009).

Many courts have adopted the libel-proof plaintiff doctrine in some form, recognizing the importance of demonstrating reputational harm in order to establish the elements for a defamation claim. *See, e.g., Cardillo v. Doubleday & Co.*, 518 F.2d 638 (2d Cir. 1975) (issue-specific); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993) (incremental harm); *Lamb v. Rizzo*, 391 F.3d 1133 (10th Cir. 2004); *Logan v. District of Columbia*, 447 F. Supp. 1328 (D.D.C. 1978) (issue-specific). Further, several courts that have rejected the doctrine have done

so based on facts or contradictory state law rather than validity of the doctrine. *See generally Schiavone Const. Co.*, 847 F.2d at 1069; *Zerangue v. TSP Newspapers*, 814 F.2d 1066, 1067 (5th Cir. 1987); *Brooks v. Am. Broad. Companies, Inc.*, 932 F.2d 495, 497 (6th Cir. 1991).

Courts that have applied the libel-proof plaintiff doctrine, particularly the issue-specific variation, have done so with the understanding that the inquiry involves a necessary balance between reputational harm and freedom of expression. *See, e.g., Cardillo*, 518 F.2d at 639 (plaintiff was "so unlikely by virtue of his reputation . . . to be able to recover anything other than nominal damages as to warrant the dismissal of the case, *involving as it does First Amendment considerations*") (emphasis added); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1075 (3d Cir. 1985) (libel cases require courts to "chart the proper course between the Scylla of inadequately guaranteeing First Amendment protections and the Charybdis of diminishing an individual's right to reputation"). While the First Amendment does not afford publishers "carte blanche to report inaccurate, incorrect statements," libel actions sometimes warrant dismissal since the costs of defending against the claim alone can impair vigorous freedom of expression. *Dewit v. Outlet Broad., Inc.*, No. C.A. NC 98-0196, 1999 WL 1334932, at *4 (R.I. Super. Dec. 17, 1999).

Categorically eliminating the libel-proof plaintiff doctrine necessarily gives preference to defamation claims above free expression, leaving speakers to defend against meritless suits for exercising a constitutional right. This Court should be cautious about restricting the reach of the First Amendment. As James Madison warned, it is not the obvious affronts on the First Amendment that will cause it to crumble, but rather the small digs that go largely unnoticed by the public. James Madison, Speech at the Virginia Convention to Ratify the Federal Constitution (June 6, 1788) ("I believe there are more instances of the abridgment of the freedom of the

people by gradual and silent encroachments of those in power than by violent and sudden usurpations"). By giving free reign to defamation claims at the expense of free expression, we are complicit in discretely dismantling the bedrock of the American Constitution.

2. Abandoning the libel-proof plaintiff doctrine would suffocate legitimate defamation claims.

Defamation—though not a "garden variety" tort—falls under the umbrella of state tort law and the specific elements required to make a claim vary by jurisdiction. Hemphill, *Libel-Proof Plaintiffs and the Question of Injury*, 71 Tex. L. Rev. at 414. Though this Court articulated in *Gertz*, 418 U.S. at 347, that defamation is not necessarily a fault-based tort that compels damages as an essential element, the state of Tenley requires damages. (J.A. at 7.) Further, presumed and punitive damages, absent a showing of actual malice, are unconstitutional.[1] Under these circumstances, Courtier's remedy is limited to—at most—nominal damages. *Dun & Bradstreet*, 472 U.S. at 756-57. Since Tenley mandates damages as an essential element, holding for the Respondent would waste finite judicial resources hearing a meritless claim for the sake of awarding nominal damages.

Critics will argue that nominal damages, even absent any other remedy, serve an important function in vindicating a libel plaintiff's good name. This line of logic is faulty for two reasons. First, the core of a defamation claim is reputational harm, and without

[1] *Gertz*, 418 U.S. at 349. The *Gertz* rule, articulated above, applies to statements involving matters of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 756-57 (1985). Speech involving public concern is at "the heart of First Amendment's protection." *Id*. at 759. This includes 1) speech relating to *any* matter of *political*, social or other community concern; or 2) speech that is a subject of a legitimate news interest. *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (emphasis added). Here, Lansford's statements were a matter of public concern. As a politician in the midst of a reelection campaign, Lansford was faced with the pressure of addressing Courtier's public allegations that he was a "divisive leader," "relic of the past," and declaring "war on the . . . denizens of Cooperwood." (J.A. at 3-4.) His statement directly related to his political stance and responded to comments about his fitness to lead the community. This type of speech falls squarely within the first prong of public concern articulated in *Snyder*. Even if this Court does not agree that the matter is one of public concern, nowhere does the record demonstrate that Courtier is seeking punitive damages. (J.A. at 4.)

demonstrating this harm, a plaintiff has not shown the need for any vindication. Issuing damages absent a showing of harm is contrary to the modern approach to tort law that focuses on injury. Hemphill, *Libel-Proof Plaintiffs and the Question of Injury*, 71 Tex. L. Rev. at 414. Second, allowing meritless defamation claims to proceed would open the floodgates of litigation and limit the opportunities to hear credible cases. *Id*. at 418 (the doctrine serves as a "check on the number of lawsuits filed and helps ensure that *truly serious injuries* have a likelihood of being redressed in court") (emphasis added). Both branches of the libel-proof plaintiff doctrine conserve judicial resources by permitting courts to avoid protracted litigation at an early stage. Marder, *Libel Proof Plaintiffs – Rabble Without a Cause*, 67 B.U. L. Rev. at 993.

The doctrine is not simply a way to shortcut a libel claim as Respondent may urge this Court to believe. *See* Joseph H. King, Jr., *The Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian Knot" Syndrome*, 29 Hofstra L. Rev. 343, 344-45 (2000) (critiquing the doctrine as a "simplistic expedient . . . for bypassing established elemental principles of defamation law"). Rather, it reorders the elements of a defamation claim, allowing a court to assess reputational harm first. Defamation law requires a plaintiff to establish *all* elements of a claim to succeed. Tenley Code Ann. § 5 – 1 – 705(b). Since all elements must be met for Courtier's claim to survive—and because damages is a necessary element under Tenley law—this Court should place no significance on the order of analysis.

Much like substantial truth cripples the falsehood element of a defamation claim, the libel-proof plaintiff doctrine cripples the reputational harm prong. Kite, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine*, 73 N.Y.U. L. Rev. at 539. Since the doctrine simply answers the question of whether the plaintiff suffered reputational harm in context, starting with this inquiry is a workable solution for courts

to review potentially meritless claims. This Court should avoid drowning legitimate claims in a sea of frivolous suits and adopt the narrowly construed libel-proof plaintiff doctrine.

3. The incremental harm doctrine is alive and well post-*Masson*.

Respondent may argue that this Court's decision in *Masson v. New Yorker Magazine, Inc.* weakens the force of the incremental harm doctrine. 501 U.S. 496, 523 (1991). There, the Court rejected the "suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech." *Id.* However, using the *Masson* decision to preclude application of the incremental harm doctrine in this case would be fatal for two reasons.

*First*, the *Masson* Court explicitly deferred to states to determine whether to adopt the incremental harm doctrine. *Id.* ("[W]e are given no indication that California accepts this doctrine, *though it remains free to do so*") (emphasis added). Importantly, the Court held that "state tort law doctrines of injury, causation, and damages calculation might allow a defendant to press the argument that the statements did not result in any incremental harm to a plaintiff's reputation." *Id.* Thus, the Court did not eviscerate the doctrine in *Masson* but rather left the door open for Tenley to determine whether it is consistent with state law.

The Tenley Supreme Court explicitly adopted the libel-proof plaintiff doctrine in the opinion below. (J.A. at 20.) ("[W]e agree with the majority of our sister courts that the libel-proof plaintiff makes sense to adopt"). Further, by adopting the Tenley Citizens' Public Participation Act to protect citizens, like Lansford, who are sued in attempt to chill the exercise of First Amendment free speech rights, the state has implicitly ratified the incremental harm doctrine. (J.A. at 2.) The anti-SLAPP law in conjunction with the statement from the Tenley Supreme Court reiterates the state's interest in promoting free expression and discouraging frivolous libel claims where reputational harm has not occurred. Though the *Masson* Court

declined to set the incremental harm doctrine as the floor for assessing reputational harm in libel claims, it did not preclude its application altogether. Therefore, by accepting Tenley's decision to adopt the doctrine and applying it to the current case, this Court would be acting in accordance with its holding in *Masson*.

*Second*, *Masson* did not call for an incremental harm analysis because the challenged statements were the "most provocative, bombastic statements" of the publication. *Masson*, 501 U.S. at 523. There, a journalist published fabricated quotations in an article, claiming that the plaintiff made statements that he had not in-fact made. *Id*. As the *Masson* Court highlighted, fabricated quotations stand to injure reputation in at least two senses: 1) the quotation may injure because it attributes an untrue factual assertion to the speaker; and 2) the manner of expression or the fact that the statement was made at all may indicate an attitude that the speaker does not hold. *Id*. at 511. Either may independently give rise to a defamation claim. *Id*. Since the incremental harm doctrine only applies when challenged statements cause significantly *less* harm than the unchallenged statements, *Masson* does not adequately address how the doctrine should be applied when circumstances call for it.

The reasoning that led the Court to reject the incremental harm doctrine in that instance should lead the Court to apply it in this case. Here, it is undisputed that Lansford did not make representations that would influence the public to believe Courtier spoke words she had not spoken. Rather, Lansford merely adlibbed—albeit distasteful—opinions about the Respondent that were in-line with, and less injurious than, the uncontested true statements. While *Masson* shows an egregious departure from the truth, Courtier challenges mere name-calling. (J.A. at 5.) Since the challenged statements here are arguably not harmful, the Court should defer to Tenley's decision to adopt the doctrine and proceed with an analysis.

B. Respondent Is Libel-Proof Under Both Constructions of the Libel-Proof Plaintiff Doctrine.

The challenged statements here pale in comparison to both the unchallenged statements and Respondent's own past misconduct. Courtier has failed to establish the damages element of her defamation claim because any reputational harm she suffered is not attributable to the benign challenged statements. Her libel claim is an obvious attempt to blame a political foe for her own soiled reputation. Thus, regardless of whether this Court applies the issue-specific or incremental harm approach to the libel-proof plaintiff doctrine, her actions are barred.

1. Under the incremental harm doctrine, Respondent suffered significantly greater reputational harm from the unchallenged labels of "coddler of criminals" and "lewd and lusty lush" than the challenged label "leech on society."

To determine that the challenged statements did not contribute to Courtier's alleged reputational harm, the Court should apply the incremental harm doctrine. Under the incremental harm doctrine, courts will review the communication—in this case Lansford's post—in its entirety in relation to the effects of the statements on the challenger's reputation. *The Libel-Proof Doctrine*, 98 Harv. L. Rev. at 1912-13. If the potentially actionable parts of a publication "do not add significantly to the adverse reputational impact beyond that attributable to the nonactionable portions of the same publication" the defamation claim fails.[2,3] *Id*. Though a speaker may not publish "with impunity a vast collection of false statements," even false

[2] Wayne M. Serra, *New Criticisms of the Libel-Proof Plaintiff Doctrine*, 46 Clev. St. L. Rev. 1, 5-6 (1998). Non-actionable statements include those that are true or are otherwise protected because they do not rise to the required level of defamatory meaning.

[3] King, *The Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian Knot" Syndrome*, 29 Hofstra L. Rev. at 350. The comparative language adopted by courts with respect to the incremental harm doctrine varies by case. The harm caused by the challenged statements, should be "minimal," "minor," "negligible," "incremental," "nominal," "far less," "nominal or nonexistent" or "of no significant damage" when compared with the unchallenged statements.

challenged statements are not enough to defeat a libel-proof label when they are menial in the context of the larger communication. *Herbert v. Lando*, 781 F.2d 298, 312 (2d Cir. 1986).

The incremental harm doctrine was created for purposes exactly like the case at bar. Reviewing Lansford's publication as a whole reveals the trivial nature of the challenged statements. For example, Courtier claims to have been defamed specifically by the statement that she is a "leech on society" yet does not challenge assertions that she "walked the streets strung out on drugs . . . [and] is nothing more than a former druggie." (J.A. at 18.) Here, the true statements that accompany the challenged statements demonstrate that any alleged reputational harm she suffered as the result of the latter is negligible.

A review of *Simmons Ford*, the case that created the incremental harm doctrine, informs the analysis here. 516 F. Supp. at 742. There, the defendant published a magazine article critiquing the design of the manufacturer's CitiCar vehicle. *Id*. at 743. Specifically, the article discussed the vehicle's "flimsy construction" and low speed—both of which made the cars unsafe for travel on public highways. *Id*. at 744. While the plaintiffs did not challenge those assertions, they based a defamation action on the allegedly libelous statement that the vehicle failed to meet certain federal safety regulations. *Id*. at 745.

The *Simmons Ford* court held that in context the manufacturer's reputation could not be harmed beyond that caused by the unchallenged design failures discussed in the article. *Id*. at 750 ("the blunt fact is that . . . if the article had made no reference to federal safety standards, or to the CitiCar's exemptions from them, the opinions expressed therein upon which the defendant concluded the car was 'Not Acceptable' would not give rise to any actionable claim in plaintiff's favor"). Given the plaintiff's own "abysmal performance and safety evaluations" discussed in the article, the false statement did not cause additional reputational harm. *Simmons Ford*, 516 F.

Supp. at 750. Importantly, the article contained "ample basis" for readers to reach the opinion that the car was unsafe apart from the challenged statements about federal safety standards. *Id*.

Similarly here, the unchallenged statements on their own provide ample basis to allow readers to reach the opinion that Courtier is a hypocrite. It is inconceivable that the terms "corrupt and a swindler," "whore for the poor," "pimp for the rich," and "leech on society" caused any additional reputational harm to Courtier in the context of the broader communication. (J.A. at 9.) If the article were republished without the challenged statements, readers would be left with the same image of Courtier: someone who represents herself as a champion for the less fortunate yet caters to the wealthy—someone whose actions speak louder than her words.

In fact, the doctrine's application is broader in *Simmons Ford* than the application Lansford is seeking here. There, the plaintiff was considered libel-proof even though the defendant made concrete false accusations. *Id*. at 743 (defendant claimed that the car had failed to meet federal safety standards that the manufacturer was in fact exempt from). Here, however, the statements do not accuse Courtier of taking or failing to take any action. (J.A. at 9.)

By applying the incremental harm doctrine, this Court would not be making a blanket decision that Courtier is *incapable* of being libeled, as Respondent would have this Court believe. In fact, Petitioner concedes that the doctrine must be applied narrowly, looking at the challenged and unchallenged statements as a whole on a purely factual basis. Instead, it focuses only on the publication containing allegedly libelous statements. Thus, this branch of the libel-proof plaintiff doctrine operates within a narrower frame of reference than the issue-specific formulation. King, *The Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian Knot" Syndrome*, 29 Hofstra L. Rev. at 350.

By turning to the statement as a whole here, the Court should determine that the challenged statements caused no additional harm to Courtier's reputation than the unchallenged, true statements. Especially considering that the challenged statements do not accuse Courtier of any crime or other concrete falsehood, the statements could not have caused any additional harm to her reputation. By labeling the plaintiff as libel-proof under the incremental harm doctrine, this Court resists the temptation to undergo an unnecessary defamation analysis where the plaintiff's claim for damages is fatal.

2. Even if this Court applies the issue-specific formulation of the libel-proof plaintiff doctrine, Respondent's colorful past renders her libel-proof.

Courtier's own past actions make her libel-proof under the issue-specific brand. This version of the doctrine is typically invoked to justify dismissing defamation actions where the plaintiff's criminal record shows that as a matter of law they would be unable to recover beyond nominal damages. *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 324 (2007) (citing *Jackson v. Longcope*, 394 Mass. 577, 579 (1985)). It has also been applied where previous publications or acts have "irreparably stained" the plaintiff's reputation, such that additional harm cannot be proven. *Herbert v. Lando*, No. 74 CIV. 434-CSH, 1985 WL 506, at *1 (S.D.N.Y. Apr. 4, 1985). The underlying justification for its application is that where an individual's reputation is sufficiently poor in a certain context, it is not possible to suffer additional damage from statements alleging similar behavior. Kussmann, *Construction and Application of Libel-Proof Doctrine*, 54 A.L.R. 6th at *2.

The doctrine has been applied unevenly across courts, ranging from the most permissive in *Wynberg* to, what Respondent will argue was an outright rejection in, *Anderson*. *Compare Wynberg*, 564 F. Supp. at 928 (holding that "if an individual's reputation is bad, [that person] is libel-proof on all matters") *with Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1569 (D.C. Cir.

1984) (characterizing the doctrine as a "fundamentally bad idea"). Neither of these extreme formulations applies the doctrine as was intended. *See*, *Cardillo*, 518 F.2d at 639 ("appellant is, *for purposes of this case*, libel-proof") (emphasis added). Taking a middle-of-the-line approach when applying this formulation of the libel-proof plaintiff doctrine, the Court should not look to the severity of the plaintiff's crimes on their face. Rather, the Court should consider the relationship between the allegedly defamatory statements and the truthful past actions. Only then will the inquiry focus on whether the potentially libelous statements caused the plaintiff any *additional* reputational harm than their own past actions already inflicted. Applying this formulation, Courtier's past misconduct clearly bars her defamation claim.

*a. Courtier may not escape the libel-proof label simply because she was not a notorious criminal.*

The libel-proof plaintiff doctrine has most often applied in the context of defamation claims brought by individuals with multiple criminal convictions. Kussmann, *Construction and Application of Libel-Proof Doctrine*, 54 A.L.R. 6th at *2. This formulation "seems to be grounded in the proposition that the allegedly libelous statements have already been widely disseminated." Serra, *New Criticisms of the Libel-Proof Plaintiff Doctrine*, 46 Clev. St. L. Rev. at 16 (citing *Wynberg*, 564 F. Supp. at 928). Some courts have been reluctant to apply the doctrine where the plaintiff has not gained notoriety for their crimes. Kussmann, *Construction and Application of Libel-Proof Doctrine*, 54 A.L.R. 6th at *13. While notoriety of past criminal conduct supports a finding that a plaintiff is libel-proof, it is not critical for a determination that the individual lacks sufficient reputation in a given context to protect. *Id.* at *2.

In fact, some courts have applied the issue-specific brand even absent the plaintiff's criminal conviction. For example, in *Guccione v. Hustler Magazine, Inc.*, the Second Circuit applied the libel-proof plaintiff doctrine to pornographer and Penthouse Magazine publisher, Bob

Guccione. 800 F.2d 298, 303 (2d Cir. 1986). There, Guccione brought a defamation claim against a fellow publisher for labeling him as an "adulterer." *Id*. at 302. The court recognized the link between the plaintiff's known affiliation with the sex industry and the label. *Id*. To support its holding, the court quipped, "where, as here, 'the truth is so near the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done.'" *Id*. (quoting *Cafferty v. S. Tier Publ'g Co.*, 226 N.Y. 87, 93 (1919)).

Even absent a criminal conviction, courts like *Guccione*, have analyzed the nexus between the challenged statements and the plaintiff's own past conduct, rather than the severity of the crime. Applying the same analysis here, Lansford's challenged statements are closely related to true statements and the Court would have to stretch words beyond their ordinary use to sustain an action for libel. For example, calling Courtier a "pimp for the rich" was clearly a loose reference to her being a "proprietor of a bunch of upscale, hoity-toity clothing stores." (J.A. at 4.) Further, calling her a "leech on society" likely references the litany of past offenses that she admits to including assault, possession of illegal narcotics, indecent exposure, vandalism, and "walk[ing] the streets strung out on drugs." (J.A. at 4, 15.)

Respondent will position the issue-specific doctrine as an insurmountable barrier designed to eviscerate defamation claims for anyone with a criminal record. However, the issue-specific version is just that: contextual and based on a fact-intensive analysis. Plaintiffs with sufficiently tarnished reputations are only barred from asserting libel claims for behavior similar or identical to the known past actions. *Langston v. Eagle Publ'g. Co.,* 719 S.W.2d 612 (Tex. App. Waco 1986). In overturning a libel-proof label when the challenged statements were incongruous with the plaintiff's past misconduct, then-Judge Antonin Scalia articulated this

distinction: "It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity." *Anderson*, 746 F.2d at 1568. Though her previous convictions did not necessarily gain notoriety, Courtier's extensive rap sheet and laundry list of misconduct are closely aligned with the challenged statements. (J.A. at 5, 15.) These acts, taken together, have chiseled away at her reputation and completely overshadow the menial alleged harm.

Application of the doctrine when an individual's extensive past criminal history closely relates to the challenged statements, even absent multiple convictions, comports with the notion that "as the amount of reputation remaining approaches zero, the possibility of harm—and the amount of recoverable damages—also approaches zero." Greenburg, *The Privacy-Proof Plaintiff: But First, Let me Share your #Selfie,* 23 J.L. & Pol'y at 708. Despite the fact that Courtier is not a notorious mobster or murderer, the claims she challenges bear close relation to her own prior misconduct, a nexus sufficient to determine she is libel-proof in this context.

*b. This Court should rely on the probative value of Courtier's criminal record—especially her guilty plea—to determine that she is libel-proof.*

Individuals are likely to be deemed libel-proof when their criminal record demonstrates that they are unlikely, as a matter of law, to recover more than nominal damages for an allegedly libelous publication. 50 Am. Jur. 2 Libel and Slander § 325. Further, this Court may use a plaintiff's guilty plea in a prior criminal matter as a binding admission of the relevant conduct for purposes of a civil proceeding, including a defamation claim. *See Ray v. Time, Inc.*, 452 F. Supp. 618 (W.D. Tenn. 1976), *aff'd without opinion* 582 F. 2d 1280 (6th Cir. 1978) (holding that the plaintiff's guilty plea to previous indictment was conclusive of the matter and not subject to challenge for the defamation action). Thus, while Courtier's conviction resulting from her plea

to charges of possession and distribution may not be the only relevant factors in assessing her standing in the community, her record is certainly probative of her diminished reputation.

Based on case law, Courtier's criminal history falls comfortably in-line with others considered libel-proof. *See Logan*, 447 F. Supp. at 1328 (admitted drug user was libel-proof in claim against newspaper for stating that he tested positive for drug use); *Wynberg*, 564 F. Supp. at 928 (plaintiff's criminal convictions involving "sex and drug experiences with women" along with theft and other financial crimes were enough to label him libel-proof in claim against tabloid that accused him of financially exploiting his ex-girlfriend). This line of cases demonstrates that it is not only criminals with serious violent convictions who may be considered libel-proof when the challenged claim is closely related to the plaintiff's past misconduct. After all, the doctrine was created in *Cardillo* in consideration of this distinction. *Cardillo*, 518 F.2d at 639. There, the plaintiff was considered libel-proof not because his reputation placed him outside the protection of the law, but rather "since the truth of the appellant's illicit past was as damaging as the alleged falsehoods" in that circumstance, the plaintiff could not recover more than nominal damages. *Simmons Ford*, 516 F. Supp. at 750 (citing *Cardillo*, 518 F.2d 639).

Respondent may urge this Court to compare the severity and notoriety of others' crimes with Courtier's seemingly lesser and somewhat distant transgressions. The issue-specific doctrine, of course, has attached to plaintiffs with much more serious crimes than those on Courtier's rap sheet. *See, e.g.*, *Ray*, 452 F.Supp. at 622 (Dr. Martin Luther King Jr.'s assassin was libel-proof in defamation case against Time Magazine when an article called him a "narcotics addict and peddler" and a "robber"); *Davis v. Tennessean*, 83 S.W.3d 125, 131 (Tenn. Ct. App. 2001) (libel-proof plaintiff doctrine applied to life-sentence inmate convicted of aiding and abetting a murder during a robbery when a newspaper falsely identified him as the gunman).

However, ending the inquiry by comparing Courtier to mobsters and violent killers oversimplifies the doctrine. By doing so, this Court would stray from the doctrine's fundamental purpose: to assess whether the alleged falsehoods closely resemble the plaintiff's past acts.

## II. TENLEY'S ANTI-SLAPP LAW STRIKES DOWN REPONDENT'S LIBEL CLAIM BECAUSE SHE RETALIATED AGAINST PETITIONER FOR EXERCISING HIS FREE SPEECH RIGHTS.

The right to freedom of expression is a constitutional pillar that upholds the democratic ideals of our nation. "If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter." *DeAngelis v. Protective Parents Coal.*, 556 S.W.3d 836, 851 (Tex. App. 2018) (quoting George Washington). Given the constitutional mandate to protect freedom of expression, states have enacted laws to safeguard against SLAPP suits.

SLAPP suits stifle free speech in an attempt to prevent citizens from speaking out against a particular person or organization. George W. Ping & Penelope Canan, *SLAPPS: Getting sued for Speaking Out*, Temple University Press (1996). They hide under the guise of an ordinary lawsuit, when their real function is to deter citizens from exercising their political or legal rights. David C. Thornton, *Evaluating Anti-SLAPP Protection in the Federal Arena: An Incomplete Paradigm of Conflict*, 27 Geo. Mason U. Civ. Rts. L.J. 119, 120 (2016). Anti-SLAPP statutes recognize that public participation is a tenet of our democracy and implement a mechanism for early procedural review. Kourtney Harrison & Scott Ellis Ferrin, J.D., Ed.D., *Strategic Lawsuits Against Public Participation in Educational Settings: Are Anti-SLAPP's Provisions Protecting the Right Parties?*, 306 Ed. Law Rep. 1, 5 (2014).

Such statutes have been implemented in over half the states and the District of Columbia. Thornton, *Evaluating Anti-SLAPP Protection in the Federal Arena: An Incomplete Paradigm of Conflict*, 27 Geo. Mason U. Civ. Rts. L.J. at 120. The Tenley legislature recognized this need to

protect its citizens from SLAPP suits and enacted the Tenley Citizens' Public Participation Act. (J.A. at 2.) The Act shields the public from lawsuits that target speech protected by the First Amendment. (J.A. at 2.)

Here, Lansford's speech is protected under Tenley's anti-SLAPP statute because Courtier's defamation claim is an attempt to silence him. To overcome the statute, Courtier bears the burden of proving that *each* defamation element is met. (J.A. at 7.) While she can prove identification and publication, she failed to demonstrate defamatory meaning and falsity. Thus, the Court should grant Lansford's motion to strike/dismiss.

A. Under Tenley's Anti-SLAPP Law, Petitioner Has Failed to Meet Her Burden of Establishing Each Element of the Defamation Claim.

Tenley's anti-SLAPP law provides that Lansford had the burden of demonstrating that the action is based on his exercise of free speech. Tenley Code Ann. § 5 – 1 – 705(a). As both the lower courts held, Courtier's claim implicated his First Amendment rights. (J.A. at 15.) As such, the burden shifted to Courtier to establish a prima facie case for defamation. Tenley Code Ann. § 5 – 1 – 705(b).

The Tenley defamation elements include identification, publication, defamatory meaning, falsity, statement of fact, and damages.[4] (J.A. at 7.) Defamation harms the reputation of another and lowers their estimation within the community, such as holding a plaintiff to "scorn, hatred, ridicule, or contempt." *See* Restatement (Second) of Torts § 559 (1977); *Stanton v. Metro Corp.*, 438 F.3d 119, 125 (1st Cir. 2006). However, a person who publishes a harmful yet truthful statement is not subject to defamation liability. Restatement (Second) of Torts § 581A (1977).

Here, the elements of identification and publication are not at issue. A statement identifies an individual when it is "of and concerning" the plaintiff. *New York Times Co. v.*

[4] For damages discussion, see *supra* Section I.A.2.

*Sullivan*, 376 U.S. 254, 267 (1964). Lansford identified Courtier by name, thus his statements "concerned" her. (J.A. at 4.) Further, the Tenley District Court recognized that the publication element is met because Lansford posted the statement on his website. (J.A. at 8.) However, Courtier's successes end there. She fails to meet the element of defamatory meaning, because the challenged statements are rhetorical hyperbole. Moreover, she fails to demonstrate falsity and statement of facts because the communication as a whole was substantially true.

1. Respondent fails to demonstrate that the challenged statements had defamatory meaning because the language is clearly hyperbolic speech.

The Constitution protects "rhetorical hyperbole" to ensure that public debate will not suffer from lack of "imaginative expression." *Milkovich*, 497 U.S. at 20. Courts recognize "the reality that exaggeration and non-literal commentary have become an integral part of social discourse." *Levinsky's, Inc. v. Wal–Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997). While there is no specific definition, protected hyperbolic speech is identifiable as loose, figurative language. *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 284 (1974).

Case law demonstrates that protected hyperbolic speech varies on a continuum. On one end is language so outrageous and figurative that there can be no mistake that the speaker is exaggerating. *Austin*, 418 U.S. at 267. For example, in *Austin*, a local union published a list of "scabs," or names of individuals who had not yet joined a letter carrier union. *Id*. The publication described a scab as "a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles." *Id*. at 268. The named individuals sued the union for defamation. *Id*. at 269-70. This Court held that the definition of a "scab" was protected hyperbole because no reader would have interpreted the publication as espousing factual information. *Id*. at 286. *See also*

*Greenbelt Co-op. Pubs. Ass'n v. Bresler*, 398 U.S. 6 (1970) (holding that the term "blackmail" in reference to a developer's negotiation style was protected hyperbole rather than an accusation of criminal conduct); *Fortson v. Colangelo*, 434 F. Supp. 2d 1369 (S.D. Fla. 2006) (holding the owner of professional basketball team's statement, calling a player on a rival team a "thug" was rhetorical hyperbole, not actionable defamation).

On the other end of the continuum lies language that seems to perpetuate blatant factual statements and yet—relying on the context where the statements were emotionally spewed—courts have still held to be protected hyperbole. *Compare Gold v. Harrison*, 88 Haw. 94, 101 (1998) (holding an entertainer's statement that he was being "raped" due to invasions of his privacy as constitutionally protected hyperbolic speech) *with Cashion v. Smith*, 286 Va. 327, 339 (2013) (holding a surgeon's statement, "[y]ou just euthanized my patient," to an anesthesiologist following surgery where the patient died was not protected hyperbolic speech). Further, in *Horsley v. Rivera*, the Eleventh Circuit protected the defendant's statements accusing the plaintiff of homicide. 292 F.3d 695, 701 (11th Cir. 2002). There, the defendant made several statements including "[y]ou are an accomplice to homicide, Mr. Horsley," and "[y]ou may have the blood of this doctor on your hands." *Id*. at 702. The court emphasized that the parties "were engaged in an emotional debate concerning emotionally-charged issues of significant public concern." *Id*. Thus, in context, the speech was protected hyperbole. Here, Lansford's statements clearly fall on this continuum for two main reasons. First, his language was loose and figurative. Second, his speech was made in the wider context of a heated exchange.

*a. Lansford's loose and figurative statements, such as "pimp" and "leech," are obvious examples of rhetorical hyperbole.*

Lansford's statements were clearly bombastic rhetoric. Though perhaps distasteful and immature, "[t]he First Amendment does not police bad taste." *New Times, Inc. v. Isaacks*, 146

S.W.3d 144, 166 (Tex. 2004). Further, "[d]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Sullivan*, 376 U.S. at 270. Thus Lansford's "loose [and] figurative language" constitutes protected hyperbole rather than defamation. *Austin*, 418 U.S. at 284.

Name-calling may violate the rule of polite society, but it does not violate the rule of law. Lansford's hyperbolic statements fall comfortably on the continuum of protected speech. Calling a critic "a pimp for the rich" or "a leech on society" falls more in line with the language at issue in *Austin*. There, the defendant called the plaintiffs "scabs" and described the scab-like features. Language such as "scab," "pimp," and "leech" is clearly an exaggerated means of pointing out flaws in another. This Court should follow its own line of cases to determine that such colorful adjectives constitute rhetorical hyperbole.

*b. All challenged name-calling occurred in the context of a heated exchange surrounding Lansford's reelection campaign.*

If accusations of homicide made in the heat of debate are protected, then surely mere epithets are also protected. In *Horsley*, the defendant blatantly accused the plaintiff of being an "accomplice to homicide" and having blood on his hands. *Horsley*, 292 F.3d at 701-02. The Eleventh Circuit's analysis turned on the fact that the statement was made in the heat of an emotional debate. *Id*. at 702. The court determined that protecting a citizen's right to freely express their opinions outweighed the possible negative implications of harsh or outrageous language. *Id*. Here, Lansford's statements were significantly less accusatory than the statements in *Horsley*. Calling her a "leech" is far less concrete than calling her a murderer. (J.A. at 5.) Moreover, Lansford's statements were made in the heat of their emotional debate. Courtier attacked Lansford's leadership and policies, and Lansford fired back.

An actor in the political arena does not have an "obligation to suffer [hecklers] silently." *Miller v. Block,* 352 So.2D 313, 314 (La. Ct. App. 1977). Courtier attacked Lansford calling him "an entrenched incumbent," "a plutocrat," and "a divisive leader." (J.A. at 3-4.) Lansford should not have to suffer her attacks silently. He defended himself with figurative statements that would not confuse the public into believing they were statements of fact. Protecting this kind of political exchange is of utmost societal value.

Lastly, Lansford's statements were not made in a vacuum. As the Tenley District Court highlighted, "the Defendant made his emotional response to a targeted political column authored and disseminated by the Plaintiff." (J.A. at 12.) Lansford and Courtier had presumably once been on far friendlier terms, given that Courtier's late husband was Lansford's political ally and helped him enter into politics. (J.A. at 3.) When Courtier published demeaning statements against Lansford, she sullied what was once a close relationship. Though distasteful as his response may have been, Lansford had the right to defend himself against Courtier. Given the context of the emotional exchange, his hyperbolic statements lack defamatory meaning.

2. Even if the Court determines that the challenged statements had defamatory meaning, the post was substantially true and therefore dismantles Courtier's defamation claim.

A speaker is not subjected to defamation liability if his statements are true. Restatement (Second) of Torts § 581A (1977). In fact, substantial truth is a complete defense to a defamation claim. *See e.g. Air Wisconsin Airlines Corp. v. Hoeper*, 320 P.3d 830, 842, *rev'd and remanded* 571 U.S. 237 (Colo. 2014) ("Speech that is 'substantially true' will not support a defamation claim, and a plaintiff may not prove falsity based on slight inaccuracies of expression"); *Cweklinsky v. Mobil Chem. Co.*, 267 Conn. 210, 228 (2004) (for a claim of defamation to be actionable, the statement must be false).

While Lansford's hyperbolic statements cannot be taken as literally true, his accusations as a whole were factual. Courtier committed a series of crimes including assault, possession and distribution of illegal narcotics, incident exposure, and vandalism. (J.A. at 15-16.) After exiting a boot camp meant to reform her delinquency, she maintained a criminal lifestyle. (J.A. at 15.) Though Courtier has since reformed, Lansford's statements about her past were all true. She admits to her former drug habits and prior criminal offenses. (J.A. at 15, 18.) Respondent may argue that Lansford's statements were false and inaccurate representations because he called her "corrupt" and a "swindler." (J.A. at 5.) While some courts have held that such terms constitute defamation, the use of the terms here are distinguishable for three reasons.

*First*, the use of the term "corrupt" is not defamation per se in this context.[5] Calling another individual "corrupt" constitutes defamation per se only when that individual is a public official. *Bentley v. Bunton*, 94 S.W.3d 561, 582 (Tex. 2002). Courtier is not a public official because she does not work for the government nor does she appear to have substantial control over government affairs. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). Because she cannot rely on defamation per se, Courtier cannot solely rely on the terms "corrupt" and "swindler" to satisfy the elements of her claim.

*Second*, the meaning of the challenged statements should be interpreted fluidly. Courts have noted that "[m]ost words have more than one meaning." *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 1358 (Colo. 1983). Here, the words "corrupt" and "swindler" take on several different meanings given the context. For example, "corrupt" may take on the meaning that Courtier was morally corrupt for opening high-end stores that only cater to the wealthy when she presents herself as a champion for the poor. "Swindler" could mean that she tricks the less

[5] *Carey v. Piphus*, 435 U.S. 247, 262 (1978). Libel per se recognizes that some statements are "virtually certain" to cause damage and that injury to reputation is often difficult to prove.

fortunate into believing she is their champion, as indicated by the following, ". . .who hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood." (J.A. at 18.) Lansford's language indicates that Courtier has a personality flaw, but does not accuse her of actionable misconduct in her profession.

*Third*, his statements did not target her business practices or accuse her of impropriety. Tenley's Supreme Court incorrectly posited that Lansford attacked Courtier's "abilities and integrity as a businessperson." (J.A. at 22.) Using the same logic, Respondent may also argue that Lansford's speech targeted her professional dealings. However, "[m]erely to call a man a swindler or a cheat, or dishonest person, by word of mouth, is not actionable unless it be spoken of him in his trade or business." *Lyford v. Winters*, 163 A.D. 720, 724 (App. Div. 1914). Importantly, Lansford did not accuse her of swindling her customers nor did he allege that she engaged in corrupt business practices. His exact language was, "She is corrupt and a swindler, who hoodwinks the poor." (J.A. at 18.) Here, context is key. Instead of accusing Courtier of corrupt business practices or hoodwinking her customers, he merely accused her of misleading the less fortunate in a larger societal context. Given that Courtier sells luxury goods, this statement concerning the poor does not speak of her trade or business. Thus, the lower court mistakenly held—and Respondent may erroneously argue—that Lansford's speech was defamatory because it attacked her professional abilities.

### B. Public Policy Demands that Lansford's Statements Are Protected Under the First Amendment.

A ruling that Lansford's statements were not protected hyperbole could have a chilling effect on political free speech. "[P]olitical speech is at the very core of the First Amendment." *Carey v. Fed. Election Comm'n*, 791 F. Supp. 2d 121, 133 (D.D.C. 2011). This type of speech

encourages, "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484 (1957).

For example, in *Clifford v. Trump,* the court held that the President's speech was protected because he made "a hyperbolic statement against a person who has sought to publicly present herself as a political adversary to him." 339 F. Supp. 3d 915, 927 (C.D. Cal. 2018). In reaching its conclusion, the court noted that holding otherwise could hinder the nation's political discourse. *Id*. While every citizen is allowed to criticize their government, political leaders are permitted to respond to such critiques. To hold otherwise would violate the First Amendment.

The American tradition is rife with heated exchanges involving hyperbolic language. For example, former President Obama has criticized President Trump with hyperbolic statements, including assertions that Trump has no self-control, that "he's insecure enough that he [has] to pump himself up," and that he should not be allowed to handle the nation's nuclear codes. Meghan Keneally, *President Obama's Long History of Insulting Donald Trump*, ABC News, (November 10, 2016, 10:48 AM), https://abcnews.go.com/Politics/president-obamas-long-history-insulting-donald-trump/story?id=43442367. President Trump has responded with hyperbolic statements of his own including accusations that Obama was a disaster for the country, calling him "the most ignorant president in our history," and suggesting he founded the terrorist organization, ISIS. Madeline Conway, *Nine of the nastiest things Trump said about Obama*, POLITICO, (November 10, 2016, 12:41 PM), https://www.politico.com/story/2016/11/9-ways-trump-insulted-obama-231184.

To analogize here, Courtier is a proxy for Obama and Lansford for President Trump. Obama criticized and attacked President Trump's policies and personality. President Trump responded with attacks of his own. If this Court holds that Lansford's statements are not

protected hyperbole, such political exchanges between President Trump and Obama—and arguably President Trump's colorful Twitter account—will be smothered under the weight of purported reputational harm. The very loose and figurative language that marks our public discourse will vanish for fear of defamation suits.

Freedom of expression is an imperative pillar upholding the weight of this nation's democracy. To chip away at this essential foundational structure would risk destabilizing First Amendment protections. Respondent may argue that it is too early a state of litigation to permit a motion to strike/dismiss the lawsuit. However, as the court noted in *Trump*, permitting the defamation lawsuit to continue would violate the First Amendment. *Clifford*, 339 F. Supp. 3d at 927. Political leaders must be permitted to respond to attacks on their leadership and policies. If this nation is to continue in its legacy of unbridled democracy, then the Court must not strip away important constitutional protections.

## CONCLUSION

Respondent bore the burden of establishing all six defamation elements under Tenley law. She utterly failed to demonstrate half. Tenley's anti-SLAPP statute shields Lansford's right to free expression from such baseless assault and mandates dismissal. Accordingly, Petitioner respectfully requests that this Court REVERSE the decision of the Tenley Supreme Court.

Dated: September 29, 2019

Respectfully Submitted,

s/ Team #219547

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