NO. 18-2143

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

ELMORE LANSFORD,

Petitioner,

v.

SILVIA COURTIER,

Respondent.

On Writ of Certiorari to the

Supreme Judicial Court of Tenley

BRIEF FOR PETITIONER

TEAM NO. 219753

Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether an individual can be a libel-proof plaintiff under defamation law solely based on past criminal convictions for various juvenile offenses and felony possession of cocaine that have gained no notoriety or public attention?

II. Whether, in context, the statements "corrupt" and "a swindler" qualify as unprotected defamation or protected rhetorical hyperbole?

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JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

This case arises amongst an epidemic of political tension spreading across the United States. Public disdain and banter between those who intertwine themselves with politicians is an ever-increasing part of campaigning. Silvia Courtier entered this political arena by openly asserting her opinion of Elmore Lansford on her public website. (J.A. at 3.).

Silvia Courtier has an extensive public record. (J.A. at 5.). In one of multiple juvenile adjudications including simple assault, simple possession of marijuana, indecent exposure, vandalism, and possession of cocaine, she was declared delinquent. (J.A. at 5, 15.). Additionally, she made a habit of robbing grocery stores. (J.A. at 5.). This plethora of socially unacceptable behavior did not cease after Courtier was given an opportunity to redeem herself through a period of captivity in a boot camp for offenders. (J.A. at 15.). Instead, Courtier carried her propensity for irresponsibility into adulthood when she was arrested and charged with possession and distribution of cocaine for which she was ultimately incarcerated for two years following her guilty plea. (J.A. at 15–16.).

After release from prison, Courtier established herself within the community by opening high-end clothing stores and eventually marrying the mayor. (J.A. at 2.). She used her newfound social status to donate to and associate herself with causes relating to her past including educational equity, restorative justice, and affordable housing. (J.A. at 2.). Despite losing her husband, Courtier remains tangled in these issues by maintaining a website relating to these causes. She maintains a separate website for her business. (J.A. at 2.). Courtier uses her social website to criticize political candidates whose views she disagrees with, including the current mayor, Elmore Lansford. (J.A. at 3.). These negative assessments have included calling Lansford

a "relic of the past," "a divisive leader," "someone who cares little for social justice issues," and the post which spurred the speech challenged by Courtier in this case which read:

> The Time is Now for Political Change!
>
> The choice is clear for the citizens of Silvertown. Our current mayor, Elmore Lansford, is out of touch with 21st century America and the need for social justice. We need a mayor who cares about all of the citizens of Silvertown, not just the wealthy developers who seek to reap excess profits over the less fortunate in our community.
>
> Lansford's time is past. He once was a caring politician, but now he is simply an entrenched incumbent; beholden to special interests. He has engaged in a war on the economically-strapped denizens of Cooperwood, imposing more and more police patrols. His repressive measures contribute to the process of gentrification and the displacement of Cooperwood residents to other neighborhoods or other cities.
>
> In short, Mayor Lansford is a plutocrat. He needs to be replaced by a compassionate politician, one who cares about all people of all races, genders, and ethnicities.
>
> That candidate is Evelyn Bailord. She has devoted her life to social justice causes. She was a former member of the United States Peace Corps years ago. In her law practice, she devoted countless hours to pro bono service. She will put policies into practice that champion many of the social justice causes that are most important to our community. We have endeavored to share over the past several years.
>
> The choice is clear for Silvertown – Out with the Old and In with the New.
>
> Vote for Bailord on Election Day!

(J.A. at 3, 17.).

Compelled by the criticisms of Silvia Courtier, Elmore Lansford, a man whose mayoral efforts have been put towards developing Cooperwood and ridding it of drugs, responded by posting the following message on his website:

> 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 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 pimp for the rich and a whore for the Poor. What a Joke!

(J.A. at 3, 18.).

II. SUMMARY OF THE PROCEEDINGS

Courtier sued alleging defamation and false light invasion of privacy based on the following statements:

"A pimp for the rich";

"A leech on society";

"A whore for the poor"; and

"Corrupt and a swindler."

(J.A. at 5.).

The United States District Court for the District of Tenley denied Lansford's special motion to strike and dismiss as a strategic lawsuit against public participation (SLAPP) under the Tenley Citizens' Public Participation Act, Tenley Code Ann. § 5 – 1 – 701 *et seq.* (J.A. at 2.). The district court rejected application of the Libel-Proof Plaintiff Doctrine but held that Lansford's statements were rhetorical hyperbole protected by the First Amendment. (J.A. at 11–13.).

Courtier appealed to the Supreme Judicial Court of State of Tenley, which held that Courtier was not subject to the doctrine due to rehabilitation. (J.A. at 19–20.). The court also held that the statements "corrupt" and "a swindler" were possibly defamatory and reversed the motion to strike and dismiss. (J.A. at 23.).

SUMMARY OF THE ARGUMENT

This Court should reverse the Supreme Judicial Court of Tenley and grant the motion to strike and dismiss because Silvia Courtier is a libel-proof plaintiff and Elmore Lansford's statements are nothing more than rhetorical hyperbole.

I.

The lower court erred in refusing to find that Silvia Courtier is a libel-proof plaintiff. The Libel-Proof Plaintiff Doctrine should be adopted and applied to Courtier. The doctrine is used when a plaintiff asserts a defamation claim despite having a severely damaged reputation. Defamation law allows for the recovery of actual damages only. Thus, if there is no quality character and reputation to protect, the court should dismiss the case. The delicate balance of the objectives of defamation law paired with the guarantees of the First Amendment are accomplished by the Issue-Specific and Incremental Harm sub-doctrines of the Libel-Proof Plaintiff Doctrine. These sub-doctrines provide the flexibility to analyze each plaintiff's reputation without creating a per-se libel-proof background. Accordingly, it is conceivable that Courtier—who has past criminal convictions, including a felony, which gained no notoriety or public attention—could be labelled libel-proof. This is true because the doctrine should apply more liberally when plaintiffs like Courtier demonstrate a tendency to break the law and fail to disassociate themselves from their damaging past.

Courtier's extensive list of convictions and continued connection with organizations pertaining to her past have damaged her reputation greatly. Even if she prevailed on this claim, she would receive nothing more than nominal damages. This would be a waste of judicial resources and an invitation by the Court for additional frivolous defamation claims. Adopting and applying the Libel-Proof Plaintiff Doctrine avoids these consequences while simultaneously

affording defendants the freedoms they are due under the First Amendment. Thus, this Court should adopt the Libel-Proof Plaintiff Doctrine in these circumstances.

II.

The lower court also erred in holding that Lansford's statements were not constitutionally protected rhetorical hyperbole. The statements that Courtier is "corrupt" and "a swindler" are mere loose and figurative epithets. The nature of Lansford's statements precludes any reasonable person from concluding that an actual assertion was being made that Courtier had committed crimes. Lansford's statements lack the factual basis necessary to establish them as capable of being provably false, an element required for actionability under defamation law.

Further, the inherent vague and ambiguous nature of Lansford's statements render them incapable of susceptibility to defamatory meaning. Considered in context, Lansford's references of Courtier as "corrupt" and "a swindler" were indefinite emotional responses to her attack on his mayoral competency, placed in a setting where hyperbolic political debate would be expected, and directed towards her personality traits, motives, and general state of mind. Without specific alleged instances that could provide contextual definition, Lansford's statements fall comfortably in line with the weight of precedent determining similar statements non-actionable.

Accordingly, this Court should reverse the lower court's judgment.

ARGUMENT

The Tenley District Court resolved this case by granting a special motion to dismiss/strike the Courtier's lawsuit as a strategic lawsuit against public participation. R. at 2. The issues raises First Amendment issues that are purely legal questions. In reviewing cases pertaining to First Amendment issues, the Court must use a de novo standard of review that examines the record as a whole. *Bose Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

I. COURTIER CAN BE A LIBEL-PROOF PLAINTIFF SOLELY ON THE BASIS OF HER NON-PUBLICIZED CRIMINAL CONVICTIONS BECAUSE THE GOALS OF THE LIBEL-PROOF PLAINTIFF DOCTRINE CAN BE ACCOMPLISHED DUE TO HER SUBSTANTIAL RECORD AND LACK OF REHABILITATION.

The first inquiry before this Court is whether The Libel-Proof Plaintiff Doctrine should apply to Courtier based on her abundance of criminal convictions that did not gain public attention. (J.A. at 24.). The application of the doctrine presents an opportunity for the Court to dismiss meritless defamation claims, thereby preserving judicial resources.

The Libel-Proof Plaintiff Doctrine can be applied to Courtier based on criminal convictions, including a felony, which did not attract public attention because reputation is personalized and should be assessed individually. When criminal convictions rise to a habitual level synonymous with an individual's current lifestyle, the individual's reputation has been impaired to a level that warrants utilization of the doctrine. In such instances, the delicate balance between defamation law and the First Amendment is best harmonized.

The First Amendment protects speech by banning laws that would deny that safeguard. U.S. Const. amend. I. The lines become blurred when a defamation claim is filed because it places limits on the absoluteness of the protection afforded. *Garrison v. Louisiana*, 379 U.S. 64

(1964). To prevail on a defamation claim, the plaintiff must prove the following elements: publication, defamatory meaning, identification, statement of fact, falsity and damages. David L. Hudson Jr., *Freedom of Speech: Understanding the First Amendment* § 5:7 (2018). Sometimes, the proof of these elements may not be enough to justify a lawsuit for defamation. In these situations, the Libel-Proof Plaintiff Doctrine should apply.

When a person's reputation has been harmed to the extent there is no reputation to protect, the individual should not be able to recover for defamation. *See* David L. Hudson Jr., *Shady Character: Examining the Libel-Proof Plaintiff Doctrine*, 52 Tenn. B.J. 14, 14 (2016) [hereinafter Hudson, *Shady Character*]. There are two ways an individual can be deemed libel-proof under the doctrine: issue specific and incremental harm. Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1921 (1985) [hereinafter *Libel-Proof Plaintiff Doctrine*]. The Issue-Specific Doctrine analyzes the plaintiff's reputation solely as to the matter being discussed within the alleged defamatory statement. *Id.* at 1922–23. The Incremental Harm Doctrine analyzes whether the challenged portions of the defendant's overall statement do any additional harm compared to the statement in its entirety. *Id.* at 1924. Each of these frameworks should be adopted because they provide flexibility in accomplishing a constitutional balance of defamation law and the First Amendment. *Id.* at 1921.

A. The Libel-Proof Plaintiff Doctrine Provides Flexibility in the Analysis of an Individual's Reputational Status.

Permitting defamation claims brought by plaintiffs who have no good reputation to protect defeats the purpose of defamation law and places unnecessary restraints on the freedoms granted by the First Amendment protection of speech. *Id.* at 1916. The status of an individual's reputation should be assessed based on the unique facts of each case. The two sub-doctrines of

the Libel-Proof Plaintiff Doctrine provide the framework for this analysis and allow flexibility in application. *Id.* at 1921–25.

1. The Libel-Proof Plaintiff Doctrine harmonizes the common-law objectives of defamation law and fundamental guarantees of the First Amendment.

This Court should adopt the Libel-Proof Plaintiff Doctrine and apply it to Courtier because it enforces the intent of the First Amendment. At its core, defamation law seeks to protect reputation. Hudson, *Shady Character*, *supra*, at 14. This protection requires a careful balance of First Amendment protection of speech with the right to protect that reputation. Joseph H. King Jr., *The Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian Knot" Syndrome*, 29 Hofstra L. Rev. 343, 362 (2000). While a person should have access to court and any potential legal remedies, First Amendment rights are some of the most fundamental protections afforded to citizens. *Id.* For this reason, there are pre-existing procedures in place to limit defamation cases to avoid frivolous claims and a finding that the cause of action is unconstitutional. *Libel-Proof Plaintiff Doctrine*, *supra*, at 1916. These include the malice requirements set forth for public figures in which the burden they must prove to prevail on a defamation claim is higher than that of an average person. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). This requirement shows a tolerance by the Court to restrict claims of defamation and insinuates that the Libel-Proof Plaintiff Doctrine could be adopted due to its similar intention and ultimate effects.

The Libel-Proof Plaintiff Doctrine limits the ability of certain people to bring defamation claims due to their previously tarnished reputation and provides an extra layer of protection under the First Amendment. King, *supra*, at 362. The doctrine's rationale is based on the premise

that defamation claims require actual harm to reputation. *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639 (2d Cir. 1975). In all defamation suits, pre-existing harm to reputation can prove that an ultimate award of damages should be reduced. *Libel-Proof Plaintiff Doctrine*, *supra*, at 1917. This is a sliding scale. In some defamation cases, there is minimal harm to reputation and, thus, little information affects damages. *Id.* In other cases, reputation is polluted in a much more extreme way and could decrease recovery substantially. *Id.* Adopting the Libel-Proof Plaintiff Doctrine is simply setting a point on the scale at which nothing more than nominal damages could be recovered. *Id.* This eliminates the concern that that juries could award more than actual damages based on improper factors. King, *supra*, at 363. Application of the Libel-Proof Plaintiff Doctrine to Courtier based on her past criminal convictions accomplishes these goals.

To hold otherwise opens the door for meritless defamation claims which do not protect reputation and therefore have no merit. *Id.* If a person has no good reputation to protect, yet brings a defamation claim, there is no actual injury upon which relief may be granted. *Cardillo*, 518 F.2d at 639. These actions would consume the court's time and resources unnecessarily. King, *supra*, at 363. The Libel-Proof Plaintiff Doctrine's goals are met when applied to Courtier based on past criminal convictions, including a felony, despite a lack of public attention. While it may be true these circumstances do not always justify a determination that the plaintiff in question is libel-proof, the Incremental Harm and Issue-Specific Doctrines allow for flexibility in assessing reputation. They make it plausible that Courtier could be a libel-proof plaintiff despite the lack of notoriety to her criminal record because it is not an absolute bar to deeming an individual libel-proof. *Libel-Proof Plaintiff Doctrine*, *supra*, at 1921–24.

2. The Issue-Specific and Incremental Harm Doctrines of the Libel-Proof Plaintiff Doctrine allow for an in-depth analysis of each individual and avoid per-se libel-proof conduct.

There is no need to make a blanket determination that everyone with a criminal record is a libel-proof plaintiff because the Issue-Specific and Incremental Harm Libel-Proof Plaintiff Doctrines allow for an adequate evaluation of each individual, including Courtier. *Thomas v. Tel. Publ'g Co.*, 929 A.2d 991, 1004 (N.H. 2007). The Issue-Specific branch of the Libel-Proof Plaintiff Doctrine is used to bar an individual from successfully suing for defamation when they have no good reputation to protect pertaining to the topic of the defamatory statement at the center of litigation. *Id.* at 1005. The Incremental Harm branch of the Libel-Proof Plaintiff Doctrine is used to bar a defamation claim by assessing the specific, false phrases attacked by the plaintiff compared to the defendant's statement as a whole to determine if the plaintiff has suffered any additional harm due to the challenged portions. *Id.* at 1003. Using these tests to evaluate Courtier, whose criminal convictions did not gain public attention, allows the Court to meet the goals of both defamation law and the First Amendment without hearing a meritless claim. *Libel-Proof Plaintiff Doctrine*, *supra*, at 1918.

The Issue-Specific branch of the doctrine was used in *Guccione v. Hustler Magazine*, 800 F.2d 298 (2d Cir. 1985). There, the plaintiff sued for defamation when the defendant published an article alleging that the plaintiff had committed adultery by living with his girlfriend while he was married to his wife. *Id.* at 299. The plaintiff was deemed libel-proof because he had been living in the alleged arrangement and it had not been hidden from the public. *Id.* at 303–04. Thus, the plaintiff had no good reputation to protect on the issue of adultery, and the court determined that allowing the case to proceed would result in nothing more than nominal

damages. *Id.* at 303. In *Guccione*, the plaintiff's conduct was not criminal, yet the Issue-Specific Doctrine still applied. *Id.* Thus, evidence of criminal convictions should compel the Court to consider applying the Libel-Proof Plaintiff Doctrine. If it is possible for an individual without convictions to have damaged their reputation so severely they cannot sue for defamation, surely an individual with a felony conviction, such as Courtier, could have as well. *Id.* This is true despite a lack of notoriety to the criminal convictions because of the stigma and decline in reputation due to the mere existence of a felony on an individual's record.

Absent an expungement or nondisclosure, a felony can affect one's credibility for the rest of their life. Felons lose the right to vote, to serve as an executor in a will, and to have firearms. More often than not they are discriminated against in housing and employment applications. This loss of basic privileges reverts back to the fact that society views a felony in and of itself as diminished character. Consequently, lack of public attention to crimes should not prohibit the use of the Libel-Proof Plaintiff Doctrine because the evidence shows that Courtier's reputation relating the alleged defamatory statements has already been severely tarnished.

The Incremental Harm Doctrine can apply with a similar mindset in that the district court should use its discretion in each case because it is possible that someone with criminal convictions that lacked public attention, such as Courtier, could be libel-proof under this theory. *Libel-Proof Plaintiff Doctrine*, *supra*, at 1921. This doctrine considers if the defendant's statements caused any additional damage to plaintiff's reputation. *Id.* The analysis relies on the defendant's statement in its entirety. *Id.* This requires a careful review of each plaintiff and, in turn, avoids any suggestion that all individuals with criminal convictions are libel-proof. It is reasonable to believe that this analysis could support a finding that Courtier is a libel-proof plaintiff because of her criminal past.

The Issue-Specific and Incremental Harm Libel-Proof Plaintiff Doctrines harmonize defamation law and the First Amendment. Their flexible application avoids the risk of taking rights away from an individual by determining that all criminal convictions lead to per-se libel-proof plaintiff status. As a result, this Court should adopt the Libel-Proof Plaintiff Doctrine.

B. Silvia Courtier Is a Libel-Proof Plaintiff.

Courtier is a libel-proof plaintiff under the Issue-Specific and Incremental Harm Doctrines. Her extensive criminal record and lack of rehabilitation make her susceptible to application of the Issue-Specific Doctrine. The lack of additional harm to Courtier's reputation by Lansford's statements, which were not challenged compared to the challenged statements, make Courtier susceptible to application of the Incremental Harm Doctrine.

1. Courtier has no good reputation to protect under the Issue-Specific Libel-Proof Plaintiff Doctrine.

The Libel-Proof Plaintiff Doctrine should apply to Courtier based on her criminal convictions that did not gain public attention because her actions have risen to a habitual status and she continues to associate with social causes that have a connection to her troublesome background. The limited case law on the Libel-Proof Plaintiff Doctrine shows a tendency of courts to be more willing to apply the doctrine when the plaintiff's criminal convictions have risen to a level that requires a finding that they are a habitual criminal and have not undoubtedly disconnected from that lifestyle.

a. Courtier's status as a delinquent makes her more susceptible to the Libel-Proof Plaintiff Doctrine.

Silvia Courtier is a libel-proof plaintiff because she demonstrated an inclination to break the law from a young age and carried it into adulthood. (J.A. at 5, 15.). Delinquency is the

equivalent of being a habitual criminal in younger years. Thus, Courtier is libel-proof under the Issue-Specific Libel-Proof Plaintiff Doctrine.

The application of the doctrine to habitual criminals has been seen in *Cardillo v. Doubleday*, 518 F.2d at 639, and *Ray v. Time, Inc.*, 452 F. Supp. 618 (W.D. Tenn. 1976). *Cardillo* developed the Libel-Proof Plaintiff Doctrine and set the guidelines as to how it should be assessed. *Libel-Proof Plaintiff Doctrine*, *supra*, at 1909–10. There, the plaintiff sued for libel when the defendant published a book containing details of crimes the plaintiff committed. *Cardillo*, 518 F.2d at 639. The plaintiff's criminal record contained convictions for conspiracy, receiving stolen property, felonies, and multiple minor crimes. *Id.* at 640. The plaintiff argued that some details and crimes in the book were inaccurate. *Id.* Unpersuaded, the court held that the plaintiff's status as a habitual criminal made him libel proof because any potential damages he might be entitled to would be nominal. *Id.*

Similarly, in *Ray v. Time, Inc.*, the plaintiff, who had previously plead guilty to the murder of Martin Luther King, Jr., sued for libel against Time, Inc. for an article containing potentially false information. 452 F. Supp. at 619. The court held that the plaintiff was libel-proof because of his stature as a habitual criminal based on assorted felony convictions. *Id.* at 622. These cases provide a clear guideline that the Court could adopt to determine when to apply the Libel-Proof Plaintiff Doctrine.

Habitual criminals are more likely to be barred from bringing a defamation claim due to the Libel-Proof Plaintiff Doctrine. *Id.* Being declared a delinquent equates to being a habitual criminal because it requires the existence of multiple offenses, which shows a pattern of behavior. All minors make mistakes, but not all are declared delinquent. Courtier's list of crimes

is extensive and vary in nature. (J.A. at 5, 15.). This Court need not make a finding that she is habitual, because it was already done when she was declared delinquent.

The Libel-Proof Plaintiff Doctrine applies. Although Courtier's criminal convictions did not receive public attention, they were serious crimes, including a felony, which occurred frequently enough that it displayed a propensity for disregarding the law.

b. Courtier is an ideal candidate for the Libel-Proof Plaintiff Doctrine because of her lack of rehabilitation.

Association with causes relating to a criminal past shows a lack of rehabilitation. *Cardillo*, 518 F.2d at 640. After alleged rehabilitation, Courtier continues to associate herself with causes relating to her troubled past by advocating for them. (J.A. at 15–16.). Thus, Courtier is libel-proof under the Issue-Specific Libel-Proof Plaintiff Doctrine.

A showing that criminal convictions were acquired several years ago is not sufficient to say that a person has rehabilitated themselves and therefore should no longer be considered a Libel-Proof Plaintiff. In *Lamb v. Rizzo*, Lamb was denied parole after two articles about his kidnapping and murder convictions were published in a newspaper. 391 F.3d 1133 (10th Cir. 2004). Lamb sued for libel, alleging that the articles contained false statements and that he should not be libel-proof because his reputation had been rejuvenated. *Id.* at 1134–35. Lamb argued that the only crime that could have been the basis for applying the Libel-Proof Plaintiff Doctrine occurred 31 years ago. *Id.* at 1137. For that reason, Lamb argued his defamation claim should not be dismissed. *Id.* The court held that the thirty-one-year time period did not bar the use of the doctrine because Lamb's reputation was tarnished to the extent that only nominal damages could be recovered. *Id.* at 1139.

The amount of time since Courtier's convictions should not prohibit the use of the Libel-Proof Plaintiff Doctrine. This is not a case of one crime as a minor. Courtier's offenses range in type and severity and continued into adulthood when Courtier was charged with and ultimately pled guilty to a felony drug charge. (J.A. at 5, 15–16.). She was incarcerated more than once, and there is no indication that her record has been sealed or expunged; therefore, they continue to affect her. (J.A. at 15–16.). Additionally, the crime that most affects her reputation, the felony, is the most recent conviction. (J.A. at 16.).

Courtier's altruistic efforts all connect to the troubles she displayed as a delinquent and into young adulthood and therefore support a finding that she has not fully alienated herself from that mindset and lifestyle. (J.A. at 15–16.). The age of criminal convictions is not enough to show they are completely in the past. If it were, criminal records would likely be automatically removed from a record after a specified number of years.

Courtier is a libel-proof plaintiff under both the Issue-Specific and Incremental Harm Doctrines based on her habitual status, the nature of her crimes, lack of significance of the age of the convictions, and her association with social causes connected to her troubled past. Under the Issue-Specific Doctrine, the focus is on the pertinent statements being challenged: "Corrupt and a swindler." (J.A. at 5.). Courtier's disregard for the law based on her extensive track record is enough to tarnish her reputation and deem her libel-proof under the Issue-Specific Doctrine. Specifically, her extensive criminal record calls into question her morals, political motives, and state of mind—the core of Lansford's statements. (J.A. at 5.).

2. Courtier has no reputation to protect under the Incremental Harm Doctrine.

Courtier would also be libel-proof under the Incremental Harm Doctrine. In *Simmons Ford, Inc. v. Consumers Union of United States, Inc*.. an article, which was published about a car the plaintiff made, said the car was "Not Acceptable" based on a multitude of tests and observations and did not meet a set of specific federal regulations. 516 F. Supp. 742, 744 (W.D. Mich. 1980). The plaintiff sued for defamation, claiming the federal regulations did not exist and therefore it was impossible that the car could not comply with them. *Id.* at 745. The court held that irregularity within the challenged portion of the article did not harm the plaintiff's reputation any more than the remainder of the article showing the failed tests and observations and, therefore, the plaintiff was libel-proof. *Id.* at 750.

Lansford's statement might damage Courtier's reputation more than the challenged portions she hand-selected. Lansford makes bold references to Courtier's drug habit and explains why her morals are less than favorable. (J.A. at 3, 18.). Courtier did not challenge these, likely because they would fail under defamation law due to the truth. The statements pled pale in comparison to the post as a whole. Lansford's statements pertaining to Courtier's criminal record do no additional harm to her reputation because the unchallenged, undisputed statements of her life as a delinquent drug user have rendered her reputation beyond repair. (J.A. at 3, 5, 18.). Under these circumstances, Courtier should be deemed a libel-proof plaintiff under the Incremental Harm Libel-Proof Plaintiff Doctrine.

The Court should hold that Silvia Courtier is libel proof under the Issue Specific and Incremental Harm Libel-Proof Plaintiff Doctrines. The time passed since her convictions do not bar such a finding, and delinquency is the equivalent of being declared a habitual criminal.

Adoption of the Libel-Proof Plaintiff Doctrine is appropriate based on her past criminal convictions, including a felony, which gained no notoriety or public attention because it does not require a blanket statement that anyone within that scenario is libel-proof. This is accomplished through the flexibility of the Issue-Specific and Incremental Harm Doctrines that accomplish the goals of defamation law and the First Amendment while avoiding frivolous defamation lawsuits and preserving judicial resources.

II. THE CHALLENGED STATEMENTS ARE PROTECTED UNDER THE FIRST AMENDMENT AS RHETORICAL HYPERBOLE BECAUSE NO REASONABLE PERSON COULD HAVE CONCLUDED THAT LANSFORD WAS ACCUSING COURTIER OF COMMITTING ILLEGAL BUSINESS PRACTICES.

The second inquiry before this Court is whether the challenged statements are constitutionally protected rhetorical hyperbole. (J.A. at 24.). Courtier contends that Lansford's statements have "harmed her good name." (J.A. at 1.). As the challenged statements were published amidst political exchange about issues of public interest, they pose a critical inquiry into this Court's determination of when public and political discourse impedes a citizen's reputational integrity.

The foundational ideology upon which the First Amendment was written is best exhibited when media outlets foster in-depth public discussion on political issues. The very essence of living in a free democracy thrives on the underlying ideal that a nation's citizens should have vast knowledge of those who influence and represent its political functions. "One of the prerogatives of American citizenship is the right to criticize public men and measures." *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944). "Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to

'vehement, caustic, and sometimes unpleasantly sharp attacks.'" *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *Sullivan*, 376 U.S. at 270). But "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

Although an individual might find an attack on their reputation to be offensive, the greater societal good is best served by the continued facilitation of uninhibited public and political discussion, for that is the seed from which a diverse and all-inclusive culture grows. Appropriately, the words of the late Justice John Marshall Harlan II ring true:

> That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Cohen v. California, 403 U.S. 15, 25 (1971). Indeed, defamation law must be analyzed in conjunction with the First Amendment's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . . ." *Sullivan*, 376 U.S. at 270. As such, the First Amendment firmly protects "rhetorical hyperbole," i.e., metaphors or epithets that cannot reasonably be taken as stating "actual facts" about the plaintiff. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990). Such language is essential to the longevity of free expression. *Id.* Accordingly, this Court has held that such statements must be protected "if the freedoms of expression are to have the breathing space they need to survive." *Sullivan*, 376 U.S. at 272. Here, Lansford's statements are of such a character. Thus, they are non-actionable.

A. Lansford Did Not Imply an Assertion of Actual Facts Because in Context the Statements "Corrupt" and "a Swindler" Are Not Provably False.

To assure "that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our nation,"

Milkovich, 497 U.S. at 20, the First Amendment protects statements that cannot "reasonably be interpreted as stating actual facts about the public figure involved," *Hustler*, 485 U.S. at 50. Thus, Courtier must show that Lansford's statements differ from the loose, figurative language that no reasonable person would deem credible. *Levinsky's Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997). She cannot do so.

In analyzing claims of defamation, "'the dispositive question for the court is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion.'" *Rosenaur v. Scherer*, 105 Cal. Rptr. 2d 674, 687 (Ct. App. 2001) (quoting *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 275 Cal. Rptr. 494, 524 (Ct. App. 1990)). "A fussy insistence upon literal accuracy" would condemn society to a bleak and oppressive standard of reciting bare facts. *Loeb v. Globe Newspapers*, 489 F. Supp. 481, 486 (D. Mass. 1980) (quoting *Time, Inc. v. Johnson*, 448 F.2d 378, 384 (4th Cir. 1971)). Accordingly, metaphors and loose, colorful language are essential to robust political debate. Thus, Courtier must show that Lansford's statements calling her "corrupt" and "a swindler" were distinguishable, and of a character that implied the assertion that Courtier had committed illegal business practices. *See Milkovich*, 497 U.S. at 4. Based on precedent, however, she cannot make such a showing.

Notably, in *Greenbelt Publishing Association v. Bresler*, this Court concluded that a local newspaper's publication characterizing a developer's negotiation style as "blackmail" was unactionable as rhetorical hyperbole. 398 U.S. 6, 15 (1970). In its holding, this Court concluded that no reasonable viewer of the publication could have misunderstood what was meant by the term "blackmail," namely, that it was a specific critique of the developer's "public and wholly legal negotiating principles." *Id.* This Court held:

> No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.

Id.

By contrast, this Court reached the opposite conclusion in *Milkovich*. 497 U.S. at 23. There, the petitioner, a high school wrestling coach sued the respondents, an author and a newspaper for defamation after publishing an article implying that the petitioner had lied under oath while testifying at a judicial proceeding. *Id.* at 3, 4. The day following the proceeding, the respondents published the following statements:

> "[A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet last Feb. 8. . . . It is simply this: If you get in a jam, lie your way out. . . . If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened. . . . The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott. . . . Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth. . . . But they got away with it. . . . Is that the kind of lesson we want our young people learning from their high school administrators and coaches? . . . I think not."

Id. at 4–5. This Court distinguished these statements from *Greenbelt*, concluding that a reasonable viewer "could conclude that the statements . . . imply an assertion that [the petitioner] perjured himself in a judicial proceeding." *Id.* at 2, 3. Based on the challenged statements' specificity, "general tenor," and availability of the petitioner's testimony in the record, this Court held that "the connotation that [the petitioner] committed perjury is sufficiently factual . . . ." *Id.* Critically, the statements differed from mere metaphorical epithets based out of personal dislike; they were provably true or false phrases predicated upon actual testimony. Thus, this Court determined they were credible, and not the "loose, figurative, or hyperbolic language" that would

negate the impression that the respondents were asserting the petitioner had committed a crime. *Id.*

Lansford's statements are far more like those in *Greenbelt* than *Milkovich*. Here, as in *Greenbelt*, no reasonable viewer could have construed Lansford's references of Courtier as "corrupt" and "a swindler" as anything more than loose, figurative, hyperbolic epithets given amidst heated political exchange. As in *Greenbelt*, and distinguishable from *Milkovich*, Lansford's statements lack the necessary specificity, tenor, and foundational evidence that could support a factual basis upon which a reasonable conclusion could be made that Lansford was asserting Courtier had committed crimes. Simply, they are not credible.

Moreover, this Court and others have repeatedly held that statements resembling Lansford's are non-actionable. *See, e.g.*, *Rosenaur*, 105 Cal. Rptr. 2d at 674 (holding that local candidate's statement that commercial landowner was "thief" and "liar" protected by the First Amendment due to lacking underlying factual basis); *see also Webster v. Wilkins*, 456 S.E.2d 699, 700 (Ga. Ct. App. 1995) (holding that assertion that plaintiff mother was "unfit to have a kid" was loose, figurative, rhetorical hyperbole); *Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284–86 (1974) (holding that First Amendment protected hyperbolic statement that plaintiff was a "traitor" as it was made "in a loose, figurative sense" and was nothing more than "lusty and imaginative expression"); *U.S. Steel, L.L.C. v. Tieco, Inc.*, 261 F.3d 1275, 1293–94 (11th Cir. 2001) (holding that statement comparing plaintiff's conduct to "Jeffrey Dahmer" could not reasonably be interpreted as likening party to a convicted mass murderer); *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1191–95 & n.6 (11th Cir. 1999) (holding that defendant placing plaintiff on list of "scabs" not defamatory); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 728 (1st Cir. 1992) (holding that describing musical production as a "rip-off, a fraud, a

scandal, a snake-oil job" not actionable); *Keller v. Miami Herald Publ'g Co.*, 778 F.2d 711, 716 (11th Cir. 1985) (holding that cartoon depicting nursing home operators as gangsters and analogizing nursing home to a "haunted house" not actionable).

Here, Lansford's statements fall comfortably in line with the weight of precedent. Like *Greenbelt*, and unlike *Milkovich*, Lansford's statements lack the factual basis necessary to establish them as provably false. As such, they are non-actionable.

B. Lansford's Statements' Indefinite and Ambiguous Nature Make Them Incapable of Susceptibility to Defamatory Meaning.

Indefinite and ambiguous statements are incapable of susceptibility to defamatory meaning. *See Ollman v. Evans*, 750 F.2d 970, 980 (D.C. Cir. 1984); *Buckley v. Littell*, 539 F.2d 882, 895 (2d Cir. 1976); *see also Nat'l Ass'n of Letter Carriers*, 418 U.S. at 284 ("[T]o use loose language or undefined slogans that are part of the conventional give and take in our economic and political controversies . . . is not to falsify facts."). Simply, as readers are "less likely to infer facts from an indefinite or ambiguous statement," the statements are non-actionable. *Ollman*, 750 F.2d at 979. These determinations, however, cannot be made in a vacuum. *See Moldea v. N.Y. Times Co.*, 22 F.3d 310, 313–15 (D.C. Cir. 1994). The distinction between opinion and fact is a matter of law, determined by analyzing the totality of the circumstances in which the statements were made including: the common usage of the specific language, the statement's verifiability, the full context of the statement, and the broader setting in which the statement appeared. *See generally Ollman*, 750 F.2d at 970. Here, the surrounding context establishes Lansford's statements as inherently non-actionable.

1. In context, calling Courtier "corrupt" and "a swindler" were characterizations of her personality traits, motives, and state of mind, not of her professional and business capacity.

In context, Lansford's statements Courtier were vague and indefinite responses directed at her personality, motives, and general state of mind. As such, the lower court's characterization of them as attacks on her "professional or business capacity" is misplaced. (J.A. at 22.). In *Okun v. Superior Court*, the California Supreme Court reached a similar conclusion. 629 P.2d 1369, 1374 (Cal. 1981). There, a condominium developer sued for libel and slander against citizens campaigning against his new development project. *Id.* at 1372. The developer claimed that the citizens harmed his professional and business capacity by publishing statements implying that he secured the project via an inside deal with a city councilman. *Id.* The court held otherwise, concluding that the "vague charge that the plaintiff 'entered into a corrupt relationship with Councilman Stone' was not a factual assertion of crime but an expression of opinion." *Id.*

Focusing on context, the court held that "the statement was part of the debate over whether the city should permit plaintiff's condominium project. Thus it was in a 'setting in which the audience may anticipate efforts . . . to persuade . . . by use of epithets, fiery rhetoric or hyperbole.'" *Id.* The court opined that "a statement regarding . . . business, social, or political affiliations, and how those affiliations seem reflected in decision-making hardly constitutes a libelous charge of bribery and corruption." Based on its context, the term "corrupt" was simply a "moral criticism of objectives and methods, not the occurrence of bribery." *Id.*

Similarly, in *Rosenaur*, the Third District Court of Appeals of California held that statements referring to a political opponent as a "thief" and "liar" were unverifiable epithets regarding personality, motives, and state of mind. 105 Cal. Rptr. 2d at 687. In *Rosenaur*, the

court concluded that in context, the respondent's use of the words "thief" and "liar" amidst a heated public confrontation with a political foe was the type of "loose, figurative, hyperbolic language that is constitutionally protected." *Id.* The court concluded that:

> Specifically, in the context of a heated oral exchange at a shopping center in the midst of a hard-fought initiative contest, anyone who might have overheard [defendant] call plaintiff a thief or a liar would have understood [defendant] to be furious at, and critical of, plaintiff's position, but would not likely have thought that [defendant's] supposed outburst was accusing plaintiff of a criminal past or of dishonesty in his business dealings.

Id. Lansford's statements are similar to those in *Okun* and *Rosenaur*. They were published in response to Courtier's unwarranted political attack on his competency as mayor. (J.A. at 3, 4.). Like in *Okun* and *Rosenaur*, the setting of publication is critical to the statement's hyperbolic qualities. "[T]he setting of the speech in question . . . makes their hyperbolic nature apparent and . . . helps determine the way in which the intended audience will receive them." *Moldea*, 22 F.3d at 314; *see also Ollman*, 750 F.2d at 979 ("[C]ourts should analyze the totality of the circumstances in which the statements are made . . . ."); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 894 (9th Cir. 1988) ("[T]he context of the article makes clear that its content is opinion. Even apparent facts must be allowed as opinion 'when the surrounding circumstances of a statement are those of a heated political debate.'"); *Keller*, 778 F.2d at 717 (holding that courts must consider the totality of the circumstances surrounding challenged statements to determine whether they are meant to convey "actual facts").

Here, Lansford published the challenged statements on his own website—a public forum for political discourse. (J.A. at 8.). As in *Okun*, the setting is one in which an observer would reasonably expect efforts to persuade by use of epithets, fiery rhetoric, or hyperbole. As such, any reasonable reader would have understood Lansford simply to be furious at, and critical of, Courtier's attack on his candidacy and her overall motives for doing so, not that an actual

implication of crimes was taking place. Although Courtier might find Lansford's statements to be hurtful, or offensive, "the First Amendment does not police bad taste." *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 164 (Tex. 2004). "A political candidate has no license to defame his hecklers, but he also has no obligation to suffer them silently. One who engages in fractious and factious dialogue at a political meeting cannot demand sweetness and light from his adversary." *Miller v. Block*, 352 So. 2d 313, 314 (La. Ct. App. 1977). As such, Lansford is afforded the same constitutional protections in *responding* to her attack as she was in *giving* it. Thus, she must fail.

2. The Supreme Judicial Court of Tenley's reliance on State court holdings featuring specific criminal allegations is misplaced.

The Supreme Judicial Court of Tenley cited multiple cases in its reasoning for applying potentially defaming qualities to Lansford's statements. *See generally* (J.A. at 21, 22.). (citing *Bentley v. Bunton*, 94 S.W.3d 561, 581–82 (Tex. 2002); *Burrill v. Nair*, 158 Cal. Rptr. 3d 332 (Ct. App. 2013); *Laughland v. Beckett*, 870 N.W.2d 466 (Wis. Ct. App. 2015); *Kumaran v. Brotman*, 617 N.E.2d 191, 199 (Ill. App. Ct. 1993); *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144 (2d Cir. 2000)). But its reliance on this precedent is misplaced. The court based its reasoning upon the commonplace ideology that words may sometimes be considered merely hyperbolic in one sense, but factual in another. (J.A. at 21.). (citing *Bentley*, 94 S.W.3d at 581–82).

The court mistakenly thought that as these cases deal with substantially similar phrases to Lansford's, they are analogous; but they differ dramatically. For example, in *Bentley*, the Texas Supreme Court held that a radio DJ's reference to a local judge as "corrupt" was, in context, definite enough to be susceptible to defamatory meaning. To support its reasoning, the court stated:

> [The defendant] identified eight discrete instances that he said showed [the plaintiff's] corrupt conduct in office. He cited to details himself, and attempted to elicit factual and expert testimony . . . not merely to substantiate his personal opinions, but to prove his statements true. . . . [T]he clear import of [the defendant's] statements . . . was that [the plaintiff] was corrupt as a matter of verifiable fact . . . .

94 S.W.3d at 585. Simply, when paired with such a specified list of instances to qualify it, a seemingly vague and ambiguous term like "corrupt" gains definition and becomes distinguishable from its deployment in cases such as *Okun*. The connection to such instances becomes the agent that facilitates defamatory status, i.e., the "vehicle" that drives it over the hill.

Analogous reasoning was adopted in *Burrill*, *Laughland*, *Kumaran*, and *Flamm*. *See Burrill*, 158 Cal. Rptr. 3d at 8 (finding that counselor called a "corrupt criminal" survived Anti-SLAPP dismissal as child's parents' "accusations of crime" were specific and definite enough to be susceptible to defamatory meaning); *Laughland*, 870 N.W.2d at 475 (holding that contextually the term "swindler" is actionable as "[defendant's] Facebook posts did not merely opine that [plaintiff] was a 'low life loser.' . . . 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.'"); *Kumaran*, 617 N.E.2d at 200 (recognizing that portraying a teacher as "a swindler" deemed actionable as publishing article insinuating plaintiff was "working a scam" for monetary gain by specifically referencing their repeated, meritless lawsuits provided sufficient definite meaning to the challenged statements); *Flamm*, 201 F.3d at 144 ("[T]he term 'ambulance chaser' was not rhetorical hyperbole since it was placed in a purely fact-laden directory, and accordingly, the term reasonably implied that plaintiff engaged in unethical solicitation, and such a statement could be provable as true or false.").

Lansford's statements differ greatly from those in *Bentley*, *Burrill*, *Laughland*, *Kumaran*, and *Flamm*. Unlike those cases, Lansford's statements lack the critical agent for facilitating defamatory susceptibility. Here, Lansford alleges no specific instances in which Courtier has supposedly been "corrupt" or "a swindler." Lansford's full sentence in which those words appear states: "She is corrupt and a swindler, who hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood." (J. A. at 4.). Such an epithetical statement is a far cry from the stark criminal allegations the Texas Supreme Court deemed sufficient to provide actionable definition in *Bentley*. Accordingly, as no specific instances are alleged that could provide such definition, Lansford's statements are rightfully deemed ambiguous and vague. Thus, as in *Okun* and *Rosenaur*, they are inherently incapable of harboring defamatory meaning.

3. Courts have repeatedly held similar statements to be non-actionable.

Federal and state courts have repeatedly held that similar characterizations of personality traits, motives, and states or frames of mind are inherently ambiguous and indefinite, thus incapable of being considered actionable. *E.g.*, *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 367 (9th Cir. 1995) (holding that statement that plaintiff was "intrinsically evil" was indefinite opinion); *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1106 (N.D. Cal. 1999) (holding that calling plaintiff manipulative "refers to subjective motivations and personality traits, which are not provable as true or false"); *Miller v. Bakersfield News-Bulletin, Inc.*, 119 Cal. Rptr. 92, 94 (Ct. App. 1975) (finding that "an opinion with respect to a characterization of a personality trait of a public official" non-actionable).

If a reasonable viewer were given a transcript of Lansford's statements standing alone, with no contextual support, a defamatory conclusion could be argued. But the First Amendment prohibits defamation claims from being self-servingly constructed by taking the alleged

defaming phrases out of context. It is imperative to reject a "strictly literal interpretation" of hyperbolic statements that, out of context, might appear to assert legal conclusions about the status or conduct of a plaintiff. *See generally Keller*, 778 F.2d at 716. Thus, this Court must consider Lansford's statements in their full epithetical context. By doing so, Courtier's claim fails.

Based on a critical lacking in factual basis, definition, and context conducive of credibility, Lansford's statements could not reasonably be interpreted as stating actual facts that could be proven false. As such, they could not be construed as asserting that Courtier had committed crimes. Thus, they are rhetorical hyperbole and protected by the First Amendment.

CONCLUSION

This Court should REVERSE the judgment of the Supreme Judicial Court of Tenley.

Respectfully submitted,

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TEAM NO. 219753

COUNSEL FOR PETITIONER