No. 18-2143

IN THE

Supreme Court of the United States

ELMORE LANDSFORD,

Petitioner,

v.

SILVIA COURTIER

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF TENLEY

BRIEF OF THE PETITIONER

TEAM 219736
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QUESTIONS PRESENTED

I. Whether an individual with a tarnished reputation and lack of anything beyond nominal damages can adequately sustain a claim for defamation based on politically charged discourse.

II. Whether an article is rhetorical hyperbole, protected under the First Amendment of the United States Constitution, when it uses emotionally charged language to respond to a political adversary's public columns in the context of a reelection campaign.

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STATEMENT OF JURISDICTION

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

SUMMARY OF FACTS

Lansford has long been an active member in the Silvertown community. Over the many years of Lansford's political journey, and through his long-standing participation in the public sector, Lansford has acquired many supporters who have worked alongside him. One supporter specifically was the Respondent's former husband, Raymond Courtier, who supported Lansford from the start of his political career and helped Lansford enter the political arena. (J.A. at 16.). Raymond Courtier was Lansford's political contemporary and ally, and together they served on the city council. *Id*.

Lansford's success in the political world continued beyond his service on the city council, and he now currently holds office as mayor of Silvertown. *Id*. Community support has continued to follow him in his current efforts to enhance the overall welfare of Silvertown. *Id*. Lansford has built a campaign foundation that seeks to increase the economic boom in Silvertown and decrease the rate of crime. *Id*. As a part of this campaign, Lansford has been a strong supporter in efforts made with the intent to enhance both the quality of life and the economy of Silvertown. (J.A. at 3.). Accordingly, knowing Cooperwood, an area of Silvertown comprised of high poverty and crime rates, Lansford has supported efforts to create new property structures in the area. (J.A. at 16.).

The Respondent in this case directly opposed Lansford's political campaign and openly supported his opponent, Evelyn Bailord ("Bailord"), in the most recent mayoral election. (J.A. at 17.). Specifically, Respondent was one of Bailord's chief proponents and advisors who made noteworthy campaign contributions, hosted several dinner events in support of Bailord, and wrote numerous commentaries advertising Bailord as "the candidate the community need[ed] to move the city in a positive direction." *Id*.

In support of Bailord, Respondent publicly attacked Lansford's character on numerous occasions in an attempt to diminish his credibility and shift supporters over to Bailord's side. *Id* Specifically, Respondent has branded Lansford as "a divisive leader" who cares little about the citizens of Silvertown and social justice issues. *Id*. More severely, Respondent publicly accused Lansford of being "simply an entrenched incumbent; beholden to special interests," whose "repressive interests" focus on attacking the poor and enhancing life for the wealthy citizens of Silvertown. *Id*. Respondent also alleged Lansford is a "plutocrat" who was "engag[ing] in war on the economically-strapped denizens of Cooperwood." (J.A. at 17.).

After remaining silent despite the repeated attacks on his character by the Respondent, Lansford finally took measures to defend himself. In an attempt to defend his questioned character, Lansford rebutted Respondent's statements on his personal website, which ultimately led to the action at hand. (J.A. at 17-18.) The post provided:

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

streets. Now, this businesswoman is a pimp for the rich and a whore for the Poor. What a joke!" (J.A. at 18.).

It is true that Respondent's is a persistent criminal offender. (J.A. at 15-16.). Particularly, Respondent has been charged with crimes that include, simple assault, simple possession of marijuana, indecent exposure, vandalism, and possession of cocaine. (J.A. at 15.) After serving time in a boot camp facility for female offenders, Respondent was again convicted of possession of cocaine, and even more seriously, distribution of cocaine. *Id*. These felony charges led to the Respondent to serve 2 years in federal prison. *Id*. Later in life, Respondent opened a business selling high quality clothes to the wealthy and supporting political candidates throughout the elections of Silvertown. (J.A. at 16.). As a result of Respondent's involvement in the political atmosphere and her contact with Lansford, Respondent commenced this action. (J.A. at 6.).

PROCEDURAL HISTORY

Silvia Courtier (the "Respondent") initiated a defamation action against Elmore Lansford ("Lansford") in the Tenley District Court. (J.A. at 2.). Lansford filed a special motion to dismiss under Tenley's Anti-SLAPP law alleging that Respondent was a libel-proof plaintiff and Lansford's article was protected under the First Amendment as rhetorical hyperbole. (J.A. at 2.) (citing TENLEY CODE ANN. § 5–1–704 (2019)). The trial court dismissed the lawsuit and held that the article was rhetorical hyperbole. (J.A. at 13.). The Supreme Judicial Court of Tenley reversed the trial court holding that Respondent was not a libel proof plaintiff and the statements were not protected by the First Amendment. (J.A. at 22.). This Court granted certiorari to review the libel-proof plaintiff doctrine and rhetorical hyperbole. (J.A. at 24.).

SUMMARY OF THE ARGUMENT

The Supreme Judicial Court erred in holding that the Respondent's libel claim should not be dismissed because Respondent was not a libel-proof plaintiff under either the issue-specific or

incremental harm libel-proof doctrines. Under the libel-proof plaintiff doctrine, a plaintiff is libel-proof when their reputation is so poor, they are unlikely as a matter of law, to recover more than nominal damages for an alleged defamatory publication. 2 CHRISTOPHER ERNST, BALDWIN'S OH. PRAC. TORT L. § 40:292. Regardless of whether Respondent is a libel-proof plaintiff, Respondent failed to establish that she could be awarded special damages, which is required for a claim of defamation unless an exception applies. *Ello v. Singh*, 531 F. Supp. 2d 552, 576 (S.D.N.Y. 2007); *Ford v. Clement*, 834 F. Supp. 72, 78 (S.D.N.Y. 1993).

In addition to Respondent being a libel-proof plaintiff, Lansford's statement is rhetorical hyperbole and therefore protected by the First Amendment. U.S. CONST. Amend. I. Lansford's statement was an online article responding to an adversary's politically charged columns. Under the principles this court stated in *Milkovich* and *Bressler*, the context would lead a reader to only interpret the article as politically flavored hyperbole. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Greenbelt Co-op. Publ'g Ass'n v. Bresler* 398 U.S. 6, 13-15 (1970). Furthermore, the article uses loose, figurative, and hyperbolic language which this court in *Austin* stated would lead a reader of a statement to only interpret as rhetorical hyperbole. *Letter Carriers v. Austin*, 418 U.S. 264, 278 (1974).

ARGUMENT

The First Amendment's freedom of speech clause places constitutional limits on the breadth of speech that can be actionable as defamation in state or federal courts. U.S. CONST. Amend. I; *New York Times v. Sullivan*, 376 U.S. 254, 264-55 (1964) (holding that defamation has its constitutional limits); *see also,* U.S. CONST. Amend. XIV; *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the freedom of speech clause to apply to the States).

Tenley's anti-SLAPP laws[1], requires that when an action is filed challenging an individual's "right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action." TENLEY CODE ANN. § 5–1–704 (a) (2019). Such person has "the burden of making a prima facie case that a legal action against the petitioning party is based upon, relates to, or in response to that party's exercise of the right to free speech, right to petition, or right of association." TENLEY CODE ANN. § 5–1–705 (b) (2019). If this burden is met, the burden will shift to the responding party who must establish a prima facie case for each essential element of the claim in the legal action or it will be dismissed. *Id*.

Defamation claims directly challenge a citizen's fundamental right to freedom of speech afforded to them by the First Amendment of the United States Constitution. U.S. CONST. Amend. I. In the enforcement of laws that impose liability for speech, which give rise to First Amendment issues, courts have held that one must "make sure 'the judgement does not constitute a forbidden intrusion on the field of expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964))*; see also Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995). Black's Law Dictionary defines a defamatory statement as one that "is likely to lower that person in the estimation of reasonable people and in particular to cause that person to be regarded with feelings of hatred, contempt, ridicule, fear, or dislike." *Defamatory Statement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Lansford properly demonstrated that the underlying lawsuit was related to or in response to his social media post about the Respondent, and therefore the burden has shifted to

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[1] "SLAPP" was the term adopted as an acronym for Strategic Lawsuits Against Public Participation. The term is applied to lawsuits against public participation. R. at 2.

Respondent to establish a prima facie case for each element required for a defamation claim. (J.A. at 6-7.). The only elements of Respondent's case on certiorari are the actual damage, falsity, statement of facts, and defamatory meaning.[2] (J.A. at 24.)

I. RESPONDENT'S CLAIM SHOULD BE DISMISSED BECAUSE SHE IS A LIBEL-PROOF PLAINTIFF AND FURTHER FAILED TO ESTABLISH SHE COULD BE AWARDED DAMAGES.

Respondent's claim fails because she is a libel-proof plaintiff whose tarnished reputation could not be further diminished by the challenged statements. Furthermore, even if a court were to find that Respondent is not a libel-proof plaintiff, she failed to demonstrate she may be awarded special damages.

a. Respondent's claim should be dismissed as a matter of law because she is a libel-proof plaintiff whose reputation could not stand to be further harmed by the challenged statements.

It has long been argued that constitutional considerations demand the use of the libel-proof plaintiff doctrine. *See* DAVID MARDER, *Libel Proof Plaintiffs-Rabble Without A Cause*, 67 B.U. L. REV. 993, 993 (1987); *Lamb v. Rizzo*, 391 F.3d 1133, 1137 (10th Cir. 2004); *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987). Numerous courts scattered throughout our justice system have dismissed, or upheld the dismissal, of libel claims when a plaintiff's is libel-proof and are incapable of suffering further harm. David Marder, 67 B.U. L. Rev. at 993. A plaintiff is libel-proof when their reputation is so poor, they are unlikely as a matter of law, to recover more than nominal damages for an alleged defamatory publication. 2 CHRISTOPHER ERNST, BALDWIN'S OH. PRAC. TORT L. § 40:292. The libel-proof plaintiff doctrine encompasses two different doctrines, (1) the incremental harm doctrine; and (2) the issue-specific doctrine.

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[2] The elements of identification and publication are not before this court. (J.A. at 7-9.)

i. Incremental Harm Doctrine

The incremental harm doctrine examines the entire communication as a whole, rather than the challenged and non-challenged statements individually, in order to determine whether there has been a forbidden intrusion into the First Amendment rights of free expression. *See Harte-Hanks Commc'n, Inc. v. Connaughton*, 491 U.S. 657, 662 (1989). Specifically, the doctrine examines whether the challenged statements in a libel claim harm a plaintiff's reputation in any way beyond the harm already caused by the remainder of the communication. *See Masson v. The New Yorker Magazine, Inc.*, 501 U.S. 496, 524 (1991); *Simmons Ford, Inc. v. Consumers Union of U.S., Inc.*, 516 F.Supp. 742, 750 (S.D.N.Y. 1981). Where the challenged statements cause minimal harm in comparison to the unchallenged statements, the court will dismiss the claim. 67 B.U. L. REV. at 993.

In *Simmons*, where a manufacturer and retailer of an electrically powered automobile filed a libel claim against a magazine after printing an evaluation of the company, the court dismissed the action. 516 F.Supp. at 751. The court recognized that the plaintiffs' reputation was damaged by the challenged statement which alleged that the plaintiffs' product was "[n]ot [a]cceptable". *Id*. at 750. However, the court held that the plaintiffs could not expect to gain more than nominal damages because the unchallenged misstatement regarding federal safety standards caused more harm than the statements that were challenged. *Id*. (noting that if the article made no reference to federal safety standards, or the company's exemptions from them, the conclusion that the car was "[n]ot [a]cceptable" and would not have given rise to any actionable claim in plaintiffs' favor).

Similar to the evaluation in *Simmons*, the portion of Lansford's website post challenged by the Respondent could not harm her reputation in any way beyond the harm that was caused by

the rest of the article. (J.A. at 4-5.). The portions of Lansford's communication that were not challenged, state that Respondent was a "coddler of criminals", "a lewd and lusty lush", and was "nothing more than a former druggie" who "walked the streets strung out on drugs." (J.A. at 4.). Even if the challenged statements were found to have damaged Respondent's reputation, analogous to the challenged statements in *Simmons*, if Lansford's post had not referenced that Respondent was a "coddler of criminals" or a "former druggie", the challenged statements would not present an actionable claim of libel. 516 F.Supp. at 750. Indeed, Respondent was declared a delinquent in the past, and was incarcerated at a boot camp as a result of charges including simple assault, simple possession of marijuana, indecent exposure, vandalism and possession of cocaine. (J.A. at 5.). More detrimental however, is that Respondent maintained a criminal lifestyle after her release from boot camp and was ultimately charged with felony possession and distribution of cocaine, which caused her to serve two years in prison. (J.A. at 5.). The inclusion of these unchallenged statements caused more harm to Respondent's reputation than the actual challenged statements because of her past criminal history.

Given that Respondent has a greater interest in preventing further unfavorable commentary regarding her past criminal lifestyle, the interests in protecting First Amendment rights outweighs affording her protection under defamation laws. Since the unchallenged statements harm the Respondent's reputation significantly more than the challenged ones at hand, it would not be possible to award the Respondent anything greater than nominal damages. Accordingly, Respondent is a libel-proof plaintiff under the incremental-harm doctrine and the libel claim should be dismissed.

ii. Issue-Specific Doctrine

Opposite the incremental harm doctrine, the issue-specific doctrine allows a trial court to

dismiss a libel case on if a plaintiff's reputation is already so tarnished, that if any damage were to occur from the alleged defamatory statements, it would only be nominal. *See Guccione*, 800 F.2d at 303; 67 B.U. L. REV. at 993. If defamatory statements, as a matter of law; could not damage a plaintiff's reputation in the community; deter others from associating or dealing with them; or otherwise expose them to contempt or ridicule, any more than what has already been caused as a result of their past, they are deemed a libel-proof plaintiff and their claim shall be dismissed. *See Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639 (2d Cir. 1975).

While the issue-specific branch of the libel-proof plaintiff doctrine is often regarded in cases where the plaintiff is a habitual criminal, the court in *Guccione* acknowledged that a plaintiff may be decreed libel-proof by evidence apart from criminal convictions. 800 F.2d at 303. A person is an issue-specific libel-proof plaintiff when their previous criminal convictions are similar to the ones charged by the allegedly defamatory statements. *Logan v. Dist. Of Columbia*, 447 F.Supp. 1328, 1332 (D. D.C. 1978) (finding a convicted drug user was a libel-proof from false defamatory statements that he had recently tested positive for drug use). The entire libel claim should be dismissed when the plaintiff is libel-proof. *Lamb*, 391 F.3d at 1139 (barring a plaintiff's entire defamation claim because he was a convicted on a crime similar to what the defamatory statement alleges).

Here, as mentioned above, the unchallenged statements are inextricably linked to the challenged statements. Accordingly, the challenged statements will relate on the issue of drug use because of Lansford's characterization that the Respondent as a "former druggie" that "walked the streets strung-out on drugs." (J.A. at 4). Respondent, like the plaintiff in *Logan*, is a libel-proof plaintiff on the issue of drug use because of her prior convictions. (J.A. at 5.); 447 F.Supp. at 1332. Therefore, Respondent's entire defamation claim is barred. *Lamb*, 391 F.3d at

1139.

In conclusion, Respondent's claim is barred because she is an issue-specific libel-proof plaintiff on the issue of drug use.

b. Respondent's defamation claim lacks the ability to award damages because she failed to establish that the challenged statements caused her actual harm.

In order to sustain a claim of defamation, a plaintiff must demonstrate special damages, economic or financial losses, unless they fall within an exception where damages are presumed or demonstrate that the statements were made with malicious intent. *See Holy Temple First Church of God in Christ v. City of Hudson*, 17 A.D. 3d 947, 947, 794 N.Y.S. 2d 465 (N.Y. App. Div. 2005); *Calafiore v. Kiley*, 303 A.D.2d 816, 816-17, 756 N.Y.S. 2d 348 (N.Y. App. Div. 2003). In some circumstances, where the statement is so egregious that it is presumed to cause serious harm, the statement is defamatory "per se" and the plaintiff is not required to demonstrate such damages. *Sharratt v. Hickey*, 20 A.D. 3d 734, 735, 799 N.Y.S. 2d 299 (N.Y. App. Div. 2005). The four established exceptions of "slander per se" are statements that (1) charge a plaintiff with a serious crime; (2) tend to injure another in their trade, business or profession (3) allege the plaintiff has a loathsome disease; or (4) impute unchastity to a woman. N.Y. CIV. RIGHTS § 77 (1963); *Liberman v. Gelstein*, 80 N.Y.2d 429, 435-36 (2004); 2 SEELMAN, LIBEL AND SLANDER IN THE STATE OF NEW YORK 869-907; RESTATEMENT (SECOND) OF TORTS § 570 *et. seq*. In the present case, it is apparent that exceptions three and four are not applicable to the challenged statements because they do not pertain to Respondent having a loathsome disease or her chastity[3].

[3] The phrase "whore for the poor" does not pertain to the Respondent's chastity as will be discussed later under rhetorical hyperbole. Notwithstanding, the phrase is used in a common

With regard to exception one, the court in *Liberman* provided that the law distinguishes between serious and relatively minor defenses when examining whether a statement falls under the exception that it charged the plaintiff with a serious crime. 80 N.Y.2d at 436. The Restatement provides a list of crimes actionable as per se slander to include murder, burglary, larceny, arson, rape, and kidnapping. RESTATEMENT (SECOND) OF TORTS § 571, cmt. *g*. Similar to the plaintiff in *Liberman*, Respondent fails to fall within this category because the challenged statements did not charge her with any crime listed within the exception. The phrases, "a pimp for the rich"; "a leech on society"; "a whore for the poor"; and "corrupt and a swindler" fail to allege that the Respondent participated in murder, burglary, larceny, arson, rape, or kidnapping. (J.A. at 4-5.). They are linguistic dramatizations that portray the Respondent as a hypocrite, rather than an actual criminal. As previously asserted, such statements were made in rebuttal to comments the Respondent made against Lansford in opposition of his political campaign. (J.A. at 3-5.). Therefore, these statements were simply intended to discredit the Respondent's opinions against Lansford and rebuild his own reputation after she attacked his intentions.

With regard to the second exception, exempt statements which tend to injure another in their trade business or profession are limited strictly to "defamation of a kind incompatible with the proper conduct of the business, trade, profession or office itself." *Liberman*, 80 N.Y.2d at 436. A statement must be made with reference to a matter of significance and importance for that purpose and must be more than a general reflection upon the plaintiff's character or qualities. *Id*. The court in *Liberman* held that statements accusing a businessman of being drunk

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way where it would not impute unchastity. *Matts v. Borba*, 37 P. 159, 159, 4 Cal. Unrep. 691 (Cal. 1894) (holding that the Portuguese word for whore, when used in the common way, provides a sufficient basis to find it does not impute unchastity).

and committing moral misconduct would not affect the duties of his profession and are unrelated to his status of employment. *Id.* Again, Respondent fails to fall under this exception because as indicated above, Lansford's statements were made to attack Respondent's credibility, which goes directly to her personal character. (J.A. at 4.). Lansford made these statements after Respondent publicly attacked him on several different occasions to her large social media platform, in an attempt to ruin his political campaign. (J.A. at 3-4.). This demonstrates that Lansford did not intend to impair Respondent's ability to conduct her clothing business, but rather to defend his own character that she repeatedly attacked. Since Respondent does not fall into any of the exceptions provided under slander per se, she is required to show special damages. *Liberman*, 80 N.Y.2d at 436.

In order to establish special damages in a defamation case, a plaintiff's complaint must clearly allege that they suffered economic, emotional, or reputational damage as a result of the defendant's defamatory statements. *See Hughes v. Twenty-First Century Fox, Inc.*, 304 F. Supp. 3d 429, 454 (S.D.N.Y. 2018); Where a plaintiff makes mere conclusory statements that he or she was disparaged by false statements, they will not be entitled to relief under a defamation action. *See Ello v. Singh*, 531 F. Supp. 2d 552, 576 (S.D.N.Y. 2007); *Ford v. Clement*, 834 F. Supp. 72, 78 (S.D.N.Y. 1993).

Respondent failed to establish that she has suffered any economic or financial losses, she merely alleges that her reputation was harmed without any support of such accusation in her favor. As a result, the damages element of a defamation claim has not been met and her claim of defamation fails.

II. LANSFORD'S STATEMENTS WERE RHETORICAL HYPERBOLE BECAUSE THEY HAD THE "GENERAL TENOR OF RHETORICAL SPEECH" AND EMPLOYED "LOOSE, FIGURATIVE, OR HYPERBOLIC LANGUAGE."

The free speech clause immunizes speech that is rhetorical hyperbole from tort liability. U.S. CONST. Amend. I; *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990). Rhetorical hyperbole may be vulgar, offensive, or insulting however is still protected by the First Amendment. *Schaecher v. Bouffault*, 290 Va. 83, 92 (2015); *see also, Sims-Felton v. Hegedus*, No. 11-4923 (NLH)(AMD), 2013 WL 1844512, at *4 n. 6 (D.N.J. April 30, 2013) (noting that "name-calling does not constitute actionable defamation"); *Yeagle v. Collegiate Times*, 255 Va. 293, 297 (1998) (holding that rhetorical hyperbole is protected by the First Amendment despite being "disgusting, offensive, and in extremely bad taste").

Rhetorical hyperbole is found by looking at two factors. *Snyder v. Phelps*, 580 F.3d 206, 220 (4th Cir. 2009) *aff'd*, 562 U.S. 443 (2011). The first factor is whether the statement has the "general tenor of rhetorical speech," and the second factor is whether the statement employs "loose, figurative, or hyperbolic language." *Id.* (quoting *Milkovich*, 497 U.S. 1); *see also*, *Letter Carriers v. Austin*, 418 U.S. 264, 278 (1974). The court must consider the context in which the statements were made when evaluating the tenor of the statements. *Milkovich*, 497 U.S. at 17-22; *Greenbelt Co-op. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-15 (1970) (holding that "blackmail" was rhetorical hyperbole because, given the context, it would only be interpreted as a State Representative's "negotiating position [was] extremely unreasonable" in a public meeting); *Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002). Here, both the factors would lead a reader of Lansford's article to believe it was only rhetorical hyperbole.

a. Lansford's single article was made in the context of responding to a political opponent, and therefore has the general tenor of rhetorical speech.

To determine the tenor of a statement, the court must look to the context in which the

statement was made. *Milkovich*, 497 U.S. at 17-22 (holding that allegedly defamatory statements should be reviewed given their context); *Bresler*, 398 U.S. at 13-15, 20; *Lane v. Salazar*, 911 F.3d 942, 951 (9th Cir. 2018) (holding that, when a prisoner asked if the Bureau of Prisons was "willing to bet a guards life" on his guilt, it was not in a context that it would be taken as hyperbole); *Schnare v. Ziessow*, 104 F. App'x 847, 850-52 (4th Cir. 2004) (holding that statements were not defamatory because snide comments between competing breeders at a dog show clearly alerts a listener to the hyperbolic nature of the statements); *cf. Green v. Cosby*, 138 F. Supp. 3d 114, 135 (D. Mass. 2015) (holding a statement was not rhetorical hyperbole because it was in the context of a press release); *Bentley*, 94 S.W.3d at 580-85.

When a statement is made in response to a political adversary's criticism, that statement should be afforded First Amendment protection. *See Clifford v. Trump*, 339 F. Supp. 3d 915 (C. D. Cal. 2018); *Rehak Creative Services v. Witt*, 404 S.W.3d 716, 729-32 (Tex. App. Ct. 2013), *disapproved on other grounds by*, *In Re Lipsky*, 460 S.W.3d 579, 587-88 (Tex. 2015) (disapproving of *Witt*'s characterization of the clear and convincing evidence standard). A statement is more likely to be interpreted as rhetorical when a it is "single excited reference." *Clifford*, 339 F. Supp. 3d at 926-28; *Bentley*, 94 S.W.3d at 581 (holding that a single excited reference is indicative of rhetorical hyperbole).

The context of a statement is more important than the literal meaning of the words. *Bresler*, 398 U.S. at 13-15. In *Bresler*, a politician sued a newspaper for the tort of libel. *Id.* The politician, in *Bressler* asserted that the newspaper defamed him when it described the politician's negotiation strategy in a public meeting as "blackmail." *Id.* This Court held that the First Amendment immunized the newspaper from being held liable for tort based on the statement. *Id.* Specifically, a reader could only believe that the newspaper used blackmail in a

hyperbolic fashion given the context and not in the literal sense of the word. *Id.*

In *Bentley*, the defendant's opinion was not rhetorical hyperbole because it was based on defamatory alleged facts that were not accessible by the public. 94 S.W.3d at 580-85. The Supreme Court of Texas held that a listener would believe the defendant was asserting a fact because, such statements were supported by defendant own private research. *Id.* Therefore, the statement, that the plaintiff was 'corrupt' was held to be used in a manner to convince people of a statement of fact. *Id.*

In *Clifford*, a statement was protected by the First Amendment because it was a "single excited reference" and was made with an incredulous tenor. 339 F. Supp. 3d at 926-28. The district court held that the tenor of a statement by President Trump was incredulous because it was made online, in a tweet, in response to a political adversary's own tweet. *Id.* Furthermore, the court noted that the President's statement was only a "single excited reference." *Id.* Therefore, the district court concluded that the tweet would not be perceived as alleging a fact but just responding to the adversary and therefore dismissed the suit under Texas's Anti-SLAPP law. *Id;* Texas Citizens Participation Act, TEX. CIV. PRAC. & REM. § 27.003 (West 2011).

In *Witt*, the court held that making a statement in a politically charged context negates a finding that a reader would perceive the statement as one of facts. 404 S.W.3d at 729-32. In *Witt,* the allegedly defamatory statements were posted on a website that attacked a state judge for his record during a reelection campaign. *Id.* The court held that the statements were protected by the First Amendment because a person of ordinary intelligence would perceive it as nothing more than "politically flavored hyperbole" and not asserting facts. *Id.* Accordingly, the court affirmed the dismissal of the action under the State's Anti-SLAPP law. *Id.*; § 27.003.

Like the statement made in *Clifford*, Lansford's statement was a one-time excited reference,

of which the court in *Bentley* considered to be indicative of rhetorical hyperbole. *Clifford*, 339 F. Supp. 3d at 926-28; *Bentley*, 94 S.W.3d at 581; (J.A. at 3-4.). The only statement at issue was the three-paragraph posting by Lansford. (J.A. at 4.). Similar to the statement in *Clifford*, Lansford's post was filled with emotionally charged language. 339 F. Supp. 3d at 926-28; (J.A. at 4.). In Lansford's post he used emotional language, not alleged by Respondent to be defamatory such as "lusty lush," "hoity toity," and "Robinta Hood" which shows a reader the rhetorical tenor of the posting. (J.A. at 4-5.).

Like the newspaper article in *Bresler*, the context of Lansford's statement does not lead a reader to believe that he is alleging facts. 398 U.S. at 13-15. Lansford was responding to a tirade of insulting columns by Respondent. (J.A. at 3-4.). In his posting, Lansford starts out with a reference to Respondent's columns by stating, "[i]t is ironic that Silvia Courtier blasts me as uncaring toward the less fortunate." (J.A. at 4.). By starting the posting in this manner, a reader is put on notice that it is a responsive statement to Respondent's previous politically charged insults. (J.A. at 4.).

Like in *Witt*, a reader would only perceive Lansford's posting as nothing more than "politically flavored hyperbole." 404 S.W.3d at 729-32. Lansford, like the defendant in *Witt*, referred to a political opponent on his website during the midst of a reelection campaign. *Id.*; (J.A. at 2-5, 8.) Like in *Witt* and *Clifford* the tenor of both Respondent's and Lansford's statements were all in the context of political discourse and therefore would only be perceived as rhetorical hyperbole and require First Amendment protection. (J.A. at 2-5.); *Clifford*, 339 F. Supp. 3d 915; *Witt*, 404 S.W.3d 716.

In conclusion, the tone and tenor of Lansford's statement would only lead a reader to interpret it as politically flavored hyperbole and therefore is protected by the First Amendment.

b. The statement by Lansford used phrasing that is widely perceived as "loose, figurative, or hyperbolic language."

Language that is loose, figurative, or hyperbolic is characteristic of rhetorical hyperbole and does not lead a reader to believe a statement is asserting facts. *Snyder*, 580 F.3d at 220-25 (holding that the Westboro Baptist Church did employ imaginative and hyperbolic language when, they protested using signs saying "[f]ag troops" and "God hates the USA/Thank God for 9/11," because it employed the use of irrelevant and indefinite language that would not be perceived as stating facts) *cf. Milkovich*, 497 U.S. at 17-22 (holding that statements did not employ loose, figurative, or hyperbolic language and therefore not considered rhetorical hyperbole). The language in the statements at issue must be reviewed in the context of the words surrounding it. *Standing Comm. on Discipline of U.S. Dist. Court v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 2015) (interpreting the word "dishonest" in light of the context of the close by "colorful adjectives"); *Green*, 138 F. Supp. 3d at 132-33 (holding that when the words were not surrounded by hyperbolic or figurative language the literal meaning of the words governed).

When deciding whether language is loose, figurative, or hyperbolic it is relevant to determine how, given the context, it would be interpreted. *See, Austin*, 418 U.S. at 277-86; *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 808 (9th Cir. 2002) (noting that in an intellectual property action that calling someone a "pirate" was rhetorical hyperbole because no one would believe the alleged infringers were being called "nautical cutthroats with eyepatches and peg legs who board galleons to plunder cargo"); *see also, Bresler*, 398 U.S. at 13-15 (1970) (holding the word 'blackmail' would be interpreted as hyperbole by a reader when used to describe a negotiation style); *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 401 (2008); *Witt*, 404 S.W.3d at 729-32. Vulgar insults can be protected by the First Amendment as rhetorical hyperbole. *Imperial*, 227 Ill. 2d at 401; *Yeagle*, 255 Va. at 297

(holding that a vulgar insult that was in "extremely bad taste" was rhetorical hyperbole protected by the First Amendment).

When a statement uses words that are commonly used in a hyperbolic fashion it is likely rhetorical hyperbole. *Austin*, 418 U.S. at 277-78. The controversy in *Austin* arose out of a workers' strike. *Id.* The union that represented the permanent workers published the names of the temporary workers, calling them "scabs" and "traitors" with "rotten principles." *Id.* at 283-84. The court held that these statements could not be construed as statements of fact because "they were used obviously used . . . in a loose, figurative sense to demonstrate the union's strong disagreement." [sic] *Id.* at 284.

Statements on a website should be viewed in the context of the entire site to determine their meaning. *Witt*, 404 S.W.3d at 729-32. In *Witt*, a political opponent to a Representative running for reelection created a "[h]ow to succeed" webpage detailing the representative's service as a public official in a negative light. *Id.* The court viewed the statements in the context of the website as a whole. *Id.* at 730-731. The website included references to the "pesky Texas constitution" and called the representative "a professional politician." *Id.* The court held that the "[h]ow to succeed" page was rhetorical hyperbole because such references would lead an ordinary person to only interpret the page as using loose and figurative wording. *Id.*

Statements are protected by the First Amendment as rhetorical hyperbole even when they are extremely insulting and vulgar. *Imperial*, 227 Ill. 2d at 401. In *Imperial*, a published advertisement for a discount mens' clothing store referred to their competitor's offerings as "[r]ags, flea market style warehouse, dried cream cheese, low rent, and a hookers come on." [sic] *Id.* (internal quotations marks omitted). The Supreme Court of Illinois held that those statements were rhetorical hyperbole because the insulting words were just to attract the readers' attention.

Id. Accordingly, the court affirmed the dismissal under the state's motion to dismiss on the pleadings. *Id*; 735 ILL. COMP. STAT. 5/2-615 (1982).

Similar to the statement made in *Austin*, the words Lansford used are commonly made in discourse that resort to personal insults. 418 U.S. at 278. In her original article, Respondent alleged Lansford was "engag[ing] in war on the economically-strapped denizens of Cooperwood" and disparaged him as an "entrenched politician" that "was beholden to special interests." (J.A. at 17.). She specifically alleges that the phrases "a pimp for the rich;" "a leech on society;" "a whore for the poor;" and "corrupt and a swindler" are the defamatory statements. (J.A. at 4-5, 18.).

Urban dictionary[4], an online collective of definitions for words commonly used in American-English slang has over 883 unique entries for the words pimp, leech, whore, corrupt, and swindler. Entries, Urban Dictionary, https://www.urbandictionary.com (Follow the main page hyperlink; then input the contested words into the "Type any word…" field). Further, Urban Dictionary has an entry that directly speaks to the "a leech on society" phrase. Doodling, Societal Leech, URBAN DICTIONARY (Aug. 25, 2019, 12:05 PM), https://www.urbandiction ary.com/define.php?term=Societal%20leech. The entry defines a "societal leech" as "[a] leech in the form of human, who sucks big time but pretends that society will [benefit] from it." *Id.* Obviously, the entries hold no authority to show the definition of the phrases however, it shows

[4] Urban Dictionary has been used by appellate courts to interpret the meanings of words in the English language that are used everyday life. *See Brown-Baumbach v. B&B Auto., Inc.*, 437 F. App'x 129, 131 nn. 1-2 (3d Cir. 2011) (using urban dictionary to define "creamed my pants" and "to get busy"); *O'Hearon v. Hansen*, 409 P.3d 85, 93 n. 8 (Utah 2017) (using urban dictionary to find the common usage of "absent"); *In Re Tracy*, 391 S.C. 51, 57 n. 2 (2010) (using urban dictionary to define "dap").

prevalent the phrases, made by Lansford, are used in a hyperbolic fashion in modern society. Mainstream dictionaries share the view that these phrases are used in a hyperbolic nature. Merriam-Webster, in their entry for "pimp," uses the term, in an example sentence, in a hyperbolic way. Pimp, MERRIAM-WEBSTER DICTIONARY (Online Ed. 2019)[5].

Similar insults have long been used in politically charged discourse in a hyperbolic sense. William Perkins, *Political Insults You Didn't Learn About in History Class*, THE COLUMBUS DISPATCH (Apr. 8, 2016), https://www.dispatch.com/article/20160408/NEWS/304089699 (detailing a speech from 1855 by then Congressmen Raynor calling then President Peirce "the pimp of the White House"). The word "whore" has been used in a hyperbolic fashion dating back to the Shakespearian era. WILLIAM SHAKESPEARE, KING LEAR ACT 2 SC. 4 (referring to fortune as an "arrant whore").[6] As "fortune" is not an actual person it shows that the hyperbolic meaning existed as early as 1606 when King Lear was published. *Id.*

Like the phrases made in *Mattel* and *Imperial*, the phases used by Lansford are for illustrative purposes and would only be interpreted as for an artistic styling to attract the readers' attention. 296 F.3d at 808; 227 Ill. 2d at 401. This is most clearly seen by the use of rhyme between the words "whore" and "poor", the alliteration of "lusty lush," and the contrast between the words "pimp" and "rich." (J.A. at 4-5, 18.).

Similar to the phrase in *Witt,* it is clear that when taken in context as a whole, that

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[5] Merriam Webster uses pimp in the example sentence, "a movie actress who pimped everybody she ever met as she clawed her way to the top." Pimp, MERRIAM-Webster Dictionary (Online Ed. 2019).

[6] Translations of *King Lear* into modern English state that Shakespeare was referring to "Lady Luck." No Fear Shakespeare: King Lear, p. 118 (2003), https://www.sparknotes.com/nofear/shakespeare/lear/page_118/.

Lansford's statement is politically flavored hyperbole. 404 S.W.3d at 729-32. This is because Lansford is responding to Respondent's allegations that he is "engaging in war" and is a "plutocrat" (J.A. at 4.) Furthermore, just like in *Witt*, these were posted on Lansford's website meant to enhance his political career. (J.A. at 8.); 404 S.W.3d at 729-30.

In conclusion, a reader of Lansford's statement would see the loose, figurative, and hyperbolic language in the posting and would only interpret it as rhetorical hyperbole used in response to an attack from a political opponent. Therefore, Lansford's statements are protected under the First Amendment.

c. Lansford's opinion cannot be actionable as defamation because it does not rely on undisclosed defamatory facts.

The Respondent will assert that Lansford's statement is an opinion that relies on unknown facts and therefore actionable as defamation. However, in order for an opinion to be actionable it must imply undisclosed false defamatory facts as the basis and imply that the speaker is a disinterested observer. *Milkovich*, 497 U.S. at 20-21 (holding that an opinion can only be actionable if it implies undisclosed facts that are false and defamatory); *Bentley*, 94 S.W.3d at 581-83 (holding that an opinion, that a judge was corrupt, was actionable because the accuser claimed that it was based on "investigations" he conducted which were not public information) *see also, Brian v. Richardson*, 87 N.Y.2d 46, 53 (1995) (holding that there was not an actionable opinion because "[a]t the outset of the article, defendant [signaled] that he was not a disinterested observer"). It is a true statement that Respondent has pled guilty to drug offenses in the past and therefore the statement was not defamatory. (J.A. at 5); *Milkovich*, 497 U.S. at 20-21. Furthermore, like the statement in *Brian,* Lansford's article signaled at the outset that he was responding to Respondent "blast[ing]" him. (J.A. at 4); 87 N.Y.2d at 53. This case is unlike *Bentley* because Respondent's past is a matter of public record and accesible to everyone. (J.A.

at 5); 94 S.W.3d at 581-83. Therefore, Lansford's statement is not an actionable opinion.

CONCLUSION

In conclusion, this action was properly dismissed by Tenley District Court. Respondent's tarnished reputation could not be further harmed by Lansford's statements, thus, making her a libel-proof plaintiff who could not recover anything more than nominal damages. Furthermore, Lansford's article was rhetorical hyperbole because it had the tone and tenor of hyperbolic speech and a reader would only interpret it as politically flavored hyperbole based on the language he used. Therefore, the decision of the Supreme Judicial Court of Tenley should be reversed on constitutional grounds and remanded to the Tenley District Court for a rehearing consistent with the First Amendment.

Respectfully Submitted,

/s/ Team 219736

Counsels for Petitioner