IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

No. 18-2143

ELMORE LANSFORD,

Defendant-Petitioner.

v.

SILVIA COURTIER,

Plaintiff-Respondent.

ON WRIT OF CERTIORARI

TO THE SUPREME JUDICIAL COURT OF TENLEY

BRIEF FOR PETITIONER

Participant Team 219566
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether a Convicted Felon is Libel-Proof as a Matter of Law Given Their Inability to Demonstrate "Actual Injury" to Their Reputations

II. Whether the Challenged Statements Protected by The First Amendment

A. Whether the statements protected rhetorical hyperbole because no reasonable reader would believe them to be factual assertions

B. Whether the statements also non-actionable defamation because petitioner is a public figure and there was no actual malice?

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES

ONLINE SOURCES

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

In a recent mayoral election, plaintiff-respondent, Silvia Courtier published a harsh critique of current Silvertown Mayor, defendant-petitioner, Elmore Lansford. (J.A. at 3.) Lansford posted a response regarding Courtier's trustworthiness. (J.A. at 4.) Courtier, offended by his response, sued Lansford for defamation of character and false light invasion of privacy. (J.A. at 4.)

Elmore Lansford is a dedicated politician in Silvertown; prior to his tenure as Mayor, he served on the city council. (J.A. at 3). Lansford has recently been involved with efforts to revitalize Coppertown, an area of Silvertown with high levels of crime and poverty, through new real estate developments and increased enforcement of illegal drug and narcotics distribution. (J.A. at 3.)

Prior to entering the political arena, Silvia Courtier, operated on the other side of the law. (J.A. at 15-16.) As a juvenile, Courtier committed a litany of offenses – assault, indecent exposure, vandalism, and possession of marijuana and cocaine. (J.A. at 15.) Eventually, Courtier was declared delinquent and incarcerated at a facility for young females. (J.A. at 5, 15.) Courtier maintained a criminal lifestyle as an adult; in her twenties she was charged with multiple felonies for possession and distribution of cocaine and served two years in prison. (J.A. at 5, 15-16.)

After her incarceration, Courtier met an older man, Raymond Courtier. (J.A. at 5.) Mr. Courtier was the primary investor in Mrs. Courtier's exclusive, luxury clothing stores that cater to consumers of expensive designers such as Fendi, Chanel, Gucci, and Louis Vuitton. (J.A. at 5, 16). The late Mr. Courtier served on city council, and as Mayor of Tenley, and as such, served as the catalyst to Silvia Courtier's involvement in the local political arena. (J.A. at 3, 1.)

In recent years, Courtier has become an outspoken critic of Lansford. (J.A. at 3.) Courtier inserted herself into the most recent mayoral election between Lansford and Evelyn Bailord. (J.A. at 17.) Courtier not only spoke out against Lansford, but also made significant financial contributions to Bailord's campaign and hosted extravagant fundraisers. (J.A. at 17.) Courtier instigated the present issue by posting the following column on her website (dedicated to political issues):

> "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 care about all 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 4.)

As expected in an arena of political discourse, Lansford responded to Courtiers critique, with an emotional critique of his own:

> "It is ironic that Silvia Courtier blasts me as uncaring toward the less fortunate. No wonder she is such 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 sued Lansford for defamation of character and false light invasion of privacy. (J.A. at 4.) The statements challenged as defamation are: "a pimp for the rich", "a leech on society", "a whore for the poor" and, "corrupt and a swindler."

Lansford then timely filed a special motion to strike and dismiss Courtier's claim under the Tenley Public Participation Act, § 5 – 1 – 701 et seq., which provides in pertinent part "If a legal action is filed in response to a party's exercise of the right of free speech...that party may petition the court to dismiss the legal action. (J.A. at 6.) If Lansford establish a prima facie case that he exercised his right to free speech, then the case shall be dismissed unless the responding party can establish a prima facie case for each essential element of their claim. (J.A. at 6-7.)

The Tenley District Court granted Lansford motion to strike/dismiss because his emotional response was not defamation and was merely rhetorical hyperbole, even though the court determined Courtier was not a libel-proof plaintiff despite Courtier's lengthy and felonious criminal background. (J.A. at 10-13.) The Supreme Court of Tenley reversed and refused to

grant Lansford motion on the basis of the libel-proof plaintiff doctrine or rhetorical hyperbole, even though it acknowledged that Courtier may not prevail on her defamation claim. (J.A. at 20-23.) The Supreme Court of the United States granted Lansford writ of certiorari as to the issues of the libel-proof plaintiff doctrine and protected rhetorical hyperbole. (J.A. at 24.)

SUMMARY OF THE ARGUMENT

The Supreme Court of Tenley improperly denied Mr. Lansford's motion to strike and dismiss because Courtier is a libel-proof plaintiff. However, in the event that this Court determines that Courtier may sue for libel, the motion to strike should nevertheless be granted because the challenged statements are protected rhetorical hyperbole. Ultimately, though, if it is determined that the statements are not rhetorical hyperbole, they are nevertheless protected under the First Amendment because the plaintiff is a public figure and there was no actual malice in this case.

The cornerstone of defamation law is whether the statements harm one's reputation. Thus, a convicted felon like Courtier with no reputational interests to protect may not sue another for libel. The libel-proof doctrine, adopted by Tenley's highest court, bars a plaintiff's claim under both the issue-specific doctrine and the incremental harm doctrine. Here, Courtier's claims fail under both of these doctrines. However, even if Courtier is allowed to sue for defamation, Mr. Lansford's post is protected under the First Amendment.

When a statement is rhetorical hyperbole, name-calling, or an imaginative expression, it is not defamation because no reasonable person would interpret such epithets as true statements, and therefore simply cannot damage someone's reputation. To determine whether statements are defamatory, the context of the entire publication should be evaluated. When loose and figurative language is used throughout the publication or in the challenged statements themselves, and there

is a lack of factual specificity, it indicates use of rhetorical hyperbole. Mr. Lansford's statements were rhetorical hyperbole because they employed the use of figurative language, lacked factual specificity, and his entire publication was a passionate illustration of his distrust and frustration of Ms. Courtier.

In a case in which a public official or public figure is involved, not only must the statement be defamatory, but the plaintiff must prove that the defendant acted with actual malice in the publication of the statements, in order for a defamation case to be actionable. A public figure is defined as individual that voluntarily inserts themselves into a public issue. Ms. Courtier is a public figure because she thrust herself into the middle of the mayoral election and publicly criticized Lansford. Actual malice requires that the defendant made the statements with knowledge that it was false or with reckless disregard of whether it was true or not. The record is devoid of any allegations or facts to suggest that Mr. Lansford acted with actual malice. Even if the Court determines that the statements are defamatory, they are still protected because Ms. Courtier is a public figure and failed to show that Mr. Lansford acted with actual malice.

The standard of review of an order granting or denying a motion to strike is de novo. Block v. Tanenhaus, 815 F.3d 218, 220 (5th Cir. 2016); E. Davis v. Electronic Arts Inc., 775 F.3d 1172, 1176 (9th Cir. 2015). Thus, the Court is not required to give any deference to the Supreme Judicial Court of State of Tenley. See id.

ARGUMENT

I. COURTIER IS LIBEL-PROOF AS A MATTER OF LAW BECAUSE SHE IS A HABITUAL CRIMINAL WITH NOMINAL REPUTIONAL INTERESTS AND FALLS OUTSIDE THE SCOPE OF DEFAMATION LAW.

A. Convicted Felons are Libel-Proof Because They Lack Legally Cognizable Reputational Interests in Their Criminal Records.

The First Amendment in the Bill of Rights to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances." United States Const., amend. I. First Amendment jurisprudence has, consistent with the Constitution, worked to protect the "prized American right 'to speak one's mind." New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Goldberg, J. concurring).

There are, though, some limits on an individual's right to speak freely. For example, the law of defamation is a product of state law and serves as such a limit. First Amendment Law: Freedom of Speech, 5:7. Notably, the sole occupation of defamation law is to strike the appropriate balance between both an individual's right to express themselves freely and the right of members of society to preserve their reputational interests. Id. Under defamation law, an individual may generally sue for libelous or slanderous statements: false publications and false utterances about said individual, respectively. Id.

Because of the inherent risks of chilling or "abridging the freedom of speech," within defamation law, courts have limited the right of individuals to sue for defamation. See e.g., New York Times Co.; Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). One such limitation is the libel-proof plaintiff doctrine. Thomas v. Tel. Pub'g Co., 155 N.H. 314, 322 (N.H. 2007). Under the libel-proof plaintiff doctrine, an individual's defamation claim shall be dismissed if the court

finds that the individual would not recover more than nominal damages if allowed to pursue the claim in court. Id. The doctrine is acknowledges that not all defamation will be injurious. Id. Though different jurisdictions have adopted different versions of the libel-proof doctrine, the state of Tenley has taken a dual-prong approach to the doctrine. Id. Specifically, Tenley protects the right to Freedom Speech of its citizens through both the (1) issue-specific and (2) incremental harm doctrines. Id. These doctrines minimize the chilling effects of defamation litigation when a plaintiff would ultimately recover nothing more than nominal damages. Id.

1. Convicted felons cannot recover for defamation because they cannot show "actual injury" to their reputation as required by this Court in Gertz.

In order to give First Amendment interests appropriate breathing space, a plaintiff's defamation lawsuit must be dismissed if it is clear that the plaintiff cannot prove "actual injury" to their reputation. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). Habitual criminals do not possess (or possess nominal) reputational interests, and thus, are libel-proof and cannot sue for defamation. In Cardillo v. Doubleday & Co., Inc., the Second Circuit dismissed a libel claim because the plaintiff was a habitual criminal. Cardillo, 518 F.2d 638, 639-40. (2d. Cir. 1975). The court stated that the plaintiff was "so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case, involving as it does First Amendment considerations." Id. at 640. Among other things, the court relied on the myriad felony convictions on the plaintiff's criminal record when rendering him libel-proof. Id. In other words, the case was dismissed because plaintiff's felony convictions made it highly unlikely that plaintiff would be able to demonstrate to the court that he sustained an "actual injury." See id.

Being a habitual criminal is a sufficient basis to hold that a convicted criminal is libel-proof. Notably, the court in Cardillo, the seminal libel-proof plaintiff doctrine case, did not find

it necessary to find that the plaintiff's criminal record gained notoriety or public attention to find that the plaintiff was libel-proof given his robust criminal record. See Cardillo,518 F.2d, at 640. Similarly, in Davis v. Tennessean, a plaintiff for defamation was deemed libel-proof solely on the basis of his felony conviction which led to incarceration. Davis v. Tennessean, 83 S.W.3d 125, 131 (Tenn. Ct. App. 2001). The court found it unnecessary to find that the plaintiff's criminal convictions gained notoriety or public attention to declare him libel-proof for purposes of defamation law. Id.

b. *Convicted criminals cannot rehabilitate their reputation for purposes of the libel-proof doctrine.*

No court applying the libel-proof plaintiff doctrine has held that a habitual criminal is not libel-proof on the grounds that their reputation has been rehabilitated. See e.g., Lamb v. Rizzo, 391 F.3d 1133 (10th Cir. 2004). For example, in Lamb, a convicted felon sued a newspaper for libel for writing two articles which he alleged contained "lies and false information." Id. at 1134-35. Though he had a criminal background, he argued that he was not libel-proof because he had committed his worse crime thirty-years ago and had rehabilitated his reputation in the community. Id. at 1137. The court explained that it did not matter that "thirty-one years had passed since" since his main offense, held that the plaintiff was libel-proof and rejected the plaintiff's argument that he has rehabilitated his reputation. Id. at 1139-40. Thus, a convicted felon's reputation is reasonably irreparable for purposes of the libel-proof doctrine. See id.

Here, Courtier is a libel-proof for purposes of defamation law because she is a convicted felon with a comprehensive criminal record with a history of incarceration and thus, cannot show "actual injury." Like in Cardillo and Lamb, in which the court rendered both plaintiffs libel-proof because they were habitual criminals and one even had a history of incarceration, here, Courtier is so unlikely to be able to recover for more than nominal damages based on her history

of incarceration, cocaine and illegal marijuana use, drug dealing, vandalism, theft, delinquency, assault, and even indecent exposure. She was in and out of prison well into her adulthood and served a substantial sentence in state prison. Because no court has held that convicted felon can rehabilitate their reputation for purposes of the libel-proof doctrine, and because doing so would unnecessarily complicate the application of the already narrowly applied libel-proof doctrine, Courtier is libel-proof as a matter of law because she has no reputational interests to protect. Additionally, like in Lamb, in which the court held that plaintiff committed his crime thirty years ago, here, it is irrelevant when Courtier committed her crimes. Courtier committed not just, one, two, or three crimes; she engaged in a plethora of criminal activities while pursuing a full criminal agenda. Given that she is a public figure, *infra*, her criminal records are a matter of public record, and there is no evidence that these have been expunged. Thus, plaintiff does not have reputational interests to protect.

In sum, Courtier is a habitual criminal with no reputational interests to protect and cannot meet the "actual injury" burden required by the United States Supreme Court.

2. The Issue-Specific Doctrine Adopted by the Supreme Judicial Court of State of Tenley Supports Precluding Defamation Claims Brought by Convicted Felons.

Even absent criminal convictions, an individual with a reputation so tarnished in one area is unlikely to be able to recover anything more than nominal damages for alleged defamatory statements made regarding the tarnished area and is therefore libel-proof. Guccione v. Hustler Magazine,800 F.2d 298 (2d Cir. 1986); see also Wynberg v. National Enquirer, Inc. 564 F. Supp. 924, 928-29 (C.D. Cal. 1982) (recognizing that a plaintiff may be rendered libel-proof by evidence apart from criminal convictions). In Guccione, plaintiff was found to be libel-proof with respect to an "accusation of adultery." Id. at 303. Plaintiff, who was not a convicted felon, testified that his "relatives, friends, and business associates knew that he was living with" his

mistress "while still legally married." Id. at 303-04. He also acknowledged that he "never hid either his marriage or his relationship with" his mistress from anyone. Id. at 304. Thus, plaintiff's claim for defamation was dismissed because his community was aware that he was indeed an adultery and was therefore libel-proof with regard to the topic of adultery.

Here, Courtier is libel-proof with regard to the issue of criminality. Admittedly, if Courtier's criminal activities would have received notoriety or public attention might have made her reputation in the community *worse*, pragmatically, a crime does not need to make the prime-time news in order for it to tarnish the perpetrator's reputation. For instance, sex offenders in some states are ordered by the court to register in the state's sex offender registry. A substantial number of these crimes do not attain public attention. It would be unreasonable though to deduce from that that the perpetrator's reputation has remained unharmed. Here, Courtier engaged in multiple crimes, from her adolescence well into adulthood. Her immediate community, including family members, friends, etc. were likely aware of this particular history. Additionally, her crimes are a matter of public record and available to the community. As a public figure and former First Lady of her community, it would not shock the conscience if members of the community had run a basic internet search and found the litany of offenses she committed. After all, there is no evidence that her record has been expunged.

In sum, under the issue-specific doctrine, even if Courtier's crimes received no notoriety or public attention, her reputation in regard to criminality is probably tarnished and she would not be able to recover more than nominal damages if allowed to proceed with this suit. Thus, she is libel-proof.

B. Alternatively, Courtier Is A Libel-Proof Plaintiff Under The Incremental Harm Doctrine Because The Purported Reputational Harm Caused By Her Challenged Statements Is "Far Less" Than The Harm Caused By The Unchallenged Statements In Lansford's Publication.

The Tenley District Court applied the incorrect analytical framework when it held that Courtier is not libel-proof. See J.A. at 9-11. Namely, it failed to consider whether Courtier is libel-proof under the incremental harm doctrine which has now been adopted by Tenley's highest court. Id. at 19-20. This Court has discretion to hold that the incremental harm doctrine bars Courtier's defamation claim and should do so for the reasons below. Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 379 (1995). (explaining that the Court has discretion to hear a new argument if it inheres the claim before the Court).

Under the incremental harm doctrine, a plaintiff is libel-proof as a matter of law if the harm caused to the plaintiff's reputation by the challenged statements is "far less" than the harm caused by statements in the same publication or article that the plaintiff has chosen to leave out of his or her defamation complaint. Thomas,155 N.H. at 322; see also Masson v. United States, 501 U.S. 496, 523 (1991) (holding that a plaintiff is libel-proof if in their defamation complaint they do not include the most "provocative, bombastic statements"). The inference courts make is that the statements left out of the complaint are not libelous (or true). See id. Thus, in Simmons Ford, Inc. v. Consumers Union of the United States, the court held that plaintiff, a manufacturer, was libel-proof under the incremental harm doctrine. Simmons Ford, 516 F. Supp. 742 (S.D.N.Y. 1981). In that case, a manufacturer and retailer of automobiles alleged that an article evaluating its automobile was libelous because it incorrectly stated that one of plaintiff's vehicles failed to meet federal safety standards. Id. at 745. The plaintiff did not, however, challenge other statements in the article which amounted to "abysmal performance and safety evaluations." Id. at 750. The court held that the plaintiff was libel-proof because the "portion of the article

challenged by plaintiffs, could not harm their reputations in any way beyond the harm already caused by the remainder of the article." Id. at 750-51. Similarly, a plaintiff with a criminal background was libel-proof under the incremental harm doctrine when he sued for alleged defamatory statements published about him. Jones v. Globe International, 1995 WL 819177 at 11 (D. Conn. 1995). Specifically, the plaintiff disputed statements which he suggested he had stolen personal items from a client and that he had idiosyncratic sexual habits. Id. at 10. Because the article also included statements which highlighted his criminal background, the incremental harm doctrine deemed him libel-proof because the reputational harm caused by his criminal record outweighed the nominal harm caused by the challenged statements. Id.

On the other hand, a plaintiff cannot be libel-proof under the incremental harm doctrine solely based on past criminal convictions. Thomas, 155 N.H. at 322-23. The court in Thomas, the case from which Tenley adopted its reasoning for the implementation of the libel-proof doctrine, declined to hold that a plaintiff was libel-proof based solely on their criminal record. Id. at 323. The court explained that "the incremental harm doctrine focuses upon the communication at issue and the extent to which the challenged and actionable portions of its contents create harm above that caused by the portions that are unchallenged or nonactionable." Id.

Here, Courtier is libel-proof under the incremental harm doctrine because the statements she has challenged are "far less" harmful to her reputation than the statements she intentionally left out of her defamation complaint and these statements are also not the most "provocative, bombastic statements" in Mayor Lansford's post. Like in *Simmons* and *Jones*, in which plaintiffs were libel-proof under the incremental harm doctrine because the statements they challenged could not harm their reputation in any way beyond the harm already caused by the other

statements in the relevant publications, here, the four statements in the record that Courtier challenges are "far less" harmful than other unchallenged statements. For example, Courtier has not challenged the statement about her drug use. This statement, found in the first paragraph of the publication, is the gravamen of Mayor Lansford's post and substantially more harmful than the four statements she is suing for. This is supported by the fact that in the record there are felony convictions associated with this use for not just the use of cocaine, but also, for being a drug dealer. Furthermore, this statement alone reveals so much about her life as a habitual criminal. Once a reader begins their research into her drug use and finds her criminal convictions, they will learn of Courtier's robust criminal past that started at a very young age. The reader will learn of her "litany of offenses" ranging from "simple assault, simple possession of marijuana, indecent exposure, vandalism, and possession of cocaine." The reader will learn that she was declared a "delinquent" by a judicial body, and that she spent years in prison for her behavior. The record is silent on any "expungements", so it is reasonable to infer that all of these behaviors are still on her record. Importantly, the purpose of defamation law is certainly not to help criminal criminals hide their criminal convictions.

Additionally, application of the incremental harm doctrine is appropriate here because the basis of its application is the communication itself. Unlike in *Thomas*, in which the court declined to hold that a plaintiff was libel-proof under the incremental harm doctrine solely based on the plaintiff's past criminal convictions, here, Courtier's past criminal convictions are relevant but they are not the sole basis for successfully application of the incremental harm doctrine. Her comprehensive criminal history becomes relevant only because in the same communication she is suing about there are statements about her past criminal drug use, which would reasonably

read the reader of the publication to inquire into her past behavior. It would not be difficult to find her whole laundry list of offenses.

In sum, the incremental harm doctrine bars Courtier's defamation claim because the statements she brought suit for are "far less" damaging than the statements which the record supports are true.

II. THE CHALLENGED STATEMENTS IN THIS CASE ARE PROTECTED RHETORICAL HYPERBOLE, AND EVEN WITHOUT THIS PROTECTION, THE STATEMENTS DO NOT QUALIFY AS DEFAMATION BECAUSE THERE WAS NO ACTUAL MALICE OR FAULT.

The constitutional right to freedom of speech is crucial to the unfettered exchange of ideas, public debate, and discourse that embody our democracy. New York Times Co. v. Sullivan, 376 U.S. 254, 282-83 (1964). While common law allows a cause of action when a person's reputation has been damaged by defamatory statements, there are strict constitutional limits to such actions in order to protect the First Amendment freedom of speech. Milkovich v. Loraine Journal Co., 497 U.S. 1, 14-18 (1990); see also New York Times, 376 U.S. at 272 (explaining that "whatever is added to the field of libel is taken from the field of free debate.") Statements classified as rhetorical hyperbole or statements involving a public figure, free of actual malice are constitutionally precluded from defamation actions. Milkovich, 497 U.S. at 20; Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967).

A. Lansford's Statements Were Merely Emotional Rhetorical Hyperbole in a Combative Public Debate and Therefore Do Not Constitute Defamation.

When a statement is rhetorical hyperbole, mere epithet or an imaginative expression is it not defamation. Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6, 14 (1970). Proper action for defamation turns on whether a person's reputation has been damaged by the publication of another's statements. Milkovich, 497 U.S. at 11-12. No reasonable person would interpret

rhetorical hyperbole, parody, fantasy and imaginative expressions as true statements; therefore they simply cannot damage one's reputation. Id. at 20 (explaining that "this provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation.")

In order to determine whether a statement is rhetorical hyperbole the challenged statement should be evaluated in the context in which it appears. Bresler, 398 U.S. 6, 13 (1970). In Bresler, it was not defamation when a newspaper article described a developer's negotiations as "blackmail" because no reasonable person would assume the newspaper was accusing the developer of the actual criminal offense. Id. at 14 (reasoning that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiation position extremely unreasonable.) Determining whether a statement is rhetorical hyperbole often requires looking beyond the statement itself and to the publication as a whole. Underwager v. Channel 9 Australia, 69 F.3d 361, 366 (9th Cir. 1995) (instructing to first look at the statement in broad context, including the tone of entire work, then turn to the specific context and content of statements.) In Standing Comm. On Discipline of the United States Dist. Court v. Yagman an attorney was not defaming a judge when he accused him of being "dishonest", because the other emotional language in the statement including; "ignorant," "ill-tempered," "buffoon," "sub-standard human," and "right-wing fanatic" made it clear that he was merely expressing his general contempt for the judge, rather than accusing him of corruption. Yagman, 55 F.3d 1430, 1440 (9th Cir. 1995).

Words may be rhetorical hyperbole in one context, but statements of fact in another. See generally Bentley v. Bunton, 94 S.W. 3d 561 (Tex. 2002). In 600 W. 115th St. Corp. v. Von Gutfeld, the use of the word "corruption" was not defamation because entire statement was

characterized as a "rambling, table-slapping monologue" and "angry unfocused diatribe," and lacked factual specificity. Von Gutfeld, 603 N.Y.2d 130, 144 (1992); but see Bentley, 94 S.W. 3d at 583-84 (rationalizing that a radio host's use of the statement "corrupt" was not rhetorical hyperbole because he stated it on eight separate occasions and he "plainly and repeatedly stated that his accusations of corruption were based on actual fact.")

The use of "loose, figurative" language is also indicative of rhetorical hyperbole because such statements cannot be reasonably interpreted as factual allegations. Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974); Figure of Speech, Merriam-Webster, https://www.merriam-webster.com/dictionary/figure%20of%20speech (last visited 9/29/2019) (defining figurative speech as "a form of expression (such as a simile or metaphor) used to convey meaning") In Letter Carriers, a union's use of the word "traitor" was not a factual accusation of their opponents because it was used in a loose, figurative sense to demonstrate strong disagreement. Id. Additionally, in Letter Carriers, the union labeled their opponents as "scabs," which they defined by a piece of trade union literature which descried "a scab' through a series of evocative phrases, including "when a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out," and "Judas was a gentleman compared with a scab." Id. at 268. The use and definition of "scab" was not defamation, rather it qualified as rhetorical hyperbole because it was a "lusty" expression of the contempt felt by the union members. Id. at 286. In Knievel v. ESPN, stating that a public figure was a "pimp" was not defamation, because it was recognized slang and the context determined it was figurative rather than a criminal accusation of procuring prostitutes. Knievel, 393 F.3d 1068, 1074-75 (9th Cir. 2005); see also Breeser v. Menta Group, 934 F. Supp.

2d 1150, 1162 (D. Ariz. 2013) (explaining that calling someone a "bitch" is rhetorical hyperbole because the law does not protect against harsh name-calling.")

Here, the challenged statements are merely Lansford's passionate response to a public critique. Similar to Bresler, in which no reasonable reader would believe that the use of the word "blackmail" was a criminal accusation rather than a mere epithet expressing frustration, Lansford was not accusing Courtier of procuring prostitutes or being a prostitute when he stated she was a "pimp for the rich" or a "whore of the poor", he using metaphorical language to express his frustration at her hypocritical behavior. Additionally, as in Underwager, in which the context and tone of the entire statement was evaluated to determine whether statements were rhetorical hyperbole, Lansford's entire statement should be considered in determining whether the challenged statements are rhetorical hyperbole. The overall tone of Lansford's statement is laced with emotion and frustration, signaling that it a dramatized diatribe, rather than a factual accusation. Similar to Yagman, in which an attorney was not defaming a judge when he said he was dishonest, because the other language, such as "buffoon" and "sub-standard human," in the statement made it clear he was expressing general distaste, rather than accusing corruption, although Lansford used the words "corrupt" and "swindler", the other statements in his publication, such as "coddler of criminals," and "hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood" make it clear he is expressing his general distrust of her motives rather than accusing her of criminal corruption. Furthermore, like Von Gutfeld, in which the use of the word "corrupt" was not defamation because the entire statement was a heated monologue and lacked factual specificity, Lansford's use of the word "corrupt' is not defamation because his entire statement is a dramatic diatribe and there was no factual specificity regarding "corruption," rather, he merely includes additional figurative language, "she is corrupt and a

swindler, who hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood." Furthermore, unlike in Bentley, in which "corrupt" was defamation because it was repeated on eight occasions and the speaker insisted it was based on actual fact, Lansford used the work "corrupt" once in the middle of a heated response to criticism, and never purported his claim was based on actual fact.

Lastly, the challenged statement themselves are indicative of rhetorical hyperbole because they are "loose, figurative language." In fact, three of the challenged statements, "a pimp for the rich,", "a leech on society," and "a whore for the poor" are metaphors and therefore fit squarely in the definition of figurative language. Additionally, similar to Letter Carriers, in which the terms "traitor" and "scab" were not defamation because it was figurative language used in trade disputes, Lansford's use of the words "corrupt" and "swindler" is figurative language commonly used in political disputes. Also, as in Knievel, in which "pimp" was not derogatory because it is common slang, and as in Breeser, in which "bitch" was not defamatory because it is mere name-calling, Lansford's use of slang for the words "pimp", "bitch", and "whore" is merely rhetorical hyperbole.

B. Even if the Statements Do Not Qualify as Rhetorical Hyperbole, They Involved a Public Figure and Are Free of Actual Malice, Therefore Are Not Defamation.

Statements that involve a public figure, free of actual malice, are protected by the First Amendment. Curtis Pub. Co., 388 U.S. at 155 (1975). Freedom of speech does not depend on whether the statements in question are true, popular, or respectful. New York Times Co., 376 U.S. at 270-71. In New York Times, the newspaper did not defame a local public official when it published false and exaggerated statements regarding the official's actions towards Dr. Martin Luther King Jr. and claiming he conducted "a wave of terror" against African American

protestors, because debate on public issues should be "uninhibited" and "robust" and may contain erroneous and caustic remarks, as long as they are free of actual malice. See Id. at 256-57, 270-72, 280. (explaining that in public debate, an opponent often resorts to exaggeration, vilification, and even false statement of their adversary, but "in spite of the probability of excesses and abuses, these liberties, in the long view, are essential to enlightened opinion and right conduct on the part of citizens of a democracy") "Actual Malice" requires that the defendant knew the statement was false or acted with reckless disregard of the truth. Id. at 280. This high level of culpability was put in place to help guarantee the protections of freedom of speech. Id. at 282-83.

The profound commitment to unfettered freedom of speech in public debate, extends beyond public officials, to public figures and even private individuals engaging in matters of public interest. See Curtis Publish Co., 388 U.S. at 155; see Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45, 347-48, 350 (1974) (noting that a private person engaged in public debate need not show actual malice to prove defamation, but still needs to show fault.)

1. Since Courtier is a Public Figure and Lansford Did Not Act with Actual Malice, His Statements are Not Actionable Defamation.

Public figures are also subject to the "actual malice" standard in a defamation cause of action. Curtis, 388 U.S. at 155. The New York Times standard was extended because there is "no basis in law, logic, or First Amendment policy" that justifies treating public figures differently than public officials in defamation claims; public figures play an influential role in society and have similar access to mass media to distribute their opinions. Id. at 163.

An individual qualifies as a public figure under two alternative bases; if the individual achieves widespread fame or notoriety that they become a public figure for all purposes and in all contexts or if an individual "voluntarily injects himself or is drawn into a particular public

controversy and thereby becomes a public figure for a limited range of issues." Gertz, 418 U.S. at 351. Individuals that actively campaign for political candidates are considered public figures because they voluntarily injected themselves into a public controversy in order to influence the issues involved. See Hemenway v. Blanchard, 294 S.E 2d 603, 670-71 (Ga. Ct. App. 1982); see also Gertz, 418 U.S. at 345 (explaining that "those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved invite attention and comment.") In Hemenway, a spouse of a political candidate was deemed a public figure because he made his presence and opinion known in an attempt to influence the outcome of the election, and therefore "thrust himself into the vortex of a particular controversy." Id. at 671. In Rebozo v. Washington Post Co., an individual was a public figure because he played an active role in the President's re-election campaign and helped arranged for financial contributions for the candidates benefit. Rebozo, 637 F.2d 375, 379 (5th Cir. 1981.)

In Clifford v. Trump, the importance of debate and discourse in the political process was emphasized when a political adversary was held to the same standard as the President when she criticized the President but sued for defamation when he published a direct response to her critique. Clifford, 339 F. Supp 3d 915, 927 (C.D. Cal. 2018); see also Miller v. Brock, 352 So. 2d 313, 314 (La. Ct. App. 1977) (explaining that a political candidate has no obligation to suffer his hecklers silently, and one who engages in fractious dialogue cannot demand sweetness and light from their adversary.)

The actual malice standard is employed for both public officials and public figures because otherwise the threat of lawsuits would inhibit political debate and unconstitutionally chill the First Amendment. See New York Times, 376 U.S. at 270, 282 (explaining there is a

profound national commitment that debate on public issues should be uninhibited, robust, and wide-open, even if it includes vehement, caustic, and sometimes unpleasantly sharp attacks.) Actual malice has nothing to do with bad motive or ill-will, rather it requires that the plaintiff prove the defendant made the statement with knowledge that it was false or with reckless disregard of whether it was true or not. Letter Carriers, 418 U.S. at 282. "Reckless disregard" is a subjective standard that focuses on the defendant's state of mind, the plaintiff must establish "that the defendant in fact entertained serious doubts as to the truth of his publication", or had "a high degree of awareness of ...probable falsity" of this published information. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989).

In the present case, Courtier falls squarely into the definition of a public figure, and because she offered nothing to suggest Lansford acted with actual malice, there is no actional defamation claim. As in Gertz, in which a public figure was defined as one who voluntarily injects themselves into a public controversary in order to influence the outcome, Courtier thrust herself into the political campaign of Lansford and Bailord and publicly criticized Lansford in order to influence the election in favor of Bailord. Additional, as in Hemenway, in which a campaigner was deemed a public figure after making his opinion known and attempting to influence the outcome of the campaign, Courtier was actively and publicly campaigning for Bailord and criticizing Lansford, putting herself into the middle of the public controversy. Also, like in Rebozo, in which a campaigner that helped arrange significant financial contributions for a candidate was determined to be a public figure, Courtier made noteworthy financial contributions and hosted fundraisers for Lansford's opponent. Also, as in Clifford, in which a political opponent that publicly critiqued an official was held to the same standard as a public

official, Lansford is under no obligation to suffer his heckler silently, and given her actions, Courtier should be held to actual malice standard that public officials are held to.

Lastly, as established in New York Times, the burden of showing actual malice is on the plaintiff, Courtier pled no facts that claimed or even suggested actual malice, therefore she has not met her burden and Lansford's motion to dismiss should be granted.

CONCLUSION

Lansford's motion to dismiss should be granted because Courtier is a "libel proof plaintiff" based solely on her criminal background and the statements are protected rhetorical hyperbole. In the very least, the statements are protected by the First Amendment because Courtier is a public figure, and there was no actual malice. Therefore, the motion to dismiss should be granted.

Respectfully Submitted,

By: Participant 219566

Counsel for Petitioner