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 Tenley

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. The incremental harm version of the libel-proof plaintiff doctrine does not consider a plaintiff's prior reputation. Elements of notoriety and public attention are irrelevant to the version's analysis. So, can criminal convictions that have garnered no notoriety or public attention make a plaintiff libel-proof?

II. In the context of defamation, the First Amendment protects rhetorical hyperbole. Courts look at the language of a publication, examine the context, and consider public policy when determining whether statements are rhetorical hyperbole. Do Mr. Lansford's statements constitute rhetorical hyperbole when they cannot reasonably be interpreted as stating an actual fact and the statements were published as part of normal political discourse?

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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

Petitioner Elmore Lansford is a dedicated public servant, currently serving as the mayor of Silvertown. (J.A. at 16.). As a former city council member, Lansford, and the Respondent's husband were political contemporaries and allies who served on the city council together. (J.A. at 16.). Lansford has campaigned on a "tough-on-crime" platform, in attempts to lower the area's crime rates and to increase the economic capital in Silvertown. (J.A. at 16.).

Respondent Silvia Courtier came from a troubled background. She has a litany of juvenile offenses, was declared a delinquent, and has been incarcerated as both a juvenile and an adult. (J.A. at 15-16.). After her time in prison, Respondent has opened a clothing business and has become involved in social and political causes. (J.A. at 16.).

In his most recent election, Mr. Lansford defeated Respondent's preferred candidate. (J.A. at 16-17.). During an election of hard campaigning on both sides, Respondent supported Mr. Lansford's opponent publicly. (J.A. at 17.). Respondent attacked Mr. Lansford's beliefs and character, describing Mr. Lansford as a plutocrat waging war on the poor. (J.A. at 4.). In defense of his beliefs, and as part of his campaign, Mr. Lansford responded in kind. During his response advocating for himself, Mr. Lansford called respondent a "leech on society," a "pimp for the rich and a whore for the poor," and as "corrupt and a swindler." (J.A. at 16-17.). In response to Mr. Lansford's statement, Respondent sued Mr. Lansford for defamation of character and false light invasion of privacy. (J.A. at 18.). Respondent did not, however, challenge the remainder of Petitioner's communication which included many phrases, some of which include the following: "a coddler of criminals"; "a lewd and lusty lush"; "a former druggie"; and "she pimps out these clothes." (J.A. at 18.). Mr. Lansford argued Respondent was a libel-proof plaintiff and that his

challenged statements constituted rhetorical hyperbole protected by the First Amendment. (J.A. at 18.).

The Tenley District Court determined that Respondent sued Mr. Lansford based on the exercise of his free-speech rights under the anti-SLAPP law. The district court found that the plaintiff was not a libel-proof plaintiff but did find that the challenged statements were rhetorical hyperbole and dismissed the suit. (J.A. at 11.).

Respondent appealed to the Supreme Judicial Court of State of Tenley. In a much closer case, the Supreme Judicial Court also found Respondent not to be a libel-proof plaintiff but reversed the grant of dismissal and held that the challenged statements were possibly defamatory. (J.A. at 19, 21.). This appeal followed.

SUMMARY OF THE ARGUMENT

The protections guaranteed by the First Amendment are a vital element of America's legal system. The ability to express one's beliefs through speech without persecution or prosecution is a fundamental right in America that has not existed through nearly all history. As a result, the protection of that very right remains one of the fundamental concerns of modern-day Americans and jurisprudence.

When Respondent, advocated for her preferred candidate and insulted Mr. Lansford, she was exercising her First Amendment rights. When Mr. Lansford exercised his First Amendment rights in response, Respondent sued. This Court should reverse the Supreme Judicial Court of Tenley for two reasons: first, a plaintiff may be libel-proof without notoriety, and second, Mr. Lansford's challenged statements constitute rhetorical hyperbole protected by the First Amendment.

The incremental harm doctrine is one version of the libel-proof plaintiff doctrine. Incremental harm focuses on the communication at issue and the extent to which the challenged portions of its contents create harm above that caused by the portions that are unchallenged. The doctrine does not operate based on a finding of a previously damaged reputation. Instead, it considers only the reputational harm done by the communication in question. An individual's reputation rests on the opinion of the public. As a result, the elements of notoriety and public attention dictate an individual's previous reputation. Because the incremental harm doctrine does not consider a plaintiff's previous reputation, the incremental harm doctrine also does not consider notoriety or public attention.

An individual can be a libel-proof plaintiff under defamation law solely because of past criminal convictions that have gained no notoriety or public attention for three reasons. First, the incremental harm doctrine is a valid version of the libel-proof plaintiff doctrine. Second, the incremental harm doctrine should be applied when a plaintiff challenges only a portion of the communication. Third, neither notoriety nor public attention is necessary to classify an individual as a libel-proof plaintiff. As a result, this Court should reverse the Supreme Judicial Court of Tenley and hold that an individual can be a libel-proof plaintiff solely based on past criminal convictions that have gained no notoriety or public attention.

The First Amendment protects rhetorical hyperbole. Defamation law consists of a fine balance between common law remedies and constitutional protections. Individuals are not liable for defamation when their statements consist of rhetorical hyperbole. Mr. Lansford's challenged statements are rhetorical hyperbole. Mr. Lansford filled his response with imaginative expressions and rhetorical devices. The challenged publication attempts to discount Respondent's publication that portrays Mr. Lansford as a plutocrat who doesn't have the best

interests of his own constituents in mind. No reasonable individual could read Mr. Lansford's statements and believe that they are fact. Additionally, the context and figurative language of the statement provide evidence that Mr. Lansford's statements are rhetorical hyperbole. Finally, this Court should recognize that public officials need the ability to engage in political discourse and advocate for themselves. This Court should reverse the Supreme Judicial Court and find that Mr. Lansford's statements constitute constitutionally protected rhetorical hyperbole.

ARGUMENT

I. A plaintiff can be libel-proof solely on the basis of criminal convictions that have not gained notoriety or public attention.

Because reputational harm is required of a defamation claim, it logically follows that challenged statements that do not further harm a person's reputation negate a plaintiff's basis for a defamation claim. Thus, the essence of the libel-proof plaintiff doctrine is that the plaintiff cannot prevail on a libel claim because the plaintiff's reputation has not been harmed by the challenged statements. *See* David L. Hudson, Jr. *Shady Character: Examining the Libel-Proof Plaintiff Doctrine*, 52 Tenn. B.J. 14, 15 (2016).

The Supreme Court has maintained that the First Amendment requires strict control of defamation awards. Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1917 (1985). This Court has cautioned that the First Amendment precludes granting plaintiffs "gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch*, 418 U.S. 323, 349 (1974). The libel-proof plaintiff doctrine precludes a plaintiff from recovering when an allegedly defamatory statement cannot cause more reputational harm. A judge guards against the possibility of a miscarriage of justice by rendering a verdict for the defendant upon finding that a challenged communication could not have damaged a plaintiff's reputation further.

In doing so, the judge prevents the waste of judicial resources that would occur if courts permitted fruitless claims to go to trial. Note, *supra* at 1917.

This Court should reverse the Supreme Judicial Court of State of Tenley and hold that an individual can be libel-proof because of criminal convictions without prior notoriety for these three reasons. First, the incremental harm doctrine is a valid version of the libel-proof plaintiff doctrine. Second, the incremental harm doctrine should be applied when a plaintiff challenges only a portion of the publication. Lastly, a plaintiff can be libel-proof solely on the basis of criminal convictions that have not gained notoriety or public attention. Whether criminal convictions that have not gained notoriety are sufficient to find a plaintiff libel-proof is a question of law and is reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

A. The incremental harm doctrine is a valid version of the libel-proof plaintiff doctrine.

There are two versions of the libel-proof plaintiff doctrine: (1) the incremental harm doctrine; and (2) the issue-specific libel-proof plaintiff doctrine. *Thomas v. Tel. Publ'g Co.*, 929 A.2d 993 (N.H. 2007). The incremental harm doctrine involves an examination of the challenged communication rather than a finding of a previously damaged reputation. Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1917 (1985). The judge evaluates the defendant's communication in its entirety and considers the effects of the challenged statements on the plaintiff's reputation in the context of the full communication. *Id.* "If the challenged statements could cause no cognizable damage in addition to that presumed to attend the unchallenged part of the communication, the court dismisses the entire libel action." *Id*. at 1913. In other words, if the challenged statements do not increase the plaintiff's reputational harm caused by the unchallenged statements, courts will find the plaintiff to be libel-proof. *See* Note, *supra*.

The incremental harm doctrine first appeared in *Simmons*. *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F. Supp. 742 (S.D.N.Y. 1981). The court found that a report the defendant published regarding the plaintiff's vehicle contained an inaccurate statement about the car's exemption from federal safety standards. *Id*. at 745. Even so, the plaintiffs left more critical statements in the report unchallenged. *Id.* The court found that this made the plaintiff libel-proof. *Id*. at 750. The court held that the challenged portion of the article could not harm the plaintiffs in any way beyond the harm already caused by the remainder of the article. *Id*. With the performance and safety evaluations detailed in the article, plaintiffs could not have expected to gain more than nominal damages based on the additional misstatement. *Id*. So the manufacturer's interest in recovering was minimal when compared with the First Amendment interests at stake. *Id*. at 750–51. The court did not consider the plaintiff's public reputation before the publication of the reports. *See Id*.

The Second Circuit adopted a similar approach in *Herbert v. Lando*. *Herbert v. Lando*, 781 F.2d 298 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986). The court stated the following:

> If the appellees' published view that Herbert lied about reporting war crimes was not actionable, other statements – even those that might be found to have been published with actual malice – should not be actionable if they merely imply the same view and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery.

Herbert, 781 F.2d at 312. So if the challenged statements do not cause more reputational harm to the plaintiff than the unchallenged statements have, courts should hold that the plaintiff is libel-proof.

Courts developed the incremental harm doctrine as a response to plaintiffs who disputed only portions of publications otherwise extremely negative or unflattering. Jay Framson, *The First Cut is the Deepest, but the Second May be Actionable: Masson v. New Yorker Magazine,*

Inc. and the Incremental Harm Doctrine, 25 Loy. L.A. L. Rev. 1483, 1484 (1992). Courts have offered many policy reasons to justify this version of the libel-proof plaintiff doctrine. *Id*. One such policy is the interest in improving judicial economy. *Finklea v. Jacksonville Daily Progress*, 742 S.W.2d 512, 517 (1987). Another is the desire to prevent the chilling effect on the press caused by lawsuits filed to harass media defendants rather than to redress injuries. *Simmons Ford*, 516 F. Supp. at 750. In such cases, like as is the case here, plaintiffs are simply seeking to prevent public participation rather than to recover for reputational harm.

In *Masson v. New Yorker Magazine, Inc.*, this Court held that courts are not compelled by the constitution to use this version of the libel-proof plaintiff doctrine, but courts remain free to adopt the doctrine. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991). This Court discussed how to treat cases in which a plaintiff challenged only a minor portion is a state law question. *Id*. State courts concerned with protecting the judicial system from potentially unwarranted lawsuits and preventing the chilling effect such lawsuits can have on press and free expression may still find the doctrine useful. Framson, *supra* at 1485. These courts may find the doctrine justified by their own state constitution or statutory free-speech and free-press guarantees. *Id*.

The federal district court in Massachusetts recognized the incremental harm concept in a product disparagement case involving a *Consumer's Digest* article. *Bose Corp. v. Consumers Union*, 529 F. Supp. 357 (D. Mass. 1981). An Illinois federal court applied the doctrine to dismiss a business defamation claim. *Desnick v. Capital Cities/ABC, Inc.*, 851 F. Supp. 303 (N.D. Ill. 1994). In California, a federal district court, citing *Herbert*, applied the incremental harm doctrine to dismiss a suit by Engelbert Humperdinck against the *National Enquirer*. *Dorsey v. National Enquirer*, 973 F.2d 1431 (9th Cir. 1992).

Aside from state constitutional arguments, the incremental harm doctrine offers a way to analyze causation issues in defamation actions. Framson, *supra* at 1485. The incremental harm analysis may lead a court to either dismiss a suit in which the challenged statements damage a plaintiff's reputation only a negligible amount over the rest of the publication or to limit damage awards in such suits, based on simple common-law tort principles. *Id*.

B. This Court should apply the incremental harm doctrine.

There are no rigidly defined categories of cases to which either version of the libel-proof doctrine may automatically be applied. Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1921 (1985). The libel-proof plaintiff doctrine provides judges with a framework for analyzing libel claims. *Id*. Because there are two versions of the libel-proof plaintiff doctrine, context will determine which version courts should apply.

This Court should apply the incremental harm doctrine for two reasons. First, the incremental harm doctrine should be applied when a plaintiff challenges only a portion of the communication. Second, these facts show that this is an incremental harm case.

1. The incremental harm doctrine should be applied when a plaintiff challenges only a portion of the communication.

The incremental harm version of the libel-proof plaintiff doctrine has the same intent as the issue-specific version. Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1924 (1985). In each version, a judge must ask the same question: how much harm must a plaintiff allege to bring his libel claim before the factfinder? *Id*. So the two versions of the doctrine may often arise in the same case. *Id*. For example, in *Jackson v. Longcope*, even though an article might have misstated the plaintiff's activities, the court held that the plaintiff was libel-proof under the incremental harm doctrine because the article also described him as having a criminal

record for murder and rape. *Jackson v. Longcope*, 476 N.E.2d 617, 618–19 (1985). In the scope of such an article, the circumstances would have also found the plaintiff to be libel-proof under the issue-specific libel-proof plaintiff doctrine. Note, *supra* at 1925.

Despite the similarity of the rationales for the two versions of the doctrine and the frequency with which they might appear together in the same case, their differences are paramount. *Id*. Unlike the issue-specific version, the incremental harm version allows courts to find a plaintiff libel-proof without a criminal conviction or without a prior reputation. *Id*. When a plaintiff challenges statements that damage his reputation much less than other, unchallenged statements in the same communication, common sense, the common law, and the constitutional protections of the First Amendment require dismissal of the suit. *Simmons Ford*, 516 F. Supp. at 750-51. Recognizing the differences between the two versions of the libel-proof plaintiff doctrine affords judges context and a framework within which to analyze individual cases. Note, *supra* at 1926.

The key difference between the incremental harm version and the issue-specific version is what the court examines when using each doctrine. *See Thomas*, 929 A.2d at 1002. The incremental harm version involves an examination of the challenged communication rather than a finding of a previously damaged reputation. *Id*.

Courts have found that the incremental harm doctrine is appropriate when plaintiffs challenge small portions of entire publications. In *Thomas v. Tel. Publ'g Co.*, the defendant contended that the incremental harm doctrine applied because "the accurate reporting of the plaintiff's criminal record . . . would have been more than sufficient to 'demolish his reputation.' Nothing published . . . did, or could have, done any incremental harm to this reputation above and beyond that which such an accurate report would have caused." *Id.* at 1003. The court ruled

that, given the state of the record, they need not debate adopting the incremental harm doctrine, because even if they were to adopt it, it would not apply under the current posture of the case because of the portion of the publication challenged. *Id*. at 1004. This was a case in which the plaintiff challenged fifty-eight out of ninety statements from the article. *Id*. Citing *Ferreri v. Plain Dealer Publishing Co.*, the court stressed that this is not a case in which the plaintiff challenges only a few statements in an article that is otherwise unchallenged and largely injurious to his reputation. *Id*. at 1003. Thus, the court maintained that the incremental harm doctrine should be applied when a plaintiff has challenged only a minor number of statements in the communication. *Id*. The record here shows that Respondent challenged only a small portion of the publication.

2. The facts of this case show that this is an incremental harm case.

Respondent Courtier has challenged four phrases of Petitioner Lansford's social media post. (J.A. at 18.). These challenged phrases constitute only a mere eighteen words out of the total one hundred and fifty-four words in the communication. (J.A. at 18.). Respondent challenged these phrases: "a pimp for the rich"; "a leech on society"; "a whore for the poor"; and "corrupt and a swindler." (J.A. at 18.). Respondent did not, however, challenge the remainder of Petitioner's communication which included many phrases, such as the following: "a coddler of criminals"; "a lewd and lusty lush"; "a former druggie"; and "she pimps out these clothes." (J.A. at 18.). For that reason, Respondent challenged only a portion of the communication.

Courts should apply the incremental harm doctrine in cases like the present case. In *Thomas v. Tel. Publ'g Co.*, the court declined to apply the incremental harm doctrine because "this [was] not a case in which the plaintiff challenge[d] only a small number of statements in an article that [was] otherwise unchallenged and largely injurious to his reputation." *Thomas*, 929

A.2d at 1003. Here, however, Respondent has challenged only a few statements in Petitioner Lansford's social media post that has otherwise been unchallenged despite the remainder of the publication being largely injurious to Respondent Courtier's reputation. The unchallenged phrases such as "a coddler of criminals" and "a lewd and lusty lush" are certainly injurious to Respondent Courtier's reputation. Thus, here, Respondent Courtier has challenged only a portion of the communication, most of the communication has been unchallenged, and the unchallenged statements are largely injurious to Respondent Courtier's reputation. As the court in *Thomas* highlighted, this case is certainly one of incremental harm. *See Id*. As a result, the lower courts erred in failing to consider that a plaintiff may be libel-proof without a prior reputation, which is precisely what the incremental harm doctrine allows.

C. Neither notoriety nor public attention is necessary to classify an individual as a libel-proof plaintiff.

Both the incremental harm version and the issue-specific version of the libel-proof plaintiff doctrine may often arise in the same case. Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1924 (1985). Both versions of the doctrine are viable, so context and circumstance will guide application. Under the issue-specific doctrine, the harm to the plaintiff's reputation occurred before the defendant's publication took place. *The Law of Torts* § 575 (2d ed.). While under the incremental-harm doctrine, the publication causes the harm. *Id*.

The incremental harm doctrine involves an examination of the challenged communication rather than a finding of a previously damaged reputation. Note, *supra* at 1917. The judge evaluates the defendant's communication in its entirety and considers the effects of the challenged statements on the plaintiff's reputation in the context of the full communication. If the challenged statement does not harm a plaintiff's reputation more than unchallenged statements in the same communication, courts may find the plaintiff libel-proof. If the challenged

statements could cause no perceptible damage on top of the damage presumed to attend the unchallenged part of the communication, the court dismisses the entire libel action. *Id*. at 1913.

The incremental harm doctrine focuses on the communication at issue and the extent to which the challenged portions of its contents create harm above that caused by the portions that are unchallenged. *Thomas*, 929 A.2d at 1003. The doctrine does not operate based on a finding of a previously damaged reputation. *Id*. Reputation is the esteem in which someone is held or the goodwill extended to or confidence reposed in that person by others, whether with respect to personal life, professional, and business qualifications, social dealings, conduct, status, or financial standing. *Reputation*, Black's Law Dictionary (10th ed. 2014). A reputation rests on the opinion of the public. For that reason, the elements of notoriety and public attention dictate an individual's previous reputation. Because the incremental harm doctrine does not consider a plaintiff's previous reputation, the incremental harm doctrine also does not consider notoriety or public attention. As a result, criminal convictions need not have gained notoriety or public attention in the context of the incremental harm doctrine to be sufficient to render a plaintiff libel-proof.

The court in *Thomas v. Tel. Publ'g Co.*, stated that the plaintiff's prior reputation was not dispositive under the incremental harm doctrine. *See Thomas*, 929 A.2d at 1003. The court acknowledged that a plaintiff's criminal history, notoriety, and public attention were all irrelevant in applying the incremental harm doctrine. *Id*. The incremental harm doctrine analyzes the challenged statements in the context of the entire communication to make a ruling on a plaintiff's reputational harm from that communication alone. The incremental harm doctrine does not consider a plaintiff's reputation before the communication. *The Law of Torts* § 575 (2d ed.). Even so, when the unchallenged statements of a communication showcase a plaintiff's

criminal convictions, the incremental harm doctrine may find the plaintiff libel-proof for convictions that have not gained notoriety or public attention. To hold otherwise would defy logic. It would be inappropriate to rule that a criminal conviction, of any kind or magnitude, cannot be the sole basis to find a plaintiff libel-proof unless that conviction gained notoriety or public attention.

Because notoriety and public attention are irrelevant to the incremental harm doctrine's application, a plaintiff may not have a prior reputation and be considered libel-proof. For example, should the incremental harm doctrine be applied in the current case, a court would analyze the four challenged phrases in comparison to the entirety of the communication. Should the judge find the excised phrases' harm negligible in comparison to the effect of the remainder of the communication, the plaintiff will be libel-proof, and the case should be dismissed.

Respondent challenged these phrases: "a pimp for the rich"; "a leech on society"; "a whore for the poor"; and "corrupt and a swindler." (J.A. at 18.). Respondent did not, however, challenge the remainder of Petitioner's communication which included many injurious phrases. The unchallenged portion of Petitioner's social media post includes these phrases: "a coddler of criminals"; "a lewd and lusty lush"; "a former druggie"; "hoodwinks the poor"; and "pimps out these clothes." (J.A. at 18.). Under the incremental harm doctrine, the reputational harm caused by these four challenged phrases should be compared to the reputational harm caused by the unchallenged statements. The reputational harm done by the four challenged statements is negligible in comparison to the unchallenged remainder of the social media post. In other words, if the court removed the challenged phrases, the unchallenged phrases, such as "pimps out these clothes"; "a former druggie"; or "hoodwinks the poor," are as damaging, if not more so, to Respondent's reputation. As a result, the challenged statements cannot have harmed

Respondent's reputation any more than the harm already caused by the entirety of the social media post. Respondent is libel-proof under the incremental harm doctrine, and this case should be dismissed.

The libel-proof plaintiff doctrine includes incremental harm. Incremental harm is appropriate when plaintiffs challenge only a small portion of a publication. Incremental harm does not consider notoriety or public attention. The above application considered neither notoriety nor public attention because notoriety and public attention are irrelevant to the incremental harm doctrine's application. So, as illustrated, a plaintiff may not have any prior reputation and still be found libel-proof. Respondent challenges a small portion of the Petitioner's communication, so this Court should apply the incremental harm doctrine. *See Thomas*, 929 A.2d at 1003. Respondent need not possess notoriety nor public attention for this court to hold Respondent is libel-proof under the incremental harm version of the libel-proof plaintiff doctrine. By extension, criminal convictions that did not gain notoriety or public attention can be the sole basis of finding a plaintiff libel-proof.

II. Mr. Lansford's challenged statements qualify as protected rhetorical hyperbole.

This Court has long recognized that the First Amendment protects rhetorical hyperbole to safeguard free expression and public debate. *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL—CIO v. Austin*, 418 U.S. 264, 284 (1974).

The protection granted by the First Amendment is especially important when the future of American democracy is at stake. The ability to express opinions and fiercely advocate for those who we believe are most qualified to serve as our public representatives is an essential American right.

Respondent exercised that very right when she lampooned Mr. Lansford as a plutocratic, repressive, and uncaring mayor crusading against the best interests of the good people of Silvertown. (J.A. at 17.). The First Amendment protected Respondent's right to make such statements. The First Amendment also protects Mr. Lansford, a public official who has served his constituents for years. (J.A. at 3.). Just like Respondent, Mr. Lansford exercised his constitutionally guaranteed right to Freedom of Speech when he addressed Respondent's harsh criticisms. Essentially, a political rival attacked Mr. Lansford in a social media post, and Mr. Lansford responded in kind with rhetorical hyperbole and imagery. Elected officials need the freedom to participate and respond through common political discourse. The First Amendment ensures that officials have that ability. This court should reverse the Supreme Judicial Court to preserve their rights as both individuals and officeholders.

This Court should reverse the Supreme Judicial Court of Tenley and hold that Mr. Lansford's challenged statements qualify as rhetorical hyperbole for three reasons. First, the statements cannot be reasonably interpreted as stating actual fact, second, the context of the statements shows that the statements were rhetorical hyperbole, and lastly, the challenged statements are rhetorical hyperbole normally associated with politics and public discourse in the United States. Whether a statement is rhetorical hyperbole is reviewed de novo. *See Bose Corp.*, 466 U.S. at 506–511.

A. Mr. Lansford's statements cannot reasonably be interpreted as stating an actual fact, and, as a result, are constitutionally protected rhetorical hyperbole.

The First Amendment protects Mr. Lansford's statements because they constitute rhetorical hyperbole. Statements that cannot be reasonably interpreted as stating actual facts qualify as protected rhetorical hyperbole. *See Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). Courts have long held that name-calling and the use of epithets are not factual

assertions and are not actionable. *See Dobb's Law of Torts* § 572. Mr. Lansford's challenged statements consist of imagery, rhetorical devices, and name-calling. Thus, they cannot be reasonably interpreted as stating actual facts. Because no reasonable person would perceive the statements as stating actual facts, the First Amendment protects Mr. Lansford's statements that constitute rhetorical hyperbole. **"**[S]tatements that cannot reasonably be interpreted as stating actual facts about an individual are protected" under the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 2 (1990). Although the trial and appellate court characterized four distinct challenged statements, Respondent has really challenged three of Mr. Lansford's statements: "a pimp for the rich and a whore for the poor; "a leech on society"; and "corrupt and a swindler." (J.A. at 5.). A closer look at each statement shows that the statements cannot be reasonably interpreted as stating actual fact.

1. Mr. Lansford's statement that Respondent was "a pimp for the rich and a whore for the poor" cannot reasonably be interpreted as stating an actual fact.

No reasonable individual would interpret the phrase "a pimp for the rich and a whore for the poor" as stating an actual fact. The name-calling that is apparent on the face of this statement is enough to support a finding of rhetorical hyperbole but is just one reason why the statement constitutes rhetorical hyperbole.

By placing the statements in immediate proximity, Mr. Lansford has created a juxtaposition. Mr. Lansford's exact statement reads: "Now, this businesswoman is a pimp for the rich and a whore for the poor." Juxtaposition is the act or an instance of placing two or more things side by side often to compare or contrast or to create an interesting effect. Mr. Lansford's placement of the statements in immediate succession creates that juxtaposition. Mr. Lansford does not literally mean that Respondent is both actually and factually a "pimp"

and a "whore," nor would that argument be reasonable. (J.A. at 5.). Instead, Mr. Lansford prefaces the statement by calling Respondent a businesswoman, her actual occupation. (J.A. at 5.). Mr. Lansford juxtaposes two vastly different ideas in two ways. Mr. Lansford compares both "pimp" and "whore" and "rich" and "poor." (J.A. at 5.). For both to be true, a literal reading would be required. But, it would be ridiculous to think, and no reasonable person would, that Mr. Lansford was calling Respondent a sex worker in two roles, especially after just calling Respondent a businesswoman. (J.A. at 5.). By doing so, Mr. Lansford is using juxtaposition as a rhetorical device to maintain interest.

Courts have held that the use of rhetorical devices strongly suggests that a statement was not an assertion of objective fact. In *Partington v. Bugliosi*, an attorney used a rhetorical device—a dramatic passage of dialogue designed to maintain his audience's attention, and the ninth circuit held that such a rhetorical device could not be read to imply the assertion of an objective fact. *Partington v. Bugliosi*, 56 F.3d 1147, 1157 (9th Cir. 1995). The First Amendment protects "imaginative expression" that enlivens writers' prose. *Id.* (citing *Malkovich*, 497 U.S. at 20). Mr. Lansford is writing in an imaginative way to maintain his readers' attention and to persuade. The First Amendment protects Mr. Lansford's use of juxtaposition and imaginative expression because the statement cannot be reasonably interpreted as stating an actual fact.

2. Mr. Lansford's statement that Respondent was a "leech on society" cannot be reasonably interpreted as stating an actual fact.

Just as with Mr. Lansford's above-referenced statement, Mr. Lansford's statement where he refers to Respondent metaphorically as a leech cannot be reasonably interpreted as an actual fact. "Pure opinion, which includes derogatory remarks and metaphorical language, clearly seems to fall within the protection of the First Amendment." *Smith v. McMullen*, 589 F. Supp.

642, 645 (S.D. Tex. 1984). A reasonable individual would understand that Mr. Lansford was not calling Respondent a leech in some factual sense. Rather, it is Mr. Lansford's opinion that Respondent takes more from society than she provides. The First Amendment protects this statement because the statement is pure opinion, and cannot be reasonably interpreted as stating an actual fact.

That this challenged statement is also a metaphor also shows that the statement is rhetorical hyperbole. A metaphor is defined as a figure of speech in which a word or phrase literally denoting one kind of object or idea is used in place of another to suggest a likeness or analogy between them. Calling an individual a leech fits squarely within the definition of metaphorical language. In one of its most famous defamation cases, this Court determined the use of the term "scab" was rhetorical hyperbole. *Letter Carriers*, 418 U.S. at 284. Here, use of the term "leech" is like "scab." The terms used are not literal, and no individual could reasonably interpret that Mr. Lansford was calling respondent an actual leech. Metaphors are also rhetorical devices subject to the rhetorical device analysis. Because Mr. Lansford's statement cannot be interpreted as stating actual fact, Mr. Lansford's leech statement is rhetorical hyperbole protected by the First Amendment.

3. Mr. Lansford's statement that Respondent was "corrupt and a swindler" cannot be reasonably interpreted as stating an actual fact.

Mr. Lansford's final challenged statement is like the other challenged statements: it cannot reasonably be interpreted as stating fact. Mr. Lansford does call Respondent "corrupt and a swindler." (J.A. at 5.). He then immediately claims that Respondent is some kind of Robinita Hood. The reference to Robinita Hood is an allegory, a rhetorical device that shows rhetorical hyperbole. It also represents satire as a female characterization of a typically male character in folklore. Respondent attempts to cherry-pick the statement and, rather than discuss the full

statement, seeks to portray that Mr. Lansford simply alleged that she was corrupt. (J.A. at 6.). How the sentence reads in context, however, could not paint a more different picture. When taken along with the following sentence, it is clear that Mr. Lansford was expressing an opinion: that Respondent's political positions and role in society were both more form than substance. The statement cannot be reasonably interpreted as fact, and as a result, is rhetorical hyperbole.

B. Mr. Lansford's use of the words "corrupt" and "swindler" was rhetorical hyperbole.

Whether language qualifies as rhetorical hyperbole or defamatory content depends on the context of the language. *See Milkovich*, 497 U.S. at 9 (explaining that the court uses four factors to determine whether content is a defamatory fact or opinion protected by the First Amendment. Two of the factors are the general context of the statement and the broader context in which the statement appeared.) The appellate court's primary reasoning in reversing the trial court was the fact that cases exist where the use of the terms "corrupt" and "swindler" qualified as rhetorical hyperbole. The question before this Court is whether the terms *in this context* constitute rhetorical hyperbole, not whether courts have found the terms defamatory in entirely different contexts in the past. As a result, after considering the context of each statement, this Court should reverse the Supreme Judicial Court and hold that Mr. Lansford's statements constitute rhetorical hyperbole.

The use of the terms "corrupt" and "swindler" constitutes rhetorical hyperbole for two reasons: first, the context in which the terms were used determines rhetorical hyperbole, and second, the terms were used among loose, figurative language.

1. In the context of Mr. Lansford's political, social media post, the terms "corrupt" and "swindler" are rhetorical hyperbole.

Context determines whether language is defamatory or rhetorical hyperbole. *See Milkovich*, 497 U.S. at 9. For example, material published on a sports page would probably be construed as opinion rather than fact when dealing with commentary on individuals. *Id.* Both the broader context in which the statement was published and the internal language of Mr. Lansford's post provides evidence that the use of the terms "corrupt" and "swindler" are rhetorical hyperbole.

The context in which Mr. Lansford's statement was published provides evidence that the statement is rhetorical hyperbole. Mr. Lansford's post in which the challenged statements appear is on social media. The post appeared in support of his election during a tough campaign and was published after Respondent subjected Mr. Lansford to withering criticisms and acidic accusations. The external context of the published statement shows that it was part of a heated, politically charged exchange between two people who strongly disagree. The purpose behind Mr. Lansford's published statement is the same as Respondent's: persuasion. Mr. Lansford made the statement to protect his reputation and discredit his opposition. Respondent made her statement to discredit her opposition. The context shows that the purpose of the statement was to hyperbolize Respondent into some caricature in order to win votes.

The Supreme Judicial Court held that they would not find rhetorical hyperbole because cases exist, although in different contexts, where courts held the term corrupt was defamatory. (J.A. at 21.). But in doing so, the court missed the crucial portion of the rhetorical hyperbole analysis: context. *See Milkovich*, 497 U.S. at 9. When considering the context of the challenged "corrupt and swindler" statement, the statement constitutes rhetorical hyperbole.

The cases cited by the Supreme Judicial Court where courts found the term "corrupt" to be defamatory were all based on the specific factual context. Those factual contexts are distinguishable here. In *Bentley,* the Texas Supreme Court explicitly stated that the term "corrupt" was defamatory because of its repeated use by a public media figure against an elected public official. *Bentley v. Bunton*¸ 94 S.W.3d 561, 583 (Tex. 2002). The court determined that if the defendant had only used the term once, the use of corrupt would likely not have constituted defamation. *Id.* Noted by the court in *Bentley,* was that the defendant repeatedly pointed to specific "facts" and the defendant claimed to have evidence of corruption. *Id.* The court specifically compared the context of the challenged statements to another case in which a court found the term corrupt not to be defamatory:

> *See, e.g., 600 West 115th St. Corp. v. Von Gutfeld,* 80 N.Y.2d 130, 589 N.Y.S.2d 825, 603 N.E.2d 930, 937 (1992)(concluding that statement made at public hearing on a building permit application that the plaintiff's conduct " 'is as fraudulent as you can get and it smells of bribery and corruption' " was merely opinion, given the lack of factual specificity and the tenor of its presentation, a "rambling, table-slapping monologue" and "angry, unfocused diatribe")

Id. at FN 50 (following the court's determination that "the word [corrupt] may be merely epithetic in the context of amorphous criticism.") This case is far more like the statement in *600 West*. There is no factual specificity, Mr. Lansford made the statement in a monologue, and the language was angry and unfocused given Respondent's attacks on Mr. Lansford. Respondent is not a public official and cannot be guilty of corruption. The Supreme Judicial Court ignored this context, despite context being a determinative factor on whether challenged language is rhetorical hyperbole.

Here, an official was not called corrupt, and Mr. Lansford only used the term in the same sentence that Mr. Lansford compared Respondent to a "Robinita Hood" who was swindling the poor. (J.A. at 5.). Mr. Lansford is delivering an opinion and is in no way charging or asserting

that Respondent is guilty of a crime the reasoning the court in *Bentley* found the repeated use of the term "corrupt" to be defamatory. *Bentley*, 94 S.W.3d at 582. Another distinguishing fact from *Bentley* is that the party making the defamatory statement testified that they meant the plaintiff had committed the crime of corruption. *Id.* at 581. The Supreme Judicial Court seems to base their decision on the fact that Mr. Lansford expressed opinion that questioned Respondent's abilities as a businesswoman. (J.A. at 23.). Ignoring the fact that opinion is constitutionally protected, Respondent did not challenge the statements in which Mr. Lansford questioned Respondent's business acumen. (J.A. at 5.). The court effectively used unchallenged statements to rule that the challenged statements were potentially defamatory. This is an incorrect analysis supported by no precedent at all. Mr. Lansford used the terms in a passing manner and later called Respondent a Robin-hood type figure. (J.A. at 5.). The context, which the Supreme Judicial Court ignored, shows that the terms where rhetorical hyperbole.

2. The use of "loose, figurative language" as part of a stream of rhetoric including "corrupt" and "swindler" shows that the terms are protected rhetorical hyperbole.

Saying that someone "must be inhaling" isn't an accusation that someone was consuming illicit substances through incineration and inhalation, but is an accusation of outlandishness, depending on the context. *See Kreuzer v. George Washington Univ.*, 896 A.2d 238, 248 (D.C. 2006). The use of "loose, figurative language" provides evidence that language is rhetorical hyperbole. *Id.* In stories, and a famous animated movie, King John was certainly of the opinion Robin Hood was a swindler. After all, Robin Hood stole from the rich to give to the poor. But Robin Hood isn't real. Neither is Robinita Hood for that matter. Instead, Robinita Hood is a caricature, a figurative term meant to portray an opinion. Robinita hood is that loose, figurative language used by Mr. Lansford. Mr. Lansford did write the statement "corrupt and a swindler,"

however, Mr. Lansford used the statement by immediately stating that Respondent believed she was "Robinita Hood." (J.A. at 5.).

In *Lieberman v. Fieger*, the court held that the use of the term "Looney Tunes" in the stream of rhetoric describing a psychiatrist showed that the term "mentally imbalanced" was not factual and instead rhetorical hyperbole. *Lieberman v. Fieger*¸338 F.3d 1076, 1080 (9th Cir. 2003). The court held that the use of this loose, figurative language in the same stream of rhetoric transforms the surrounding terms into rhetorical hyperbole. *Id.* Mr. Lansford used the terms "corrupt" and "swindler" in the same stream of rhetoric as the figurative modern-day Robinita Hood. As in *Lieberman*¸ Mr. Lansford used the statement "corrupt and swindler," but he did so while comparing respondent to a fictional character and stated no facts. (J.A. at 5.). Mr. Lansford also sought to create satire by transforming the character Robin Hood to Robinita Hood. (J.A. at 5.). The figurative language provides evidence that the terms consisted of protected rhetorical hyperbole.

The context of the statement "corrupt and a swindler" as well as the figurative language used in the same sentence evidence that Mr. Lansford's statements consisted of rhetorical hyperbole. Because the context of the challenged statements show that they are rhetorical hyperbole, this Court should reverse the Supreme Judicial Court of Tenley.

C. Mr. Lansford's language was the type of rhetorical hyperbole normally associated with politics and public discourse of the United States.

The First Amendment protects both the Respondent's critical political speech and Mr. Lansford's political rhetoric in response. Rhetorical hyperbole is a normal part of American politics. *Rehak Creative Services, Inc*. v. *Witt*, 404 S.W.3d 716, 730 (Tex. App.—Houston [14th Dist.] 2013. pet. denied), *disapproved on other grounds by In re Lipsky*, 460 S.W.3d 579 (Tex. 2015). Not only is rhetorical hyperbole normally associated with politics, but public officials also

need to engage in political discourse and engage with political rivals for both freedom of expression and public debate. The challenged statements were published as part of political discourse, which provides evidence that the statements are rhetorical hyperbole normally associated with such political discourse.

If this Court found that the First Amendment did not protect Mr. Lansford's speech, catastrophic consequences for both the American people and the political process would abound. Essentially, "any strongly-worded response by a [public official] to another politician or public figure could constitute an action for defamation." *Clifford v. Trump,* 339 F. Supp. 3d 915, 927 (C.D. Cal. 2018). Effectively, Respondent would have the ability to voice her opinions about Mr. Lansford, but Mr. Lansford would be precluded from responding. *Id.* Such an action would violate Mr. Lansford's rights that the First Amendment guarantees and would also greatly advantage non-incumbent officials running for office. Mr. Lansford's statements provided no support for his opinions, nor were his opinions repeated, and there is no reasonable way to consider the statements anything besides politically charged rhetoric for purposes of persuasion.

A Louisiana Court of Appeals put it best: "A political candidate has no license to defame his hecklers, but he also has no obligation to suffer them silently. One who engages in fractious and factious dialogue at a political meeting cannot demand sweetness and light from his adversary." *Miller v. Block,* 352 So.2d 313, 314 (La. Ct. App. 1977). That double-standard is exactly what Respondent wishes this Court to impose. To hold that Mr. Lansford's statements constitute defamatory language would chain the voices and beliefs of Americans everywhere: a result the framers believed untenable as evidenced by their passage of the First Amendment. Mr. Lansford's language is dripping with imagery and cannot reasonably be interpreted as fact. The freedom to express beliefs is as important to Mr. Lansford as it is to Respondent. America gains

great value from its citizens being afforded latitude to express their beliefs and advocate for individuals they consider best for our future. The only method by which to preserve this process is through the continued protection of the freedom of speech. Recognizing rhetorical hyperbole affords that protection. Officials like Mr. Lansford need to engage in the normal political discourse that includes hyperbole or their power in office would be severely hampered. Mr. Lansford's statements constitute hyperbole as part of the normal political discourse, and, as a result, the First Amendment protects those statements. Thus, this Court should reverse the Supreme Judicial Court and hold that Mr. Lansford's challenged statements constitute protected rhetorical hyperbole.

CONCLUSION

For the above reasons, and in the interest of protecting speech and the political process, Petitioner asks this Court to reverse the judgment of the Supreme Judicial Court of Tenley.