**Team 219556**

**No. 18–2143**

# In the Supreme Court of the United States

October Term, 2019

ELMORE LANSFORD, PETITIONER,

*v.*

SILVIA COURTIER, RESPONDENT.

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

**BRIEF FOR THE PETITIONER**

## QUESTIONS PRESENTED

I. Whether an individual is libel-proof when her past criminal conviction is part of the public record although it gained no notoriety or public attention.

II. Whether the challenged statements in Petitioner's social media post are defamatory or are protected under the First Amendment because they are rhetorical hyperbole.

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## **JURISDICTION 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 the Facts**

Despite a contentious election, Petitioner Elmore Lansford was reelected as mayor by the people of Silvertown. (J.A. at 3.) Lansford successfully campaigned on his efforts to stimulate the economy. (J.A. at 3.) Some of these efforts included fostering economic activity in Silvertown's struggling Cooperwood neighborhood by supporting the development of new high-rise housing initiatives. (J.A. at 3.) He has also worked to fight the dangerous distribution of illegal drugs and narcotics through increased policing in Cooperwood, historically known for high crime rates. (J.A. at 3, 16.)

In furtherance of her own political agenda, Respondent Silvia Courtier, Silvertown's former first lady, heavily advocated against Lansford. She served as a political advisor to Lansford's opponent, Evelyn Bailord, and hosted multiple black-tie fundraisers. (J.A. at 3, 17.) She also wrote scathing criticisms of Lansford's policies on her social advocacy website. (J.A. at 3.) In several posts, Courtier publicly criticized Lansford's platform by characterizing it as promoting gentrification, racial profiling, and police brutality. (J.A. at 3–4.) She used Lansford's focus on reducing crime and stimulating the economy against him to advance her and Bailord's agenda. (J.A. at 3–4.) Among her several attacks, one of Courtier's most recent stabs at Lansford stated the following:

> "The Time is Now for Political Change!
>
> The choice is clear for citizens of Silvertown. Our current mayor, Elmore Lansford, is out of touch with 21st century America and the need for social justice. We need a mayor who cares about all of the citizens of Silvertown, not just the wealthy developers who seek to reap excess profits over the less fortunate in our community.
>
> Lansford's time is past. He once was a caring politician, but now he is simply an entrenched incumbent; beholden to special interests. He has engaged in a war on

> the economically-strapped denizens of Cooperwood, imposing more and more police patrols. His repressive measures contribute to the process of gentrification and the displacement of Cooperwood residents to other neighborhoods or other cities.
>
> In short, Mayor Lansford is a plutocrat. He needs to be replaced by a compassionate politician, one who cares about all people of all races, genders, and ethnicities.
>
> That candidate is Evelyn Bailord. She has devoted her life to social justice causes. She was a former member of the United States Peace Corps years ago. In her law practice, she devoted countless hours to pro bono service. She will put policies into practice that champion many of the social justice causes that are most important to our community. we have endeavored to share over the past several years
>
> The choice is clear for Silvertown – Out with the Old and In with the New. Vote for Bailord on Election Day! (J.A. at 3–4).

The post harshly criticized Lansford's good-faith efforts to clean up Cooperwood. (J.A. at 3.) This could be due to the fact that Courtier has her own lengthy criminal history and is sensitive to criminal just reform. (J.A. at 5, 15). Courtier grew up around a life of crime and was a habitual lawbreaker during her teens and twenties. (J.A. at 5, 15.) She was declared delinquent by a juvenile court for many offenses, including indecent exposure, assault, vandalism, and possession of cocaine. (J.A. at 5, 15.) She served time at a boot camp, otherwise known as a juvenile intensive incarceration center,[1] for these crimes, but this did not reform her behavior. (J.A. at 15.) Shortly after leaving that center, she became addicted to cocaine and re-offended. (J.A at 5). Courtier was charged with two felonies for distribution of cocaine; she pled guilty to one charge and served two years in prison. (J.A. at 5.)

[1] *Juvenile Boot Camp*, UNITED STATES DEP'T OF JUSTICE, https://www.crimesolutions.gov/PracticeDetails.aspx?ID=6 (last visited Sept. 28, 2019).

While in prison, Courtier received her G.E.D. and took community college classes. (J.A. at 5.) Upon finishing her criminal sentence, she opened a small-scale clothing store that she later expanded into a larger operation. (J.A. at 5.) Later, she met her husband, Raymond Courtier, now deceased. He was the primary investor in her current business venture, an exclusive clothing store that caters to Silvertown's elite by selling designers such as Fendi, Chanel, Gucci, and Louis Vuitton. (J.A. at 5, 16.)

Raymond Courtier was a former city council member once politically allied with Lansford. (J.A. at 3.) Raymond Courtier also served as mayor of Silvertown for eighteen consecutive years. (J.A. at 2.) By virtue of being married to the mayor, Silvia Courtier was thrust into the political arena and the public spotlight. (J.A. at 2.) After her husband's death, however, Courtier chose to remain active in town politics. (J.A. at 2.) Her involvement includes making charitable donations as well as operating two websites, one for her designer clothing business and another for social and political advocacy on criminal justice reform. (J.A. at 2.) She is a prominent figure in the Silvertown community.

Courtier leveraged her status in Silvertown to support Bailord's campaign. (J.A. at 3, 17.) She used her political capital and large social media presence to aggressively and continuously criticize Lansford, calling him a "relic of the past," an "entrenched incumbent," a "plutocrat," "someone who cares little for social justice issues," and who is "beholden to special interests." (J.A. at 3–4, 16.) She claimed Lansford is "engaged in a war" with his own constituents. (J.A. at 3.) She even went so far as to accuse him of not caring equally for people of all races, genders, and ethnicities, implying he is sexist and racist. (J.A. at 3.)

To defend himself and his policies against Courtier's harsh personal and political attacks, Lansford finally responded to one of her columns in the heat of the mayoral election with an emotional social media post:

> It is ironic that Silvia Courtier blasts me as uncaring toward the less fortunate. No wonder she is a coddler of criminals. In her early years, Silvia Courtier was a lewd and lusty lush, a leech on society, and a woman who walked the streets strung out on drugs. She is nothing more than a former druggie.
>
> It is also ironic that she casts herself as the defender of the less fortunate. Last time I checked, she is the proprietor of a bunch of upscale, hoity-toity clothing stores that are lacking in class and substance. How ironic that she pimps out these clothes to the rich and lavish. She is corrupt and a swindler, who hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood. I guess she learned something from the streets.
>
> Now, this businesswoman is a pimp for the rich and a whore for the Poor. What a Joke! (J.A. at 4.)

Courtier contends that Lansford's phrases in the post "a pimp for the rich," "a leech on society," "a whore for the poor," and "corrupt and a swindler" (collectively, the "challenged statements") harmed her reputation (J.A. at 5.) In response to her allegations, Lansford maintains that Courtier is libel-proof due to her felonious background. (J.A. at 6.) He also argues that his statements are political name-calling protected as rhetorical hyperbole under the First Amendment. (J.A. at 6.) Finally, he contends that the challenged phrases are true or substantially true. (J.A. at 6.)

**Summary of the Proceedings**

Silvia Courtier brought an action for defamation against Elmore Lansford in the Tenley District Court. Pursuant to the Tenley Citizen's Public Participation Act (the "anti-SLAPP" statute), Lansford moved to strike Courtier's action for failure to plead a prima facie claim of defamation. (J.A. at 7.) Despite incorrectly holding that Courtier was not a libel-proof plaintiff,

the Tenley District Court properly found that Lansford's comments are protected rhetorical hyperbole under the First Amendment and granted his special motion to strike. (J.A. at 11, 13.)

Courtier appealed this decision to the Supreme Judicial Court of the State of Tenley ("Tenley Supreme Court"). Tenley's Supreme Court erred in affirming the Tenley District Court's ruling that Courtier was not a libel-proof plaintiff. (J.A. at 19.) The court further erred in reversing the Tenley District Court's ruling that Lansford's speech is protected rhetorical hyperbole. (J.A. at 23.) The court incorrectly denied his motion to strike. (J.A. at 23.) Lansford appealed the decision, and this Court granted certiorari. (J.A. at 24.)

## SUMMARY OF THE ARGUMENT

Before even reaching the issue of rhetorical hyperbole, Courtier's action should be dismissed because she is a libel-proof plaintiff, regardless of whether her criminal conviction has received public notoriety or attention. Courtier is libel-proof because Lansford's comments did not further harm her already tarnished reputation. There are two tests used to evaluate whether a plaintiff is libel-proof: the incremental harm test and the issue-specific test. Tenley's courts first erred in not applying the incremental harm test and further erred in their analysis under the issue-specific test.

Courtier is libel-proof under the incremental harm test. This test balances the harm caused by the challenged statements within a publication against the harm caused by the non-actionable or unchallenged statements in that same publication. If the non-actionable or unchallenged statements are more damaging than the challenged statements, the plaintiff is libel-proof. The most harmful statements of Lansford's post are those about her criminal past. These statements are non-actionable because they are substantially true. Courtier, however, only challenges Lansford's statements criticizing her contradictory political stances and business

ventures. On balance, Courtier is libel-proof because any additional damage she suffered from Lansford's criticism, the statements Courtier challenged, would be incremental or minimal in comparison to the damage that her reputation suffered from her criminal conviction, the non-actionable statements.

Courtier is also libel-proof under the issue-specific test. The issue-specific test applies when a plaintiff's reputation is so tarnished that the allegedly libelous statements can cause no additional damage to that reputation. A plaintiff's reputation need not receive public attention or notoriety for the issue-specific test to apply. Information damaging to the plaintiff's reputation must only be available to the public. Any Silvertown resident could access information about Courtier's criminal past because it is part of the public record. Her long rap sheet makes her impervious to new reputational damage under the issue-specific test, notwithstanding her reputation's possible rehabilitation.

Courtier is libel-proof under both tests. But given Tenley's preference that the libel-proof doctrine be narrowly applied, incremental harm is more appropriate and should be applied.

Even if Courtier is not a libel-proof plaintiff, her claim should be dismissed because she did not plead a prima facie case for defamation as required by the Tenley's anti-SLAPP statute. Tenley enacted this law as part of its strong commitment to protect its citizens' First Amendment rights by giving them a mechanism—an expeditious motion to strike—to defend themselves from frivolous defamation claims. This Court has subject-matter jurisdiction to apply Tenley's anti-SLAPP statute because important First Amendment issues are implicated in this case. When federal courts decide a motion under an anti-SLAPP statute, the plaintiff must plead each element of defamation with sufficient certainty such that the claim will succeed on its merits.

Courtier did not adequately plead four elements of her suit to this high standard: defamatory meaning, statement of fact, falsity, or damages. Therefore, Courtier's lawsuit must be dismissed.

Courtier did not plead the elements of defamatory meaning or statement of fact with sufficient certainty. In his post, Lansford simply asserted his opinion during a contentious election using rhetorical hyperbole. This is protected speech under the First Amendment. Even a careless reader would understand the challenged statements were figurative speech and not statements of fact capable of carrying defamatory meaning.

Courtier also did not adequately plead the element of falsity. Lansford's statements are either substantially true or cannot be understood as false within the general tenor of the publication. First, some of Lansford's statements are protected because they truthfully describe, albeit in figurative terms, Courtier's criminal past and her political platform. On the one hand, she advocates for the poor, while on the other hand, she makes her livelihood off of the rich and is a part of Silvertown's elite. Second, Courtier has not plead with any certainty how Lansford's other statements are definitively false.

Moreover, because Courtier is a public figure, the First Amendment requires Courtier to show that Lansford spoke with actual malice: either he knew that his statements were false or recklessly disregarded the possibility that they were false. Courtier failed to plead that Lansford knowingly made false statements and the record does not support any inference that he did. As a result, Courtier failed to properly allege that Lansford made the statements knowing they were false or that he recklessly disregarded the statements' falsity.

Finally, Courtier failed to allege any damages with sufficient certainty. She only generally claims that "her good name" was tarnished without pleading particular damages. Damages is an element of Tenley's defamation tort. Courtier's failure to allege these damages

with any specificity omits a required element of her defamation claim. Thus, because she cannot plead four elements of the prima facie case, her lawsuit collapses and must be dismissed.

## ARGUMENT

### I. COURTIER IS LIBEL-PROOF ON THE BASIS OF HER PAST CRIMINAL CONVICTION DESPITE IT HAVING GAINED NO NOTORIETY OR PUBLIC ATTENTION.

The libel-proof plaintiff doctrine exists to dismiss frivolous defamation claims before even reaching the merits, thereby preserving innocent defendants' First Amendment rights and protecting them from suffering prolonged litigation. *See Wynberg v. Nat'l Enquirer, Inc.*, 564 F. Supp. 924, 927 (C.D. Cal. 1982). This doctrine is based on the premise that a defamation claim is not actionable without damage to the plaintiff's reputation. *See Langston v. Eagle Publ'g Co.*, 719 S.W.2d 612, 621 (Tex. App. 1986). Tenley, along with the majority of other states, has adopted the libel-proof plaintiff doctrine as an additional safeguard to protect its citizens' First Amendment rights, although it is not required by the Constitution. (J.A. at 20.) *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991).

Tenley has adopted both versions of the libel-proof doctrine, the incremental harm and issue-specific tests, each of which maintains that a plaintiff can suffer no reputational damage even if the statements in a publication are allegedly libelous. (J.A. at 20.) Courtier is a libel-proof plaintiff under both tests, regardless of the notoriety or public attention given to her criminal conviction. The incremental harm test, however, is more appropriate here given Tenley's preference for a narrow libel-proof doctrine. (J.A. at 20.)

#### A. Under the incremental harm test, Courtier is libel-proof because the challenged statements in Lansford's post are less harmful to Courtier's reputation than the non-actionable statements that expose her criminal history.

The incremental harm test compares the reputational harm caused by the statements the plaintiff challenges as libelous to the harm caused by the unchallenged or non-actionable

statements in a publication. *See Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F. Supp. 742 (S.D.N.Y. 1981), *abrogated by*, *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d. 348 (S.D.N.Y. 1998) (choosing not to apply the incremental harm test under dissimilar circumstances). When the non-actionable portion of a publication is more damaging than the allegedly libelous statements, a plaintiff is libel-proof. *See id.* (finding an auto-dealer to be a libel-proof plaintiff because non-actionable statements revealing poor car performance were more damaging to the dealer's reputation than any defamatory statements made in the same publication); *see also Herbert v. Lando*, 781 F.2d 298, 310–11 (2d Cir. 1986); *Ferreri v. Plain Dealer Publ'g Co.*, 756 N.E.2d 712, 723–24 (Ohio Ct. App. 2001). Statements can be non-actionable because, *inter alia*, the statements are substantially true or are protected opinion. *See Tannerite Sports, LLC v. NBCUniversal News Grp., LLC*, 864 F.3d 236, 242 (2d Cir. 2017) (finding that substantially true statements are non-actionable); *Riley v. Harr*, 292 F.3d 282, 289 (1st Cir. 2002) (finding that protected opinions are non-actionable).

There are at least three non-actionable statements in Lansford's post—"a woman who walked the streets strung out on drugs," "a former druggie," and "a lewd and lusty lush"—because, though colorful, they are substantially true. (J.A. at 4.) A statement is substantially true, and therefore non-actionable, when the "gist or substance" of the statement can be justified by true facts. *See Masson*, 501 U.S. at 517. Courtier committed offenses ranging from assault and vandalism to possession and distribution of cocaine. (J.A. at 15.) She served two years in state prison for drug-related offenses. (J.A. at 16.) These facts support Lansford's characterization of Courtier as a "former druggie" who "walked the streets strung out on drugs." (J.A. at 4.) Courtier also committed the offense of indecent exposure. (J.A. at 15.) Indecent exposure is the "crime of intentionally showing one's sexual organs in public." *See Indecent Exposure*, THE

NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005); *see also Indecent Exposure*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2014). Based on this offense, Lansford's comment calling Courtier a "lewd and lusty lush" accurately describes her former behavior. Consequently, these statements are non-actionable because they truthfully depict her past criminal conviction and behavior.

These statements about Courtier's criminal past are the most damaging to her reputation precisely because they publicized her prior criminal history to the public. Statements about her conviction are far more damaging than challenged statements like "leech on society," which is merely political banter. Many courts recognize the uniquely serious reputational harm that labelling someone a criminal can cause. *See Carey v. Piphus*, 435 U.S. 247, 262 (1978); *see also Finklea v. Jacksonville Daily Progress*, 742 S.W.2d 512, 516 (Tex. App. 1987). Here, by accurately calling Courtier "a former druggie" and "a woman who walked the streets strung out on drugs," Lansford alerted the public to her criminal past. (J.A. at 4.) These non-actionable statements truthfully impute criminal conduct that seriously damages Courtier's reputation. Because none of the other statements about her contradictory political stances and business ventures refer to her past criminal conviction, they do not rise to this level of harm. (J.A. at 5.) Any additional damage suffered from the challenged statements would be incremental or nugatory. Accordingly, Courtier is libel-proof.

### B. Courtier is also libel-proof under the issue-specific test because her past criminal offenses are matters of public record and have already irreparably damaged her reputation.

The issue-specific test applies when a plaintiff's reputation is so tarnished that the allegedly libelous statements can cause no further damage to that reputation. *See Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638, 639 (2d Cir. 1975). This ensures that speech is not censored when the plaintiff suffers no meaningful damage to her reputation. *See Wynberg*, 564 F.

Supp. at 928. The issue-specific test weighs the defamatory effects of the statements in the publication against the plaintiff's existing poor reputation.

The Tenley Supreme Court noted this was a "close[] case" under the issue-specific test, but incorrectly found that Courtier was not libel-proof. (J.A. at 19.) The court erred by focusing exclusively on Courtier's rehabilitation since her conviction and by ignoring the permanent reputational harm Courtier suffered from her previous incarceration for drug crimes. (J.A. at 19.) While some courts have found public attention to crimes necessary for a plaintiff to be declared libel-proof, others have declared plaintiffs libel-proof even when their conviction received no public attention or notoriety. *See United States ex. rel. Vasudeva v. Dutta-Gupta*, No. 11-CA-114, 2014 WL 6811506, at *10 (D.R.I. Dec. 2, 2014) (finding that a conviction, a confession at a plea hearing, and a court's condemnation at sentencing were enough to declare the plaintiff libel-proof); *Rogers v. Jackson Sun Newspaper*, No. 94-CV-301, 1995 WL 383000 (Tenn. Ct. App. Jan. 30, 1995); *Langston*, 719 S.W.2d at 612 (distinguishing between publicity and criminal convictions as separate bases for finding a plaintiff libel-proof under the issue-specific test).

Accordingly, it is not necessary for Courtier's criminal conviction to be publicized or receive any notoriety to make her libel-proof under the issue-specific test. *See Logan v. District of Columbia*, 447 F. Supp. 1328 (D.D.C. 1978) (finding a plaintiff libel-proof based on past history of drug use and unpublicized drug convictions). There is no evidence that Courtier's conviction was sealed or otherwise inaccessible to the public. (J.A. at 1–24.); (Clarification § 2 ¶ 2(a)). Courtier's conviction was a "highly verifiable" matter of public record. *United States v. McGatha*, 891 F.2d 1520, 1526 (11th Cir. 1990). Therefore, the information causing Courtier's reputational harm was accessible to all Silvertown residents. Moreover, Courtier is a prominent citizen in Silvertown. (J.A. at 2.) She has been politically active for a number of years and is the

widow of former, long-serving mayor, Raymond Courtier. (J.A. at 2.) Given Courtier's public status in Silvertown, it is reasonable to conclude that her criminal conviction was known within the community despite receiving no publicity or notoriety.

The criminal behavior underlying Courtier's damaged reputation is worse than behavior exhibited in other cases where courts have found plaintiffs to be libel-proof. In *Guccione v. Hustler Magazine, Inc.*, for example, the court found that the plaintiff was libel-proof on the issue of adultery despite never having been convicted for that crime. *See* 800 F.2d 298, 304 (2d Cir. 1986). Similarly, courts have found a plaintiff to be libel-proof where her general reputation for fair dealing and honesty was sufficiently low. *See Wynberg*, 564 F. Supp. at 928. Courtier's criminal behavior spanned a significant period from her early teens to her mid-twenties. (J.A. at 5.) This behavior included offenses of simple assault, indecent exposure, vandalism, and cocaine possession and distribution. (J.A. at 5, 15.) Her "litany of offenses" is more than sufficient to render Courtier a habitual criminal with a permanently damaged reputation. (J.A. at 15.); *see also Cardillo*, 518 F.2d at 639. Lansford's social media post merely publicizes information about Courtier's criminal history that was already accessible to Silvertown residents. (J.A. at 4.) The fact that Courtier's reputation was already tarnished means she cannot recover damages. Lansford should not be punished for making comments about Courtier's past that caused her no more harm than her criminal conduct did. Therefore, Courtier is a libel-proof plaintiff and her claim must be dismissed.

### C. The incremental harm test is more appropriate given Tenley's preference for a narrow libel-proof test and the stage of this litigation.

The Tenley Supreme Court acknowledged that the incremental harm test is a valid test under its libel-proof doctrine but erred in not considering whether Courtier was a libel-proof plaintiff under that test. Once a court adopts the libel-proof doctrine in its entirety, it should

analyze the plaintiff's claim under both versions of the test. *See Jones v. Globe Int'l Inc.*, No. 94-cv-01468, 1995 WL 819177, at *9 (D. Conn. Sept. 26, 1995); *see also Noonan v. Staples, Inc.*, 707 F. Supp. 2d 85 (D. Mass. 2010) (arguing that the incremental harm test should be applied in conjunction with the issue-specific test); Note, *The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909 (1985) (describing the libel-proof doctrine as containing two co-equal tests).

The incremental harm test fits squarely within what this Court and the Tenley courts have defined as the proper scope of the libel-proof doctrine. (J.A. at 20.) When adopting the libel-proof doctrine, the Tenley Supreme Court stated that the test "should be narrowly applied and in limited circumstances." (J.A. at 20.) Similarly, this Court has warned against defining libel-proof too broadly. (J.A. at 20.); *see also Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 168 (1979). In keeping with these demands, the incremental harm test is narrower because, unlike the issue-specific test, it only balances statements within the four-corners of the publication at issue and does not evaluate a plaintiff's existing reputation and background. Plaintiffs are libel-proof under the incremental harm test only in those limited circumstances where a publication's most damaging statements are not the challenged statements. *See Masson*, 501 U.S. at 522. Such is the situation here.

Further, the incremental harm test is also narrower because when deciding a motion to strike, like Lansford's, a court need only consider the limited documents in the plaintiff's pleadings such as the complaint, documents referenced in the complaint, and matters of which the court may take judicial notice like exhibits to the complaint. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Clifford v. Trump*, 339 F. Supp. 3d 915, 922 (2018). Incremental harm does not require looking at any material outside of the complaint. The court must only determine that the non-actionable statements are more harmful than the challenged

statements. This decision can be made as a matter of law. *See Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345, 1350 (7th Cir. 1995). By contrast, the issue-specific test requires the court to make a factual determination about the existing reputation of the plaintiff and to consult material outside the pleadings. Thus, the Court should apply the incremental harm test here because it is consistent with both this Court's and Tenley's stated policy for a narrow libel-proof doctrine and more appropriate for this stage of the litigation.

## II. THE COURT SHOULD DISMISS COURTIER'S CLAIM BECAUSE LANSFORD'S STATEMENTS MADE IN A POLITICAL CONTEXT ARE PROTECTED RHETORICAL HYPERBOLE, AND COURTIER CANNOT ADEQUATELY PLEAD FOUR OF THE DEFAMATION ELEMENTS.

The right to free speech is one of our most fundamental rights. *See Janus v. Am. Fed. of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct 2448 (2018); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The Supreme Court has emphasized that "the constitutional guarantee [to free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *See Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). In this case, Lansford responded to a publication written by a political adversary critical of his policies and character during a contentious election. (J.A. at 3–4.) His political statements require the broadest and most exigent First Amendment protection.

Courtier failed to plead with sufficient certainty each of the contested[2] elements of a prima facie case for defamation—defamatory meaning, statement of fact, falsity, and damages—

[2] Courtier satisfied the elements of identification and publication. (J.A. at 8.)

consistent with Tenley's anti-SLAPP statute.[3] (J.A. at 7–8.) Lansford's statements do not hold defamatory meaning because they are rhetorical hyperbole expressing his opinion, which no one could believe were defamatory statements of fact. In addition, Courtier cannot establish that any of Lansford's statements are false. Even if they are false, the First Amendment requires that Courtier must show that Lansford spoke with actual malice because she is a public figure. She cannot. Finally, Courtier did not adequately plead damages, an element of defamation under Tenley law. Because Courtier failed to establish any of the four contested defamation elements with sufficient certainty, her claim must be dismissed.

### A. Courtier must plead each defamation element with sufficient certainty under Tenley's anti-SLAPP statute.

Courtier's action is a Strategic Lawsuit Against Public Participation ("SLAPP"). SLAPP refers to frivolous defamation suits used by wealthy and politically connected people, like Courtier, to chill free speech in their communities and scare off citizens from engaging with them in public debate. (J.A. at 2.) In response to the threat that SLAPP suits pose to First Amendment rights, a majority of states,[4] including Tenley, have adopted anti-SLAPP statutes that provide their citizens a mechanism—an expedited motion to strike—to dispense with these

[3] Under Tenley's anti-SLAPP statute, Lansford has met his burden of showing that Courtier's claim is in response to an exercise of his free speech. (J.A. at 15.); *see also* Tenley Code Ann. § 5 – 1 – 705(a). Accordingly, the burden shifts to Courter to adequately plead her prima facie case for defamation. Tenley Code Ann. § 5 – 1 – 705(b).

[4] *State Anti-SLAPP Reference Chart*, PUB. PARTICIPATION PROJECT: FIGHTING FOR FREE SPEECH, https://anti-slapp.org/your-states-free-speech-protection/#reference-chart (last visited Sept. 28, 2019).

claims early in the litigation. *See* Tenley Code Ann. § 5 – 1 – 701 *et seq.*; *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003) (explaining that anti-SLAPP statutes allow early dismissal of defamation claims to protect defendants from costly litigation). In fact, Tenley's anti-SLAPP statute, which is similar to California's, robustly[5] protects free speech by making a motion to strike available to all defamation defendants.

Based on the important constitutional issues implicated in this case, this Court has subject-matter jurisdiction to review the Tenley Supreme Court's analysis of Lansford's anti-SLAPP motion under a heightened pleading standard. (J.A. at 23.); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (reviewing a Florida state court decision immediately because it implicated "important" First Amendment issues involving political speech that would be "intolerable to leave unanswered"). To preserve Lansford and his fellow citizens' right to speech, this Court should find, along with the federal circuits that have reviewed anti-SLAPP motions, that plaintiffs are required to show with *sufficient certainty* that they will prevail on each element of the defamation claim. *See Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 176 (5th Cir. 2009) (finding that a plaintiff must show a sufficient probability of being able to prove [a] claim"); *see also Metabolic Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001) (finding that a plaintiff must plead that sufficiently substantial evidence

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[5] Tenley's anti-SLAPP statute is similar to California's, which protects a person's "right of petition or free speech under the United States Constitution." Cal. Civ. Pro. Code § 425.16(b)(1) (West 2015). Watch groups give broad statutes like Tenley's or California's an "excellent" rating. *State Anti-SLAPP Scorecard*, PUB. PARTICIPATION PROJECT: FIGHTING FOR FREE SPEECH, https://anti-slapp.org/your-states-free-speech-protection/#scorecard. (last visited Sept. 28, 2019).

exists to support a ruling in the plaintiff's favor). *Contra Abbas v. Foreign Policy Grp, LLC*, 783 F.3d 1328 (D.C. Cir. 2015) (holding that defamation suits heard in federal court should be held to the pleadings requirement prescribed by FED. R. CIV. P. 12(b)(6)). This high burden, higher than the FED. R. CIV. P. 12(b)(6) particularity standard, comports with Tenley's legislative purpose in enacting an anti-SLAPP statute: to robustly protect free speech. (J.A. at 6.); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that a complaint may survive a 12(b)(6) motion to dismiss when it alleges facts that are facially plausible). Therefore, claims arising under Tenley's anti-SLAPP statute, like Courtier's, must be pleaded with sufficient certainty.

Even if the Court applies a pleading standard closer to the FED. R. CIV. P. 12(b)(6) particularity standard—contrary to the standard used by all federal courts that decide anti-SLAPP cases—Courtier still fails to meet her burden. *See Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010). Without showing any particularity, she only made conclusory statements that Lansford's comments had defamatory meaning, were statements of fact, were false, and caused her harm. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

By failing to properly apply this high anti-SLAPP standard, the lower courts infringed on Lansford's right to free speech and undermined Tenley's political process. (J.A. at 6.) Applying the sufficient certainty standard to the facts here, Courtier's claim must be dismissed because she did not meet this standard for four of the defamation elements. Even under a particularity pleading standard, Courtier fails to meet her burden.

### B. Courtier failed to adequately plead the elements of defamatory meaning and statement of fact because Lansford's statements are protected rhetorical hyperbole.

Lansford made his statements in the course of a political debate, a context in which the audience expects opinionated statements to be dripping with exaggeration and hyperbole. Rhetorical hyperbole—a form of opinion, exaggeration, and imaginative epithets—is recognized

as a fundamental First Amendment protection to give freedoms of expression the "breathing space that they need to survive." (J.A. at 11.) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)). This breathing space empowers Americans to take part in the public debate necessary for democracy to function. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Rhetorical hyperbole is protected as long as it is not offered as a statement of fact or if it is not reasonably susceptible to the defamatory meaning imputed to it. (J.A. at 8.) (citing *Levin v. McPhee*, 119 F.3d 189, 195 (2d Cir. 1997)).

Courtier failed to show with sufficient certainty under Tenley's anti-SLAPP statute, or any particularity standard, that Lansford's statements were offered as statements of fact or carried defamatory meaning. Rather, his statements are protected rhetorical hyperbole. Thus, the Tenley Supreme Court erred in denying Lansford's motion to strike, suffocating his freedom of expression.

1. <u>Even a careless reader would interpret the challenged statements in Lansford's post as rhetorical hyperbole given his figurative language and the context within the social media post.</u>

When an author uses metaphorical and figurative language, readers understand that this is opinion, not a statement of fact, communicated through "imaginative expression and rhetorical hyperbole." *RainSoft v. MacFarland*, 350 F. Supp. 3d 49, 58 (D.R.I. 2018); *see also Mr. Chow of New York v. STE. Jour Azur S.A.*, 759 F.2d 219, 229 (2d Cir. 1985). Tenley has adopted the most careless reader standard, making it the appropriate standard through which this Court should analyze Lansford's claims that his statements were rhetorical hyperbole. (J.A. at 11.); *see, e.g.*, *No. 496, Nat'l. Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970). Applying that standard here, even the most careless reader could not mistake Lansford's statements for fact over opinion because they are metaphorical.

Lansford uses metaphors to communicate his opinion about Courtier. When a reader encounters a metaphor, she processes it in figurative terms; she will not read the statement literally. *See* MICHAEL KEARNS, METAPHORS OF MIND IN FICTION AND PSYCHOLOGY 31 (2015). The statements Courtier challenges are metaphors. "A pimp for the rich," "a whore for the poor," "corrupt and a swindler," and "a leech on society"—a phrase that compares her to a freshwater worm—all instantly signal to a reader that this is metaphorical, imaginative expression not to be taken as a statement of fact. *See id.*

Lansford uses the phrases "a pimp for the rich" and "a whore for the poor" as metaphors to express his opinion that Courtier's political platform is hypocritical. No reader could think that Lansford is factually claiming that Courtier illegally arranges sexual partners for wealthy clients as a pimp or that she prostitutes herself to those less fortunate. Courtier conveniently claims to be a defender of the poor when in fact she is part of Silvertown's wealthy elite. Her livelihood depends on selling expensive clothes and she regularly hosts black-tie dinners for the rich. (J.A. at 2–3.)

In fact, Lansford signals to the reader what he really means by "pimp" when he uses it earlier in his social media post. (J.A. at 4.) In the second paragraph of the post, Lansford says Courtier "pimps" her clothes to the rich and lavish. In the next paragraph, he says "this businesswoman is a pimp for the rich." (J.A. at 4.) While Courtier claims that being labeled "a pimp for the rich" is defamatory, reading this phrase in context with his earlier use of the word "pimp" clarifies that he was simply repeating, in figurative speech, his claim that she sells expensive clothes to the wealthy. (J.A. at 4.) This is not defamatory.

"A whore for the poor" by itself is not derogatory. (J.A. at 4.) The phrase is colloquially used to refer to someone's excess enthusiasm or interest in caring for those less fortunate. ED

BOLAND, THE BATTLE FOR ROOM 314: MY YEAR OF HOPE AND DESPAIR IN A NEW YORK CITY HIGH SCHOOL (2016) (using "whore for the poor" to endearingly refer to a new teacher taking a position in a low-income public school). Here, Lansford is referring to Courtier's intensive advocacy for welfare policies for the poor. (J.A. at 2, 16.) This colloquial use is separate from any derogatory meaning. This phrase is not defamatory because it is not reasonably susceptible to its traditional defamatory meaning. (J.A. at 8.)

Even if a reader was unfamiliar with the colloquial use of this phrase, read literally, it is nonsensical and cannot be taken as fact. "Pimp for the rich" and "whore for the poor" would be understood by a careless reader as Lansford's flippant criticism. While these may be insensitive words, they are merely figurative phrases, not facts, protected by the Constitution. "The First Amendment does not police bad taste." *New Times, Inc. v. Isaacks*, 146 S.W.2d 144, 164 (Tex. 2004). As this Court has consistently embraced, "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (internal quotation marks omitted) (citing *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

"A leech on society" is no different. This phrase is colloquially used to define a person as someone who clings to another for personal gain without giving anything in return. *See Leech*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2014) ("a hanger-on who seeks advantage or gain"); *Leech*, THE NEW OXFORD AMERICAN DICTIONARY (1st ed. 2001) ("a person who . . . sponges on others"). Lansford's comment is a metaphor for Courtier's time in prison, which was funded by Tenley's taxpayers without any benefit to them. This is only a political criticism. It is an opinion that cannot support Courtier's defamation claim. (J.A. 2–3, 16.)

Further, any reader would understand that calling Courtier "corrupt and a swindler" is a rhetorical exaggeration not meant to be taken as a statement of fact. To be corrupt is to act dishonestly in return for money, while a swindler is someone who uses their power or property to take money from another. *Corrupt*, THE NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005); *Swindler*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2014); *Swindler*, THE NEW OXFORD AMERICAN DICTIONARY (1st ed. 2001).

Here, Lansford is not claiming that Courtier is stealing from anyone. Immediately after calling Courtier "corrupt and a swindler," Lansford says she "hoodwinks the poor." But he then compares Courtier to Robin Hood, a fictional outlaw who took money from the rich to give to the less fortunate. (J.A. at 4.) This is contradictory and cannot mean that Courtier is corrupt. She could not be stealing from the poor while at the same time being "Robinita Hood" and giving to the poor. Lansford's "Robinita Hood" comment is an imaginative reference to Courtier's use of her business to support her social advocacy causes. In fact, she heavily contributes to charitable activities. (J.A. at 2.) Moreover, to call someone Robin Hood is not derogatory; he is the heroic protagonist of a children's story. By juxtaposing Lansford's statement that Courtier is "corrupt and a swindler" with his reference to Robin Hood, even the more careless reader would understand Lansford is not making a statement of fact.

2. <u>Lansford's social media post is especially protected rhetorical hyperbole because of the political context in which it was made.</u>

In determining defamatory meaning courts look to the context of the statement, not just the challenged phrases themselves. *See, e.g.*, *Knievel v. ESPN*, 393 F.3d 1068, 1074–75 (9th Cir. 2005); *Adelson v. Harris*, 973 F. Supp. 2d 467, 488 (S.D.N.Y. 2013). When deciding whether Lansford's statements were rhetorical hyperbole, Tenley's Supreme Court stated that context should be analyzed. (J.A. at 21–22.) ("Sometimes a word can be considered a mere epithet or

rhetorical hyperbole in one context but can also be considered a statement of fact that can be proved true or false [in another context.]"). Yet, Tenley's Supreme Court failed to consider any context at all. (J.A. at 22–23.) (citing to cases discussing context but failing to conduct any contextual analysis). Earlier in the litigation, the Tenley District Court correctly reviewed context at various levels, including the political and social media environment surrounding the post. (J.A. at 12.) The lower court properly found that Lansford's "political rhetoric in response" to Courtier's attack is protected free speech because the phrases are rhetorical hyperbole, not to be considered statements of fact within their charged political context. (J.A. at 12–13.)

Language used in the context of political debate is "often vituperative, abusive, and inexact." *See Watts v. United States*, 394 U.S. 705, 708 (1965). Nevertheless, courts recognize that derogatory language in a political context is often rhetorical banter that cannot serve as a foundation for a defamation claim because it is not asserted as a statement of fact. *See Gilbrook v. City of Westminster*, 177 F.3d 839, 863 (9th Cir. 1999) (finding that a council member's reference to a union leader as a "Jimmy Hoffa" was the type of rhetorical hyperbole expected to be heard in political speech); *Welch v. Am. Publ'g Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999) (accusing a mayor of "squander[ing]" money is "generalized rhetoric bandied about in a political campaign"). Throughout her recent column, Courtier used classic political epithets such as "divisive leader," "entrenched incumbent," "plutocrat," "repressive," and "beholden to special interests." (J.A. at 3–4.) Lansford's social media post was in direct response to these labels and is also filled with commonly protected political epithets. (J.A. at 4.)

In today's social media atmosphere, derogatory hyperbolic language, such as Lansford's use of political barbs like "corrupt" and "swindler," are part and parcel of a political debate. *See* @ewarren ("Donald Trump is the most corrupt president in our lifetime."); @realDonaldTrump

("Shady Eric was head of New Yorkers for Clinton, and refused to even look at the corrupt Clinton Foundation.");[6] *see also* Dominick Mastrangelo, *Al Sharpton responds to Trump: I'm happy to make trouble for racists and people like you*, WASHINGTON EXAMINER (July 29, 2019) ("Trump accused Sharpton of being . . . a political swindler in an early morning tweet."). By calling Courtier "corrupt and a swindler" in a social media post, Lansford engaged in the same inexact political lampooning that is practiced by virtually all national politicians today and is protected as rhetorical hyperbole. (J.A. at 4.) Additionally, Lansford must be protected when using rhetorical hyperbole in response to his political adversaries, or else he will be continuously forced to fight frivolous defamation lawsuits, impeding the performance of his official duties. *See Clifford*, 339 F. Supp. 3d at 927.

**C. Courtier failed to plead the element of falsity because all of the challenged statements are either substantially true or not provably false within the general tenor of the publication.**

A statement cannot be defamatory unless it is false. (J.A. at 8.) Courts use two standards to evaluate the falsity element of defamation. First, statements that are true or at least substantially true are not defamatory. *See A Fisherman's Best, Inc. v. Recreational Fishing All.*, 310 F.3d 183, 196 (4th Cir. 2002). Second, statements are not defamatory when, taking into account the "general tenor" of the publication, the statements are not provably false. *See Adelson*, 973 F. Supp. 2d at 488 (citing *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d. 144, 150 (2d Cir. 2000)); *see also Knievel*, 393 F.3d at 1074–75 (holding that the veracity of a statement must be evaluated against the totality of the circumstances in which the statement was made).

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[6] TWITTER (Apr. 30, 2019 11:24 PM), https://twitter.com/ewarren/status/1123427875250671616?lang=en; TWITTER (Dec. 19, 2018, 9:56 AM), https://twitter.com/realdonaldtrump/status/1075404434862235649.

Regardless of the hyperbolic meanings of Lansford's phrases, his statements are either at least substantially true, or cannot be interpreted as false when read in the general tenor of his social media post. Therefore, Lansford has an "absolute defense" against Courtier's claims. *See Andrews v. Prudential Sec., Inc.*, 160 F.3d 304, 308 (6th Cir. 1998).

First, "leech on society" is a substantially true statement. (J.A. at 18.) Leech is defined as someone who takes without reciprocating. *See Leech*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2014). The record states that Courtier continuously violated the law into her early twenties. (J.A. at 15.) Tenley declared her delinquent as a teen. (J.A. at 5.) She was incarcerated twice, once in a juvenile intensive incarceration center and once in prison for committing a felony. (J.A. at 15.) Through their taxes, Tenley citizens paid for Courtier's time in the criminal justice system without receiving any benefit in return. Thus, calling Courtier a "leech on society" is also at least a substantially true statement.

Similarly, "a pimp for the rich" is also a substantially true statement. (J.A. at 5.) Among other meanings, a pimp is someone who "make[s] use of [something] for one's own gain or benefit." *See Pimp*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2014). Courtier owns a series of high-end fashion stores, selling haute couture designers like Fendi, Chanel, Gucci, and Louis Vuitton. (J.A. at 16.) Courtier relies on Silvertown's wealthy population to buy her merchandise. Consistent with the definition of pimp, Courtier makes use of the rich for her own financial gain. Even if she were to argue that Lansford used "pimp" with sexual or amoral connotations, as argued *supra*, the statement is rhetorical hyperbole.

Second, phrases like "whore for the poor" and "corrupt and a swindler" are not provably false when evaluated within the general tenor of Lansford's post. While the statements are not professional or even appropriate, Lansford did not call Courtier a prostitute by describing her as

"a whore for the poor." (J.A. at 5.) A "whore" is an unscrupulous or unprincipled person. *See Whore*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2014); *Whore*, THE NEW OXFORD AMERICAN DICTIONARY (1st ed. 2001). In the post's full context, "a whore for the poor" criticizes Courtier, not for promiscuity, but for unscrupulously and hypocritically campaigning on social justice issues. This is not false as she simultaneously pursues her business interests that are aligned with Silvertown's elite. (J.A. at 2–4.) Therefore, the phrase "whore for the poor" is not a provably false statement.

Likewise, calling Courtier "corrupt and a swindler" is not a false statement because the general tenor of Lansford's post describes how Courtier is not as altruistic as she claims. (J.A. at 4). To be corrupt and a swindler is to engage in "dishonest practices." *See Corrupt*, *Swindler*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Corrupt*, THE NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005); *Swindler*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2014); *Swindler*, THE NEW OXFORD AMERICAN DICTIONARY (1st ed. 2001). Just as Lansford is not categorizing Courtier as a prostitute by calling her a "whore" or a "pimp," he is also not suggesting that she is actually involved in white-collar crime. "Corrupt and a swindler" merely points out that Courtier has tricked Silvertown's less affluent communities into believing that she is altruistic. (J.A. at 4.) ("She is corrupt and a swindler, who hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood."). The purpose of Lansford's comments is to remind Silvertown that Courtier is being misleading; she is heavily involved with and has a major stake in Silvertown's wealthy community. (J.A. at 16.) Thus, none of the challenged statements in Lansford's post are provably false under the sufficient certainty or particularity pleading standards.

**D. Even if the challenged statements were false, Courtier's defamation claim fails because Courtier, a public figure, cannot show that Lansford's statements were made with actual malice, as required by the First Amendment.**

A statement is made with actual malice when the speaker knows the statement is false or makes the statement with reckless disregard for whether the statement was false.[7] *See Sullivan*, 376 U.S. at 280; *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 59 (2d Cir. 1980). This higher defamation standard[8] is required by the First Amendment in suits involving public figures to ensure that free debate in the public forum can flourish without fear that an erroneous or impassioned statement will lead to punishment. *See NAACP v. Button*, 371 U.S. 415, 433 (1963). If a person abuses her First Amendment privileges to criticize a public figure, the public figure, unlike a private citizen, can defend herself by utilizing her public platforms, which allow her to reach a wide audience and counter potentially damaging statements. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974); *see also Sullivan*, 376 U.S. at 271 (citing 4 JONATHAN ELLIOT, ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)).

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[7] Courtier claimed that she suffered false light invasion of privacy. Neither of Tenley's courts addressed this claim. Actual malice is also an element of false light invasion of privacy. To the extent that this additional claim could be heard on appeal, it must fail because Courtier cannot show that Lansford acted with actual malice. *See Braun v. Flynt*, 726 F.2d 245, 252 (5th Cir. 1984).

[8] Private citizens, in contrast, are only required to show a speaker negligently disregarded the statements' falsity. *See D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 434 (Tex. 2017).

Courtier is a public figure. She has affirmatively chosen to enter the public arena and should be prepared to parry inevitable public criticism levied in the course of a democratic election whether it was mean-spirited or not. While the First Amendment requires that courts apply this higher standard to public figures, like Courtier, both of Tenley's courts failed to consider it in conducting their defamation analysis. (J.A. at 1–24.) Had the courts applied the standard to Courtier, her defamation claim would have failed below as she cannot prove that Lansford's statements were made with actual malice.

1. Courtier's active participation in politics, social advocacy, and entrepreneurship makes her a public figure.

Public figures are those individuals who have either achieved general fame and notoriety in their community or chosen to participate in efforts to resolve a public issue—this is a fairly low bar. *See Gertz*, 418 U.S. at 342, 345; *see also Hatfill. v. New York Times Co.*, 532 F.3d 312 (4th Cir. 2008) (finding that a scientist related to the Anthrax scare was a public figure); *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir. 1994) (finding that grandparents involved in a publicized child custody affair were public figures); *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980) (finding that the chief executive officer of a grocery store chain was a public figure). Courtier is a public figure whether this Court assesses her general fame and notoriety or her specific involvement in Silvertown's recent mayoral race.

First, Courtier has garnered general fame and notoriety because she visibly participates in Silvertown politics, widely advocates for social causes impacting Silvertown's citizenry, and is a prominent Silvertown business owner. (J.A. at 5–6.) As the widow of the former, long-serving mayor of Silvertown, she is the town's former first lady. (J.A. at 16.); *see also Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1976) (holding that Johnny Carson's wife was a public figure); *Zupnik v. Associated Press, Inc.*, 31 F. Supp. 2d 70, 72 (D. Conn. 1998) (holding that the

wife of a public figure is also treated as a public figure in a defamation case). Since her husband's death, however, Courtier has chosen to remain in the public's eye. She actively participates in social advocacy, which includes "heavily" campaigning against Lansford and his policies. (J.A. at 16.) Courtier maintains a "sizeable social media presence." (J.A. at 16.) She manages one website as a platform to push her political and social agenda and another to support her business, a series of posh clothing stores. (J.A. at 2.) Courtier's former role as first lady of Silvertown, her prominent role as an advisor in a contentious mayoral election against Lansford, and her business interests garner her fame and notoriety within her community.

Second, even if the Court determines that Courtier has not sufficiently achieved general fame and notoriety in Silvertown, she is still a public figure because she affirmatively entered into the "vortex" of Silvertown's most recent municipal elections. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967). She repeatedly and publicly criticized Lansford, the current mayor of Silvertown, and was a "diehard" supporter of Lansford's chief political opponent, Bailord. (J.A. at 3.) She not only wrote commentaries to support Bailord, but she also "campaigned quite heavily" during the election against Lansford's policies to clean up Cooperwood. (J.A. at 16.) Courtier also served as one of Bailord's political advisors, substantially contributed to Bailord's campaign, and hosted formal events to support Bailord's mayoral run. (J.A. at 17.) Courtier's position in Silvertown is the definition of a public figure. Therefore, she is required to show that Lansford spoke with actual malice—that he knew his statements were false or that he recklessly disregarded their falsity. She failed to meet this burden.

If Courtier were somehow deemed a private citizen, she must still show that Lansford spoke with actual malice because he is a public official speaking on a matter of public interest. *See Sullivan*, 376 U.S. at 281–82; *see also Barr v. Matteo*, 360 U.S. 564, 575 (1959). Lansford

is a public official because as mayor of Silvertown, he is the town's chief executive responsible for conducting governmental affairs. *See Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). Lansford's statements were in response to political criticism made in his capacity as a mayor or candidate for a public office during the course of a democratic election. (J.A. at 3–4.) He is a public official speaking on matters of public interest. Consequently, his speech is protected unless Courtier can show that he spoke with actual malice, irrespective of whether the Court classifies her as a public or private figure.

2. Courtier's defamation claim fails because she cannot show with clear and convincing evidence that Lansford's statements were made with actual malice.

Actual malice can only be proven with clear and convincing evidence that the speaker knowingly or recklessly made a false statement. *See Gertz*, 418 U.S. at 342. Courtier failed to meet this standard. Courtier may argue that because Lansford and Raymond Courtier were "political contemporaries" and "allies," Lansford had enough knowledge of her life to know his statements were false or recklessly disregard their falsity. (J.A. at 3.) The record, however, does not support this inference. It is silent as to whether Courtier's husband knew the full extent of her criminal past or that Courtier herself disclosed private information to Lansford. The record is also silent regarding whether Lansford and Raymond Courtier developed a personal relationship. Even if they did, however, the record does not state that Raymond Courtier discussed any information with Lansford about his wife. Therefore, Courtier cannot plead with clear and convincing evidence that Lansford knew enough about her to speak with actual malice. The First Amendment dictates that her entire claim must fail.

**E. Courtier failed to plead damages resulting from Lansford's hyperbolic, non-defamatory remarks.**

Even if this Court finds that Courtier is not libel-proof, that Lansford's remarks had defamatory meaning, that they were made as statements of fact, that they were not rhetorical

hyperbole, that they were false, and that he spoke with actual malice, Courtier's claim still fails because she cannot show any damages.

Tenley, like a number of states, requires that plaintiffs plead damages as an element of a defamation claim. (J.A. at 7.); *see, e.g.*, *Salomone v MacMillan Publ'g Co.*, 429 N.Y.S.2d 441 (N.Y. App. Div. 1980). Under Tenley's anti-SLAPP statute, Courtier needed to show with sufficient certainty that she suffered reputational harm. Yet, she failed to allege any specific harm at all. (J.A. at 1–24.) The only reference on the record to damages is a vague claim that Lansford's statements "harmed her good name." (J.A. at 1.) Nowhere in the record does Courtier allege that she was humiliated or ousted from her elite social circles, suffered any loss in sales at her business, had any difficulty getting donors to attend her political fundraisers, or suffered any other loss. (J.A. at 1–24.) Thus, she failed to plead the element of damages with sufficient certainty or particularity and her whole claim collapses.

## CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the judgment of Tenley's Supreme Court be reversed.

Respectfully submitted,

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