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 JUDICIAL COURT
OF STATE OF TENLEY
No. XSJ-99219

BRIEF FOR THE PETITIONER
Oral argument requested.

TEAM 219561
Counsel for Petitioner, Elmore Lansford.

QUESTIONS PRESENTED

(1) Whether a convicted felon can be a libel-proof plaintiff under defamation law solely on the basis of past criminal convictions, even if the convictions have not been widely publicized.

(2) Whether an expression made in the context of a politically-heated debate that uses words that do not state actual facts about an individual and has multiple meanings is protected rhetorical hyperbole under the First Amendment.

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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

A. Summary of the Facts

Deemed a "juvenile delinquent" for stealing money from grocery stores; committing simple assault, indecent exposure, and vandalism; and possession of marijuana and cocaine, Respondent Ms. Silvia Courtier lived a life of crime for many years. (J.A. at 5, 15.) Despite attending a rehabilitation boot camp for young female offenders, Ms. Courtier maintained her life of crime into her 20s. (J.A. at 15.) After she developed a cocaine addiction, Ms. Courtier earned her living as a cocaine dealer, eventually landing herself in prison. (J.A. at 5.) Following an arrest, she pled guilty to distribution of cocaine and served a prison sentence. (*Id.*)

After her release from prison, she turned her attention to clothing and politics. Ms. Courtier opened a high-end clothing store with the assistance of her future-husband, the-late Mr. Raymond Courtier. (J.A. at 5, 16.) He served as mayor for eighteen years, publicly supporting Mr. Elmore Lansford as he entered local politics. (J.A. at 16.) Mr. Lansford currently serves Tenley's mayor. (J.A. at 17.) Recently, Ms. Courtier has become politically active in social issues generally benefitting the poor, such as affordable housing. (J.A. at 2.)

Ms. Courtier turned her activism to a full-blown attack on Mr. Lansford to support a new mayoral candidate: first-time politician, Evelyn Bailord. (J.A. at 17.) On her website, Ms. Courtier disparaged Mr. Lansford as a "relic of the past," whose "time has passed," a "divisive leader," and "entrenched incumbent," is "out of touch with 21st century America." (*Id.*) She also accused him of "car[ing] little for social justice issues," and declared he "engaged in a war on the economically-strapped denizens of Cooperwood." (*Id.*) Ms. Courtier is not a political candidate or a professional campaign manager; she is a local business-woman. (J.A. at 2-3.)

In response to Ms. Courtier's unwarranted and untruthful attack, Mr. Lansford illuminated Ms. Courtier's past as a convicted felon and her preference for wealthy elite. (J.A. at

4.) Mr. Lansford described Ms. Courtier's "hoity-toity" stores that "pimp[] out" to the "rich and lavish," and depicts Ms. Courtier as "some kind of modern-day Robinita Hood," a "coddler of criminals," "lewd and lusty lush," and "a whore for the Poor." (J.A. at 4, 18.)

B. Summary of the Proceedings

Convicted felon-turned-political activist, Ms. Courtier, publicly criticized Mr. Lansford, and brought a defamation claim in the Tenley District Court when Mr. Lansford responded to her attacks. (J.A. at 1.) She based her claim on the terms, "a pimp for the rich"; "a leech on society"; "a whore for the poor"; and "corrupt and a swindler." (J.A. at 5.) Mr. Lansford filed a special motion to strike and dismiss the claim under the Tenley Public Participation Act. (J.A. at 2.) This law permits dismissing a claim filed in response to "a party's exercise of the right of free speech." (J.A. at 6.) The District Court granted the motion and dismissed the lawsuit on the grounds that Mr. Lansford's statements constituted rhetorical hyperbole, protected by the First Amendment. (J.A. at 13.) The Supreme Judicial Court of the State of Tenley reversed. (J.A. at 23.) Mr. Lansford timely appealed the decision, and this Court granted Certiorari. (J.A. at 24.)

C. Standard of Review

This Court reviews the facts *de novo* in cases where the court must draw a line dividing protected speech and speech that may be regulated. *N.Y. Times v. Sullivan*, 376 U.S. 254, 285 (1964). In its analysis, the court must consider the "statements in issue and the circumstances under which they were made" to determine whether protection is warranted. *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946). Similarly, in the context of an anti-SLAPP motion, the court must conduct a *de novo* review. *Burrill v. Nair*, 217 Cal. App. 4th 357, 382 (Ct. App. 2013). To affirm an order denying the SLAPP motion, the court must determine whether *plaintiff* has demonstrated a probability of prevailing on the merits of the defamation action. *Id.* at 365.

SUMMARY OF THE ARGUMENT

The First Amendment needs breathing space in order to survive. As such, courts should interpret the freedom of expression broadly and discourage lawsuits aimed at silencing others. Mr. Lansford's expression is protected speech under the First Amendment because (1) Ms. Courtier is a libel-proof plaintiff, and (2) Mr. Lansford's expression is properly characterized as rhetorical hyperbole. This Could should find Mr. Lansford's special motion to strike is the appropriate remedy and reverse the Supreme Judicial Court of the State of Tenley.

First, this Court should adopt both the issue-specific and incremental harm versions of the libel-proof plaintiff doctrine for individuals with felony convictions in order to limit defamation law's intrusion of the First Amendment's protection of free expression. Under the issue-specific version, courts can deem a plaintiff libel-proof as a matter of law when a plaintiff's reputation is so damaged that further public comments on his or her reputation will not cause greater reputational damage. *See Cardillo v. Doubleday & Co.*, 518 F.3d 638 (2d Cir. 1975). Here, Ms. Courtier's criminal convictions, which are public records, sufficiently damaged her reputation to render her libel-proof. Further, under the incremental harm doctrine, a court can deem a plaintiff libel-proof as a matter of law where a generally true publication contains minor falsities that do not harm the plaintiff's reputation more than the truthful statements. *See Simmons Ford, Inc. v. Consumers Union of U.S., Inc.*, 516 F. Supp. 742 (S.D.N.Y. 1981). Here, the majority of Mr. Lansford's statements are completely true such that any incremental harm caused by his statements is insufficient grounds for a libel action. This doctrine allows courts to limit defamation claims where a plaintiff will likely be awarded minimal compensatory damages.

Second, this Court should find Mr. Lansford's expression is rhetorical hyperbole. In this analysis, courts consider two factors. First, courts heavily rely on the context of the expression. As such, courts examine the overall tone and tenor and give deference to expressions made in a

politically-heated debate. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Clifford v. Trump*, 339 F. Supp. 3d 915 (C.D. Cal. 2018). Here, the overall tone and tenor of the social media post gives the impression that Mr. Lansford's words cannot reasonably be taken literally. Indeed, Mr. Lansford responded to politically-motivated criticisms from a political newcomer's "diehard supporter." (J.A. at 3.) Further, courts protect statements that cannot reasonably be interpreted as stating actual facts about an individual and words with multiple meanings. *Milkovich*, 497 U.S. at 20; *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974); *Greenbelt Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970). Here, the fanciful language cannot reasonably be interpreted as stating actual facts about Ms. Courtier, and she fails to identify *the* definition of each phrase she alleges is defamatory.

Remaining in line with its precedent and staying true to the meaning and purpose of the First Amendment, this Court should protect Mr. Lansford's expression, and thus maintain the critical breathing space the First Amendment needs to survive.

ARGUMENT

The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Accordingly, the First Amendment exists to protect the fundamental right to every person's freedom of expression. *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). The Court may, however, in some instances, restrict the fundamental right to otherwise free expression. *See e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (finding no protection for "fighting words"); *Virginia Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976) (finding less protection for commercial speech). In limiting this freedom, however, the Court must balance the freedom of expression and an individual's reputational interest. *See Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). This Court

narrowly regulates any suppression of the freedom of expression to give the First Amendment the "breathing space" it needs to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

This commitment to balancing the freedom of expression with limited regulation dates back to the founding fathers. For instance, James Madison, pioneer of the First Amendment, stated that "some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than that of the press." 4 Elliot's Debate on the Federal Constitution 571 (1876). This Court has noted that the only conclusion supported by history is that the "unqualified prohibitions laid down by the framers were intended to give all liberty to the press . . . the broadest scope that could be countenanced in an orderly society." *See, e.g.*, *Bridges v. California*, 314 U.S. 252, 265 (1941).

Defamation law exemplifies the challenging balance this Court must undergo. For decades, this Court has grappled with a desire to maintain its commitment to free speech, "narrow the contours of the tort of libel," and provide compensation to injured plaintiffs. Evelyn A. Peyton, *Rogues' Rights: The Constitutionality of the Libel-Proof Plaintiff Doctrine*, 34 Santa Clara L. Rev. 179, 181 (1993). Indeed, defamation law is a limit on free expression. *Gertz v. Welch*, 418 U.S. 323, 342 (1974). Thus, to strike this balance more efficiently, lower courts developed the libel-proof plaintiff doctrine and rhetorical hyperbole. These doctrines illustrate the continuing trend shifting away from blanket tort remedies available under defamation law. *See, e.g.*, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 152 (1967) (stating defamation law shifted from protecting "absolute social values" to protecting "valid personal interests"). As defamation law is a state law cause of action, the elements a plaintiff must prove vary by jurisdiction. *See Herbert v. Lando*, 441 U.S. 153, 156 (1979). When the allegedly defamatory statement is written, the plaintiff may allege a cause of action for libel. *See Milkovich*, 497 U.S. at 17.

Thus, at the direction of this Court, and in line with its precedents, lower courts apply defamation law narrowly in recognition that it limits the freedom of expression. Accordingly, here, the Court should find that the libel-proof plaintiff doctrine can ensure defamation law only truncates free expression in the most limited way. Secondly, the Court should find that Mr. Lansford's statements are merely rhetorical hyperbole that do not give rise to defamation.

I. THIS COURT SHOULD ADOPT THE LIBEL-PROOF PLAINTIFF DOCTRINE BECAUSE DEFAMATION ONLY PROTECTS GOOD REPUTATIONS AND THIS COURT'S PRECEDENTS WORK TO LIMIT, NOT EXPAND, DEFAMATION LAW.

In an effort to uphold a national commitment to free expression in light of the competing interest of defamation law, lower courts have adopted the libel-proof plaintiff doctrine. *See, e.g.*, *Cardillo*, 518 F.3d 638; *see also Simmons Ford*, 516 F. Supp. at 748. In essence, the doctrine deems specific plaintiffs unable to recover for libel because their reputations are so diminished that they would be unable to collect any meaningful recovery in a defamation suit. *See Cardillo*, 518 F.3d 638. Because defamation awards damages to plaintiffs who suffer actual harm to reputation, the doctrine allows courts to dismiss claims by plaintiffs who would be unable to recover any real damages from the alleged libelous statements. *Id.*

Courts apply two forms of the doctrine: issue-specific and incremental harm. Under the issue-specific form, a court may find plaintiffs libel-proof if their anti-social behavior renders their reputation so damaged that they would be so unlikely to recover any damages in a libel action. *See Wynberg v. Nat'l Enquirer, Inc.*, 564 F. Supp. 924, 928 (C.D. Cal. 1982). Under the incremental harm doctrine, a court may deem a plaintiff libel-proof as to a specific publication containing untruthful statements about a plaintiff when the truthful parts of that publication already harm a plaintiff's reputation beyond repair. *Simmons Ford*, 516 F. Supp. at 750. When finding a plaintiff libel-proof, courts generally determine that society's interest in "uninhibited,

robust, and wide-open discussion" must prevail over an individual's diminished reputation. *Wynberg*, 564 F. Supp. at 928. Further, in an effort to avoid the cost of litigation in cases where juries typically find a plaintiff entitled to minimal damages, a court can halt the defamation proceedings and save defendants the financial burden of defending a case. *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 304 (2d Cir. 1986).

Here, Mr. Lansford's statements about Ms. Courtier illustrate why this Court should adopt the libel-proof plaintiff doctrine. Mr. Lansford's comments on Ms. Courtier's prior felony criminal history—which is available to the public—did not harm her reputation any more than Ms. Courtier herself damaged it with her own criminal actions. Further, any of Mr. Lansford's statements that may have lacked complete truthfulness do not give merit to Ms. Courtier's otherwise deficient claim. As a result, deeming Ms. Courtier a libel-proof plaintiff saves lower courts significant resources, saves this Court's resources, and saves Mr. Lansford significant financial burden for a defamation claim that is unlikely to produce meaningful damages.

A. Courts find individuals with felony records, like Ms. Courtier, libel-proof.

Ms. Courtier is libel-proof under the issue-specific form of the doctrine because she has a diminished reputation based on her past conviction for cocaine distribution.

This Court has stated that the essence of libel is actual harm to a person's reputation. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971). This is because "society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt*, 383 U.S. at 86. However, one must possess good standing and reputation for good character to bring a libel suit. *See, e.g.*, *Davis v. Tennessean*, 83 S.W.3d 125, 130 (Tenn. Ct. App. 2001) (finding plaintiff libel-proof when serving a ninety-nine-year prison sentence for murder). Eventually, "there comes a time when the individual's reputation for specific conduct . . . is sufficiently low in the public's estimation that he [or she] can recover only nominal damages for subsequent defamatory

statements." *Wynberg*, 564 F. Supp. at 928. Consequently, when a person lacks good reputation, defamation has no place, and a plaintiff claiming injury should be found libel-proof. *See id.*

Courts have applied the issue-specific form of the doctrine in cases where convicted criminals had reputations that were so diminished as to render them libel-proof. *See Cardillo*, 518 F.2d at 639. In *Cardillo*, the court recognized that plaintiff-convicted-felon had little chance of prevailing on a defamation claim for libelous statements about his criminal acts. *Id.* at 639-40. At the time of publication, plaintiff was serving a felony prison sentence for convictions for stolen securities and bail-jumping. *Id.* at 640. Finding that he was so "unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages," the court deemed the convicted felon libel-proof as a matter of law and affirmed dismissal of the case. *Id.*

Similarly, in *Ray v. Time Inc.*, a court found the plaintiff, James Earl Ray—known for his assassination of Martin Luther King, Jr.—libel-proof. 452 F. Supp. 618, 622 (W.D. Tenn. 1976), *aff'd without opinion*, 582 F.2d 1280 (6th Cir. 1978). Based on his status as a "convicted habitual criminal," and likely inability to recover damages based on his diminished reputation, the court applied the issue-specific form of the doctrine. *Id.* The court deemed the plaintiff's case frivolous because the facts did not support a claim for defamation. *Id.* Indeed, because the publication was based on an "in-court admission and guilty plea," in a lawful and constitutional procedure, the plaintiff was barred from "attempt[ing] to attack the effect of his criminal conviction," even through a claim of defamation. *Id.*

In contrast, courts have found the doctrine does not apply when genuine issues remain as to whether the plaintiff's reputation could have been damaged more by the defendant's statements. *Brooks v. Am. Broad. Cos., Inc.*, 932 F.2d 495 (6th Cir. 1991). In *Brooks*, a nationwide news reporter targeted the plaintiff criminal as a "hitman for a corrupt judge." *Id.* at

502. The reporter used terms such as "pimp," "muscleman," and "street knowledge jive turkey," to disparage the plaintiff. *Id.* The court found that although the plaintiff's criminal record was known locally, no other publication had nationally portrayed the plaintiff using the same terms as the reporter. *Id.* On appeal, the court found that dismissing the case would be improper because genuine issues remained as to whether the plaintiff's reputation was further damaged by these allegedly defamatory statements. *Id.* at 496, 501-02.

Courts have also found individuals libel-proof despite having no criminal convictions. *Wynberg*, 564 F. Supp. at 927. For example, in *Wynberg*, the plaintiff brought a defamation action against a publisher that he alleged mischaracterized him as financially exploiting his relationship with movie star Elizabeth Taylor. *Id.* at 925. The court deemed the plaintiff libel-proof because the court's records—filled with evidence that the plaintiff borrowed and never repaid large sums of money from Ms. Taylor—supported the characterization. *Id.* at 927-29. As a general policy, the court recognized that courts must often use several flexible rules and aids in resolving the continually rising number of defamation suits. *Id.* at 927-28. And, when "an individual engages in conspicuously anti-social or even criminal behavior, which is widely reported to the public" his reputation diminishes proportionately. *Id.* at 928.

In *Guccione*, the court followed *Wynberg*'s lead and applied the doctrine to an individual accused of adultery. 800 F.2d at 299. In that case, defendant magazine accused plaintiff publisher of committing adultery by living with his girlfriend while still married. *Id.* at 300. The court deemed plaintiff publisher's reputation as to adultery rendered him libel-proof because any subsequent reporting could not realistically further injure his reputation on that subject. *Id.* at 304. The court stated the doctrine was not limited to individuals with criminal records. *Id.* at 303. The court also noted that even though plaintiff publisher may have succeeded in "restoring

his reputation" in the few years prior to the article, these efforts were insufficient to repair his reputation such that the publications actually further damaged his reputation. *Id.* at 304.

This Court's adoption of the issue-specific form of the libel-proof plaintiff doctrine as a rule—and as applicable to Ms. Courtier—enables this Court to ensure that defamation cases protect good reputations. In *Cardillo* and *Ray*, the lower court recognized that the plaintiffs had little-to-no good reputation to uphold after committing felonies. Similarly, here, Ms. Courtier stole money from grocery stores; committed simple assault, indecent exposure, and vandalism; and possessed cocaine and marijuana. (J.A. at 15.) In each of the precedent cases, the court recognized that when individuals act in a criminal manner, their reputation diminishes proportionately such that they cannot recover on a libel claim. Therefore, here, the Court should recognize that Ms. Courtier's numerous criminal activities *and* felony conviction diminished her reputation on those aspects of her life as to render her libel-proof.

Moreover, in *Wynberg* and *Guccione*, even though the plaintiffs did not commit felonies, the courts rendered the plaintiffs libel-proof due to their inability to recover on a libel claim. The plaintiff's own actions, just like Ms. Courtier's own actions, diminished their reputations so significantly that recovery on a libel claim would be nominal. As stated by Mr. Lansford, Ms. Courtier *did* lead a life of crime and caters to the wealthy with her stores. (J.A. at 15-16.) By her own actions, Ms. Courtier exemplifies the need for this Court to adopt the doctrine.

Like the Tenley lower courts, Ms. Courtier may rely on the opinion in *Liberty Lobby* that called the doctrine a "fundamentally bad idea." *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984). Plaintiff cherry-picks this quotation from the only circuit to flatly decline to apply the doctrine, and she ignores its important context. The court in *Liberty Lobby* feared that courts would face immense difficulty in determining whether a reputation had been

irreparably damaged. *Id.* at 1568. This concern hinged on the notion that publicity was part and parcel of the damage to a reputation. *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 326 (2007).

Luckily, with criminal convictions, a court does not need to meddle with questions of publicity because criminal records are inherently notorious. Criminal records are public records. Even scholars have acknowledged that "criminal convictions represent the paradigm of full and fair litigation, and publicly reported convictions inevitably damage a prospective libel plaintiff's reputation severely." *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1922 (1985). Criminal records are so accepted as widely-known that under Federal Rule of Evidence 201, courts take judicial notice of criminal records. Fed. R. Evid. 201. Inherent in the principle of judicial notice is that the facts are "generally known or can accurately and readily be determined from sources whose accuracy cannot reasonably be questioned." *Id.* The fear that courts will have to conduct extensive investigations into the publicity of a criminal conviction lacks foundation in our justice system.

Although the court in *Brooks* assumed the plaintiff's criminal record was not publically known, this Court should not adopt that view. Requiring courts to investigate whether each plaintiff's criminal records received sufficient notoriety creates a cumbersome rule for lower courts to enforce. Rather, this Court can look to *Ray*, where the court based its decision to deem the plaintiff libel-proof on an "in-court admission and guilty plea." This is precisely the evidence present in this case; Ms. Courtier admitted to her criminal behavior in a guilty plea. (J.A. at 5.) Defamation law inhibits free expression, and the libel-proof plaintiff doctrine allows courts to limit the damaging effects of defamation against free expression.

Finally, this Court does not have to limit the doctrine to plaintiffs serving long-term sentences. Although Ms. Courtier attempts to distinguish her case from the plaintiffs in *Cardillo*

and *Davis*, her point is misguided. The question for this Court is not whether Ms. Courtier served a long prison sentence, but rather, whether her actions—or any other plaintiff's actions—sufficiently ruined her reputation as to render to her libel-proof. Thus, application of the libel-proof plaintiff doctrine based on prior felony convictions is fundamentally a *good* idea in this Court's continued commitment to free expression.

Accordingly, this Court should find Ms. Courtier's criminal past renders her libel-proof.

B. Next, any incremental harm caused by Mr. Lansford's statements to Ms. Courtier's reputation is too minimal to support a claim of defamation.

Ms. Courtier is libel-proof under the incremental harm version of the doctrine because her reputation is already diminished significantly from the truthful words in Mr. Lansford's statements regarding her criminal past and preference for the wealthy.

This Court has recognized that erroneous statements are inevitable in free debate. *Sullivan*, 376 U.S. at 271. In an effort to uphold the First Amendment's protection of free expression, this Court requires that such erroneous statements have the "'breathing space' that they need to survive." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984). Thus, in furtherance of the high values placed on the freedom of speech, this Court protects those who engage in free discussion even when they make careless errors. *Zeanague v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1072 (5th Cir. 1987). It follows that when a publication contains erroneous statements, but the truthful parts of a publication refer to aspects of a plaintiff's reputation that are already beyond repair, lower courts have found that portions of untruthfulness in the article do not constitute grounds for a libel action. *Simmons Ford, Inc.*, 516 F. Supp. at 748. Thus, courts use the incremental harm doctrine to limit defamation claims.

In *Simmons Ford*, the manufacturer of an electric car sued a consumer magazine after it published an unsavory article about the manufacturer. *Id.* at 744. The plaintiff singled out one

false statement from the entire article as the basis for its libel claim. *Id.* The court deemed the plaintiff libel-proof under the incremental harm doctrine, reasoning that the truthful portion of the article damaged plaintiff's reputation beyond the hope of redemption, and dismissed the action. *Id.* at 750-51. It considered "the adverse comments regarding [erroneous information] minimal when compared with the First Amendment interests at stake." *Id.*

Similarly, a court applied the incremental harm doctrine to a plaintiff who had a criminal past that mirrored the statements in the allegedly-libelous article. *Jones v. Globe Int'l Inc.*, 1995 WL 819177, *10 (D. Conn. Sept. 26, 1995). In *Jones*, the plaintiff had prior criminal convictions related to his sexual attraction to women's shoes. *Id.* The article contained statements that may or may not have been true regarding his criminal convictions. *Id.* The court found the remaining—possibly untruthful statements—not actionable because the true statements of the publication were so damaging that the plaintiff failed to prove the requisite damages necessary to recover on a libel claim. *Id.*

Further, in *Guccione*, the court also found the plaintiff libel-proof under the incremental harm doctrine. 800 F.2d at 304. Plaintiff publisher lived with his girlfriend while he was separated from his wife. *Id.* The article, published in 1983, labeled the plaintiff as an adulterer. *Id.* at 299. The plaintiff claimed the article was libelous because he was divorced by the time the article was published, and thus not an adulterer. *Id.* at 301. The court deemed plaintiff publisher libel-proof as to the adultery claim because the allegedly false statements did not overcome the damaging effect of the true portions of the article. *Id.* 303. The court reasoned that the claim should be dismissed "so that the costs of defending the claim of libel, which can themselves impair vigorous freedom of expression, will be avoided." *Id.*

Conversely, in *Herbert v. Lando*, a court denied deeming a plaintiff libel-proof under the incremental harm doctrine. 1985 WL 506, *2 (S.D.N.Y. Apr. 4, 1985). In that case, the plaintiff challenged accusations that he lied on numerous instances. *Id.* The court did not deem plaintiff libel-proof because without proof of whether he had lied, the court could not determine the truthfulness of any of the accusations. *Id.* Thus, the court echoed the sentiments of the court in *Liberty Lobby* that the incremental harm doctrine should only be applied where the characteristics attributed to the plaintiff have been established or conceded to be true. *Id.* at *3.

This Court can uphold its commitment to freedom of expression within the defamation framework by adopting the incremental harm form of the libel-proof plaintiff doctrine. In *Simmons Ford*, the Second Circuit recognized the truth of the majority of the contents of an article prevented the plaintiff from suffering any cognizable harm. Similarly, in *Jones* and *Guccione*, the courts recognized the overriding truthful statements in a publication outweighed any potentially incorrect statements. Here, the statements Mr. Lansford made about Ms. Courtier demonstrate why allowing Ms. Courtier to bring a libel action would be frivolous and violate the First Amendment. The vast majority of Mr. Lansford's statements are completely true. In her early years, Ms. Courtier did use illegal drugs. (J.A. at 5.) Further, she currently is the proprietor of a number of upscale stores that do not cater to the poor, and she is heavily involved in social causes often benefitting the poor. (J.A. at 16.) Mr. Lansford disputes that any of his statements are false. However, even assuming that the allegedly defamatory statements lack complete truth—which Mr. Lansford does not concede—this does not preclude a court from deeming Ms. Courtier libel-proof. To the contrary, under the incremental harm doctrine, because Mr. Lansford's statements are generally true, any incremental harm resulting from his allegedly untruthful statements is not sufficient to allow Ms. Courtier to bring a claim of defamation.

Rather, Mr. Lansford's statements represent the kind of inaccuracy that is "commonplace in the forum of robust debate" that this Court encourages and protects. *Bose Corp.*, 466 U.S. at 513.

Although Ms. Courtier may rely on the Ninth Circuit's refusal to apply the incremental harm doctrine in *Masson v. New Yorker Magazine*, 960 F.2d 896 (9th Cir. 1992), this Court is not bound by that decision and its rationale is inapplicable to the question presented today. In *Masson*, the Ninth Circuit initially applied the doctrine, but after this Court granted Certiorari and held that the incremental harm doctrine was not *mandated* by the First Amendment, the Ninth Circuit decided the doctrine did not constitute an element of California defamation law. *Id.* at 899. This decision regarding California law does not preclude this Court's adoption of the incremental harm doctrine. Rather, it should be irrelevant to the Court's analysis. In deciding whether to adopt the incremental harm doctrine—which the Court should do—, the Court should consider its tradition of protecting the First Amendment's promise of freedom of expression and limiting the bounds of defamation law.

This Court can best reach the balance between the First Amendment's promise of freedom of expression and the protection of an individual's reputation in defamation law with the adoption of the libel-proof plaintiff doctrine. Therefore, this Court should adopt the doctrine, find Ms. Courtier libel-proof, and on that basis grant Mr. Lansford's special motion to strike.

C. Further, adoption of the libel-proof plaintiff doctrine aligns with this Court's precedents and its tradition of allowing only narrow exceptions to limit First Amendment protections.

This Court's precedents demonstrate the need to limit defamation law to give the utmost freedom of expression to the people. *See Sullivan*, 376 U.S. at 271-72.

In *New York Times v. Sullivan*, this Court declared, "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *Id.* at 269. In that case, this Court adopted the "actual malice" standard that a

public official must prove to recover for libel damages. *Id.* at 279-80. Among the reasons for imposing this heightened standard, the Court emphasized the need for "debate on public issues [to] be uninhibited, robust, and wide-open," even if this includes "vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.* at 270.

Similarly, in *Cohen v. California*, this Court held fast to its commitment to free expression even if certain speech may appear "trifling or annoying." 403 U.S. 15, 25 (1971). In *Cohen*, this Court did not hesitate to strike down a state conviction where the defendant was arrested for disturbing the peace for wearing a jacket that said: "Fuck the Draft." *Id.* at 16. This Court declared that the constitutional right to free expression is "powerful medicine" in society, designed to remove governmental restraint from public discourse. *Id.* at 24. Further, the Court held that speech that may be "verbal tumult, discord, and even offensive" is a necessary side effect of the broader values of free debate and discussion. *Id.* at 25. Language that is distasteful or offensive, therefore, is a sign of strength, not weakness. *See id.* at 25-26.

In line with these precedents, this Court should adopt the libel-proof plaintiff doctrine because this Court does not police bad taste. Rather, this Court focuses on promotion of free and uninhibited expression. Just as it did in *New York Times v. Sullivan* and *Cohen v. California*, when this Court balances its commitment to basic First Amendment principles with the objectives of defamation law, the issue-specific doctrine fits well within that balance. This Court has recognized the limits that defamation law puts on the freedom of expression. Now, the Court has the opportunity to adopt a rule that will halt frivolous libel proceedings, in protection of greater free expression. The lower Tenley courts and Ms. Courtier improperly rely on this Court's decision in *Wolston v. Reader's Digest Association, Inc.*, where this Court used the phrase "it would create an 'open season' for all who sought to defame persons convicted of a

crime." 443 U.S. 157, 169 (1979); (J.A. at 20.). That case dealt with defining the contours of who could be classified as a "public figure." *Id.* at 168-69. That case is wholly unrelated to the narrow issue of whether this Court should adopt the libel-proof plaintiff doctrine. Therefore, it should not be misinterpreted to control in this case. The doctrine is a fundamentally good idea.

Adoption of the issue-specific libel-proof plaintiff doctrine allows this Court to encourage—not prohibit—citizens to engage in free discussion and debate to the greatest extent possible. This Court has recognized the limits that defamation law puts on the freedom of expression. As the lower courts recognize, libel-proof plaintiffs have little-to-no chance of receiving an award of significant damages. With the expectation that defamation law functions as a protection of reputation, the lower courts formulated a method of ensuring that defamation law maintains its principal purpose. That purpose is the protection of reputation. When an individual lacks a good reputation based on past actions, and subsequently brings a defamation claim regarding a publication's reference to their past behavior, the libel-proof plaintiff doctrine allows a court to stop the proceeding, and uphold the protection of freedom of expression.

II. EVEN IF THIS COURT DOES NOT ADOPT THE LIBEL-PROOF PLAINTIFF DOCTRINE, THIS COURT SHOULD NONETHELESS DISMISS MS. COURTIER'S CLAIM BECAUSE MR. LANSFORD'S EXPRESSION IS PROPERLY CATEGORIZED AS RHETORICAL HYPERBOLE PROTECTED BY THE FIRST AMENDMENT.

For decades, this Court has grappled with balancing First Amendment protections and compensating injured plaintiffs through defamation claims. Peyton, *supra*. Indeed, this Court has narrowed the contours of the tort of libel to provide stronger protection for the freedom of expression. *See Sullivan*, 376 U.S. 254; *Curtis Publ'g Co.*, 388 U.S. 130; *Gertz*, 418 U.S. 323. In line with this narrowing, and in an effort to maintain the breathing space the First Amendment needs to survive, this Court has determined that rhetorical hyperbole is protected speech. *Bresler*, 398 U.S. at 14. In essence, courts protect defamatory-prone language that is loose,

figurative, and cannot reasonably be interpreted literally. *Id.* In determining if the challenged language constitutes rhetorical hyperbole, courts consider two factors. First, courts rely heavily upon the context of the expression. *Falwell*, 485 U.S. at 57. Within the context analysis, courts examine the tone and tenor of the expression and give added deference to expressions made in a politically-heated debate. *Milkovich*, 497 U.S. at 21; *Clifford*, 339 F. Supp. 3d at 926. Second, courts examine the individual words in the expression. Courts will protect language as rhetorical hyperbole when the words do not state actual facts about a person, and when the words have multiple meanings. *Austin*, 418 U.S. at 285; *Bresler*, 398 U.S. at 14.

Here, Mr. Lansford's statements constitute rhetorical hyperbole. First, the context of a social media post indicates Mr. Lansford's expression cannot reasonably be interpreted literally. The overall tone and tenor suggest the expression is a spoof on Ms. Courtier's criminal past; and the context of a politically-heated debate—in *response to* Ms. Courtier's attack—illustrate why this Court should protect Mr. Lansford's expression. Second, the phrases, "a pimp for the rich"; "a leech on society"; "a whore for the Poor"; and "corrupt and a swindler, who hoodwinks the poor," suggest the expression is hyperbolic in nature. These phrases do not assert identifiable facts about Ms. Courtier, and the phrases' multiple-meanings illustrate why this Court should find Mr. Lansford's language is rhetorical hyperbole and dismiss Ms. Courtier's claim.

A. Mr. Lansford's words are protected rhetorical hyperbole because the context of a politically-charged blog post suggests his words cannot reasonably be taken literally.

As mayor of Silvertown, Mr. Lansford exercised his right to free expression when he responded to Ms. Courtier's blast supporting a political newcomer and denouncing a long-standing elected member of her community. This Court should find Mr. Lansford's expression is rhetorical hyperbole. First, the overall tone and tenor of Mr. Lansford's expression suggests his

words should be interpreted as loose and figurative language. Second, the timing and underlying political backdrop of Mr. Lansford's expression suggests his words cannot be taken literally.

i. The overall tone and tenor of Mr. Lansford's language indicate his words should be interpreted as loose and figurative language.

Courts protect expressions when the overall tone and tenor suggest the words are used as loose and figurative language, rather than a literal description. *See Milkovich*, 497 U.S. at 21.

When the overall tone and tenor of an expression gives the impression that the words are not to be taken literally, courts protect the expression as rhetorical hyperbole. *See, e.g.*, *Seaton v. Trip Advisor*, 728 F.3d 592, 598-99 (6th Cir. 2013). In *Seaton*, defendant website published a "2011 Dirtiest Hotels" list. *Id.* at 594. The list posted comments from website users including, "Hold your nose for the garbage smell," and "Had to go buy socks so my feet wouldn't touch the carpet." *Id.* at 599. The court found the expression was rhetorical hyperbole because the overall tone and tenor of the article—including the users' entertaining testimonials—eliminated any reasonable claim that the website declared plaintiff's hotel as *the* dirtiest hotel. *Id.* at 598-99.

Also, courts find rhetorical hyperbole when it is impossible to believe the reader would understand the statements as anything other than pure fiction. *See Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982). In *Pring*, defendant newspaper recounted a Miss America contestant's sexual interactions that caused her partners to "levitate." *Id.* at 441. The court held the expression was rhetorical hyperbole because the overall tone and tenor of the fantastical story suggested the expression was not a literal depiction of plaintiff's sexual encounters. *Id.* at 443.

Here, the overall tone and tenor of Mr. Lanford's expression gives the impression that the words should be interpreted as loose and figurative language. In *Seaton*, the court found the examples of filth inside plaintiff's hotel was not a declaration that plaintiff's hotel was indeed *the* dirtiest hotel. Rather, the fanciful customer reviews demonstrated the publication could not

reasonably be taken seriously. Similarly, here, Mr. Lansford's expression includes an array of literary devices including alliteration, "coddler of criminals"; and "lewd and lusty lush"; metaphors, "she is some kind of modern-day Robinita Hood"; and rhymes, "a whore for the Poor." (J.A. at 18.) Also like in *Seaton*, Mr. Lansford's use of dramatic examples of Ms. Courtier's life—"a pimp for the rich"; "a leech on society"; "a whore for the Poor"; and "corrupt and swindler who hoodwinks the poor"—on a social media post demonstrate how the tone and tenor make his words hyperbolic in nature. (J.A. at 9.) Similarly, this is like in *Pring*, where the expression's overall tenor suggested the expression was a fantastical story, rather than a literal depiction, of plaintiff's sexual encounters. Here, Mr. Lansford includes a fantastical depiction of Ms. Courtier's "hoity-toity" stores that "pimp[] out" to the "rich and lavish," while she leads a double-life as a "modern-day Robinita Hood." (J.A. at 4.) This language converts the words into an overall fantastical depiction of Ms. Courtier's past and present, rather than a literal depiction of her checkered past and glamorous lifestyle. Because the tone and tenor of the expression give the impression that the words should be interpreted as loose and figurative language, this Court should find the expression is rhetorical hyperbole.

ii. The politically-heated circumstances surrounding Mr. Lansford's expression establish his words cannot reasonably be interpreted literally.

Courts protect speech when the circumstances, such as a political debate, suggest the expression is loose, figurative language. *Horsely v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002).

When speakers are involved in heated debate and make statements that cannot reasonably be taken literally, courts have found the statements are rhetorical hyperbole. *Id.* In *Horsely*, during a contentious debate regarding abortion, defendant television host said an anti-abortion proponent was an "accomplice to homicide." *Id.* at 699. Although the words accused the plaintiff of criminal conduct, the court found the expression was protected as rhetorical

hyperbole. *Id.* at 702. The court reasoned that, in the context of the debate, it was not reasonable to interpret the words literally to accuse the adversary of committing a felony. *Id.*

Similarly, to maintain First Amendment breathing space, courts are more likely to find rhetorical hyperbole when defendants use potentially-defamatory language in a politically-charged context. *Clifford*, 339 F. Supp. 3d at 926; *see, e.g.*, *Miller v. Brock*, 352 So. 2d 313, 313 (La. Ct. App. 1977) (finding "unfit" did not support defamatory meaning in a politically-heated political gathering). In *Clifford*, the president of the United States responded to allegations of misconduct—outside his presidential role—made by a political adversary. 339 F. Supp. 3d at 925. The president's social media post included the phrases, "total con job," and "playing the Fake News Media for Fools." *Id.* at 926. Because the First Amendment encourages public discourse common to the political process, the court found the expression was rhetorical hyperbole. *Id.* at 925-27. The court relied on the expression's politically-charged context and "incredulous tone," to determine that the president's words could not reasonably be taken literally. *Id.*

Conversely, when expressions contain concrete and specific language that is reasonably interpreted literally, courts will not protect the expression. *Burrill*, 217 Cal. App. 4th at 386. In *Burrill*, plaintiff counselor evaluated a family in an ongoing child custody battle. *Id.* at 368. Following the counselor's report, the son was removed from the father's custody; in response, the father published several "anonymous" statements regarding plaintiff. *Id.* at 364, 376. The father stated plaintiff was a "corrupt criminal," extorting money from clients, "accepting money to influence her child custody recommendations, and prescribing [medicine] without a license." *Id.* at 386. The court held this did not constitute rhetorical hyperbole because the words accusing plaintiff of committing *specific* crimes were reasonably interpreted literally. *Id.*

Similarly, when expressions alleging specific conduct are repeated and reiterated, courts will often find the language is not rhetorical hyperbole. *See Bentley v. Button*, 94 S.W.3d 561, 583 (Tex. 2002). In *Bentley*, a radio station hosted a segment discussing "corruption in the courthouse." *Id.* at 569. During the segment, the radio host called the judge a "corrupt . . . criminal[]," who "oughta be in jail." *Id.* Defendant radio host repeatedly brought the allegation up on air and further alleged he "investigated" the claims and stood by everything. *Id.* at 570. The court held the statements were not protected under the First Amendment. *Id.* at 585. Noting that while a single utterance of calling the judge a "criminal" might be rhetorical hyperbole, in this case, the radio host repeatedly called the judge a "criminal" in an effort to "prove" the judge was corrupt. *Id.* at 581. The court also relied on the host reiterating that his comments were based on investigated facts in finding the expression was not loose and figurative language. *Id.* at 583.

Here, because Mr. Lansford's response was in a heated debate and his expression could not reasonably be interpreted as a literal accusation, this Court should find Mr. Lansford's expression is rhetorical hyperbole. This is like in *Horsely*, where the context of a heated debate on abortion outweighed language accusing a political opponent of committing a felony. Here, Ms. Courtier accused Mr. Lansford of being an "entrenched incumbent," who is "out of touch with 21st century America," and whose "time has passed." (J.A. at 3.) She even declared that Mr. Lansford "engaged in a war on the economically-strapped denizens of Cooperwood." (*Id.*) Accordingly, this Court should follow *Horsely* and find that in the context of a heated debate, and in response to Ms. Courtier's harsh criticism, it is not reasonable to interpret Mr. Lansford's words as literal accusations against Ms. Courtier. This Court should not permit Ms. Courtier to attack others and then seek shelter under claims of defamation when others retort her remarks.

Similarly, because Mr. Lansford's expression was made in a politically-charged context, this Court should protect the expression as rhetorical hyperbole. Similar to *Clifford*, where the politically-charged context of the expression and the incredulous tone converted the expression into rhetorical hyperbole, Mr. Lansford's expression was a response to Ms. Courtier's attack on his capability as mayor. (J.A. at 4.) While Ms. Courtier is not herself a political candidate, she is stepping out of her role as citizen to engage in the political process and speak out for—and against—a mayoral candidate. (J.A. at 2-3.) Here, the political context is even more compelling than in *Clifford*, where despite the plaintiff's expression being unrelated to presidential actions, the court found the president's retort was nonetheless protected as rhetorical hyperbole. Ms. Courtier is a political activist, speaking on political issues. (J.A. at 16.) Like in *Clifford*, where the court emphasized public discourse, here, this Court should stand by its precedent of only permitting narrow exceptions to limit the First Amendment and protect Mr. Lansford's speech.

Conversely, this is unlike *Burrill*, where the expression suggested the plaintiff committed specifically identified crimes. Here, Mr. Lansford's statements identify truthful facts about Ms. Courtier's checkered past and glamorous present in a fanciful manner. (J.A. at 4.) Indeed, Ms. Courtier misplaces her reliance on *Burrill* for the proposition that Mr. Lansford's statements are defamatory per se because they impute "questionable professional conduct." In *Burrill*, as a reunification counselor, the plaintiff engaged in her professional duties, analyzing and opining on the health and safety of children in child custody battles. Here, Ms. Courtier pursued her hobby by throwing time and money at political newcomers and attacking established members of the community. (*Id.*) Ms. Courtier is not a professional campaign manager or politician; she is simply a local business-woman enthusiastic to get involved in local politics. (J.A. at 2-3.) Ms.

Courtier stepped into the political arena to speak out. She should not be allowed to crouch behind claims of defamation to prohibit others from speaking out.

Furthermore, this is unlike in *Bentley*, where defendant radio host alleged specific conduct and insisted his expression was based on investigation. Here, Ms. Courtier attacked Mr. Lansford's ability as mayor. (J.A. at 3.) In response, Mr. Lansford, unlike the radio host in *Bentley* who reiterated his allegations multiple times, posted a single retort responding to Ms. Courtier's blast. (J.A. at 4.) He did not indicate Ms. Courtier was engaged in specific conduct and did not suggest his posting was based on "investigation."

In the spirit of maintaining free discourse, this Court should protect Mr. Lansford's expression. Because Mr. Lansford's expression was made in a politically-heated debate, the circumstances surrounding the expression suggest the words cannot be interpreted literally.

B. Mr. Lansford's expression is rhetorical hyperbole because his words cannot reasonably be interpreted as stating actual facts and his words have multiple meanings.

This Court—following its history and tradition—should only permit narrow exceptions to limit freedom of expression. In *Bresler*, this Court recognized the need for an exception to defamation for rhetorical hyperbole—or extravagant communications that do not state actual facts about the plaintiff. 398 U.S. at 14. This Court should find Mr. Lansford's expression is rhetorical hyperbole because his words—a social media post with imaginative and fanciful language—is the sort of loose, figurative language this Court has deemed worthy of protection. *See Milkovich*, 497 U.S. at 21. First, the fanciful language and diction of Mr. Lansford's words cannot reasonably be interpreted as stating actual facts about Ms. Courtier. Second, Mr. Lansford's words have multiple meanings which cannot reasonably be interpreted literally.

i. Mr. Lansford's words cannot reasonably be interpreted as stating actual facts.

Words that do not state actual facts about a plaintiff are properly categorized as rhetorical hyperbole. *Bresler*, 398 U.S. at 14; *see also Butcher v. Roberts*, 595 P.2d 239, 242 (Cal. 1979) (holding "vulgar-name calling is frequently resorted to by angry people without any real intent to make a defamatory assertion," and it is properly understood to amount to nothing more).

Words that are used as loose and figurative language rather than describing literal facts about a person are rhetorical hyperbole. *See Austin*, 418 U.S. at 285. In *Austin*, in an effort to unionize, defendant union published a list of postal workers—under the heading "List of Scabs"—identifying non-union members. *Id.* at 267. The posting included a "definition of scab," which plaintiff-postal-workers alleged charged them with being "traitors." *Id.* at 283. This Court found the language was rhetorical hyperbole because the word "scab" was used in a "loose, figurative sense," to demonstrate the union's strong disagreement with the workers who had not unionized. *Id.* The Court reasoned that a generally accepted definition of "scab" is "one who refuses to join a union." *Id.* at 283. Despite recognition that "scab" was "most often used as an insult or epithet," the Court recognized the need to narrow limitations on First Amendment protections. *Id.* As such, the Court reasoned it was "impossible to believe" that readers would interpret the language literally to accuse union hold-outs of treason. *Id.* at 285.

Conversely, courts will not protect language as rhetorical hyperbole when the expression uses concrete words to describe actual events. *Milkovich*, 497 U.S. at 21. In *Milkovich*, a high school wrestling coach testified regarding an altercation involving him and his wrestling team. *Id.* at 4. Defendant newspaper published an article titled, "[High school] beat the law with the 'big lie,'" with several statements suggesting plaintiff coach had lied at a court hearing. *Id.* at 4. This Court held that the expression was not protected by the First Amendment. *Id.* at 21-22. According to this Court, a reader could reasonably interpret the article literally and conclude that

the coach perjured himself. *Id.* This Court reasoned that this was not "loose, figurative or hyperbolic language" worthy of First Amendment protection, and rather the "clear impact" of the article was that the coach lied at the hearing. *Id.* at 21.

Here, Mr. Lansford's words do not describe literal facts about Ms. Courtier. This is similar to *Austin*, where this Court found the word "scab" was used as loose, figurative language to describe the union's disagreement with union holdouts. While Ms. Courtier alleges several of Mr. Lansford's phrases defame her, not one of the statements can be reasonably interpreted as stating literal facts about her. For example, the phrase "a pimp for the rich" cannot be taken literally to suggest that Ms. Courtier arranges opportunities for illicit sexual intercourse, as suggested by Ms. Courtier. Rather, this phrase is a euphemism for an owner of a high-end, luxury store who caters to the needs of the wealthy. Here, Ms. Courtier operates such boutiques that cater to consumers "of high-end designers." (J.A. at 16.) Further, according to Urban Dictionary, "whore," is defined in part as, "A female generally lacking self-respect and morality." *Whore*, Urban Dictionary (2016). This is like "scab" in *Austin*. There, the Court emphasized that while "scab" is often used as an insult or epithet, the Court found no reader could reasonably interpret the word as anything other than rhetorical hyperbole. Further, while Ms. Courtier argues that "corrupt and a swindler" can be taken literally to suggest that she is an unethical businesswoman and therefore can support defamatory meaning, this phrase cannot be so interpreted. Indeed, immediately following this allegedly defamatory statement is a reference to a "modern-day Robinita Hood"—a clear reference to Robin Hood, a poor man's hero. (J.A. at 18.) Ms. Courtier supports social causes often benefitting the poor. (J.A. at 2.) As such, this literary reference turns any potential defamatory meaning into a literary play on Ms. Courtier's connection to—or divergence from—the idolized childhood hero. This case is wholly different

from *Milkovich*, where defendant newspaper used concrete words to describe actual events. There, the court reasoned that the "clear impact" of the article was that the plaintiff had lied. Here, Mr. Lansford's fanciful language and diction cannot reasonably be interpreted as stating literal facts that describe Ms. Courtier, rather his words are merely loose and figurative language.

Further, Ms. Courtier misplaces her reliance on *Flamm v. American Ass'n of University Women*, 201 F.3d 144 (2d Cir. 2000). In that case, an attorney referral service listed a directory of attorneys, including the attorneys' name, address, and a brief description of each professional. *Id.* at 146. The directory described plaintiff attorney as an "ambulance chaser." *Id.* at 147. The court found because this was a "straightforward directory," it was reasonable to interpret "ambulance chaser" literally, asserting plaintiff unethically solicited clients. *Id.* at 152. Nothing in the expression gave the impression that "ambulance chaser" meant anything other than an assertion of fact. *Id.* Conversely, here, Mr. Lansford's expression was made on social media, using fanciful language to express unrelated ideas. (J.A. at 8.) This is unlike in *Flamm*, where all statements—minus *the* defamatory statement—were objectively verifiable, fact-laden, assertions of fact. Here, Mr. Lansford uses literary figures, fanciful diction, and alliteration to illustrate his frustration with Ms. Courtier—the widow to Mr. Lansford's former political supporter. (J.A. at 3.) Mr. Lansford's language is unlike the objectively verifiable assertions of fact in *Flamm* because Mr. Lansford's words are not literal assertions of Ms. Courtier.

This Court should maintain its tradition of limiting restraints on free expression. Because Mr. Lansford's fanciful language and diction cannot reasonably be interpreted as stating actual facts about Ms. Courtier, this Court should find his expression is rhetorical hyperbole.

ii. Mr. Lansford's words have multiple meanings.

An expression is protected as rhetorical hyperbole when the words have more than one meaning and courts find the expression is figurative language. *See, e.g.*, *Bresler*, 398 U.S. at 14.

Courts are less willing to protect expressions when the words only have one meaning, which supports defamatory meaning. *Kumaran v. Brotman*, 247 Ill. App. 3d 216, 219 (Ct. App. 1993).

This Court protects expressions when words are used figuratively, even if a word has a concrete definition capable of supporting defamatory meaning. *See, e.g.*, *Bresler*, 398 U.S. at 14. In *Bresler*, a real estate developer sought zoning variances from the city while negotiating to sell land to the city. *Id.* at 7. Community members characterized plaintiff's negotiations as "blackmail." *Id.* at 8. This Court found the expression was rhetorical hyperbole, reasoning that while "blackmail" has a concrete definition that *could* support defamatory meaning, it was unreasonable to read "blackmail" as charging the plaintiff with the commission of a crime. *Id.* at 14. The Court reasoned that "even the most careless reader" would have interpreted the word "blackmail" as a "vigorous epithet" used to describe the plaintiff's negotiation tactics. *Id.* Further, the Court recognized that the record was "completely devoid of evidence" that anyone believed the defendant had been charged with a crime. *Id.*

Similarly, courts protect expressions when the words lack precise definition. *Welch v. Am. Publ'g Co.*, 3 S.W.3d 724, 726 (Ky. 1999). In *Welch*, a publication included the phrases, "The City is Broke Because of His Management," and "[Plaintiff] Has Squandered 1 1/2 Million Dollars of Surplus Money." *Id.* at 730. The court held this speech was rhetorical hyperbole because the words lacked precise definitions and were figurative exaggerations to cast the plaintiff in a negative light. *Id.* The court reasoned that "broke" does not have a specific definition, and while "squandered" suggests "waste," whether the money was spent for desirable purposes was a matter of opinion. *Id.*

Conversely, if a word has a precise definition which supports a defamatory meaning, courts will not protect the expression as rhetorical hyperbole. *Kumaran*, 247 Ill. App. 3d at 225.

In *Kumaran*, defendant newspaper characterized the plaintiff's practice of filing lawsuits to settle claims for small amounts as a "scam." *Id.* at 219. The court found the expression was not rhetorical hyperbole. *Id.* at 225. The court—relying on a dictionary definition—reasoned that "scam" has "a precise core of meaning," defined as a "fraudulent business scheme." *Id.* at 225, 228 (quoting *Scam*, American Heritage Dictionary (2d ed. 1985)). Thus, reading the article in its "natural and obvious meaning," would insinuate the plaintiff "committed a crime." *Id.* at 227.

Here, this Court should protect Mr. Lansford's expression because his words are used figuratively, even if some words have concrete definitions capable of supporting a defamatory meaning. Mr. Lansford's words are similar to the word used in *Bresler*, where this Court held that even the most careless reader would have understood "blackmail" as describing the plaintiff's negotiation techniques from the opponent's point of view. Here, the phrases "a pimp for the rich"; "a leech on society"; "a whore for the poor"; and "corrupt and a swindler who hoodwinks the poor," can only reasonably be interpreted figuratively because Mr. Lansford is not asserting literal facts about Ms. Courtier. For example, Oxford Dictionary defines "leech" as an "aquatic blood-sucking worm." *Leech*, Oxford Dictionary (2019). There is no indication Mr. Lansford's post suggests Ms. Courtier is a carnivorous creature. In contrast, Urban Dictionary defines "leech" as "one who constantly takes from others without giving anything in return." *Leech*, Urban Dictionary (2019). This definition illustrates the loose, figurative nature of Mr. Lansford's expression. As in *Bresler*, even the most careless reader would not have interpreted the post as describing Ms. Courtier. Indeed, as in *Bresler*, here, the record is "devoid of evidence" that anyone believed Mr. Lansford accused Ms. Courtier of committing a crime.

Similarly, this Court should protect Mr. Lansford's expression because his words lack precise definition. This is like in *Welch*, where the court held the phrases did not have a precise

definition and merely served to cast a negative light on an opposing candidate. Here, Ms. Courtier challenges Mr. Lansford's use of the phrases, "a pimp for the rich"; "a leech on society"; "a whore for the poor"; and "corrupt and a swindler." (J.A. at 18.) Ms. Courtier fails to identify *the* definition attributed to these statements. Indeed, these phrases lack precise definition. For example, according to the Oxford Dictionary, a "pimp" is "a small bundle of brushwood used as kindling." *Pimp*, Oxford Dictionary (2019). And "corrupt" means "to spoil or destroy (flesh, fruit, or other organic matter) by physical dissolution . . . ." *Corrupt*, Oxford Dictionary (2019). Conversely, Mr. Lansford's statements are wholly unlike the statements in *Kumaran*, where the court found "scam" had one meaning. Further, like in *Kumaran*, this Court should read Mr. Lansford's expression in its "natural and obvious meaning,"—as a retort to a political challenger—using expressive, rhyming phrases in a fanciful and figurative expression.

Following its longstanding history and tradition of permitting only narrow exceptions to limit First Amendment protections, this Court has continuously tightened requirements for successful defamation claims. As such, this Court protects rhetorical hyperbole. *See Bresler*, 398 U.S. at 14. To maintain the breathing space the First Amendment needs to survive, this Court should find Mr. Lansford's words are rhetorical hyperbole based on the tone and tenor of the post, the context of a politically-heated debate, and the individual words. By finding Mr. Lansford's words protected rhetorical hyperbole, this Court can follow its tradition of permitting only narrow limits to the fundamental right of free expression.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment of the Supreme Judicial Court of the State of Tenley.