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 STATE
OF TENLEY

BRIEF FOR THE PETITIONER

Team No. 219781
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QUESTIONS PRESENTED

I. Whether Respondent's past criminal convictions, alone, are sufficient to render her a libel-proof plaintiff despite lack of notoriety or attention attendant to her crimes.

II. Whether Petitioner's statements are protected under the First Amendment as rhetorical hyperbole.

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

I. Disposition Below

This is a defamation suit concerning statements made by Petitioner, Mayor Elmore Lansford, in response to Respondent Silvia Courtier's political criticisms of his administration and campaign. (J.A. at 1.).

Respondent brought this defamation action against Mayor Lansford alleging that his statements were false and harmful to her reputation. (J.A. at 1.). In response, Mayor Lansford contends that his statements were rhetorical hyperbole, imaginative expressive epithets, protected by the First Amendment, and moreover, that Respondent is libel-proof. (J.A. at 1-2.). Accordingly, Mayor Lansford filed a special motion to dismiss/strike under the state's anti-SLAPP[1] statute, the Tenley Public Participation Act, which provides that: "If a legal action is filed in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action." Tenley Code Ann. §5 – 1 – 704(a); (J.A. at 2, 6.).

The Tenley District Court found that Respondent was not a libel-proof plaintiff. (J.A. at 11.). Nevertheless, the district court granted Mayor Lansford's special motion to strike/dismiss Respondent's defamation claim on the basis that Mayor Lansford's statements were protected under the First Amendment as rhetorical hyperbole. (J.A. 13.). On appeal, the Supreme Judicial Court of State of Tenley reversed the district court's ruling and remanded the

[1] The term "SLAPP" is a commonly used acronym for "Strategic Lawsuit Against Public Participation." Anti-SLAPP laws, such as §5 – 1 – 704(a), offer "a procedural mechanism...to protect citizens who have been sued...to intimidate and silence" them for expressing opinions their opponents find inconvenient, unpopular, or even abhorrent. (J.A. at 2.).

case for trial, finding that it was too early in the litigation to determine if Respondent would be able to prevail on her defamation claim. (J.A. at 23.). However, that court adopted the libel-proof plaintiff doctrine for the State of Tenley. (J.A. at 20.). Mayor Lansford timely filed a petition for writ of certiorari, which this Court granted. (J.A. at 24.).

II. Statement of the Facts

A. Respondent's Criminal History

Respondent, Silvia Courtier, comes from a family of drug addicts. (J.A. at 5.). Her father was a drug-dealer who was murdered in prison while serving a fifteen-year sentence as a recidivist offender. (J.A. at 5.). Her mother was a drug-addict who died of a drug overdose, leaving Respondent orphaned at the age of ten. (J.A. at 5.). Growing up, Respondent was an inveterate criminal. (J.A. at 15.). A juvenile court declared her delinquent for the following offenses: (1) stealing, (2) simple assault, (3) simple possession of marijuana, (4) indecent exposure, (5) vandalism, and (6) possession of cocaine. (J.A. at 5, 15.). As a result, she was incarcerated in a boot camp for young female offenders. (J.A. at 5.).

After being released from boot camp, Respondent's criminal lifestyle did not cease. (J.A. at 15.). Instead, her criminal habits continued into her early twenties when she became addicted to cocaine. (J.A. at 5.). This addiction led to her arrest for possession and distribution of cocaine. (J.A. at 16.). Respondent pled guilty to the possession charge and served two years in state prison. (J.A. at 16.).

After Respondent's rehabilitation and release from state prison, she started a large, upscale clothing company with the financial aid of an older, local politician—Raymond Courtier—whom she eventually married. (J.A. at 2, 5.). Her convictions are currently decades old. (J.A. at 10.).

B. Pertinent Facts Giving Rise to Respondent's Defamation Claim

This defamation suit springs from a contentious political campaign. (J.A. at 3.). The Petitioner, Mayor Elmore Lansford, is the current mayor of Silvertown, Tenley. (J.A. at 2-3.). The Respondent is a local business owner, political activist, and staunch critic of Mayor Lansford. (J.A. at 2-3.).

Mayor Lansford and Respondent's family previously had a cordial, years-long personal relationship. (J.A. at 3.). Mayor Lansford and Respondent's husband, Raymond Courtier, served on the city council together before Mr. Courtier was elected as mayor of Silvertown. (J.A. at 3.). While serving in that capacity for eighteen years, Mr. Courtier was an early political ally and professional mentor for Mr. Lansford, aiding his entrance into local politics. (J.A. at 2-3.). Despite this cordial relationship that existed between Mayor Lansford and Mr. Courtier, Respondent started vocalizing her active criticism of now-Mayor Lansford after her husband passed away. (J.A. at 3.).

During the most recent mayoral election, Mayor Lansford campaigned on a tough-on-crime platform. (J.A. at 3.). Respondent found his platform abhorrent and became an active advisor and fundraiser for Mayor Lansford's political rival, Evelyn Bailord. (J.A. at 3.). Using her sizable social media presence, Respondent wrote and published multiple op-eds on her website criticizing Mayor Lansford as a "relic of the past." (J.A. at 3.). Despite their previous relationship, she campaigned vigorously against him. (J.A. at 3.).

Respondent's defamation claim stems from a particularly heated column she wrote and published on her website. (J.A. at 3-4.). In it, she accused Mayor Lansford of (1) not caring for his constituents, (2) corruptly squeezing personal profits out of new commercial developments, and (3) being bought and sold by special interests. (J.A. at 3.). In her tirade, Respondent

referred to Mayor Lansford as "repressive," non-compassionate, and "a plutocrat." (J.A. at 4.). She even insinuated that he was a racist who condoned police brutality. (J.A. at 3-4.).

Severely upset by Respondent's continual and increasing criticisms, Mayor Lansford countered with his own passionate statement on social media. (J.A. at 4, 8.). In it, Mayor Lansford colorfully referred to Respondent as "a pimp for the rich," "a leech on society," "a whore for the poor," and "a swindler." (J.A. at 5.). However, he also made accurate references to Respondent's criminal history. (J.A. at 4-5.). He wrote that Respondent was "a lewd and lusty lush," "a woman who walked the streets strung out on drugs," and described her as "nothing more than a former druggie." (J.A. at 4-5.). Thereafter, Respondent brought this defamation suit, but does not challenge the statements about her criminal past. (J.A. at 4-5.).

SUMMARY OF THE ARGUMENT

This Court should reverse the Supreme Judicial Court of State of Tenley, and grant Petitioner's special motion to strike and dismiss the claim, because Respondent cannot make out a *prima facie* case of defamation, and Mayor Lansford's use of rhetorical hyperbole is protected speech under the First Amendment.

Respondent is a libel-proof plaintiff. Her reputation has already suffered considerable injury solely because of her criminal history. Such a diminished reputation does not deserve state law protection. Accordingly, her claim of libel should be precluded under either version of the libel-proof plaintiff doctrine despite no evidence that her previous criminal activity received public attention or obtained notoriety.

Even if this Court finds that Respondent is not libel-proof, the Constitution protects Mayor Lansford's social media post from defamation claims because it was merely rhetorical hyperbole. Mayor Lansford's figurative statements are not defamatory because they do not

assert actual facts about Respondent, thus they are not provably false. Moreover, the broader political context in which the statements were made, clarify that they were not meant literally. Lastly, the statements were published on the internet, which is widely known to be a "Wild West" of hot takes, emotional blithering, and insults—certainly insults. Thus, a reasonable reader would at least be skeptical about the accuracy of its content.

ARGUMENT

The First Amendment provides that "Congress shall make no law...abridging the freedom of speech." U.S. Const. amend. I. This prohibition extends to the States under the Due Process Clause of the Fourteenth Amendment and thus applies to SLAPP suits brought in state court. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 276-77 (1964).

Courts must analyze defamation suits in light of First Amendment considerations because society has a strong interest in "uninhibited, robust, and wide-open" public debate. *Id.* at 270. Here, Mayor Lansford's rhetorical hyperbole, while coarse, contributed to the national discourse without sacrificing Respondent's "essential dignity and worth" because she is libel-proof as a matter of law. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966). Therefore, the challenged statements are entirely consistent with these First Amendment principles.

I. A SUBSTANTIAL HISTORY OF CRIMINAL CONVICTIONS IS SUFFICIENT ON ITS OWN TO REQUIRE APPLICATION OF THE LIBEL-PROOF PLAINTIFF DOCTRINE.

Five elements must be proved to establish a *prima facie* case of defamation: (1) *identification* that the challenged statement is "of and concerning" the plaintiff; (2) *publication* of the statement to a third party; (3) *defamatory meaning* of the statement based on whether it is "reasonably susceptible to the defamatory meaning imputed to it"; (4) *falsity* of the statement; and (5) *actual harm/damages* to the plaintiff as a result of the published statement. *New York Times*, 376 U.S. at 267; *Levin v. McPhee*, 119 F.3d 189, 195 (2d Cir.

1997); David L. Hudson, Jr. *First Amendment Law: Freedom of Speech*, §5:7.

"[T]he tort action for defamation has existed to redress injury to the plaintiff's reputation by a statement that is defamatory and false." *Masson v. New Yorker Magazine*, 501 U.S. 496, 515 (1991). Thus, the essence of libel is damage to reputation. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). Accordingly, when no such reputational damage exists, a defendant can assert the libel-proof plaintiff doctrine as a preemptory defense to prohibit a plaintiff from maintaining an action for libel by precluding recovery of actual or nominal damages. *Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638 (2d Cir. 1975).

This Court posited: "some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments…." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 152 (1967). The libel-proof plaintiff doctrine attempts to alleviate some of that antithesis. Its application acknowledges that First Amendment considerations of promoting "uninhibited, robust, and wide-open" public debate must prevail over an individual's interests in his reputation where "gratuitous amounts of money damages [exceed] any actual injury." *New York Times*, 376 U.S. at 276-77; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

The Second Circuit first articulated the libel-proof doctrine in *Cardillo* and stated that such claim preclusion occurs when the individual's reputation is already so stained that the allegedly libelous statements can do no further harm. *Cardillo*, 518 F.2d at 638. Since its genesis, two versions of the libel-proof plaintiff doctrine have subsequently emerged: (1) the specific-issue version and (2) the incremental harm version. *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 322 (N.H. 2007). Here, Mayor Lansford can succeed on his special motion to

strike/dismiss respondent's action under either version of the doctrine solely on the basis of Respondent's criminal history.

A. The specific-issue version of the libel-proof doctrine bars libel claims when the individual's reputation is already sufficiently tarnished by a prior criminal conviction despite no attendant notoriety or attention.

Under the specific-issue doctrine, a defamation claim must fail where the plaintiff's reputation "is so diminished that, at the time of an otherwise libelous publication, it could not be further damaged." *McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6, 9 (Tex. App. 1994). Application of this doctrine justifies the "dismissal of defamation actions where the substantial criminal record of a libel plaintiff shows as a matter of law that he would be unable to recover other than nominal damages" because "[s]tates may not permit recovery of presumed or punitive damages…." *Jackson v. Longcope,* 476 N.E.2d 617, 619 (Mass. 1985); *Gertz*, 418 U.S. at 349. Such dismissal is proper to avoid the costs of defending the claim, which on their own can "impair vigorous freedom of expression." *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986).

1. A history of criminal convictions severely diminishes one's reputation so as to require application of the specific-issue libel-proof plaintiff doctrine.

Defamation is not actionable without damage to reputation. *Davis v. Tennessean*, 83 S.W.3d 125, 130 (Tenn. Ct. App. 2001). A criminal conviction is society's formal judgment of condemnation that imposes stigma and damage to the convict's reputation. *Missouri v. Hunter*, 103 S.Ct. 673, 681-82 (1983). As such, criminal convictions significantly impair one's reputation to the point of rendering that individual libel-proof under the specific-issue doctrine because he is "so unlikely by virtue of his life as a habitual criminal to recover anything other than nominal damages as to warrant dismissal of the case." *Cardillo*, 518 F.2d

at 640-41 (finding that Cardillo was libel-proof by virtue of his criminal record); *see Davis*, 83 S.W.3d at 131 (holding that Davis' conviction for armed robbery "render[ed] any reputation he may have virtually valueless and that he is in the eyes of the law 'libel-proof.'"); *see also Cofield v. The Advertiser Co.*, 486 So.2d 434 (Ala. 1986) (granting defendant's motion to dismiss because plaintiff was unable to show substantial damage to his reputation due to his prior convictions).

Further, an individual with a criminal history can be deemed libel-proof under the specific-issue doctrine for crimes that the individual has *never been convicted of*. This proposition is exemplified by the Texas Court of Appeals in *Finklea v. Jacksonville Dailey Progress*, 742 S.W.2d 512 (Tex. App. Tyler 1987), where the plaintiff challenged a police chief's statement that he was a convicted methamphetamine dealer currently serving a 12-year burglary sentence. The plaintiff had, in fact, never been convicted of amphetamine sale or possession and was not currently serving a sentence for burglary. *Id.* at 514. Despite this, the Texas Court of Appeals found him libel-proof because he had a criminal record with charges of burglary and two convictions of drug possession. *Id.* at 517-18. Thus, criminals can be libel-proof for crimes other than those they are specifically convicted of.

However, the doctrine has its limits. It does not extend to individuals who have absolutely *no prior criminal convictions*. *See Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072 (3d Cir. 1985) (holding that an attorney who (1) was indicted, (2) went to trial, and (3) was fined was not libel-proof because he had not been convicted of *any* criminal offense); *see also Buckley v. Littel*, 539 F.2d 882 (2d Cir. 1976) (refusing to apply the issue-specific version to a plaintiff who spent his entire life in politics as the point-man for a controversial political position where there was no evidence of any criminal convictions); *see*

also Liberty Lobby v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984) (criticizing and refusing to adopt the libel-proof doctrine where there was no alleged evidence that plaintiff engaged in previous criminal activity).

Moreover, substantial passage of time between the allegedly libelous publication and the most recent criminal conviction is insufficient to deny application of the specific-issue doctrine. For example, in *Dewitt v. Outlet Broadcasting, Inc.*, 1999 WL 1334932 (R.I. Super. Ct. 1999), plaintiff Dewitt sued a news outlet claiming that its broadcast, which reported plaintiff's criminal record, was false and defamatory because it also listed him as a "convicted rapist." At the time of publication, the plaintiff had never been convicted of rape and, moreover, his last convicted crime was twenty years prior to the lawsuit. *Id*. at *6. Nevertheless, the Rhode Island Superior Court granted summary judgment in favor of the defendant reasoning that "the focus of the libel-proof defense is on plaintiff's conduct and history," and here plaintiff's extensive list of charges and convictions substantially tapered his reputation such that the "[c]ourt cannot envision any jury awarding, under any circumstances, anything but a peppercorn." *Id*. at *11-12, *14; *see also Lamb v. Rizzo*, 391 F.3d 1133, 1137 (10th Cir. 2004) (finding that an inmate's convictions, which occurred thirty-one years ago did not affect applicability of the libel-proof plaintiff doctrine). Therefore, mere passage of time is insufficient to defeat application of the libel-proof plaintiff doctrine to a habitual criminal.

2. <u>The specific-issue doctrine does not require public attention or notoriety of past criminal convictions to apply.</u>

An extensive history of criminal convictions is enough, on its own, to apply the specific-issue doctrine. The Second Circuit in *Cardillo* did not denote a condition of notoriety or public attention accompanying the plaintiff's criminal conviction when it first enunciated

the doctrine. *Cardillo*, 518 F.2d at 640. Despite off-handedly noting that Cardillo was the subject of testimony before Congress, the Second Circuit *explicitly* based its application of the libel-proof doctrine on the fact that Cardillo had an extensive criminal record and criminal associations. *Id.* Thus, the applicability of the libel-proof plaintiff doctrine must necessarily depend only on the plaintiff's criminal history regardless of any accompanying notoriety or public attention to those crimes. *See Davis*, 83 S.W.3d at 125 (finding that the issue-specific doctrine was applicable despite the fact that the conviction was not notorious or brought to the public's attention); *see also Cofield*, 486 So.2d at 434-35 (applying the issue-specific doctrine without reference to publicity or notoriety of the conviction).

Despite this, a minority of jurisdictions has refused to apply the specific-issue doctrine to plaintiffs with criminal convictions because their convictions were without notoriety or public attention. *See Thomas*, 155 N.H. at 327 (holding that plaintiff, who was convicted of multiple crimes, was not libel-proof where trial court's findings did not indicate any publicity); *see also McBride*, 894 S.W.2d at 10, (reversing application of the libel-proof plaintiff doctrine because there was no evidence that plaintiff's convictions received publicity); *see also Jackson,* 394 Mass. at 582 (finding that the plaintiff was libel-proof because he had been convicted of numerous crimes that received substantial publicity).

a. *This Court's tendency to favor First Amendment protections requires application of the specific-issue doctrine despite lack of notoriety or public attention.*

This Court has yet to adopt an approach indicative of whether such notoriety or attention is required to apply the specific-issue doctrine. However, this Court has always erred on the side of favoring First Amendment protections when it comes to defamation law: "libel can claim no talismanic immunity from constitutional limitations." *New York Times*, 376 U.S.

at 269. In *New York Times*, this Court weighed First Amendment concerns more heavily than the reputational concerns of citizens by requiring public officials to prove the heightened mens rea of "actual malice" to obtain a damage award. *Id*. at 279-80. Ten years later, the *Gertz* Court extended that mens rea requirement to public figures and went *even further* in protecting the First Amendment by requiring all libel plaintiffs to show actual malice to receive presumed or punitive damages. *Gertz*, 418 U.S. at 349. Moreover, the *Gertz* Court noted that *ad hoc* resolutions in libel cases are simply not feasible, therefore it is important to "lay down broad rules of general application." *Id.* at 343-44. Lastly, this Court reiterated the need for strict control of libel awards when it advocated for thorough supervision of juries in libel cases, which effectively notified judges that libel cases must be acutely sifted to depose of illegitimate claims. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984).

These concerns are even more acute in the context of political discourse because of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times*, 376 U.S. at 270.

In light of these precedents, the specific-issue version of the libel-proof doctrine should apply to individuals solely on the basis of prior criminal convictions without requiring notoriety or public attention because such application would maintain high standards of First Amendment protection while effectively eliminating the *ad hoc* resolutions this Court has previously and intensely frowned upon.

3. Respondent is libel-proof under the specific-issue doctrine due to her multiple criminal convictions.

Here, Respondent is no stranger to the criminal lifestyle. Similar to the plaintiffs

deemed libel-proof in *Cardillo*, *Cofield*, and *Davis*, Respondent has an extensive criminal repertoire that includes: (1) stealing, (2) simple assault, (3) simple possession of marijuana, (4) indecent exposure, (5) vandalism, and (6) possession of cocaine. (J.A. at 5, 15.); *See Cardillo*, 518 F.2d at 641; *see also Davis*, 83 at 131; *see also Cofield*, 486 So.2d at 435. A juvenile court declared her delinquent for those six offenses, which is essentially the same as an adult conviction, and required her to serve time in a boot camp for young female offenders. *See Addington v. Texas*, 441 U.S. 418, 427-28 (1979) (recognizing that there is no meaningful distinction between a juvenile delinquency adjudication and an adult conviction) (discussing *In Re Winship*, 397 U.S. 358 (1970)); (J.A. at 15.). Shortly thereafter, she served two years in state prison while in her twenties after pleading guilty to possession of cocaine. (J.A. at 5, 16.). This extensive history of criminality is sufficient to render Respondent libel-proof on its own because her reputation is effectively diminished such that Mayor Lansford's statements can do it no more harm.

Respondent will likely argue that this doctrine is inapplicable because she was convicted of these crimes decades ago. (J.A. at 10.). However, as previously indicated, mere passage of time is insufficient to defeat application of the libel-proof plaintiff doctrine. What's more, the Tenth Circuit in *Lamb* held plaintiff to be libel-proof where his most recent conviction was an astounding thirty-one years prior, and here the passage of time is even less at approximately twenty years. *Lamb*, 391 F.3d at 1137. Therefore, the fact that Respondent's convictions were over twenty years ago is irrelevant to the libel-proof plaintiff determination.

Admittedly, there is no evidence on the record that Respondent's criminality was notorious or well known, but such notoriety or public attention is not required in light of First Amendment considerations espoused by this Court. Further, convictions are a matter of public

record and Respondent has been in the public purview for well over eighteen years, beginning when her husband first got elected as Mayor and continuing to this day due to her avid participation in the current political election. (J.A. at 2-3.). Respondent's political situation most clearly mirrors the facts in *Buckley* where the plaintiff spent his entire life in politics and was the face of controversial political opinions. *Buckley*, 539 F.2d at 889. However, the holding in *Buckley* does not apply here because unlike the plaintiff in that case, Respondent has an extensive criminal history inclusive of a felony conviction. *See Id*.; (J.A. at 5, 15.). Therefore, Respondent must be found libel-proof despite no evidence of public attention or notoriety surrounding her convictions especially because the statements were made in the context of a political debate, where discourse must be uninhibited even if it includes "vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times*, 376 U.S. at 270.

B. The incremental harm version of the libel-proof doctrine applies when unchallenged statements of past criminal convictions do more reputational harm than the remaining challenged statements.

The incremental harm doctrine requires an analysis of "the defendant's communication in its entirety." Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1912-13 (1985). Specifically, the court must determine whether the challenged statements could damage the plaintiff's reputation any further as compared to the remaining unchallenged statements. *Thomas*, 155 N.H. at 322. In other words, "a plaintiff may have had his reputation so badly damaged by true statements in a particular publication that minor false accusations within the same publication cannot result in further meaningful injury." *Guccione*, 800 F.2d at 303. Thus, the incremental harm doctrine acknowledges that the plaintiff has been harmed, but determines that the harm is insignificant, so recovery is unjustified. *Jewell v. NYP*

Holdings, Inc., 23 F. Supp. 2d 348, 394 (S.D.N.Y. 1998).

This Court in *Masson* rejected the contention that the incremental harm doctrine is compelled as a matter of First Amendment protection because the doctrine fails to analyze the defendant's knowledge of falsity with respect to the published statement. *Masson*, 501 U.S. at 521-25. Nevertheless, this Court acknowledged that states are free to adopt the doctrine, thereby providing an independent basis for the doctrine in state law. *Id*. at 523. Further, it is undisputed that the Supreme Judicial Court of State of Tenley adopted the libel-proof doctrine inclusive of its dual forms, and the substantive law of the forum state applies. *See Erie R.R. v Thompkins*, 304 U.S. 64, 78 (1938); (J.A. at 20.).

1. Unchallenged statements that refer to an individual's criminal history cause substantially more reputational harm than challenged statements that are less severe in nature.

In determining the harm flowing from challenged statements, one court succinctly stated that it is relevant to consider three factors: (1) nature of the statements, (2) source of the statements, and (3) quantity of the statements. *Jewell*, 23 F. Supp. 2d at 396. In *Jewell*, a plaintiff challenged multiple publications containing statements about his status as a suspect in a bombing, some of which were made by a columnist and others by unidentified law enforcement officers. *Id.* The statements made by the officers close to the investigation were given more weight because their status as police officers gave them more credibility and subsequently "create[d] a different magnitude of harm" as compared to the statements made by the columnist. *Id.* Additionally, the *Jewell* court noted that the New York Post (NYP) was asserting the incremental harm defense with respect to eleven out of the thirty-three statements and found that this weighed against applying the incremental harm doctrine because "harm takes on a different character when the NYP continues to publish numerous statements…." *Id.*

Lastly, the nature of the statements was held to go "one step further" than the unchallenged statements by "implicitly suggest[ing] that Jewell was responsible for the bombing and that evidence to prove that fact was mounting." *Id.* Accordingly, NYP's challenged statements were found to cause more than incremental harm. *Id.*

More generally, when challenged statements only cause incremental harm in light of unchallenged statements depicting an individual's past criminal convictions, the individual is found to be libel-proof. For example, in *Jones v. Globe Int'l*, 1995 U.S. Dist. LEXIS 22080 (D. Conn. 1995), the plaintiff, Jones, sued a news outlet for publishing an article that portrayed him as a criminal with a sexual attraction to women's shoes. Jones attempted to challenge the following statements: "there's evidence that Jones, in the privacy of his office, may have secretly paraded around in Marla's pumps," a reference to Jones using Trump's intimate things "in a bizarre ritual," "underwear was stuffed into air ducts," a reference to Trump's bra and panties, a reference to Jones "sniffing a shoe and licking it," and "to feed a bizarre love obsession." *Id*. at *31. The court found that these statements did not materially add to Jones' injury because the unchallenged statements detailing Jones' conviction for burglary and possession of Trump's stolen property along with his admitted sexual attraction to women's shoes already devastated his reputation. *Id.* at *35-36.

Further, a libel claim that only challenges a *small* or *tangential* issue, as compared to unchallenged statements enumerating criminal convictions, is barred by the incremental harm doctrine. *See Jackson*, 399 Mass. at 577-78 (finding that a convicted murderer was libel-proof in relation to a statement pertaining to his alleged involvement in stealing a car). Such application is supported by the proposition that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U.S. at 341.

Lastly, notoriety or public attention to plaintiff's criminal convictions is not required under the incremental harm doctrine because, as previously indicated, this doctrine only looks at the allegedly libelous statements in the context of the publication. Therefore, only the analysis of the plaintiff's reputation as a result of the publication is necessary.

2. Respondent is libel-proof under the incremental harm doctrine because the unchallenged statements pertaining to her criminal convictions caused more reputational harm than the challenged statements.

Here, Respondent is only challenging the following statements: (1) "a pimp for the rich," (2) "a leech on society," (3) "a whore for the poor," and (4) "corrupt and a swindler." (J.A. at 5.). However, several unchallenged statements in Mayor Lansford's post refer to Respondent's prior criminal convictions including: (1) "a woman who walked the streets strung out on drugs," (2) "Silvia Courtier was a lewd and lusty lush," and (3) "she is nothing more than a former druggie." (J.A. at 4.). These unchallenged statements refer to Respondent's multiple convictions for possession of cocaine and her juvenile conviction for indecent exposure. (J.A. at 15.). These unchallenged statements critically reduce Respondent's reputation to a lowly promiscuous drug-user, just by virtue of her prior criminal convictions, such that the challenged statements do not substantially add to Respondent's injury. Therefore, it would be inappropriate to allow Respondent to recover because here the damages would outweigh the actual injury.

More specifically, the harm caused by challenged statements, when taking into consideration the factors laid out in *Jewell*, are merely incremental to the harm caused by the unchallenged statements. First, Mayor Lansford—the source—is a political candidate who has been on the receiving end of Respondent's cutting political posts. The public would be skeptical about imputing truth to Mayor Lansford's comments regarding the Respondent. Thus,

the source here does not create a "different magnitude of harm," if anything the source diminishes the magnitude of harm.

Second, the nature of the challenged statements is not significantly different from that of the unchallenged statements. The unchallenged statements maintain that Respondent is a criminal by virtue of her drug use and promiscuity, whereas the challenged statements stop just short of that by merely calling into question Respondent's integrity. None of the words "pimp," "whore," "swindler," or "leech" clearly describe Respondent as a criminal and further, all of those words in the context of the statements merely elude to dishonesty rather than criminality. (J.A. at 5.). Therefore, the nature of challenged statements stop just short of going "one step further." *Jewell*, 23 F. Supp. 2d at 396.

Lastly, Mayor Lansford is only asserting the incremental harm defense in relation to the four comments that Respondent is asserting in her claim and *all* of those comments are contained within a single publication. Thereby eliminating the concern propounded in *Jewell* of harm taking on a different character by virtue of multiple libelous publications because there is only one publication at issue here.

Overall, Respondent's prior criminal convictions—with no notoriety or public attention—require application of the incremental harm doctrine because reference to those convictions in unchallenged statements caused substantially more harm than the harm caused by the challenged statements. In order to preserve judicial resources and further First Amendment considerations, this case should be appropriately dismissed.

II. THE FIRST AMENDMENT PROTECTS MAYOR LANSFORD'S COMMENTS BECAUSE THEY ARE MERELY RHETORICAL HYPERBOLE.

The Constitution ensures the free exchange of communication. When debating matters of public concern, though, the Constitution does *not* guarantee Americans the right to feel warm and fuzzy. *New York Times*, 376 U.S. at 270. It does not shield one from bad taste, unpleasantness, or even bitter criticism. *Id*. at 269-70. It does, however, guarantee that public debate will be "uninhibited, robust, and wide-open." *Id*. at 270. Accordingly, Americans have a "profound national commitment" to the free exchange of ideas. *Id*. This societal devotion presupposes that our public discourse will "include vehement, caustic, and sometimes unpleasantly sharp attacks" on one's self or one's ideas. *Id*. Use of extremes does not make this freedom any less essential to a functional democracy. In other words, our society places such a high value on the freedom to express oneself, especially in the public domain, that it is willing to allow its people to be offended. This is the inevitable cost of individual freedom—a cost worth paying.

Strategic Lawsuits Against Public Participation ("SLAPP suits"), like the one brought by Respondent, seek to make the First Amendment conditional, by placing figurative language outside of acceptable public discourse. (J.A. at 2.). But, defamation suits do not have "talismanic immunity from constitutional limitations." *New York Times*, 376 U.S. at 269. To ensure "the freedoms of expression are to have the breathing space that they need to survive," this Court has consistently separated and protected what is merely rhetorical hyperbole from unprotected defamation. *Id*. at 272. This is an occasion to do so again.

This Court has held that hyperbolic language is protected by the First Amendment, especially when used in the context of debating matters of public concern. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-22 (1990) (summarizing the Court's rulings throughout the

19th Century that rhetorical hyperbole is protected by the First Amendment). Mayor Lansford's sharp-tongued insults were wielded at a supporter of his political adversary in response to her emotional public criticism of his administration and reelection campaign. (J.A. at 4.). Mayor Lansford's statements were exactly the sort of "imaginative expression[s]" which have "traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20. In this rough-and-tumble social media era of Twitter name-calling, advanced satirical meme[2] culture, and hyper-polarized political campaigning, society has come to not only accept the sort of counterpunch Mayor Lansford threw, but to expect it. *See generally United States v. Bradbury*, 111 F. Supp. 3d 918, 921 (N.D. Ind. 2015). The First Amendment protects this sort of speech––and rightfully so.

A. The First Amendment protects rhetorical hyperbole.

Statements that address alleged acts of public officials are considered matters of public concern. *See Milkovich*, 497 U.S. at 19-20 (using "Mayor Jones…accept[s] the teachings of Marx" as an example of a statement relating to matters of public concern). Here, the challenged statements certainly address matters of public concern: Mayor Lansford's insults were posted on his social media in the context of a heated political campaign and in direct response to harsh criticism of his job performance from one of his opponent's advisors. (J.A. at 3.).

When a challenged statement involves issues of public concern, this Court analyzes three factors to determine whether the statement is actually defamatory. *Milkovich*, 497 U.S. at

[2] An internet "meme" is "an idea, behavior, style, or usage that spreads from person to person within a culture." Memes usually are spread in image, video, or text format and are typically humorous or satirical, but can often be mean-spirited. *See Grumpy Cat Limited v. Grenade Beverage LLC*, 2017 WL 9831408, at *1 (S.D. Cal. Civ. Dec. 1, 2017).

19-22. First, the statement must be provably false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986) (holding speech regarding public concerns must be provably false for a private-figure to recover for defamation); *Milkovich*, 497 U.S. at 19 (applying *Hepps* to public figures). Second, the statement must be reasonably interpreted as stating actual facts. *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). Third, the statement must have been published with reckless disregard of its truth or with knowledge of its falsehood. *Milkovich*, 497 U.S. at 20. If all three factors are satisfied, then the statement may be defamatory. *Id*. at 19-22. However, if the statement fails to meet the first two conditions, it is not defamatory and is protected speech under the First Amendment, and this Court's analysis ends there. *Id*.

Mayor Lansford's statements do not satisfy the first and second considerations because they are rhetorical hyperbole, therefore they are not defamatory. *Bresler*, 398 U.S. at 14. As this Court has defined it, "rhetorical hyperbole" is exaggerated speech that is used in a figurative sense, especially in the context of the "conventional give-and-take" of a public controversy. *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974). In other words, it is "loose, figurative language" used to express one's strong opinion. *Austin*, 418 U.S. at 284.

1. A rhetorically hyperbolic statement cannot be defamatory because it is not provably false.

Only provably false statements of fact can be defamatory. *Hepps*, 475 U.S. at 768-69; *Bresler*, 398 U.S. at 14. Rhetorical hyperbole is comparable to "a vigorous epithet" that is used as a "lusty and imaginative expression" of contempt. *Id*.; *Austin*, 418 U.S. at 286. Words used in a metaphorical sense are not provable statements of fact because they are *figurative* by nature. *See Milkovich*, 497 U.S. at 21.

In *Hepps*, this Court held that a challenged statement must be provably false as a prerequisite to being defamatory. *Hepps*, 475 U.S. at 777. By "insulating speech that is not [] demonstrably false," the Court recognized that the Constitution protects figurative exaggeration in the public discourse to some degree. *Id*. at 778. The Court has clarified to what extent the First Amendment shields rhetorical hyperbole. In *Austin*, this Court held that when rhetorically hyperbolic statements are used, they "cannot be construed as representations of fact," despite appearing so if read literally. *Austin*, 418 U.S. at 284. This Court's rule, then, is well-defined: since rhetorically hyperbolic statements do not make an assertion of fact, they are protected by the First Amendment because they are not provably false. *Id*.

Defamatory, fact-asserting statements like that in *Milkovich*, lie outside of acceptable figurative discourse. *See Milkovich*, 497 U.S. at 3. There, a high school wrestling coach was directly accused of perjury in a newspaper article. *Id*. at 4-5. The column stated, the coach "lied at the hearing after [] having given his solemn oath to tell the truth." *Id*. at 5. This Court rightly held that this was "not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that [the coach] committed the crime of perjury." *Id*. at 21. The Court correctly recognized that there was nothing figurative or hyperbolic about the column. *Id*. Instead, it asserted a clear, provably false fact: the coach committed perjury. *Id*. at 5. The First Amendment does not protect such black and white statements of fact. *Id*. at 3. It does, however, shield the use of rhetorical hyperbole and other emotionally charged language. *Austin*, 418 U.S. at 284.

2. A statement posted on the internet that cannot reasonably be interpreted as stating an actual fact is protected speech.

The First Amendment protects speech about public figures that cannot reasonably be interpreted as asserting actual facts. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

Words often carry different meanings than their literal definitions. A writer's diction can conjure multiple meanings of a statement, but it is the context that determines which meaning a reasonable reader will choose. Often, facially factual statements are reasonably understood as mere rhetoric based on their context. For example, when reading the statement, "happiness is a warm gun," literally, it would seem that the statement asserts shooting a gun will make you happy. However, when read in its context as the chorus[3] to a Beatles' song, it could only reasonably be interpreted figuratively, as suggestive rhetoric about the writer's girlfriend. The Constitution certainly protects this sort of "lusty and imaginative expression," whether in a Beatles song, or a mayor's social media post. *Austin*, 418 U.S. at 286. In other words, since no factual claim is made in a rhetorically hyperbolic statement, it cannot be defamatory. *See Milkovich*, 497 U.S. at 21.

In *Bresler*, a local real estate developer was leading acrimonious negotiations against a city council over the sale of his land to be used for a new public school. *Bresler*, 398 U.S. at 7-8. He sued a neighborhood newspaper for defamation after it reported that residents, at a particularly rowdy council meeting, characterized his negotiation tactics as "blackmail." *Id*. This Court held that, in this context, no reader could have seen the word, "blackmail," and understood it to mean *actual* blackmail. *Id*. at 14. Further, it observed that "even the most careless reader must have perceived that ['blackmail'] was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [his] negotiating position extremely unreasonable." *Id*.

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[3] "…Happiness is a warm gun, momma (bang, bang, shoot, shoot); When I hold you in my arms (ooh, oh, yeah); And I feel my finger on your trigger (ooh, oh, yeah)…" The Beatles, *Happiness Is a Warm Gun*, The Beatles ("The White Album"), (1968), Apple Records.

Additionally, in *Austin*, this Court issued a similar holding. *Austin*, 418 U.S. at 285-86. This Court held that "lusty and imaginative expression[s] of contempt" are protected by the First Amendment. *Id*. When used in volatile labor negotiations, it was again impossible for a reader to mistake a union scab being labeled as a "traitor" to mean he was being accused of the actual crime of treason. *Id*. at 285. This Court explained that the figurative expression of a strongly held opinion, "even in the most pejorative terms," is protected speech. *Id*. at 284. It likened the word, "traitor," to common insults flung in political controversies like, "fascist." *Id*. Words such as these cannot reasonably be interpreted as statements of fact in the "conventional give-and-take" of public debate. *Id*.

Finally, in *Falwell*, the rule was made explicit. *Falwell*, 485 U.S. at 50. A pornographic magazine published an advertising parody in which celebrities discussed their "first time" drinking a particular liquor. *Id*. at 48. Only here, the celebrity was a politically connected evangelical Christian pastor. *Id*. In the faux interview the "pastor" described his first time as a "drunken incestuous rendezvous with his mother in an outhouse." *Id*. The real-life pastor sued the magazine for libel, arguing the government's interest in protecting public figures from defamation is sufficient to deny First Amendment protections for rhetorical hyperbole. *Id*. at 50. This Court flatly rejected that proposed rule. *Id*. Instead, it held that when a statement could not "reasonably have been interpreted as stating actual facts about the public figure involved," it is protected from defamation claims by the First Amendment. *Id*.

Posting a statement on the internet only enhances the applicability of this rule. When statements are read in the context of a social media post, they are even more likely to be considered merely rhetorical hyperbole, rather than factual assertions. Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke.L.J. 855, 936-37.

Reasonable social media users understand that this forum is not overflowing with tried and true facts, especially when politics are at issue. *See Id*. As a result, this Court should analyze Mayor Lansford's post in its figurative sense, but also in light of social media's sardonic and hysterical context overall.

3. If a statement is neither provably false, nor reasonably interpreted as stating an actual fact, then it is irrelevant whether it was posted with actual malice or reckless disregard for its truth.

If the Court finds that a statement of opinion reasonably implies false and defamatory facts about a public figure, its third and final consideration is to determine whether the defamatory statements were made with actual malice or reckless disregard for the truth. *Milkovich*, 497 U.S. at 20. The burden of proof for this element of a defamation claim lies with the allegedly defamed party. *Id*.

As with most modern First Amendment questions, we return to *New York Times* for guidance. *New York Times*, 376 U.S. at 279-80. In the midst of the Civil Rights movement, a newspaper of record published a full-page advertisement, soliciting donations for Dr. Martin Luther King, Jr.'s legal defense fund. *Id*. at 256-57. A public official claimed that the advertisement was defamatory because it accused the Montgomery police of being complicit in, if not leading, the "intimidation and violence" of racial minorities. *Id*. at 258. This Court held that the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id*. at 279-80.

However, before a statement of opinion about a public figure on matters of public concern can even be considered defamatory, the statement must be: (1) provably false, (2)

asserting actual facts, and (3) posted with knowledge of their falsehood or with reckless disregard for their truth. Mayor Lansford's social media posts were neither provably false, nor could be reasonably interpreted as asserting a fact because they were rhetorical hyperbole. Consequently, an analysis of the third consideration is needless.

B. Mayor Lansford's statements are protected rhetorical hyperbole based on every relevant factor.

Mayor Lansford's social media post was neither provably false, nor could it reasonably have been interpreted as asserting an actual fact about Respondent. Both the statement itself and the broader context in which it was made show that it was merely rhetorical hyperbole. An analysis of these factors establishes that it was protected speech under the First Amendment.

1. The statements' context is emotionally charged and political in nature.

"It is a prized American privilege to speak one's mind, although not always with perfect good taste," on matters of public concern. *New York Times*, 376 U.S. at 269. Accordingly, when analyzing a challenged statement, this Court looks at "the broader social circumstances in which the statement was made." *Milkovich*, 497 U.S. at 25 (Brennan, J., concurring in analysis, dissenting in result). Here, the broader context was a political debate where accusations of official corruption and personal shortcomings were traded between a candidate for office and his chief critic within the community. (J.A. at 3-5.). In this context, figurative statements cannot be provably false or read to be assertions of actual fact.

In *Austin*, this Court held that the use of emotionally charged words like "traitor," "cannot be construed as representations of fact" when used during a political fight. *Austin*, 418 U.S. at 284. An insult used in a political context suggests it is likely meant figuratively. *Id*. This sort of "loose language" should not be construed as falsifying facts. *Id*. (quoting *Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 295 (1943)). The Court went further, saying

that no reader could reasonably read disparaging phrases literally when used to express "strong disagreement" on matters of public concern. *Id*. "Such words [are] obviously used [in that context] in a loose, figurative sense." *Id*. They cannot be taken literally as asserting actual facts about someone's political adversary. *See Id*.

Similarly, Mayor Lansford's emotionally charged post came in the context of a hard-fought political campaign. (J.A. at 3.). Respondent had been a vocal, and ever-increasing, critic of the Mayor for *years*. (J.A. at 3.). She then became an advisor and donor to his reelection opponent. (J.A. at 3.). And finally, she publicly attacked Mayor Lansford, calling him "a plutocrat," and insinuating he was corrupt, racist, and derelict in his official duty. (J.A. at 3-4.). In this context—politically charged criticisms—Mayor Lanford's post was not provably false because it was figurative, and no reader could have read the insults as actually asserting facts about Respondent.

Mayor Lansford's statements were not defamatory. Instead, they were merely rhetorical hyperbole in the context of an emotional debate on matters of public concern. Consequently, they are protected speech under the First Amendment.

2. <u>The statements' tone and diction are insulting, vague, and figurative.</u>

Turning to the statement itself, Respondent claims that she was defamed when called "a pimp for the rich," "a leech on society," "a whore for the poor," and "corrupt and a swindler." (J.A. at 4-5.). But, this language cannot be defamatory because the statement's tone and the writer's choice of words were insulting, vague, and figurative in nature. Under these factors, the insults Mayor Lansford flung at Respondent are not defamatory, but are protected rhetorical hyperbole.

This Court has held that when the tone and format of a challenged statement notifies a reader to expect personal judgment, the statement cannot be defamatory. *Milkovich*, 497 U.S. at 32 (Brennan, J., concurring in analysis, dissenting in result). It laid out three factors useful for determining whether a statement was meant literally: whether the statement is (1) insulting, (2) vague, and (3) clearly figurative. If "the tone is pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage," the statement warns the reader that the language is *figurative*, or "obvious hyperbole." *Id*. Even more so, when the challenged statements are actually *insults*. *See Falwell*, 485 U.S. at 50. And, finally, if the statement is *vague*, in that it offers no factual details backing-up its claims, it is probably not meant literally. *See Bresler*, 398 U.S. at 14.

Mayor Lansford's social media post meets all three of these factors. First, it is clearly insulting, or at least was meant to insult Respondent. (J.A. at 4.). The Mayor's use of phrases like "hoity-toity" establishes the insulting tone of the post. (J.A. at 4.). The Oxford Dictionary defines this phrase as "snobbish"—a common insulting trope in every day language. Next, Mayor Lansford offered no factual background and no details to back up his assertions. (J.A. at 4.). For example, the Mayor calls Respondent "corrupt," but offers no anecdote, evidence, or any factual detail to defend it. (J.A. at 4.). Because of its vagueness, no reader could take it as actually asserting facts about Respondent. Finally, Mayor Lansford's diction indicates to the reader that the post is figurative in nature. He employs literary devices that highlight the emotional character of the post. (J.A. at 4.). For example, he writes alliterative phrases like, "lewd and lusty lush, a leech," and uses "undefined slogans" like, "pimp for the rich," and "whore for the Poor." *Austin*, 418 U.S. at 284 (quoting *Angelos*); (J.A. at 4.). These can only be read figuratively, otherwise the post would be nonsensical.

Mayor Lansford's social media post was figurative in nature, vague in its terms, and purposefully insulting to Respondent. Therefore, it is merely rhetorical hyperbole, not defamation, and is protected by the First Amendment.

We are asking the Court to adopt a limited rule on this issue: when a politician expresses opinions on matters of public concern, in a rhetorically hyperbolic manner, against a political foe, it is *not* defamatory. Understanding the politically charged context of the post, reading the statement's vague, insulting, and figurative terms, and judging SLAPP suits in light of our nation's commitment to free speech, this Court should find that Mayor Lansford's statements are constitutionally protected speech.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the decision of the lower court and grant Petitioner's special motion to strike/dismiss this defamation claim.