No. 18-2143

In the Supreme Court of the United States

October Term, 2019

ELMORE LANSFORD,

Petitioner,

v.

SILVIA COURTIER,

Respondent.

On Writ of Certiorari from the Supreme Judicial Court of Tenley

BRIEF FOR ELMORE LANSFORD

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Attorneys for Petitioner

QUESTIONS PRESENTED

1. In a defamation action, when an individual's reputation suffers no cognizable harm, can that individual be a libel proof plaintiff solely on the basis of their extensive past criminal convictions including assault and reoccurring drug charges?

2. Whether the use of the terms "pimp," "leech," "whore," "corrupt," and "swindle," constitute First Amendment protected rhetorical hyperbole, when the challenged statements were made in an online social media post by a public figure in the context of responding to a public critic?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

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

This Court is asked to preserve and uphold this nation's commitment to one of the most important constitutional rights and reverse the decision of the Supreme Judicial Court of Tenley allowing this defamation suit to survive. First, the Tenley Supreme Court improperly affirmed the decision of the Tenley District Court by holding that Respondent, Silvia Courtier, is not a libel-proof plaintiff. (J.A. at 19.). Second, the Tenley Supreme Court improperly reversed the decision of the Tenley District Court by holding that Petitioner's challenged statements were not First Amendment protected rhetorical hyperbole. (J.A. at 23.).

Petitioner, Mr. Elmore Lansford, is the current mayor of the city of Silvertown. (J.A. at 3.). Mr. Lansford has focused his efforts on decreasing crime in the community and improving the city through new real property developments. *Id.* Mr. Lansford first entered the political arena with the help of Raymond Courtier, Respondent's late husband. *Id.* However, after Mr. Courtier's passing, Respondent became a public critic of Mr. Lansford, emphatically supported his opponents, and has continued to voice her criticisms of him on public online media forums. *Id.* She particularly opposes his efforts in pursing property developments, and accuses him of using these efforts to displace Cooperwood residents. (J.A. at 4.).

As a teenager, Respondent stole money and engaged in other illegal activity. (J.A. at 5.). In her early adulthood, Respondent was charged with two felonies for distribution of cocaine and served two years in prison. *Id.* After her prison sentence, she vigorously pursued her education and ended up opening several exclusive and expensive clothing stores in the Silvertown community. *Id.* After experiencing business success with these stores, Respondent has become politically active and significantly involved in certain philanthropic activities within the

community in recent years. (J.A. at 2.). She manages a public website for her businesses and a second public website for her philanthropic activities. *Id.*

Respondent has used her websites to attack Mr. Lansford and in one particular commentary on her website Respondent stated that Mr. Lansford "is out of touch with 21st century America and the need for social justice." (J.A. at 3.). She also stated that the only Silvertown citizens he cares about are "the wealthy developers who seek to reap excess profits over the less fortunate." *Id.* She stated, "he is simply an entrenched incumbent; beholden to special interests" and that "[h]e has engaged in a war on the economically-strapped citizens of Cooperwood." *Id.* She continued to call him a "plutocrat" and call his actions as mayor "repressive." She emphasized the need for him "to be replaced by a compassionate politician, one who cares about all people of all races, genders, and ethnicities." *Id.*

After reading several of these posts alike, Mr. Lansford responded with an online comment criticizing Respondent back. (J.A. at 4.). Mr. Lansford responded with insults, name-calling, and anger-filled banter, which he wrote while extremely upset about Respondent's many attacks on his character. *Id.* Mr. Lansford's comment reads:

> It is ironic that Silvia Courtier blasts me as uncaring towards 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 the defender of the less fortunate. Last time I checked, she is the proprietor of a bunch of upscale, hoity-toity clothing stores that are lacking in class and substance. How ironic that she pimps out these clothes to the rich and lavish. She is corrupt and a swindler, who hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood. I guess she learned something from the streets. Now, this businesswoman is a pimp for the rich and a whore for the Poor. What a Joke!

Id. Respondent sued Mr. Lansford for defamation of character and false light invasion of privacy and challenged the following phrases used by Mr. Lansford: "a pimp for the rich"; "a leech on society"; "a whore for the poor"; and "corrupt and a swindler." (J.A. at 5.).

Mr. Lansford now respectfully requests that this Court reverse the Tenley Supreme Court's decision and hold that Respondent is a libel-proof plaintiff and that Mr. Lansford's comments were rhetorical hyperbole protected by his constitutional right to free speech.

SUMMARY OF THE ARGUMENT

This case is about protecting the integrity of the tort of defamation by determining the appropriate balance between the constitutional mandate of free speech and the protection of an individual's reputational interests. The denial of Mr. Lansford's motion to dismiss by the Supreme Judicial Court of the State of Tenley was improper. Despite Respondent's extensive criminal record and challenges to statements which, when compared to the other statements in the communication, are far less damaging, the court determined that Respondent was not a libel proof plaintiff. Further, even though a reader could not reasonably interpret the challenged statements as asserting fact, the court also found that the challenged statements were not merely rhetorical hyperbole.

The tort of defamation provides redress for an individual whose reputation, because of false statements, has suffered cognizable harm. A plaintiff must prove six elements in order to successfully bring a claim for defamation: identification; publication; defamatory meaning; falsity; statement of fact; damages. At the core of a defamation action is the element of damages. Indeed, without injury to an individual's reputation, there is no damage to redress and the plaintiff has not met the requisite elements.

An individual undoubtedly has a right to protect their reputational interests despite the broad assurances of free speech guaranteed by the First Amendment. However, this right is not without limitation. In circumstances where challenged statements do not impose appreciable harm upon that individual's reputation, some courts have applied the libel proof plaintiff doctrine. The doctrine is applied in two contexts. The issue specific context of the libel proof plaintiff doctrine asks whether an individual's prior criminal convictions have so impacted the plaintiff's reputation that the alleged harm from the challenged statements could merit only

nominal damages and does not validate the chilling of free speech. In contrast, the incremental harm branch of the doctrine considers a publication in its entirety, barring a libel award when the alleged harm caused by the challenged statements is rendered inconsequential because of other highly damaging statements in the same publication.

Though the doctrine's application has been controversial, the reasoning behind the doctrine is aligned with overarching concerns of free speech and the required showing of harm in a defamation action. Without a cognizable harm, an individual can be determined to be libel proof as a matter of law solely on the basis of past criminal convictions, using the libel proof plaintiff doctrine. The substantial concerns regarding the our nation's fundamental ideal of free speech and free press, the essential element of harm in a defamation action, and the practical reality of an individual's reputation cannot be ignored in a case such as this one: where Respondent asks the court to further entertain its frivolous claims in order to recover for a harm that does not exist.

In regards to whether the challenged statements are rhetorical hyperbole, Mr. Lansford respectfully requests this Court to uphold this nation's commitment to one of the most important constitutional freedoms and hold that the challenged statements made by Mr. Lansford are rhetorical hyperbole because they cannot be reasonably interpreted to assert a fact. To constitute defamation and to justify setting aside a citizen's constitutional right to free speech, the challenged statement must be proven to be a false fact. Thus, a defamation claim cannot be based on statements that cannot be reasonably interpreted as stating actual facts about an individual, such as rhetorical hyperbole. When determining the scope and extent of the First Amendment's protection, courts should consider the specific language used in the statement and whether that language is verifiable. Further, even if the specific terms used are susceptible to verification,

there is still no basis for a defamation lawsuit if the context of the statement discloses it was not intended to assert a fact. Lastly, the broad understanding of the traditional function of the forum used to make the challenged statements will confirm and predispose the average reader to regard what is found there to be opinion. Mr. Lansford's statements constitute rhetorical hyperbole for three reasons. First, the challenged statements[1] included specific terms that indicated the use of rhetorical hyperbole. Second, when considering the entire context of Mr. Lansford's post, a reasonable reader could not interpret the challenged statements as asserting a fact. Third, the broader context considering the forum used to make the challenged statements signal to a reasonable reader that no facts were intended to be asserted.

At issue here is the ability for undeserving plaintiffs to use the tort of defamation to chill the constitutional right of free speech in order to recover for a harm that does not exist. Petitioners therefore ask this Court to reverse the lower court's holding that dismissed Mr. Lansford's motion to dismiss by finding that Respondent is a libel proof plaintiff and that Mr. Lansford's statements were, indeed, rhetorical hyperbole.

[1] In this brief, Petitioner will refer to the four challenged statements stated by the Tenley Supreme Court on page 18 of the record; namely, "a pimp for the rich," "a whore for the poor," "a leech on society," "corrupt," and a "swindler" as ("the challenged statements"). (J.A. at 18.).

ARGUMENT

I. UNDER DEFAMATION LAW, AN INDIVIDUAL CAN BE A LIBEL PROOF PLAINTIFF SOLELY ON THE BASIS OF PAST CRIMINAL CONVICTIONS WHEN THERE IS NO COGNIZABLE HARM SUFFERED.

The tort of defamation provides redress for an individual whose reputation, because of false statements, has suffered cognizable harm. David L. Jr. Hudson, *Shady Character: Examining the Libel-Proof Plaintiff Doctrine*, 52 Tenn. B.J. 14 (2016). This Court should find that when there is no reputational harm suffered, an individual can be a libel proof plaintiff solely on the basis of past criminal convictions. A plaintiff must prove six elements in order to successfully bring a claim for defamation: identification; publication; defamatory meaning; falsity; statement of fact; damages. David L. Hudson, Jr. *First Amendment Law: Freedom of Speech*, §5:7. Here, only the element of damages is relevant in so far as it relates to the harm to one's reputation. Without injury to an individual's reputation, there is no damage to redress; the requisite elements of a defamation claim are not met. Damage to one's reputation is therefore at the core of a defamation action. *See* Lamb *v. Rizzo*, 391 F.3d 1133, 1137 (10th Cir. 2004).

Courts recognize that "**t**he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being . . . ." *See Rosenblatt v. Baer*, 383 U.S. 75, 92 (1996)(J. Stewart, concurring). However, this right is not absolute. For example, the right to protect one's reputation must operate in connection with the First Amendment, one of our nation's foundational ideals. Indeed, "First Amendment considerations of free press and speech, promoting society's interest in uninhibited, robust, and wide-open discussion, must prevail over an individual's interest in his reputation . . . ." *Wynberg v. National Enquirer*, 564 F.Supp. 924, 928 (C.D. Cal 1982).

Courts also recognize that in some circumstances, libel plaintiffs ". . . challenge published statements that do not in fact damage their already sullied reputations." Note, *The Libel Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1909 (1985). In such cases, some courts employ the libel proof plaintiff doctrine. *See Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638, 639 (2nd Cir. 1975); *Herbert v. Lando*, 781 F.2d 298, 310 (2d Cir. 1986); *Lamb*, 391 F.3d at 1136; *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069, 1079 (3d Cir. 1988). The doctrine is applied in two contexts. The issue specific context of the libel proof plaintiff doctrine considers ". . . whether previous publicity or criminal convictions have so tarnished the plaintiff's reputation that [they] should be barred, as a matter of law, from receiving a damage award." Note, *The Libel Proof Plaintiff Doctrine,* 98 Harv. L. Rev. 1909, 1911-12 (1985). In contrast, the incremental harm branch of the libel proof plaintiff doctrine ". . . bars libel awards when an article or broadcast contains highly damaging statements, but the plaintiff challenges only a minor assertion in the communication . . ." which in light of the other, more damaging statements, ". . . renders inconsequential any effect of the minor assertion, even if false, and thus should . . . bar the entire libel action as a matter of law." Note, *The Libel Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1912 (1985).

The libel proof plaintiff doctrine ". . . enhances the notion of defamation as injury to reputation . . ." and "promotes the constitutional mandate of protection for open public discussion." Note, *The Libel Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1926 (1985). By acknowledging an individual's prior reputation and the practical result of a defendant's statement, the libel proof plaintiff doctrine bars relief as a matter of law for a plaintiff who has not *actually* suffered any harm to their reputation, serving ". . . the common law and the Constitution equally well." Joseph H. King, Jr. *The Misbegotten Libel-Proof Plaintiff Doctrine*

*and the 'Gordion Knot' Syndrom*e, 29 Hofstra L. Rev. 343, 349 (2000). Accordingly, this Court should reverse the lower court's holding.

A. Limiting recovery in defamation actions to individuals whose reputation has suffered discernable injury by employing the libel proof plaintiff doctrine is consistent with the required elements of the tort of defamation and the constitutional mandate of free speech.

This case is about determining the appropriate balance between the constitutional mandate of free speech and the protection of an individual's reputational interests. The libel proof plaintiff doctrine is therefore a means in which these competing interests can be properly evaluated, acknowledging the requirement for damages and the practical realities surrounding a specific circumstance. Limiting recovery to individuals who suffered injury to their reputation by considering the state of that reputation at the time of the publication, acknowledging that in some circumstances, a publication does not create a genuine harm to an already tarnished reputation, is consistent with the elements of the tort of defamation and accounts for practical reality before the expense of judicial resources**.** *See* Note, *The Libel Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909 (1985); *Herbert,* 781 F.2d at 311; *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303-304 (2d Cir. 1986). While, the libel proof plaintiff doctrine is understandably controversial, today this Court is presented with the opportunity to establish clearly articulated standards that recognize the requirement of harm in defamation actions and the practical reality behind an individual's allegations.

While the fundamental right of free speech and free press is assured by the Constitution, the tort of defamation empowers a plaintiff to obtain damages for reputational harm. David L. Hudson, Jr. *First Amendment Law: Freedom of Speech*, §5:7. Fundamental to a claim of defamation is the ability to ". . . establish a tangible, quantifiable damage . . . ." Bradley C. Rosen, *Proof of Facts Establishing Affirmative Defenses Against a Claim for Defamation*, 99

AM Jur Pof 3d 393. Indeed, if the complaint cannot establish harm to an individual's reputation, the recovery will be limited to only nominal damages. *Id.* Finding that an individual can be a libel proof plaintiff based solely on their past convictions is therefore aligned with the limitations already imposed by the requirements of a defamation claim.

In *Jackson v. Longcope,* 476 N.E. 2d 617, 619 (Mass. 1985), the court recognized that when an individual "is incapable of recovering damages in a libel action" because of their pre-existing reputation, the libel proof plaintiff doctrine is applicable. *Jackson,* 476 N.E. 2d at 619. The necessity of cognizable damage was key to the court's determination that the plaintiff was libel proof, requiring that ". . . it must be clear, as a matter of law, that the reputation of a plaintiff, even a convicted felon, could not have suffered from the publication of the false and libelous statements." *Id.* (citing *Marcone v. Penthouse Int'l, Ltd.*, 577 F.Supp. 318, 333 (E.D. Pa. 1983). At the time of the publication at issue, the plaintiff's criminal record was extensive, including armed assault with intent to murder, unlawful carrying of a firearm, murder in the first degree, kidnapping, rape, and unarmed robbery. *Id.*at 580-81. Finding that at the time of the publication at issue, the plaintiff maintained a ". . . considerable criminal record, as to which there is no dispute of material fact . . . ." the court emphasized, ". . . a libel proof plaintiff is not entitled to burden a defendant with a trial in which the most favorable result the plaintiff could achieve is an award of nominal damages." *Id.*

Further, limiting recovery to individuals who suffered injury to their reputation by acknowledging the state of that individual's reputation emphasizes the practical reality of a given circumstance and ensures that damages are not awarded frivolously. In circumstances where ". . . an allegedly libelous statement cannot realistically cause impairment of reputation because the person's reputation is already so low or because the true portions of a statement have such

damaging effects, even nominal damages are not to be awarded." *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303. (2nd Cir. 1986). The libel proof plaintiff doctrine therefore recognizes the practical reality that ". . . there comes a time when the individual's reputation for specific conduct is sufficiently low . . . ." at which point, "First Amendment considerations of free press and speech, promoting society's interest in uninhibited, robust, and wide-open discussion, must prevail over an individual's interest in his reputation . . . ." *Wynberg,* 564 F.Supp. at 928 (C.D. Cal 1982).

Here, Respondent has not indicated any cognizable harm to her reputational interest and asks the Court to overlook the state of her reputation and the practical reality of the communications involved. The inability of the plaintiff in *Jackson* and the Respondent here, to allege a cognizable harm that warrants an award of damages, is important because it indicates that while the statements were certainly offensive, they did not cause cognizable harm to a reputational interest. Like in *Jackson*, at the time of Petitioner's statement, Respondent also maintained an extensive criminal record, including a felony. (J.A. at 15.). Respondent's litany of offenses includes, simple assault, reoccurring felonious drug charges involving the possession and distribution of cocaine and the possession of marijuana, indecent exposure, and vandalism. (J.A. at 15-16.). Despite the offensive nature of the statements made by Petitioner, Respondent has not established the type of "tangible, quantifiable damage" that is crucial to a claim of defamation. Bradley C. Rosen, *Proof of Facts Establishing Affirmative Defenses Against a Claim for Defamation*, 99 AM Jur Pof 3d 393. Defamation law does not afford unto a plaintiff the opportunity to expend judicial resources and chill an individual's First Amendment right to free speech because of an offensive interaction – there must be a cognizable damage to an individual's reputational interests. Here, Respondent cannot meet that element.

Applying the libel proof plaintiff doctrine upon these facts is therefore consistent with the purpose of the tort of defamation: to provide redress for an individual who, because of false statements, has suffered cognizable harm. Unable to establish the requisite showing of harm, "'the claim should be dismissed so that the costs of defending against the claim of libel, which can themselves impair vigorous freedom of expression, will be avoided.'" *Guccione*, 800 F.2d at 303.

Despite the commitment to the elements of a valid defamation claim inherent in the libel proof plaintiff doctrine and the doctrine's acknowledgement of practical realities surrounding an individual's claim, some courts view the doctrine as a "fundamentally bad idea." *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984). Though facially adverse, the reasoning in *Liberty Lobby* is reconcilable with the idea of limiting recovery to individuals who suffered cognizable injury to their reputation. Asserting that the libel proof plaintiff doctrine required rejection because "[t]he law . . . proceeds upon the optimistic premise that there is a little bit of good in all of us – or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse," the court rejected the appellee's argument that the appellant was libel proof. *Liberty Lobby*, 746 F.2d at 1568.

Acknowledging that in some circumstances, a publication does not create a cognizable harm to an already tarnished reputation does not conflict with the idea that "there is a little bit of good in all of us" or that "no matter how bad someone is, he can always be worse." *Id.* Indeed, the fact that someone can always be worse does not change the fact that the tort of defamation requires a plaintiff to show a cognizable harm to their reputation. While of course, someone can always be worse, that does not mean that in a given circumstance, a negative publication *necessarily* damages an individual's reputation just because, conceivably, a reputation *could* be

worse. A defamation claim looks to the challenged communication at issue and determines whether a harm has occurred. Awarding damages to an individual who has not *actually* been harmed by the communication because of the fact that conceivably, their reputation *could* be worse is an expansion of defamation law that dilutes the requirement of a cognizable injury to an individual's reputational interest.

B. An award of damages is unjustified when challenged statements cannot realistically cause cognizable harm to a plaintiff's reputation because past criminal convictions have already damaged the plaintiff's reputation.

A plaintiff who challenges ". . . published statements that do not in fact damage their already sullied reputations," skews the appropriate balance between the constitutional mandate of free speech and the protection of an individual's reputational interests. Note, *The Libel Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1909 (1985). The issue specific branch of the libel proof plaintiff doctrine can therefore be used to remedy this imbalance:

> It recognizes that damage to one's reputation is the core of a defamation action, and essentially holds that when a plaintiff's reputation is so diminished at the time of publication of the allegedly defamatory material that only nominal damages . . . could be awarded because the person's reputation was not capable of sustaining further harm, the plaintiff is deemed to be libel proof as a matter of law and is not permitted to burden a defendant with trial.

Lamb v. Rizzo, 391 F.3d at 1137 (citing Eliot J. Katz, Annotation, *Defamation: Who is "Libel Proof,"* 50 A.L.R. 4th 1257 (2004)). When there is no cognizable harm because of an already tarnished reputation, an individual can be a libel proof plaintiff solely on the basis of past criminal convictions. *See also Cardillo*, 518 F.2d at 640; *Jackson*, 476 N.E. 2d at 619; *Wynberg*, 564 F.Supp. at 925; *Logan v. District of Colombia*, 447 F.Supp. 1328, 1130 (D.D.C. 1978).

In *Lamb*, the Tenth Circuit determined that the allegedly libelous articles in question where ". . . not actionable as a matter of law." *Id.* at 1140. The defendant argued that the plaintiff was libel proof because at the time the challenged articles were published, the plaintiff's

reputation was so diminished – he had a criminal record of kidnapping and murder convictions, that he could not be further injured by allegedly false statements regarding his convictions. *Id.* at 1135. The plaintiff's argument was particularly interesting. He claimed that, ". . . by the time the articles were published, his reputation had been rehabilitated and that he was no longer libel proof." *Id.*

Despite the plaintiff's evidence in the form of letters from various individuals who had written on his behalf, the court acknowledged that "[d]epending upon the nature of the conduct, the nature of offenses, and the degree . . . of publicity received, there comes a time when the individual's reputation for specific conduct, or his general reputation for honesty and fair dealing is sufficiently low . . ." and suit is improper. *Id.* at 1137. The court further asserted that because the plaintiff ". . . had already suffered from a lowered reputation in the community due to his prior convictions for the crime alleged in the publication *or for a similar crime*." *Id.* at 1139 (citing *Ruebke v. Globe Communications Corp.*, 738 P.2d 1246, 1249 (Kan. 1987) (emphasis added). Finding that the challenged communication related specifically to his past criminal convictions, the court rejected the idea that the plaintiff's reputation was rehabilitated. *Id. Lamb* is therefore an example of an instance ". . . where . . . allegedly libelous statements cannot realistically cause impairment of reputation . . . and the plaintiff's claims should be dismissed." *Id.* at 1140 (citing *Guccione*, 800 F.2d at 303).

Similarly, here, the challenged statements cannot realistically cause cognizable harm to Respondent's reputation. With a criminal record[2] that includes repeated felonious behavior and

[2] The litany of specific convictions, including felonious charges regarding drug distribution, is listed in the preceding section.

imprisonment, statements that related to Respondent's prior convictions and statements relating to similar crimes do not cause additional harm. Petitioner's statements, "corrupt and a swindler," "whore for the poor," "leech on society" relate to Respondent's criminal act of stealing from a local produce store and her felonious convictions of drug possession and distribution, as well as indecent exposure and assault. While not specifically relating to these crimes, the statements, although not identical, are sufficiently similar to Respondent's crimes. *See Cardillo*, 518 F.2d at 640 (2d Cir. 1975) (finding plaintiff to be libel proof even though plaintiff's prior convictions and indictments were similar, but not identical, to those specifically described in the publication at issue).

Some courts require a substantial showing of widely disseminated publicity regarding the convictions. *Thomas v. Telegraph Publishing Co.*, 155 N.H. 314, 325 (N.H. 2007). Respondent's criminal record is not hidden from the public. To the contrary, it is a matter of public record. Even more public however is how Respondent uses her past to inform her overtly public, political positions which she passionately professes and defends. Respondents new reputation that she claims has been jeopardized by Petitioner's communication is actually premised on the reality of her past. Respondent has therefore not rehabilitated her reputation but rather, used her reputation to her benefit for years. Now however, when that reputation is recognized in a different way – one that Respondent did not curate herself, suit is brought. This is an improper use of the tort of defamation. Like in *Lamb*, the substantial time period separating the Respondent's crimes to her life today does not diminish the fact that these convictions are still an integral part of her reputation.

Respondent's extensive criminal record is undoubtedly part of her reputation. As such, this challenge is one where the statements at issue do not realistically cause appreciable damage

to an already effected reputation. Here, an award of damages would embolden plaintiffs to bring frivolous claims in order to recover for a harm that does not exist.

C. When challenged statements in a publication cause no appreciable, additional harm when read alongside unchallenged, damaging statements in the same publication, the plaintiff has not suffered a cognizable harm that warrants an award of damages.

The incremental harm branch of the libel proof plaintiff doctrine requires the evaluation of a ". . . defendant's communication in its entirety and considers the effects of the challenged statements on the plaintiff's reputation in the context of the full communication." Note, *The Libel Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1912-14 (1985). By considering the challenged statements in the context in which they were communicated, the incremental harm branch of the libel proof plaintiff doctrine ". . . measures the incremental harm inflicted by the challenged statements beyond the harm imposed by the rest of the publication." *Herbert*, 781 F.2d 311. (citing *Simmons Ford Inc. v. Consumers Union*, 516 F.Supp. 742, 750 (S.D.N.Y. 1981) (stating that the challenged portions of the article in question could not harm the plaintiffs' reputation beyond the harm already caused by the unchallenged portions). Consistent with the notion that reputational harm is the cornerstone of a defamation claim, when ". . . unchallenged or non-actionable parts of a publication are damaging, an additional statement, even if maliciously false, might be non-actionable because it causes no appreciable additional harm." *Church of Scientology International v. Behar*, 238 F.3d 168, 176 (2nd Cir. 2001).

Simmons, the case first introducing the incremental harm branch of the libel proof plaintiff doctrine, is an example of a court's commitment to the common law and constitutional foundations of libel law. In *Simmons*, the court granted the defendant's motion for summary judgement, holding in relevant part that, ". . . the portions of the article challenged by plaintiffs, could not harm their reputations in any way beyond the harm already caused by the remainder of

the article." *Simmons*, 516 F.Supp. at 750. The plaintiff in *Simmons* brought suit after the defendant's periodical published negative evaluations of the plaintiff's new electric car. *Id.* at 744-746. Rating the car as "Not Acceptable," the article published a host of damaging issues: poor acceleration, low top speed, poor braking, poor handling, poor ride, poor comfort, and generally negative performance. *Id.* The article also contained an inaccurate statement regarding the car's compliance with federal safety standards. *Id.* This assertion, that the car did not meet federal safety regulations, was the only portion of the article challenged. *Id.*

The reasoning in *Simmons* is instructive because it recognizes the realistic effect and minor impact towards the plaintiffs' reputational interest in comparison to the constitutional mandate of free speech. Acknowledging that the challenged statement could not realistically create incremental harm in light of the already damaging statements regarding the great many problems with the plaintiff's electric car, the court explained, ". . . the blunt fact is that . . . if the article had made no reference to federal safety standards or [plaintiffs'] exemptions from them, the opinions expressed therein upon which the defendant concluded the car was "Not Acceptable" would not give rise to any actionable claim in plaintiffs' favor." *Id.* at 750. Indeed, "[g]iven the abysmal performance and safety evaluations detailed in the article, plaintiffs could not expect to gain more than nominal damages based on the addition to the article of the misstatement relating to federal safety standards." *Id.* Importantly, when compared to the First Amendment at stake, the court determined that the plaintiffs' reputational interest in "avoiding further adverse comment" was "minimal." *Id.* at 751.

Similarly, here, Respondent seek to recover what would amount to nominal damages for challenged statements that could not realistically create incremental harm in comparison to the unchallenged statements. Like in *Simmons*, the publication included a host of negative

statements, including some that even alluded to prior criminal convictions. Respondent did not challenge the entire communication. (J.A. at 18.). Instead, only the following statements were challenged: "pimp for the rich;" "leech on society;" "whore for the poor;" "corrupt and a swindler." (J.A. at 18.). While these statements are certainly offensive, the Respondent's silence with regard to the other, more damaging statements in the publication is curious. Not mentioned in Respondent's libel claim are the statements made in the rest of the publication: "strung out on drugs;" "former druggie;" "lewd and lusty lush;" "coddler of criminals;" "hoodwink." (J.A. at 18.).

Here, Respondent requests the Court to chill an individual's First Amendment right to free speech on the basis of statements that, in the context of the entire communication, ". . . could not harm the plaintiffs' in any way beyond the harm already caused by the remainder of the article." *Simmons*, 516 F.Supp. at 750. When surrounded by statements that involve subjects that are particularly sensitive in today's society, including repeated drug use, controversial sexual behavior, and the politicization of the criminal justice system, the challenged statements do not provide an incremental harm beyond the harm already caused. Respondent is unable to show that the challenged statements damage her reputational interest beyond the insult already occurring due to the rest of the publication. Indeed, the unchallenged statements and their impact on Respondent's reputational interest render the challenged statements in the same article inconsequential. Like in *Simmons*, where ". . . plaintiffs could not expect to gain more than nominal damages . . . ." because of the challenged statement amid an article filled with abysmal statements of poor performance, Respondent cannot identify further damage to their reputational interest, when the challenged statements are amid a publication filled with scathing statements, that would warrant more than nominal damages. *Id.*

Petitioner acknowledges that most Circuit Courts do not employ the incremental harm branch of the libel proof plaintiff doctrine. Although facially problematic, the reasoning behind the decisions to either reject or to choose an alternative legal theory is illustrative for its indication that the policy behind the incremental harm doctrine is sound but its application requires clarification. For example, the D.C. Circuit, in *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), rejected the notion that plaintiffs' reputations were "irreparably strained by prior publications," and that challenged statements were inconsequential in the context of the entire publication, the argument made in *Simmons*. Rejecting the "prior publication" argument, the court reasoned, "[w]e see nothing to be said for the rule that a conscious, malicious libel is not actionable so long as it has been preceded by earlier assertions of the same untruth." *Liberty Lobby*, 746 F.2d at 1568. This reasoning is inapposite. At issue in the current case is not the question of whether prior publications render the reputational harm from future publications inconsequential. Here, the conflict between Respondent's claim and the required showing of injury to their reputation is the fact that the unchallenged statements in a single publication do not create an appreciable additional harm to their reputational interest . Prior publications are therefore not considered when evaluating whether a plaintiff can be a libel proof plaintiff under the incremental harm branch of the doctrine – the statements in a single publication are at issue. Accordingly, the incremental harm branch is a far cry from ". . . sanctioning willful character-assassination so long as it is conducted on a massive scale." *Id.*

Further, the court's rejection of the theory used in *Simmons* because, ". . . it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety," invites the opportunity for clarification. Inherent in the reasoning that there is no additional harm impacting a plaintiff who challenges statements that have negligible impact in light of the unchallenged

statements that substantially damage their reputational interest, is the recognition that conceivably, a challenged statement may indeed have a significant impact on the plaintiff's reputational interest. The incremental harm theory therefore does not reduce an individual's reputation to a "monolith," but rather, acknowledges that there may be situations where a challenged statement carries appreciable, additional harm. However, when the additional incremental damage to the plaintiff's reputation caused by a statement is negligible in comparison to the unchallenged statements, an award of damages for no cognizable harm is unwarranted.

II. MR. LANSFORD'S CHALLENGED STATEMENTS CONSTITUTE RHETORICAL HYPERBOLE, PROTECTED BY HIS CONSTITUTIONAL RIGHT TO FREE SPEECH, BECAUSE EACH CHALLENGED STATEMENT CANNOT BE REASONABLY INTERPRETED AS ASSERTING A FACT.

Mr. Lansford respectfully requests this Court to deny Respondent's attack on his First Amendment right to free speech and hold that the challenged statements made by Mr. Lansford are rhetorical hyperbole because they cannot be reasonably interpreted to assert a fact. When determining the scope and extent of the First Amendment's protection, courts should consider the specific language used in the statement and whether that language is "verifiable." *Milkovich*, 497 U.S. at 8 (discussing analysis used in *Ollman*, 750 F.2d at 977. Further, even if the specific terms used are "susceptible to verification," there is still no basis for a defamation lawsuit if the context of the statement discloses it was not intended to assert a fact." *Greenbelt*, 398 U.S. at 13. Lastly, the broad understanding of "the traditional function" of the forum used to make the challenged statements will confirm and "predispose the average reader to regard what is found there to be opinion." *Ollman*, 750 F.2d at 986-87.

Mr. Lansford's statements constitute rhetorical hyperbole for three reasons. First, the challenged statements included specific terms that indicated the use of rhetorical hyperbole. Second, when considering the entire context of Mr. Lansford's post, a reasonable reader could not interpret the challenged statements as asserting a fact. Third, the broader context considering the forum used to make the challenged statements signal to a reasonable reader that no facts were intended to be asserted.

A. The specific terms used by Mr. Lansford in the challenged statements reveal the use of rhetorical hyperbole and indicate that no reasonable reader can interpret his statements as asserting a fact.

The specific terms used by Mr. Lansford are not capable of asserting a fact about Respondent. When determining whether a challenged statement can be reasonably interpreted to assert a fact or whether it is rhetorical hyperbole, the courts should consider the specific language used in the statement and whether that language is "verifiable." *Milkovich*, 497 U.S. at 8 (discussing analysis used in *Ollman*, 750 F.2d at 977). It is well established that mere name-calling is protected rhetorical hyperbole and cannot be the basis for a defamation suit, because there is no fact being asserted through name-calling. *RainSoft v. MacFarland*, 350 F. Supp. 3d 49, 57 (D.R.I. 2018) (defendant's name calling, including "scam" and "shady" is "protected by the First Amendment as 'imaginative expression' or 'rhetorical hyperbole.'")

When the terms used indicate a "tremendous imprecision of meaning," there is no fact being asserted and the statement can only amount to ambiguous hyperbole. *Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976). In *Buckley*, the challenged statement referred to a columnist as a "fellow traveler" of "fascism" *Id.* at 887. The Second Circuit Court held that the use of the terms "[could not] be regarded as having been proved to be statements of fact, among other reasons, because of the tremendous imprecision of the meaning and usage of these terms in the

realm of political debate." *Id.* at 893. The terms indicated an imprecision of meaning because each of those terms are "referable to a whole range of meanings and characteristics." *Id.* at 894. These several and ambiguous definitional possibilities served as an indication that the party did not, nor did it intend to, assert a fact by making the challenged statements. *Id.*

Mr. Lansford's challenged statements constituted exaggerated name-calling and nothing more. The Tenley District Court properly referred to Mr. Lansford's statements as "an immature rant." (J.A. at 8.). The Tenley Supreme Court referred to Mr. Lansford's statements as "churlish comments he made on social media." (J.A. at 14.). Although the Tenley Supreme Court was mistaken in its ultimate holding regarding rhetorical hyperbole, both Tenley courts appear to agree that the majority, if not all, of Mr. Lansford's statements were "name-calling and mere epithets." (J.A. at 22.). When Mr. Lansford used the phrases "a pimp for the rich, a leech on society, [and] a whore for the poor," he was engaging in mere name-calling and his use of this particular language negates any impression that he was intending to assert a fact, or did assert a fact at all, whether explicitly or implicitly. (J.A. at 18.). The terms "pimp," "leech," and "whore" are all terms that are incapable of asserting an actual fact and instead qualify as the loose, imprecise, and rhetorical hyperbole that is protected speech under the First Amendment. *Id.* Further, like the terms used in *Buckley*, the terms "corrupt" and "swindler" are also "referable to a whole range of meanings and characteristics," [3] and are thus often used with a "tremendous

[3] For example, the adjective definitions of "corrupt" are "(1)(a): morally degenerate and perverted: depraved, (1)(b): characterized by improper conduct (such as bribery or the selling of favors); (2): putrid, tainted; (3): adulterated or debased by change from an original or correct

imprecision of meaning," further negating the impression that a fact was at all asserted by Mr. Lansford in the challenged statements. *Id.*

B. <u>When considering the whole context of Mr. Lansford's statements, no reasonable reader can interpret his statements as asserting a fact.</u>

Even if the terms "corrupt" and "swindler" could be narrowed down to a tangible meaning that on its face could imply Mr. Lansford was asserting a fact, the context of Mr. Lansford's whole post indicate that the challenged statements were rhetorical hyperbole and incapable of reasonably asserting a fact. Even if the terms used are "susceptible to verification," there is still no basis for a defamation lawsuit if the "context of the statement discloses it was not intended to assert a fact." *Greenbelt,* 398 U.S. at 13.

Even the use of terms that can be used to describe illegal conduct cannot be construed as representations of fact when used in a loose context to describe negativities or criticisms of the intended recipient. *Greenbelt,* 398 U.S. at 14. In *Greenbelt,* the subject of defamation was the use of the term "blackmail" to describe a public figure's "negotiating position [as] extremely unreasonable" during a heated city council meeting. *Id.* Contrary to the public figure's allegations, this Court found that "[n]o reader could have thought that . . . their words were charging [the public figure] with the commission of a criminal offense." *Id.* Further, this Court found that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole [and] a vigorous epithet." *Id.* This Court further supported its conclusion by noting that "the record [was] completely devoid of any evidence that anyone . . . thought [the public figure] had been charged with a crime." *Id.*

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condition." "corrupt." Merriam-Webster Online Dictionary. 2019. https://www.merriam-webster.com/dictionary/corrupt (13 Sept. 2019).

This Court and the vast majority of state and federal courts below it have held accordingly since this Court's decision in *Greenbelt*. *See Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) (holding that the use of the term "traitor" and the pejorative use of the term "scab" did not assert or imply that recipients had committed a crime of treason, rather were used loosely and figuratively to express the "contempt felt by union members towards those who refuse to join."); *Southern Air Transport v. Am. Broadcasting Cos.*, 877 F.2d 1010, 1016-17 (D.C. Cir. 1989) (defendant's statements were opinion when stating that plaintiff's conduct was illegal); *Buckley*, 539 F.2d at 893 (certain terms in the realm of political debate are often used rhetorically and there was no reasonable indication that the columnist was actually being accused of being a member of a communist or fascist political party.); *Aldoupolis v. Globe Newspaper Co.*, 500 N.E.2d 794, 797 (Mass. 1986) (defendant's statements were opinion when stating that individuals were wrongly acquitted of a rape).

Similarly, certain types of rhetorical hyperbole are easily identifiable because they are "normally associated with politics and public discourse in the United States." *Clifford v. Trump*, 339 F. Supp. 3d 915, 925 (C.D. Cal. 2018)[4]. As the Tenley District Court acknowledged, "[a] political candidate has no license to defame his hecklers, but he also has no obligation to suffer

[4] In *Clifford*, the challenged statement made by President Trump via a social media post included the terms "total con job." *Id.* at 926. The court held that his statements could not reasonably be interpreted as an actual criminal accusation, because the statement "display[ed] an incredulous tone, suggesting that the content . . . was not meant to be understood as a literal statement about [p]laintiff." *Id.* Rather, his comments were "extravagant exaggeration that [was] employed for rhetorical effect" even though disparaging and inflammatory. *Id.*

them silently. One who engages in fractious and factious dialogue . . . cannot demand sweetness and light from his adversary." *Miller v. Brock*, 352 So.2d 313, 314 (La. Ct. App. 1977). Certain circumstances, like dialogue between opposing sides in midst of a political election, naturally tell the reader that inflammatory comments made are lacking a factual basis. For example, this Court recalled observing that labor disputes are generally "heated affairs" and that "representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." *Letter Carriers*, 418 U.S. at 272. Similarly, political campaign disputes between opponents and between opposing side supporters are similar types of "heated affairs" that this Court described in *Letter Carriers.*

Respondent alleges that Mr. Lansford has used the terms "corrupt" and "swindler" to defame her "by accusing her of 'swindling the poor for her social causes.'" (J.A. at 6.). However, the context in which these terms were used indicates that there is no basis for a reasonable belief that Mr. Lansford was actually accusing Respondent of fraudulent conduct, just as this Court concluded in *Greenbelt, Letter Carriers,* and *Clifford*. Rather, the context reveals that Mr. Lansford made these statements and used these particular phrases loosely to express the disdain he felt towards Respondent and his opinions of Respondent as hypocritical. Additionally, there is no evidence in the record that any reader did interpret or could have interpreted such an accusation, which further supports this reading of the context in which Mr. Lansford made these statements. Rather, the terms "corrupt" and "swindler" and terms alike are often employed during heated political quarreling, as in Mr. Lansford's situation. Mr. Lansford made these comments in response to Respondent's disparaging comments against him, where she stated that he "is a plutocrat," who only cares about "wealthy developers" and has "engaged in a war on the

economically-strapped denizens of Cooperwood." (J.A. at 3-4.). By making the challenged statements, Mr. Lansford responded in the same manner initiated by Respondent and it would encourage frivolous defamation suits to find a basis for liability when two political adversaries are merely exchanging insults.

Courts have routinely distinguished between statements that are purely rhetorical hyperbole and "mixed opinion statements," the latter being statements that include rhetorical hyperbole, but are also coupled with factual defamatory accusations. *Laughland v. Beckett*, 870 N.W.2d 466, 475 (Wis. Ct. App. 2015). The court in *Laughland*, cited by the Tenley Supreme Court, cited a portion of the relevant state statute and held that "[m]ixed opinion is a communication which blends an expression of opinion with a statement of fact." *Id.* The defendant called the plaintiff names such as "corrupt" and "preying swindler," however the "[defendant]'s Facebook posts did not merely opine that [plaintiff] was a "low life loser." *Id.* at 474-75. Rather, [defendant] made specific allegations—many written in the first person—accusing [plaintiff] of defrauding banks, 'manipulating banks and credit card companies' and engaging in 'underhanded business practices.'" *Id.* at 475. The court further noted that "the record contains no factual basis for [defendant]'s assertions, even if we view them as 'opinions.'" *Id. See also Kumaran v. Brotman*, 617 N.E.2d 191, 194-96 (Ill. App. Ct. 1993) (defendant never called plaintiff a 'swindler' and instead made thirteen specific and factual libelous accusations, stating that plaintiff had "accused two federal court judges of racism" and had "taunt[ed]" his attorney" in regarding an issue at a trial); *Kolegas v. Heftel Broadcasting Corp.*, 607 N.E.2d 201, 208 (Ill. 1992) (defendant not only stated plaintiff was "scamming them" but also that there was "no such show as the classic cartoon festival," and the latter *could* be reasonably construed as asserting facts; namely, that plaintiff was concealing that no festival would take place).

The Tenley Supreme Court also stated that "it is at least possible that calling the Petitioner 'corrupt' and a 'swindler' is defamatory" and cited particular circumstances where the use of "corrupt" and words alike were determined to be defamatory. (J.A. at 22.). However, this distinction between pure hyperbole and mixed opinion is the very distinction that the Tenley Supreme Court failed to recognize when it cited the aforementioned cases as support for the proposition that Mr. Lansford's comments could be defamatory. (J.A. at 22.). Unlike the circumstances in *Laughland, Kolegas,* and *Kumaran*, here, there is no evidence in the record that any reader did interpret or could have interpreted such an accusation further supports this reading of the context in which Mr. Lansford made these statements. This was not the sort of "mixed opinion" discussed in *Laughland*, rather Mr. Lansford's challenged statements contained pure hyperbole, with no related, accompanying factual accusations.

C. The forum in which Mr. Lansford made the challenged statements signals to a reasonable reader that the statements found do not contain real assertions of fact.

Mr. Lansford posted the challenged statements on his social media website online, which is a forum that indicates to a reasonable reader that his statements did not contain real assertions of fact. When a reasonable reader encounters a forum where typical "hard news" is not found, the broad understanding of "the traditional function" of that forum will "predispose the average reader to regard what is found there to be opinion." *Ollman*, 750 F.2d at 986-87 (holding that the op-ed" columnist page is not where a reasonable reader would expect to find "hard news," such as on the front page of the newspaper or other objective news reporting areas).

The use of rhetorical hyperbole will only be considered libelous if made in an otherwise objective, unbiased, and factual forum. *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 152 (2d Cir. 2000). In *Flamm*, a former client of an attorney described the attorney as an "ambulance chaser" who only takes "slam dunk cases." *Id.* at 152. The Second Circuit Court held that in the

broader context, the phrases could be reasonably interpreted to mean an attorney who improperly solicits clients and then takes only easy cases. *Id.* However, the court noted that the forum in which the former client used to express these thoughts was essential in its holding. *Id.* The description was written in an attorney directory for referrals put out by a national professional organization, which "was, in all other respects, purely factual." *Id.* The court reasoned that it would "not be unreasonable for a reader to believe that the AAUW would not have printed such a statement without some factual basis." *Id.* Thus, the court held that because of "the 'general tenor' of the publication," a "reasonable reader [was] more likely to treat as fact the description of Flamm as an 'ambulance chaser' because there is nothing in the otherwise fact-laden directory to suggest otherwise." *Id; see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (statements in the form of an advertisement "parody" could not reasonably be understood as describing actual facts about the public figure).

Here, unlike the forum used in *Flamm*, the forum used by Mr. Lansford indicated to his readers that his post was an emotional and exaggerated expression of rhetorical hyperbole intending to put Respondent in a negative light in the same way she did to him. The record is devoid of any indication that Mr. Lansford's social media website was in all other respects, purely factual. A reader, keeping this forum in mind, cannot reasonably believe that Mr. Lansford was conveying any factual assertions through the challenged statements he made. Accordingly, this court should reverse the lower court's holding.

CONCLUSION

For the reasons set forth above, an individual, who has suffered no cognizable harm to their reputational interests, can be a libel proof plaintiff under defamation law. Additionally, because each challenged statement cannot be reasonably interpreted as asserting a fact, Mr. Lansford's challenged statements constitute rhetorical hyperbole and are protected under his constitutional right to free speech. As such, Petitioner respectfully requests that this Court reverse the lower court's holding that denied Mr. Lansford's motion to dismiss.

Respectfully Submitted,

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