Docket No. 18-2143

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

ELMORE LANSFORD,
Petitioner – Defendant,

v.

SILVIA COURTIER,
Respondent – Plaintiff.

On Writ of Certiorari to the United States Court of Appeals
for the Supreme Judicial Court of Tenley

Brief for Petitioner

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QUESTIONS PRESENTED

1. Traditionally, courts have found plaintiffs libel-proof as a matter of law if the plaintiff has multiple criminal convictions, including at least one felony, or if the plaintiff experienced significant amounts of publicity relating to the challenged statement. Plaintiff, Silvia Courtier, has a history of criminal convictions including a felony drug conviction. Is Courtier, with a tarnished and felonious history, susceptible to further reputational harm because of Lansford's statements?

2. The First Amendment protects statements when they occur amid public issues and no reasonable reader would believe the statement to be an assertion of fact. Mayor Lansford exaggerated substantially true statements regarding Silvia Courtier's past to make a point regarding her credibility as a political activist. Is Mayor Lansford's response protected rhetorical hyperbole?

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JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

Silvertown is entrenched in a battle between political rivals. Amid a heated election, Elmore Lansford was forced to defend his professional reputation after facing criticism from a political adversary. J.A. at 3–4. An onslaught of online commentaries referring to Lansford as a "relic" who is out of tune with social needs and unfit to hold his office compelled a fiery and emotional response. *Id.* Lansford's response used insulting epithets and exaggerations. J.A. at 4. The response focused on attacking the credibility and exposing the hypocrisy of his political adversary, Silvia Courtier.

Courtier is a successful Silvertown entrepreneur who owns a line of retail stores catering to customers with expensive tastes. J.A. at 2. Her late husband and former mayor of Silvertown was a primary financier for her most exclusive boutiques. J.A. at 5. Courtier's checkered background did not hinder her professional success. *Id.* Courtier has a criminal history, that includes a felony conviction, and stints in jail. J.A. at 16. From an early age, Courtier engaged in criminal behavior that spanned the gambit of crime. J.A. at 15. As a teen, she was declared a delinquent and spent time in a reformatory boot camp. *Id.* In her twenties, Courtier was a cocaine addict. J.A. at 15–16. In all, her criminal activity included simple assault, indecent exposure, vandalism, and possession of cocaine. J.A. at 15. Ultimately, her cocaine addiction resulted in two felony convictions and cost her two years in prison. J.A. at 16.

Since achieving professional success, Courtier has contributed to social causes and local politics to help the less fortunate. J.A. at 3. Significant, is Courtier's involvement in Silvertown's

mayoral election between incumbent Elmore Lansford, and his challenger, Evelyn Bailord. *Id.* Courtier substantially contributed to Bailord's mayoral campaign. *Id.* Courtier's contributions included hosting black-tie fundraisers and posting multiple online commentaries. *Id.* The commentaries criticized Lansford personally and professionally. J.A. at 3–4.

Like any passionate candidate, Lansford responded to Courtier's scathing criticisms. J.A. at 4. His statements satirically depict Courtier and highlight hypocrisy in her commentary. J.A. at 18. For instance, Courtier referred to Lansford as a "plutocrat." J.A. at 4. However, Courtier's own business caters to an elite clientele. J.A. at 2. The irony in the political debacle is that Courtier's late husband and the former mayor of Silvertown helped Lansford enter the political arena. J.A. at 3. In a way, Courtier and Lansford are political contemporaries.

In response to Lansford's "churlish" remarks, Courtier filed a defamation action against Lansford. J.A. at 14. Tenley's District Court found in favor of Lansford's special motion to dismiss pursuant to Tenley's Public Participation Act. *Id.* On appeal, Tenley's Supreme Court reversed and found in favor of Courtier. *Id.* Ultimately, Lansford and Courtier are political adversaries entrenched in a political rivalry with Silvertown hanging in the balance.

SUMMARY OF THE ARGUMENT

APPLICATION OF THE LIBEL-PROOF PLAINTIFF DOCTRINE

Tenley's Supreme Court correctly adopted the libel-proof doctrine. However, the Court erred in finding that the doctrine did not apply to Plaintiff, Silvia Courtier. Deeming Courtier is a libel-proof plaintiff aligns with traditional applications of the doctrine, serves First Amendment interests, and promotes judicial economy and consistency.

Courts traditionally apply the issue-specific branch of the libel-proof doctrine to individuals with criminal convictions when the challenged statement is similar or identical to the individual's prior convicted behavior. A criminal conviction is the benchmark for establishing a plaintiff as libel-proof. However, courts do not generally apply the doctrine to individuals with only minor convictions but apply it to individuals with multiple convictions that include a felony. Courtier has a long criminal history. In her youth she was declared a delinquent. She continued on her criminal path into her twenties, became a drug addict, was arrested and sentenced for a felony drug conviction. Courtier, a prominent Silvertown community figure, thrust herself into Silvertown's public concerns with several fundraisers and online commentaries where she maligned Defendant, Elmore Lansford, in his run for mayoral reelection. Lansford responded in kind, bringing up Courtier's past criminal behavior. Because Courtier has a criminal history, including a felony, and because the challenged statements are similarly related to her felonious history, she is effectively libel-proof.

The libel-proof doctrine seeks to balance First Amendment considerations and reputational interests. Courts must place limits on a State's interest in protecting its citizens' reputations when such interests inhibit free and vigorous public debates. Silvertown is in the middle of a heated mayoral election. Lansford, under attack, exposed the irony of his adversary's political critique. Allowing the suit to continue chills Lansford's freedom of expression and leaves political candidates with little recourse to respond to personal attacks. Additionally, the state of Tenley has an interest in protecting free speech as evident in its anti-SLAPP act, which encourages courts to dismiss meritless cases that seek to punish or inhibit speech.

Finally, courts are encouraged to make an early determination of the merits of libel cases to ensure colorable claims are heard. Further, an early ruling on the merits guards against frivolous

proceedings and wasting of judicial resources. Because the libel-proof doctrine lacks clear standards, application of the doctrine to individuals with felony convictions creates a consistent standard and limits arbitrary decisions by both judges and juries, especially when the doctrine is narrowed as it is under the issue-specific branch. Here, Courtier and Lansford are engaged in a contentious political rivalry. Litigation is not intended to hash out political differences. For the reasons set forth below and because Courtier has a felony background, she should be found libel-proof under the issue-specific branch.

DETERMINATION OF RHETROICAL HYPERBOLE

The Tenley District Court properly recognized the alleged statements as rhetorical hyperbole, and therefore, constitutionally protected. Affirming the District Court's ruling confirms what *New York Times Co. v. Sullivan* pointed out decades ago, that the First Amendment protects erroneous statements.

The District Court accurately applied the First Amendment to Lansford's statements. Courts consider content, context, and truth when analyzing whether to apply constitutional protection to alleged defamatory statements. Lansford relied on hyperbole to respond to repeated criticism from a political adversary. Reliance on exaggeration, the tone of the statement, and the broad context in which it was made are indicative of hyperbole.

Similarly, the Court has expressed a commitment to open and robust debates on public issues. Lower courts frequently exhibit leniency when statements arise within a political context to protect the effective functioning of public offices. Further, statements are protected even if they contain inaccuracies yet are substantially true.

Finally, the depth of commitment to First Amendment values extends to protecting offensive language, even at the cost of hurt feelings and damaged reputations. Therefore, affirming

the statements as protected speech secures freedom of speech while still balancing preservation of reputational interests.

ARGUMENT

I. Traditionally, Courts Apply the Issue-Specific Branch to Plaintiffs with Criminal Convictions to Safeguard Federal and State First Amendment Interests, Preserve Judicial Resources, and Provide Judicial Consistency.

The libel-proof doctrine applies to an individual whose reputation is so tarnished that the challenged statements cannot further damage or harm it. *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639 (2d Cir. 1975); Restatement (Second) of Torts § 559 cmt. d (1977). Courts reason that because a libel-proof plaintiff would be unable to recover more than nominal damages, such plaintiffs' cases should be dismissed as a matter of law. *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1909 (1985). The doctrine has developed into two branches: the issue-specific and the incremental harm branches. *Id.* at 1910–12. Here, the Court decides whether the issue-specific branch applies to the instant case.

Under the issue-specific branch, a plaintiff's libel claim is barred when prior criminal convictions *or* publicity for similar or identical behavior as described in the challenged statements have so lowered the plaintiff's reputation that, as a matter of law, the plaintiff could only recover nominal or minimal damages. *Cardillo*, 518 F.2d at 639–40; *Langston v. Eagle Pub. Co.*, 719 S.W.2d 612, 621 (Tex. App. 1986); *Ray v. Time, Inc.*, 452 F. Supp. 618, 622 (W.D. Tenn. 1976); *Wynberg v. National Enquirer*, 564 F. Supp. 924, 928 (C.D. Cal. 1982). Notably, the issue-specific branch does not bar all libel claims by plaintiffs with criminal convictions. *Cardillo*, 518 F.2d at 640.

Tenley's Supreme Court correctly adopted the libel-proof doctrine but erred in finding that the libel-proof plaintiff doctrine did not apply to Courtier. Courtier, with a prior felony, should be

found libel-proof under the issue-specific branch. Finding Courtier libel-proof serves both Constitutional and state-related First Amendment interests and serves the function of preserving judicial resources and creating judicial consistency.

A. Traditionally, Courts Have Found That a Plaintiff with Multiple Criminal Convictions Including a Felony Is Libel-Proof Under the Issue-Specific Branch of the Libel-Proof Doctrine.

The issue-specific branch applies to plaintiffs with criminal histories, particularly criminals with at least one felony conviction. The Second Circuit first articulated the libel-proof doctrine, as well as the issue-specific branch, in *Cardillo v. Doubleday & Co.*, where the plaintiff was found "libel-proof, *i.e.*, 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. . . ." 518 F.2d at 639–40. Courts have traditionally applied the issue-specific branch to individuals with criminal convictions. *See* James A. Hemphill, *Libel-Proof Plaintiffs and the Question of Injury*, 71 Tex. L. Rev. 401, 406 n.53 (1992); *also see* Patricia C. Kussmann, Annotation, *Construction and Application of Libel-Proof Doctrine*, 54 A.L.R. 6th 165, 8 (2019). Generally, courts find those with multiple criminal convictions are libel-proof as a matter of law. Patricia C. Kussmann, Annotation, *Construction and Application of Libel-Proof Doctrine*, 54 A.L.R. 6th 165, 2 (2019).

Courts traditionally apply the doctrine to plaintiffs with criminal convictions but avoid applying it to plaintiffs with minor criminal convictions. Raymond Ankney, *Libel Proof Plaintiff Defense Wins Some, Loses Some*, 23 Newspaper Research Journal 79, 79 (2002). For example, in *Marcone v. Penthouse Int'l Magazine for Men*, Marcone sued Penthouse for libel. 754 F.2d 1072, 1075 (3d Cir. 1985). Penthouse argued Marcone was libel-proof as a matter of law because of his prior criminal convictions, which included punching a police officer. *Id.* at 1079. Penthouse also referenced the negative publicity Marcone received for various drug charges, which were later

dropped, and for a criminal income tax evasion indictment, which ended with a hung jury. *Id.* The court did not recognize Marcone as libel-proof. *Id.*

Generally applied to those with criminal convictions, courts have expanded the application of the issue-specific branch to include plaintiffs without criminal convictions and those with "evidence apart from criminal convictions." *Guccione v. Hustler Magazine, Inc*., 800 F.2d 298, 303–04 (2d Cir. 1986); *Wynberg*, 564 F. Supp. at 928–29. In *Wynberg v. National Enquirer* the Court stated that if "an individual engages in anti-social or even criminal behavior, which is widely reported to the public, his reputation diminishes proportionately." 564 F. Supp. at 928. As a result, some courts have required that a conviction be accompanied by publicity for a plaintiff to be libel-proof. *McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6, 10 (Tex. App. 1994); *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 325 (2007); *Lamb v. Rizzo*, 391 F.3d 1133, 1139 (10th Cir. 2004). However, *Wynberg*, which courts have relied on for the added publicity element, can be distinguished from the traditional application of the libel-proof doctrine, which, although on occasion incidentally accompanied by publicity, did not require it in addition to a criminal conviction.

In *Wynberg*, the Central District Court of California held a defendant was libel-proof for his specific reputation for taking financial advantage of the actress Elizabeth Taylor. 564 F. Supp. at 928. In its reasoning, the District Court delineated two reputations for Wynberg: a general reputation toward women and a specific reputation toward Elizabeth Taylor. *Id*. at 928–29. In its discussion of Wynberg's general reputation, it referenced his past criminal convictions, which included charges for bribery, delinquency of a minor, and grand theft and the surrounding publicity of his convictions. *Id.* at 928. When discussing his specific reputation toward Elizabeth Taylor, the Court only emphasized the high publicity surrounding his relationship with the actress for three

years before bringing suit against the National Enquirer. *Id.* at 929. The Court in *Wynberg* only considered convictions with accompanied publicity when applying a general reputation. Conversely, it relied only on the surrounding publicity for the issue-specific reputation regarding Elizabeth Taylor. This distinction between the general and specific reputations of Wynberg allowed the court to expand the issue-specific branch to include either plaintiffs with criminal convictions or plaintiffs with high publicity concerning a specific issue.

Here, Silvia Courtier's extensive criminal history includes a felony. From her pre-teen years to her mid-twenties, Courtier engaged in various criminal activities. She was declared a delinquent in one of her multiple juvenile adjudications, became a drug addict, plead to a felony drug conviction, and served two years in prison. Courtier's history mirrors the type of criminal convictions necessary for a court to find an individual libel-proof. Her convictions were not minor affairs, but a continuous string of criminal activities effectively making Courtier a "habitual criminal." Furthermore, applying the issue-specific branch is appropriate because the challenged statements are sufficiently similar to Courtier's criminal behavior. Courtier's history of stealing money from grocery stores and drug-related criminal offenses fit within the challenged statements of "corrupt" and "swindler."

The Tenley Supreme Court questioned whether the lack of publicity and notoriety surrounding Courtier's criminal convictions prevent the application of the issue-specific branch, specifically regarding Courtier's professional business reputation. However, as courts have traditionally applied the issue-specific doctrine, publicity is not necessary to establish the plaintiff as libel-proof. Because the Court is only considering Courtier's specific reputation and not her general reputation, it is unnecessary to require any degree of publicity to accompany her felony drug conviction. Moreover, if the court chose to align itself with more recent holdings that require

a publicity element, Courtier would still be libel-proof under the issue-specific branch. First, all criminal records are public. The information is freely and easily accessible to any individual or entity. Second, as a prominent businesswoman, Courtier would need to gain investors and apply for loans. These processes and applications typically involve background checks and answering questions related to prior felonies. Thus, those doing business with Courtier would most likely already know of her checkered history. The Court need only look to the traditional application of the issue-specific branch to find Courtier is libel-proof.

B. Recognizing Plaintiffs with Felony Criminal Convictions as Libel-Proof under the Issue-Specific Branch Serves First Amendment Interests.

The libel-proof doctrine seeks to balance two conflicting interests—free speech and reputational interests. *Gertz v. Robert Welch*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). It is the role of courts to determine whether a libel case serves the purpose of redressing injury to reputation. *Finklea v. Jacksonville Daily Progress*, 742 S.W.2d 512, 517 (Tex. App. 1987). The Supreme Court's decision in *Gertz v. Welch*, cautioned that the First Amendment prohibits awarding "money damages far in excess of any actual injury" for defamation plaintiffs. 418 U.S. at 349. Thus, courts must establish libel cases are meritorious, specifically that the libel case is seeking redress of actual wrongs, so as not to burden First Amendment principles. *Finklea*, 742 S.W.2d at 517.

Further, to protect First Amendment rights, "judges must independently evaluate libel cases and summarily dispose of illegitimate claims. *Id.* (citing *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485 (1984)). The courts have a "special obligation under the first amendment to establish meaningful and predictable libel law standards." *Schiavone Construction Co. v. Time, Inc.*, 646 F. Supp. 1511, 1514 n.3 (D.N.J. 1986).

The Court in *Cardillo* "invoked First Amendment considerations" when finding the plaintiff libel-proof. 518 F.2d at 639. Notably, the issue-specific branch was the direct product of *Cardillo,* reasoning that "as a matter of law that appellant is, for purposes of this case, libel-proof, i.e., so unlikely by virtue of his life as a habitual criminal to be able to recover. . . , involving as it does First Amendment considerations." *Id.*

The libel-proof doctrine has faced judicial censure. *See Liberty Lobby v. Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1994); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991). *Liberty Lobby v. Anderson* challenged whether the libel-proof doctrine compels First Amendment protections and determined that the incremental-harm branch had no basis in Constitutional law. 746 F.2d at 1569. The Supreme Court also rejected the incremental harm doctrine in *Masson* holding that the doctrine was not "compelled as a matter of First Amendment protection of speech." 501 U.S. at 523. The Court stated California remained free to adopt the doctrine. *Id.* Although courts, including the Supreme Court, have questioned the Constitutional basis of the incremental harm branch of the libel-proof doctrine, none have rejected application of the issue-specific branch. Raymond Ankney, *Libel Proof Plaintiff Defense Wins Some, Loses Some*, 23 Newspaper Research Journal 79, 84 (2002).

Even if the court determined to extend *Masson's* reasoning to the issue-specific branch, the branch would still be viable under state constitutional and tort law. There must be damage to reputation for a libel suit to succeed. *Finklea,* 742 S.W.2d at 516. When balancing a state's interest in protecting its citizens' reputations, it should align with traditional common-law notions of libel law and "extend no further than compensation for actual injury." *Id.* (citing *Gertz v. Robert Welch, Inc.,* 418 US. 323, 349 (1974)). This standard applies to matters of public concern. *Gertz,* 418 U.S. at 346.

The state of Tenley enacted an anti-SLAPP statute to protect freedom of expression. Tenley Code Ann. § 5 – 1 – 701 *et. seq.* The statute states, "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." Tenley Code Ann § 5 – 1 – 701(a). Anti-SLAPP laws create a protective procedural mechanism for citizens sued by wealthy corporate clients in an attempt to silence or intimidate them. Matthew D. Bunker & Emily Erickson # *AINTTURNINGTHEOTHERCHEEK: Using Anti-SLAPP Law as a Defense in Social Media*, 87 UMKC 801, 802 (2019).

Courtier published multiple articles criticizing Lansford and encouraging citizens to vote for his political opponent. Lansford responded to Courtier's critical articles, highlighting the irony between Courtier's criminal past and her present critiques. Now Courtier sues Lansford because of his response. These are the types of lively exchanges the First Amendment seeks to protect. Additionally, because the exchange is political, there is a heightened need to protect such speech because our democracy relies on open and vigorous debate for matters of public concern. *Sullivan*, 376 U.S. at 270. Further, Courtier, as a prominent individual, can access multiple avenues to respond to Lansford's remarks, setting the record straight as she sees fit.

Even if the Court finds that the issue-specific doctrine does not compel First Amendment protections, Courtier is still libel-proof under state law. The state of Tenley enacted an anti-SLAPP statute to protect freedom of expression, specifically expression that wealthy corporate parties seek to silence. Courtier is one of Silvertown's prominent entrepreneurs. She is a renowned and respected local philanthropist, lending her support to issues of public concern through blog publications. Courtier enthusiastically supports Lansford's political opponent and strongly condemns Lansford's political campaign. Her attempt to silence Lansford's response to her strident political critique is equivalent to a wealthy and prominent entity (or person) stamping out

the voice of another. Although Lansford is himself a public official in the midst of a political campaign, he should not be subjected to attack without the ability to respond. If individuals fear a legal suit for engaging in public debate, then free expression is chilled, and the fabric of American democratic tradition is threatened. Moreover, Courtier has failed to show "actual damages," and according to state tort law, her claim should fail for failure to show damages. In light of these interests, the Court should find Courtier is libel-proof.

C. Recognizing Plaintiffs with Criminal Convictions as Libel-Proof under the Issue-Specific Branch Conserves Judicial Resources and Promotes Judicial Consistency.

The Court should label Courtier a libel-proof plaintiff because application of the issue-specific branch to plaintiffs with criminal felony convictions allows for the preservation of judicial resources. It further creates a consistent standard for judges to weigh a plaintiff's reputation before allowing a meritless libel case to proceed.

i. Application of the issue-specific branch preserves judicial resources.

As one court put it, "a court's time and resources should not be expended in litigating [libel-proof plaintiffs'] spurious libel claims." *Langston*, 719 S.W.2d at 623. Preservation of judicial resources is a legitimate governmental interest. Evelyn A. Peyton, Rogues' Rights: The Constitutionality of the Libel-Proof Plaintiff Doctrine, 34 Santa Clara L. Rev. 179, 209 (1993). The libel-proof doctrine, when applied correctly, allows only claims involving "colorable reputational harm [to] go forward to the jury," thus preserving judicial resources. *The Libel-Proof Plaintiff Doctrine*, 98. Harv. L. Rev. 1909, 1929 (1985).

Some courts let the jury decide whether the libel-proof doctrine applies to a particular individual. *Marcone*, 754 F.2d at 1079; *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1074 (5th Cir. 1987). However, traditionally, courts have decided the issue as a matter of law. *See, e.g.*,

Guccione, 800 F.2d at 303 (a court is justified in holding a plaintiff libel-proof when excessive costs to media defendant); *Cardillo*, 518 F.2d 640 (if a jury would find only for nominal damages, a court may recognize the plaintiff is libel-proof); *Cofield v. Advertiser Co.*, 486 So. 2d 434, 435 (Ala. 1986) (it is the province of the court to determine libel-proof status). Also, it is appropriate for judges to determine libel claims to preserve judicial economy because the question of libel-proof doctrine application "does not relate to the defendant's or any other witness's state of mind—or to any other factor that would limit a judge's ability to resolve the question without the aid of a jury." *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1919 (1985). Further, a judge can determine a plaintiff's reputational status through pre-trial documents that provide evidence to determine the plaintiff's standing in the community and whether it could have been affected. *Id.*

ii. Application of the issue-specific branch to plaintiffs with at least one felony conviction provides for judicial consistency.

Courts have a "special obligation. . .to establish meaningful and predictable libel law standards." *Schiavone*, 646 F. Supp. at 1515 n.3. Courts have been arbitrary and contradictory in how they apply the libel-proof doctrine to those with criminal convictions. Evelyn A. Peyton, *Rogues' Rights: The Constitutionality of the Libel-Proof Plaintiff Doctrine*, 34 Santa Clara L. Rev. 179, 202–03 (1993). For example, the Sixth Circuit has inconsistently applied *Cardillo*'s "habitual criminal" standard by affirming that James Earl Ray, the assassin of Dr. Martin Luther King, Jr., was libel-proof, but that William Brooks, who had a criminal past including multiple felonies, was not libel-proof. *Ray v. Time, Inc.*, 582 F.2d 1280 (6th Cir. 1978); *Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 501–02 (6th Cir. 1991).

The Court in *Liberty Lobby* expressed concern regarding "how a court would go about determining that someone's reputation had already been 'irreparably' damaged." 746 F.2d at 1568. However, *New York Times Co. v. Sullivan* established a rule of federal constitutional law,

requiring independent appellate review so as to decide the "law in its purest form under our common-law heritage" to ensure factfinders followed First Amendment principles and not grant awards in excess of actual injury. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510–11 (1984) (citing *Sullivan*, 376 U.S. at 270). And so, in cases that raise First Amendment concerns, the appellate court must consider the record as a whole to ensure that the judgment does not inhibit free expression. *Bose Corp*, 466 U.S. at 505.

Here, Courtier and Lansford are engaged in a political rivalry. The court of law is not the appropriate place to hash out the fallout of Courtier's attempt to derail Lansford's campaign and his subsequent defensive response. It would be a misuse of judicial time and resources. Further, applying the libel-proof's issue-specific branch to Courtier creates a consistent and predictable standard for future libel law. Recognizing a felony conviction as a requirement for the issue-specific branch, eliminates a judge's subjective and arbitrary task of evaluating a plaintiff's reputation before an alleged defamatory statement occurs. The efficiency allows judges to gauge the similarity of the behavior in the challenged statements against a plaintiff's prior felony. This question need not go before a jury because it does not involve a question of credibility. First Amendment jurisprudence instills the Court with the power to determine whether a plaintiff is libel-proof as a matter of law and the Court should find Courtier is libel-proof in the interests of judicial economy and consistency.

II. The First Amendment Protects Hyperbolic Statements Used to Question a Political Adversary's Credibility amid Debate on a Public Issue and Adhering to this Principal Secures Freedom of Speech.

In 1964 the Court outlined its commitment to protecting the First Amendment amid political debates. *Sullivan,* 376 U.S. at 254. Subsequently, the Court noted there is "no such thing as a false opinion." *Gertz* v. *Robert Welch,* 418 U.S. 323, 339 (1974). Then in spite of its precedent, the Court reversed course and reigned in First Amendment protections. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). This case is about how far the First Amendment extends to cover discourse amid heated political campaigns between political adversaries. This issue before the Court presents the opportunity to provide meaningful protection to speech in political discourse and protect a speaker's right to respond to criticism and question a critic's credibility.

The Supreme Court's established precedent contours the qualifications of protected speech. *See Greenbelt Cooperative Pub. Ass'n. v. Bresler*, 398 U.S. 6, 14–15 (1971); *National Association of Letter Carriers v. Austin,* 418 U.S. 264 (1974); *Hustler Magazine, Inc., v. Falwell*, 485 U.S. 46, 50 (1988*)*; *Milkovich*, 497 U.S. at 2. A statement is defamatory if it is capable of having a defamatory meaning imputed to it. *Levin v. McPhee*, 119 F.3d 189, 195 (2d Cir. 1997). *Sullivan* and its progeny suggest statements can be a fact or an opinion based on the textual content of the statement and the context in which the statement occurred. *Bressler,* 398 U.S. at 14; *Letter Carriers*, 418 U.S. at 265–68. Ultimately, if no reasonable reader could objectively construe the statement as an assertion of fact, then it is protected opinion. *Bressler*, 398 U.S. at 14.

The *Milkovich* Court held that for a statement regarding a matter of public concern to be actionable under the First Amendment, the statement must reasonably contain false and

defamatory facts and the statement must be made with malice. *Milkovich,* 497 U.S. at 21–22. However, substantially true statements still receive Constitutional protection. *Id.* at 19–20.

In light of the Court's guidance, Lansford's statements qualify as rhetorical hyperbole. Lansford's statement should be protected opinion because of its context and substantial truth. Ultimately, the statement strikes the core of the First Amendment's goals and implicates "fundamental societal values." *Cohen v. California*, 403 U.S. 15, 25 (1971). Thus, the Court should affirm the District Court's ruling and dismiss this case.

A. The Statement's Use of Epithets and Exaggeration to Address Criticism of His Administration are Indicative of Rhetorical Hyperbole.

The Court should find the alleged statements are rhetorical hyperbole. The Court held it is obliged to examine the alleged defamatory statement itself, as well as the statement's context when considering the First Amendment in light of defamation law. *Sullivan,* 376 U.S. at 284–85. *Milkovich* found a protected opinion exists when the statement relies on loose, figurative language, and when the tenor of the statement negates the impression that a speaker was asserting a fact, or the statement cannot reasonably be proven true or false. *Milkovich,* 497 U.S. at 20. Rhetorical hyperbole preserves free speech amid heated debates. *See Bresler*, 398 U.S. at 14–15; *Letter Carriers*, 418 U.S. at 272–78. A statement's context and a speaker's use of literary tools indicate the speaker is using exaggeration to express an opinion. *Bresler*, 388 U.S. at 14. Rhetorical hyperbole exists when a reasonable reader, measured by an objective standard, would not believe the alleged statements to be true. *Id.* Here, Lansford uses multiple literary tools that are indicative of hyperbole and prevents a reasonable reader from believing the alleged statement to be asserting a fact. Therefore, this Court should affirm the District Court's decision and find in favor of the Respondent.

i. The statement's tenor and use of figurative language indicate the statement is rhetorical hyperbole.

A statement's tone and use of figurative language are clear indicators of rhetorical hyperbole. Determining whether the statement is protected as rhetorical hyperbole depends on a thorough analysis of the specific language used, the tone of the statement, and the broad context in which it was made. *Milkovich*, at 8–16 (citing *Ollman v. Evans*, 242 U.S. App. D.C. 301 (1984)).

In *Bresler*, a local newspaper criticized a real estate developer's negotiation tactics in altering variances. 398 U.S. at 2. After city council meetings, the newspaper repeatedly called the developer's negotiation tactics "blackmail." *Id.* at 7. When finding in favor of the newspaper, the Court strongly considered the fact that the statement occurred in light of a public issue. *Id.* at 12–13. It specifically noted, "It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bressler's public and wholly legal negotiating proposals that were being criticized." *Id.* at 14. It was obvious to the Court that the statement's content concerned a public issue and critiqued the plaintiff's negotiation tactics, rather than a accused the plaintiff of criminal activity. *Id.* Thus, the strong relation to a public issue suggested a reasonable reader would not believe the statement to indicate the plaintiff engaged in criminal behavior. *Id.* at 14–15.

Subsequently in *Letter Carriers*, a local union published a newsletter listing non-union members and referred to them as "scabs." 418 U.S. at 267. The Court found that the use of "scabs" was an "imaginative expression of contempt" toward non-union members rather than an imputation of treason. *Id.* at 278–79. It noted that "scab" is an epithet frequently used to describe non-union members. *Id.* at 282. The Court found the term was used in a "loose, figurative sense." *Id.* at 284. The Court further noted the word "scab" has a dual meaning and can explicitly refer to parties who refuse to join unions or parties committing the crime of treason. *Id.* at 282–83. The

Court refused to hold the union libel for defamation because it occurred amid union development, a public matter, the term "scab" may have a dual meaning, and the Union's statement was factually accurate and literally true. *Id.*

This case shares several parallels with precedent. First, like both cases described above, the statement concerns a public issue. It was made in the middle of a contentious mayoral election. Lansford's statement is in response to Courtier's strident criticism of his administration. Lansford opens his statement by saying, "It is ironic Courtier blasts me as uncaring toward the less fortunate." The opening line directly indicates to readers the statement is in response to Courtier's multiple attacks on his candidacy for reelection as mayor of Silverton. Further, the statement could easily be a retort to Courtier referring to Lansford as a "plutocrat," because she, herself, depends on wealthy customers to support her boutiques. Second, Lansford relied on epithets, like "pimp," "whore," "leech," and "corrupt swindler" the meanings of which can change based on the context. For example, "pimp" can indicate an employer of prostitutes, or in this context relate to Courtier's business of selling a product to paying customers. Similarly, "leech" does not suggest Courtier committed a specific crime but does infer that she exploits society for her gain. The term "whore" can be construed to describe Courtier's constant effort to attract attention to the underprivileged. Finally, Lansford refers to Courtier as a "corrupt swindler." This nickname is not suggestive that Courtier is stealing money from clients but a literary tool in his allusion to Courtier as a faux "Robinita Hood." It highlights the irony of Courtier enjoying her business profits, which are derived from wealthy customers, further separating her from the day-to-day reality of the less fortunate, whom Lansford's administration seeks to benefit through gentrification, which Courtier adamantly opposes. Each epithet relies on facts from Courtier's past and responds to Courtier's

politics. Lansford's use of epithets conveys contempt for Courtier's politics, and therefore, the Court should find the statement is rhetorical hyperbole.

ii. A reasonable reader is unlikely to believe the statement is an assertion of fact about Courtier.

Aside from the content of a statement, courts consider a statement's entire context when determining whether Constitutional protection is merited. *Sullivan*, 376 U.S. at 285. The contextual analysis includes considering the broader setting of when a statement occurs and the tenor of the statement. *Bressler*, 398 U.S. at 14–15. *Bresler* and *Letter Carriers* both acknowledged the surrounding circumstances of the statement, notably that each statement occurred in the context of heated debates regarding public issues. *Bresler*, 398 U.S. at 13; *Letter Carriers*, 418 U.S. at 284–86. In each case, the Court explicitly reasoned that given the combination of the social context of the statements and the content of the statements, no reasonable reader would believe that the asserted statements impute criminal activity on the plaintiff. *Bresler*, 398 U.S. at 13; *Letter Carriers*, 418 U.S. at 284–86.

Lower courts consider the broader context in which the statement appears. For instance, the District of Massachusetts highlighted the importance of considering the social context of alleged defamatory statements. *Feld v. Conway,* 16 F. Supp. 3d 1, 3–4 (D. Mass. 2014). In *Feld*, the defendant relied on vulgar language to call the plaintiff "crazy" on Twitter as part of an ongoing, online discussion. *Id.* at 2. The plaintiff argued that the defamatory tweet standing alone constituted an "unexplained indictment" of her sanity. *Id.* at 3. Noting Supreme Court precedent in *Bressler* and *Letter Carriers*, the District Court found the statement to be rhetorical hyperbole rather than an assertion of fact. *Id.* at 4. Again, the Court considered the alleged statement in the context of the entire discussion, rather than in isolation. *Id.*

Recently, the Central District of California ruled a Tweet by President Trump was a protected rhetorical hyperbole. *Clifford v. Trump*, 339 F. Supp. 3d 915, 925 (C.D. Cal. 2018). In reaching its decision, the Court considered the social context in which the Tweet was made. *Id.* at 927. The Court accounted for the fact that the controversial tweet, accusing the plaintiff of being a liar, was responsive to her behavior as a political adversary. *Id.* Thus, the Court reasoned the President's statement was protected rhetorical hyperbole. *Id.* at 928.

There are multiple contextual cues setting the stage of Lansford's remark being rhetorical hyperbole. Foremost, Lansford closes his statement with "what a joke!" This closure gives readers clear notice that neither Courtier's criticism, nor Lansford's response should be taken seriously. Secondarily, Lansford responded to Courtier's criticism of his administration on a social media website. Given the era of fake news spawned on social media, reasonable readers would read the statement with the knowledge that it was hyperbole or at least with a degree of skepticism. Critically important is the fact the statement was made in light of a mayoral election, a matter of public concern. Vigorous epithets are common in political discourse, and it holds true in both Courtier's and Lansford's statements. Courtier referred to Lansford as a "relic of the past" and a "divisive leader." Courtier also accused Lansford of overtly exhibiting racial prejudice and colluding with big business at the expense of his constituents. After continual criticism, Lansford used heated language to vigorously defend his professional reputation and expose Courtier's hypocrisy. In light of the statement's broad context, no reasonable reader would believe Lansford was asserting literal facts about Courtier.

B. Even If a Reasonable Reader Believed the Statement Asserts a Fact, the Statement Is Substantially True.

New York Times Co. v. Sullivan expressed a strong commitment to protecting freedom of speech. 376 U.S. at 271. The *Sullivan* Court recognized that speakers "at times, resort to exaggeration, to the vilification of men who have been or are prominent in church or state, and even to false statement." *Id.* In light of this understanding, the Court held defamation plaintiffs must prove a defendant's statements were made with malice. *Id.* 279–80. The "malice standard" arose to ensure that when a speaker's statement has an inaccuracy, it cannot, therefore, be held liable for defamation. *Id.* at 280–83.

The malice standard and the substantial truth doctrine ensure "breathing room" for freedom of expression. *Id.* at 271–72. Truth is a complete defense to defamation claims. *See Andrews v. Prudential. Sec.*, 160 F.3d 304, 307–08 (6th Cir. 1998). Further, proving malice requires a plaintiff to show the statement is false or that the statement was made with a reckless disregard for the truth. *Milkovich,* 497 U.S. at 14. This standard has been extended to include plaintiffs who are public figures. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). Because Lansford's statements are substantially true, his rhetoric should receive Constitutional protection. Further, the truth of the statement suggests that Courtier lacks clear and convincing evidence that would prove malice.

i. A single inaccuracy falls short of proving a statement is false.

Debates surrounding public issues are filled with emotional rhetoric. Adversaries often rely on creative language to persuade an audience. *Sullivan,* 376 U.S. at 302–03. In effect, inaccurate statements are inevitable in a debate. *Id.* Holding speakers to an absolute standard of accuracy during heated discussions of public issues would discourage open and vigorous discourse. *Id.* 265–67.

The *Sullivan* Court understood the propensity of speakers to get caught up in emotions when persuading audiences or advocating issues. *Id.* at 266, 294. The case arose during desegregation. *Id*. In *Sullivan*, the Court ruled a newspaper could not be liable when printing an advertisement that included false facts about the actions of a public official. *Id.* at 265. The case demonstrates a willingness to allow a misstatement of fact during public issues. *Id.* at 292 n.30. It further indicates that, on balance, the Court values the protection of speech over a person's reputational interest. *Id.* at 281 (noting "occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.").

Likewise, the *Masson* Court emphasized that minor inaccuracies do not equate to falsity "so long as the substance, the gist, the sting, of the libelous charge can be justified." *Masson*, 501 U.S. at 517–18. Lower courts have embraced this rationale when determining whether a plaintiff adequately shows falsity. *See Schirle v. Sokudo USA, L.L.C.*, 484 Fed. Appx. 893 (5th Cir. 2012); *Pan Am. Sys. v. Atl. Northeast Rails & Ports, Inc.*, 804 F.3d 59, 64–65 (1st Cir. 2015).

In *Schirle,* the Plaintiff brought a defamation claim after a former employer indicated to the Plaintiff's client that the Plaintiff suffered from a "small mental disease." 484 Fed. Appx. at 901. The Plaintiff was diagnosed with a "mood disorder." *Id.* The Court affirmed the rejection of the defamation claim. *Id.* at 902. In its reasoning, the Fifth Circuit reiterated *Masson's* focus on the "gist" of a speakers' words. *Id.* It noted that where the gist of a statement is undisputed, then substantial truth can be determined as a matter of law. *Id.* at 896.

In this case, the gist of Lansford's statement is that Courtier's criticism of Lansford and his administration should not be taken seriously because she is a hypocrite. To illiterate his point, Lansford manipulates known or observable facts about Courtier's business operations, social activism, and political engagement. His words unite the three concepts without departing from the

ultimate message to readers. The use of epithets, based in fact, does not depart from the central meaning of Lansford's reply. The words are intended to critique Courtier's credibility amid a political election. Even if Lansford did misstate a fact in his response, it does not depart from the ultimate message the statement was intended to convey. Lansford was making a point about the credibility of his adversary and relied on her criminal record and her reliance on a wealthy husband to point out the ironies of her espoused political ideology. Even though the statement was harsh, and relied on epithets, the Court should find it is protected speech.

ii. The statement relies on facts which are easily discoverable or observed.

Defamation claims cannot proceed when a plaintiff fails to show material falsity of claims. *Milkovich*, 497 U.S. at 20. In *Milkovich*, the Court provided significant guidance regarding how to analyze the context of an article. *Id.* at 8–16. In that case, the Court imposed liability because the statement could be understood to impute the crime of perjury on the plaintiff. *Id.* at 21. The specific statement appeared in a newspaper article and indicated that the plaintiff "lied" during judicial proceedings. *Id.* at 5. It pointed out that the authors' reliance on implied facts suggested a false assertion about the plaintiff's propensity to commit perjury. *Id.* at 13–14.

Similarly, in *Pan Am.* a rail company sued a counterpart in light of the counterpart suggesting a recent accident was "perfectly predictable" because its "railroad system" was "horrendously dilapidated." *Pan Am*, 804 F.3d at 62. The Court focused on whether the Plaintiff was able to show that the statements were materially false. *Id*. at 67–68. Ultimately, the Court concluded that where synonyms were used and interchangeable, the statement could not be deemed materially false. *Id.* at 71 (equating "assurance" with "promise" and noting no material difference between "removed" and directive when referring to a plaintiff's departure from a company.).

This case bears several similarities to *Pan Am.* First, Lansford and Courtier are on relatively equal footing. Lansford is a public official, while Courtier is a public figure. Here, Lansford's colorful language is not a substantial departure from the truth. Referring to Courtier as a "pimp for the rich" is substantially true because her boutiques cater to a wealthy clientele. She arranges to have high-end designs at her clients' disposal in exchange for money. Suggesting Courtier is a "leech on society" can still be deemed accurate because Courtier engaged in a delinquent lifestyle and for a time, relied on public assistance and intervention. Indicating Courtier is "corrupt and a swindler" again could be deemed a reference to her felonious record and criminal past. It could also be a more extensive commentary indicating Courtier's hypocrisy in catering to wealthy clients but then adamantly opposing gentrification. Finally, calling Courtier a "whore for the poor" is not untrue because she has engaged in and funded events to benefit the less fortunate. Albeit harsh, Lansford's language is indicative of the truth. Therefore, the statements should receive protection under the First Amendment.

C. Furthering First Amendment Values Should Determine Constitutional Protection of Speech.

Multiple courts recognize that debates surrounding public issues are at the core of the First Amendment and therefore, worthy of protection. *See Sullivan,* 376 U.S. at 285; *Cohen,* 403 U.S. at 25. Traditionally, courts often find that speech in the political arena is protected to preserve open and robust debate. Courts will react to ensure a public official has room to work as a public servant. Statements are protected, regardless of whether the speech is in bad taste.

i. Finding for Lansford strikes the appropriate balance between free speech and the interest in protecting reputations when parties engage in political issues.

New York Times Co. v. Sullivan best illustrates the Court's commitment to preserving free speech. 376 U.S. at 270–72. The Court found the defendant's statements were unactionable defamation, even though the statements were factually inaccurate. *Id.* at 296–97. It further required that public officials show actual malice to prevail on a defamation claim. *Id.* at 279–80. Ultimately, the Court found that factual error and defamatory content of the New York Times advertisement was not enough to forgo First Amendment protection. *Id.* at 292. Since *Sullivan*, courts have recognized exceptions to inaccurate statements, particularly those arising in the political arena. *Clifford v. Trump*, 339 F. Supp. 3d 915 (C.D. Cal. 2018); *Miller v. Block,* 352 S.W.2d 313, 314 (La. Ct. App. 1977); *Rehak Creative Services, Inc. v. Whitt*, 404 S.W.3d 716 (Tex. App. 2013).

In *Clifford,* the Court categorized President Trump's Tweet as rhetorical hyperbole, not only because it was in response to a political adversary, but also because preventing the President from responding to criticism would hamper the Office of the President. 339 F. Supp. 3d at 927. Relatedly, in *Miller v. Block*, the Louisiana Court of Appeals aptly pointed out a political candidate has no obligation to suffer hecklers silently. 352 S.W.2d at 314. Court defamation decisions regarding campaign or political contexts suggest outcomes in favor of the alleged defamatory speaker.

In *Rehak Creative Services, Inc. v. Whitt,* an advertising agency sued a local representative on behalf of a client and incumbent representative. 404 S.W.3d at 717–19. The suit stemmed from an ongoing election between an incumbent representative and a political challenger. *Id.* at 720. The alleged defamatory comments accused the plaintiff of "side-stepping" the Texas Constitution for political gains, taking "sleazy steps" to gain political advantages, and "ripping off

tax-payers." *Id.* at 721. All of the statements were specific charges, yet, the Texas Appellate Court gave significant weight to the political context and favored the defendant. *Id.* at 730.

Here, this case arose from a political election. While Courtier is not a candidate herself, she presented herself as Lansford's political adversary championing his political opponent at fundraising events and through multiple online posts. Courtier specifically used social media as a tool to disparage Lansford's political standing on multiple occasions. Prompted to action, Lansford, the current mayor and incumbent candidate, defended his politics. His statements raise questions about the credibility of Courtier's political commentary during a heated electoral campaign and should be constitutionally protected.

ii. The First Amendment protects offensive speech.

Cohen v. California provides the pinnacle of protected speech. 403 U.S. at 17. In that case, Justice Harlan, writing for the plurality, focused on the single issue of whether the plaintiff's vulgar language describing his feelings toward the Selective Service System constituted offensive conduct. *Id.* at 22–23. Ultimately, the plurality's reasoning concluded that vulgar and offensive language is protected speech. *Id.* at 57. The rationale for the ruling rested on the fact that the First Amendment is not intended to protect people from being offended. *Id.* at 24–25. Ultimately, the Court sought to prevent suppression of words out of legitimate fear it would lead to suppression of ideas. *Id.* at 26. It noted, "One man's vulgarity is another man's lyric." *Id.* at 25.

Lower courts have followed the logic espoused in *Cohen*. *See New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 164 (Tex. 2004) (noting "The First Amendment does not police bad taste."). In *New Times*, a local paper crassly criticized a local judge and district attorney for arresting a minor based on a student's homework assignment detailing a school shooting. *Id.* at 145–48. The New Times' article exaggerated and distorted facts to parody the actual event. *Id.* It suggested

the teen was a six-year-old placed in shackles when appearing before the Court because of her disciplinary reprimands for spraying classmates with pineapple juice. *Id.* The article also loosely referred to the district attorney's quote that they would attempt to try the child as an adult. *Id.* The Texas Court's analysis embraced a dispassionate approach and considered the article in context as a reasonable reader might. *Id.* at 158. Ultimately, the Court acknowledged the statements were in bad taste. *Id.* However, the Court deemed the New Times' article as worthy of protection. *Id.* at 168. The Court's reasoning rested on the fact that while in bad taste, no reasonable reader would find the article as an assertion of fact. *Id.* at 164.

Like the New Times' article, Lansford cleverly exaggerated facts that parody real events that occurred in Courtier's life. However, *Cohen* established that even offensive language is protected, and *New Times* illustrates that offensive parody to actual events merits protection because it is so clear that no reasonable reader would view the statement as an assertion of fact. Lansford used hurtful words that reflect real events occurring in Courtier's life. His statement sought to make a point about his adversary's credibility and the irony of her political ideology. Although some may view Lansford's statement as "vehement, caustic, and unpleasantly sharp," it is not capable of a defamatory meaning. Therefore, the Court should affirm the Tenley District Court and find in favor of Elmore Lansford.

CONCLUSION

Petitioner respectfully requests this Court find Plaintiff, Silvia Courtier, is libel-proof under the issue-specific branch. This conclusion would serve First Amendment interests, preserve judicial resources, and provide judicial consistency in libel law. Further, Petitioner respectfully requests this Court to affirm the District's Court decision finding Lansford's statement as rhetorical hyperbole and protected speech under the First Amendment.