No. 18-2143

In the Supreme Court of the United States

ELMORE LANSFORD,

Petitioner,

v.

SILVIA COURTIER,

Respondent.

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

1. Whether a public figure and wealthy business owner, who is a felon, can be a libel-proof plaintiff under defamation law solely on the basis of her criminal convictions, including a felony, when they were unbeknownst to the public?

2. Whether a political figure's statements qualify as protected rhetorical hyperbole under the First Amendment of the United States Constitution when the challenged statements are substantially true and opinion statements?

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JURISDICTION STATEMENT

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

CONSTITUTIONAL PROVISION INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. AMEND. I.

STATEMENT OF THE CASE

During Respondent's teenage years, she was forced to support herself because both of her parents passed away due to their own lives of crime. (J.A. at 5.). However, Respondent did not support herself by getting a job; she instead stole money from grocery stores and engaged in other criminal acts. *Id*. Due to these criminal behaviors, she was titled a "delinquent" throughout her juvenile adjudications. *Id*. As a juvenile, she was charged with simple assault, simple possession of marijuana, indecent exposure, vandalism, and possession of cocaine. *Id*. at 15. Respondent's criminal activity did not stop there; as a young adult, she became addicted to cocaine and was charged twice for the distribution of cocaine. *Id*. at 5. These were felony charges, to which she pleaded guilty to and served two years in federal prison. *Id*.

During Respondent's time in federal prison, she earned her G.E.D. and took some college courses. *Id*. After prison, she opened a high-end clothing boutique. *Id*. Soon later, she married former Mayor of Silvertown, Raymond Courtier, who invested in Respondent's business endeavors. *Id*. When Mayor Courtier passed away, Mayor Lansford became the Mayor of Silvertown. *Id*. at 3.

Respondent has been publicly critical of Mayor Lansford; Respondent disagreed with Mayor Lansford's stance to be hard on crime. *Id*. Being a former felon, Respondent considered his political position to be uncongenial. *Id*. Respondent took to the internet to voice her political opinions of Mayor Lansford. *Id.* at 3-4. Respondent called Mayor Lansford a "plutocrat" and made assertions that Mayor Lansford is a prop for the rich, and a man who is not sympathetic to the needs of the community. *Id*. at 4. Respondent went as far as to demonize his desire for police patrols. *Id*. Respondent used her website's column as a way to engage in political speech and exercise her right to speak out about a political figure. *Id*.

Mayor Lansford read the hateful things written by Respondent and decided to engage in the exertion of his right to engage in protected political speech. *Id*. Within these statements, Mayor Lansford correctly stated that Respondent had engaged in criminal activity in her "early years", and was formerly a drug addict. *Id*. He also correctly stated that Respondent owned "upscale" clothing stores, which are only affordable for the wealthy people in their community. *Id*.

Based on Mayor Lansford's response to Respondent's own words, Respondent sued Mayor Lansford for defamation. *Id*. Specifically, she sued Mayor Lansford for these four phrases: "a pimp for the rich"; "a leech on society"; "a whore for the poor"; and "corrupt and a swindler". *Id*. at 5. Mayor Lansford filed a motion to strike and dismiss Respondent's defamation claim, arguing that his words were protected as rhetorical hyperbole, Respondent is a "libel proof plaintiff", and that claiming defamation was a violation of his First Amendment right to free speech. *Id*. at 6.

The District Court of Tenley broke down their analysis of law into two categories: libel-proof plaintiff doctrine and rhetorical hyperbole. *Id*. at 8. In regards to the first issue, the court ruled that Respondent was not a libel-proof plaintiff. *Id*. at 11. However, in regard to the second issue, the court granted Mayor Lansford's motion to strike and dismiss Respondent's defamation claim on the basis of protected rhetorical hyperbole. *Id*. at 13.

Respondent appealed to the Supreme Judicial Court of the State of Tenley. *Id*. at 14. That court affirmed the decision of the district court with regard to the libel-proof plaintiff doctrine. *Id*. at 19. However, it reversed the decision of the lower court on the issue of whether Mayor Lansford's words constituted rhetorical hyperbole protected under the First Amendment's right

to free speech. *Id*. at 22. Mayor Lansford has appealed to this Court decision in the present case. *Id*. at 24.

SUMMARY OF THE ARGUMENT

Respondent is a libel-proof plaintiff under both the incremental harm doctrine and issue-specific doctrine. Respondent is a convicted felon who served two years in prison after a decade-long crime spree, with crimes ranging from stealing to the distribution of illegal drugs. Her reputation cannot be tarnished because she does not have a good reputation to protect.

Respondent's current position as the wife of the former mayor, wealthy business owner, and deafening political activist is irrelevant to her past; one does not cancel the other out. The statements made by Mayor Lansford pertain to her past are true and are of public concern because of her position of authority. Further, Mayor Lansford's statements could not have damaged Respondent's reputation because her reputation was already negative due to her own criminal actions.

Mayor Lansford's statements could not be defamatory because they were rhetorical hyperbole. As a politician, Mayor Lansford's political speech is protected under the First Amendment of the United States Constitution. Political speech has the highest level of protection under the First Amendment. Mayor Lansford made his statements in response to a critic, the Respondent, during and in furtherance of his political campaign to be re-elected as Mayor if Silvertown, making the challenged statements protected political speech.

Further, Mayor Lansford was merely stating his opinions of Respondent. Opinion statements are protected speech as rhetorical hyperbole. However, if this Court was to find that these statements were not opinions, Mayor Lansford's statements were nonetheless true which is the highest defense to a defamation claim. Respondent's current role in society as a businesswoman and political activist does not negate her criminal past.

It is Mayor Lansford's position that this Court should reverse the decision of the lower court, and find that Respondent is a libel-proof plaintiff and that his speech was rhetorical hyperbole.

ARGUMENT

The tort of defamation is designed for individuals who are harmed by negative, false language, to recover damages after their reputation has been tarnished. This tort does not apply to those who have put themselves in the public eye and who began a political dialogue with a politician during his political campaign. While the elements of defamation have been ruled on by the lower court, the doctrine of defamation does not apply to these facts because Respondent is a libel-proof plaintiff, and Mayor Lansford's statements were rhetorical hyperbole. (J.A. at 7.). Respondent's reputation could not be harmed because she does not have a good reputation to protect due to her prior felony convictions. *Id*. at 5. Further, Respondent, had she had a reputation worth protecting, could not have suffered damages from Mayor Lansford's words because they were nothing more than mere exaggerations, not to be taken literally. *Id*. at 4.

I. RESPONDENT IS A LIBEL-PROOF PLAINTIFF UNDER DEFAMATION LAW BECAUSE SHE HAS NO GOOD REPUTATION TO PROTECT DUE TO HER PAST CRIMINAL CONVICTIONS, THAT OF WHICH INCLUDES A FELONY, IN ADDITION TO ALL OF THE OTHER ILLEGAL ACTIVITY SHE HAS ENGAGED IN OVER THE YEARS.

The libel-proof plaintiff doctrine was "adopted to protect the First Amendment rights of speakers whose free speech rights might be chilled by having to defend against suits where a plaintiff could at best recover only nominal damages." *Construction and Application of Libel-Proof Doctrine,* 54 A.L.R.6th 165. The libel-proof plaintiff doctrine has progressed to two different doctrines: incremental harm and issue-specific.

The incremental harm doctrine focuses on the publication where the allegedly defamatory statements were made and "the degree of harm caused by the libelous statements is compared to the harm caused by the remaining, unchallenged statements in the same publication." *Id.*

Under the issue-specific doctrine, "[a] libel-proof plaintiff is one whose reputation on the matter in issue 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). The issue-specific version is typically "applied to justify 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." *Jackson v. Longcope,* 394 Mass. 577, 579 (1985).

Respondent is a libel-proof plaintiff because the challenged statements did not cause further damage to her reputation. Respondent's criminal convictions are a part of her past and cannot be erased. Respondent committed several crimes, including two felonies, and was incarcerated for two years. (J.A. at 5.). Respondent's social justice persona is a mere front used to influence the public into voting for the candidate she supported and advised into office, while Respondent continuously makes money off of catering exclusively to the expensive tastes of the rich. (J.A. at 16.). Respondent's character is a real, legitimate issue and this Court should not automatically conclude that her reputation may be further damaged just because it may seem like she has "rehabilitated herself".

The lower court erred in its determination that Respondent is not a libel proof plaintiff because the court failed to diligently engage in a robust analysis of the libel proof plaintiff doctrine.

A. Under the Incremental Harm Doctrine, the unchallenged statements about Respondent's criminal past were more harmful than the challenged statements of "whore for the poor," "pimp for the rich," "leech on society," and corrupt and a swindler.

The incremental harm doctrine "requires the court to compare the reputational harm of the challenged statements with that of the unchallenged statements. If all the harm to

plaintiff's reputation lies in the unchallenged part, then the remainder is not actionable." *The Incremental Harm Doctrine: Is There Life After Masson?*, 46 Ark. L. Rev. 371.

This test was utilized in the Ninth Circuit where the court analyzed the doctrine as the measurement of the "incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication; if that 'incremental harm' is determined to be 'nominal or nonexistent,' the statements are dismissed as not actionable." *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1541 (9th Cir. 1989) (citing *Simmons Ford, Inc. v. Consumers Union*, 516 F. Supp. 742, 751 (S.D.N.Y. 1981)). Further, another court stated that even "if a statement is false, if the incremental harm caused by the false statement is determined to be "nominal or nonexistent," i.e., then the false statement causes no more harm to the plaintiff than the truth, the false statement is not actionable. *Ferreri v. Plain Dealer Publ'g Co.*, 142 Ohio App. 3d 629, 642-43 (2001).

Thus, the lower court erroneously held that Respondent was not a libel-proof plaintiff because the court did not give sufficient attention to whether Respondent falls under the category of libel-proof plaintiff. (J.A. at 19.). This Court must adopt the incremental harm doctrine in the case at bar would overturn the lower court's decision and dismiss the claim because Respondent's reputation was not harmed by the challenged statements.

The incremental harm doctrine "measures the difference between the harm caused by non-actionable statements when compared with the harm caused by purportedly actionable statements and dismisses the latter when the difference is incremental." *Jewell v. NYP Holdings, Inc.,* 23 F. Supp. 2d 348, 387 (S.D.N.Y. 1998). In dismissing a defamation claim, the Tenth Circuit held that the "incremental harm rule seeks to compare the allegedly false statements about the plaintiff in a particular publication with unchallenged (or true) statements *found in the*

same publication." *Bustos v. A&E TV Networks*, 646 F.3d 762, 765 (10th Cir. 2011) (citing Kevin L. Kite, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine*, 73 N.Y.U. L. Rev. 529, 543-43 (1998)). The court further explained that the incremental harm doctrine "permits recovery only if the false statements do some harm over and above the damage caused by the true ones." *Bustos,* 646 F.3d at 765 (citing Kevin L. Kite, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine*, 73 N.Y.U. L. Rev. 529, 543-43 (1998)).

In another case, the court determined that a publisher's motion for summary judgment should be granted on the grounds that "the portion of the article challenged by plaintiffs, could not harm their reputations in any way beyond the harm already caused by the remainder of the article." *Simmons Ford Inc. v. Consumers Union of United States*, 516 F. Supp. 742, 750 (S.D.N.Y. 1981).

The reputational harm of the challenged statements does not outweigh the harm that could possibly come from the unchallenged/nonactionable statements. The incremental harm doctrine in *Masson* reasoned that, "[W]hen unchallenged or non-actionable parts of a publication are damaging, an additional statement, even if maliciously false, might be non-actionable because it causes no appreciable additional harm." *Church of Scientology Int'l v. Behar,* 238 F.3d 168, 17 (2d Cir. 2001). The court in *Masson* reasoned,

> "implied that if the gist of an article is true, any tangential falsehood can cause no incremental damage to reputation: 'If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation.'"

The Incremental Harm Doctrine: Is There Life After Masson?, 46 Ark. L. Rev. 371

In one case, the incremental harm doctrine was not applied, however, the facts of that case and the case at bar are substantially different. *Langston v. Eagle Pub. Co.*, 719 S.W.2d 612, 623 (Tex. App. 1986).

The incremental harm doctrine applies when the plaintiff "only challenges a small or tangential part of overwhelmingly negative communication." *Langston,* 719 S.W.2d at 622. In one case, the plaintiff was declared libel-proof under the incremental harm doctrine when he challenged a portion of an article that misstated his activities in connection with a stolen car but failed to challenge the remaining portions of the article, which reported that he had a criminal record for murder and rape. *Jackson*, 394 Mass. at 578. When a plaintiff "challenges certain statements in a communication, which damage his reputation far less than the damage necessarily inflicted on his reputation by other unchallenged statements in the same communication, the incremental libel-proof doctrine bars his libel claim." *Langston*, 719 S.W.2d at 622.

In the case at bar, the unchallenged and unactionable statements were more harmful than the challenged statements because they were true. (J.A. at 5, 15-6.). From her teenage years until her incarceration in her early twenties, Respondent habitually broke the law and committed crimes. *Id*. at 15-6. Respondent committed multiple offenses such as "simple assault, simple possession of marijuana, indecent exposure, vandalism, and possession of cocaine." *Id*. at 15. Respondent stole money from grocery stores and engaged in illegal activity, being declared a delinquent during one of several juvenile adjudications. *Id*. at 5. In her early twenties, Respondent was arrested for possession and distribution of cocaine and served two years in prison. *Id*. at 15. The unchallenged statements informed the public of Respondent's criminal convictions and that is far more harmful than mere name-calling.

Therefore, the lower courts erred in their determination that Respondent is not a libel-proof plaintiff because the unchallenged statements were more harmful than the challenged statements.

B. Even if this Court fails to implement the incremental harm doctrine, Respondent is still a libel-proof under the issue-specific doctrine of libel proof plaintiff since her reputation as a political figure who advocates for the poor while making money off of the rich was already badly tarnished and no further damage could have been done.

The issue-specific libel-proof plaintiff applies "when the libel plaintiff has been criminally convicted for behavior similar or identical to that described in the challenged communication." NOTE: THE LIBEL-PROOF PLAINTIFF DOCTRINE., 98 Harv. L. Rev. (1909). One case explained that "when a particular plaintiff's reputation for a particular trait is sufficiently bad, further statements regarding that trait, even if false and made with malice, are not actionable because, as a matter of law, the plaintiff cannot be damaged in his reputation as to that trait." *Church of Scientology Int'l v. Time Warner*, 932 F. Supp. 589, 593 (S.D.N.Y. 1996).

One case cited the decision in *Logan v. District of Columbia* on the issue-specific approach where a newspaper article falsely asserted that the plaintiff tested positive for drug use. *Langston,* 719 S.W.2d at 621. Despite the finding that the article was false and defamatory, the court

> [H]eld that the plaintiff was libel-proof on the specific issue of drug use because he was an admitted drug user, his use of drugs had been publicized in a book, he had been convicted of a federal narcotics violation and charged with another federal narcotics violation, and he had been committed for treatment under a federal drug treatment program.

Id. at 621 (citing *Logan v. District of Columbia*, 447 F. Supp. 1328, 1332 (D.D.C. 1978)).

One case erroneously determined that an appellant was not a libel-proof plaintiff under the issue-specific doctrine despite having criminal convictions. *McBride,* 894 S.W.2d at 10.

In the current case, the challenged statements "whore for the poor," "pimp for the rich," "leech on society," and "corrupt and a swindler" go to the specific-issue of Respondent's questionable character and reliability as a public figure and wealthy business owner, especially because they are true. (J.A. at 5.). Respondent claims to be a social justice warrior who cares about all gender, races, and ethnicities, yet her business caters exclusively to the wealthy. *Id*. at 16. Respondent is a public figure, both as a business owner and a political advocate, who takes advantage of the middle class and low-income citizens by masquerading as someone who will fight for them when she really only fights for the interests of the rich. *Id*. There is no evidence that Respondent's criminal record is sealed, thus making her convictions a published and public record. *Id*. at 4.

Despite the refusal to apply the issue-specific doctrine on "just anybody" with a felony on their record, Respondent is not just "anybody". David L. Hudson*, Jr. Shady Character: Examining the Libel-Proof Plaintiff Doctrine*, 52 Tenn. B.J. 14, 16 (2016). Respondent is one of the most powerful women in the community, both as the former mayor's wife and a prominent business owner of expensive clothing. (J.A. at 2, 16.). Respondent further gained public exposure by thrusting herself into the limelight as a social justice warrior and a political activist. *Id*. at 16. Respondent's character and reliability are of public concern, as she was married to one of the most powerful men in the city, is a business owner who handles a large amount of money, and is someone who is outspoken on political issues. *Id*.

The challenged statements would not damage her reputation further because Respondent already has a damaged reputation. Respondent's criminal record, like most criminal records, is a public record. Respondent's presence in the limelight as a wealthy businesswoman who is corrupt would not be further damaged than the statements made by Mayor Lansford. The

statements made by Mayor Lansford are merely an exaggeration of her position in society. *Id.* Petitioner's contentions did not further damage Respondent's reputation because Respondent's reputation was already damaged.

Respondent's social justice persona is nothing more than a ploy to get her friend elected into office, while Respondent operates a high-end clothing store that caters strictly to the rich. *Id*. Respondent is only concerned with making money, no matter how she has to attain it. (J.A. at 10.). Respondent's felony conviction did not go away; Respondent is still a felon who habitually committed crimes. *Id*. at 5. No matter what Respondent does, she cannot erase her criminal past.

Therefore, the lower courts erred in determining that Respondent is not libel proof under the issue-specific libel-proof plaintiff.

II. MAYOR LANSFORD'S STATEMENTS WERE PROTECTED RHETORICAL HYPERBOLE AND THEREFORE ARE NOT DEFAMATORY.

The statements made by Mayor Lansford about Respondent are not defamatory because they were nothing more than rhetorical hyperbole. In order for statements to be considered rhetorical hyperbole, they must be a "lusty and imaginative expression" of someone or something. *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 286 (1974). Meaning, none of these statements made by Mayor Lansford can be taken literally in any context; even the "most careless reader" can perceive the language used to be rhetorical hyperbole. *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). Additionally, Mayor Lansford made these statements during, and in furtherance of his political campaign for mayor. (J.A. at 4.). Political speech has the highest free-speech protection under the First Amendment of the United States Constitution. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964). This Court in *Sullivan* stated that even erroneous statements by political figures are protected, so long as the defendant did not

make the statements with actual malice. *Id.* Within the facts presented here, Mayor Lansford made mere exaggerations and used terms that could not, even to a negligent reader, be taken literally in any context whatsoever. *Bresler*, 398 U.S. at 14.

Therefore, the Supreme Judicial Court of the State of Tenley erred in rejecting Mayor Lansford's motion to strike and dismiss Respondent's complaint because Mayor Lansford's statements were nothing more than mere exaggerations. (J.A. at 23.). This Court should reverse the decision of the lower court and grant Mayor Lansford's motion to strike and dismiss Respondent's defamation claims against him. *Id*. Further, this Court should rely on its own precedent of protecting speech made by politicians during political campaigns. *Sullivan*, 376 U.S. at 273. This Court has affirmed its decision time and time again: "True when we said it and true today." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011), citing to *Sullivan*, 376 U.S. at 270.

A. Mayor Lansford's speech was during and in furtherance of his political campaign, and political speech is afforded the highest level of protection under the First Amendment.

The lower court erred in rejecting Mayor Lansford's motion to strike and dismiss Respondent's complaint on the basis of rhetorical hyperbole. (J.A. at 23.). Political speech is a protected constitutional right for politicians under the First Amendment, therefore Mayor Lansford's statements cannot be considered defamatory. *Sullivan*, 376 U.S. at 273. The First Amendment prohibits the, "...abridging of free speech"; meaning that speech must be protected and the right to free speech shall not be limited. U.S. CONST. AMEND. I. This amendment has continuously been applied at its highest level protection during political campaigns throughout the past six decades. *Sullivan*, 376 U.S. at 273.

This Court first addressed the issue of whether the First Amendment provides protection to statements made by political parties during campaigning in 1964. *Id.* at 271. In *Sullivan*, this Court ruled that erroneous, negative speech was inevitable during political competition, and to consider these statements defamatory would be harmful. *Id.*, citing *NAACP v. Button*, 371 U.S. 415, 433 (1963). Further, this Court held that the making of a false statement by a politician during a political campaign could not be defamatory as long as it was not made with actual malice. *Id.* at 280. Actual malice requires a reckless disregard for the truth, or attempt to find out the truth. *Id.* Mayor Lansford's statement do not fall within the category of actual malice because he based his statements on facts that Respondent was a felon in her early years, and is now a business owner of high-end clothing boutiques. (J.A. at 4.). In addition, Mayor Lansford made these statements in order to protect his political position in his campaign. *Id*. Mayor Lansford was responding to Respondent's negative comments about him; he was protecting his own political reputation. *Id*. He merely responded to Respondent, using protected rhetorical hyperbole statements. *Id*.

In 2011, this Court affirmed the *Sullivan* holding. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 727 (2011). Citing to *Sullivan*, this Court again ruled that political debates on public issues should be undisturbed. *Id.* at 755. Mayor Lansford had a right to use loose, figurative language in defense of his political campaign; his words regarding Respondent were in duration and in furtherance of his political campaign and therefore constituted protected political speech under the First Amendment. (J.A. at 4.).

The Fourth Circuit ruled that political candidates need not stay silent when being verbally criticized by opposing party advocates. *Miller v. Brock*, 352 So. 2d 313, 314 (La. Ct. App. 1977). Respondent referred to Mayor Lansford in a negative light while publicly advocating for Mayor

Lansford's opponent. (J.A. at 3-4.). The Fourth Circuit held that "[o]ne who engages in fractious and factious dialogue at a political meeting cannot demand sweetness and light from his adversary." *Miller*, 352 So. 2d at 314. Respondent began the exchange between herself and Mayor Lansford, and her language was fractious and factious. (J.A. 3-4.). Mayor Lansford was responding to her with exaggerated language that could not be taken literally. *Id*. Therefore, Mr. Lanford's language was warranted in response to Respondent, who was heckling him in a negative light. *Id*. at 3.

The Central District of California most recently held that the President of the United States' use of rhetorical hyperbole statements is protected under the First Amendment. *Clifford v. Trump*, 339 F. Supp. 3d 915, 919 (C.D. Cal. 2018). Similarly to today's political climate, President Donald Trump used his public Twitter account to make comments about a model. *Id*. at 919. That court recognized that the First Amendment protects rhetorical hyperbole speech, particularly in political speech. *Id*. at 925. The court further recognized that the plaintiff in *Clifford* started the encounter, and because her public comments referred to the President, she was engaging in political speech concerning political issues. *Id*. at 927. Much like Respondent, the plaintiff in *Clifford* spoke of a political figure negatively and he simply reacted. *Id*. The court stated that "[i]f this Court were to prevent Mr. Trump from engaging in this type of 'rhetorical hyperbole' against a political adversary, it would significantly hamper the office of the President." *Id*. Similarly to the present case, Mayor Lansford's abilities as the Mayor of Silvertown would be limited if he could not respond to his critics. This was better described in the case of *Milkovich*, where this Court explained that the use of rhetorical hyperbole in political speech is protected by the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). This Court explained that, without protecting such speech, the political environment

would lack "imaginative expression". *Id*. This Court specifically stated that the speech within *Milkovich* was clearly not factual and that it was "heavily laden with emotional rhetoric and moral outrage." *Id*. at 32. That is similar to the facts in the present case; Mr. Landsford was simply responding to a critic which led to an emotional, exaggerated response. (J.A. at 4.).

Mayor Lansford's comments regarding Respondent cannot be defamatory because speech made during political campaigns has the highest level of protection under the First Amendment of the United States Constitution. *Sullivan*, 376 U.S. at 270. This Court should follow its precedent and continue to protect political speech. *Id.* Therefore, Mayor Lansford's statements are not defamatory because they are protected political speech under the First Amendment.

B. The statements that Respondent is challenging are not defamatory because they are opinions.

Mayor Lansford's statements are not defamatory because they are opinions. Opinion statements cannot be proved true or false; many words have more than one meaning. *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1358 (Col. 1983). Mayor Lansford's statements were rhetorical hyperbole as opinion statements; they could not be taken literally and are not assertions of fact. (J.A. at 4.).

The Ninth Circuit closely examined fact versus opinion statements in 1980. *Info. Control Corp. v. Genesis One Comput. Corp.*, 611 F.2d 781, 781 (9th Cir. 1980). That court created two factors in order to determine if a statement that may be opinion is defamatory: first, it must be established that the words are not defamatory unless they are understood by readers/listeners in a defamatory sense, and second

> [T]o consider in determining the nature of a publication is that even apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an "audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole...."

Id. at 784, quoting *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (1976). As for the first factor, Mayor Lansford's words could not have been understood as defamatory by readers because they were rhetorical hyperbole; even the "most careless reader" could see that. *Bresler*, 398 U.S. at 14. As for the second factor, Mayor Lansford's statements were made in public debate; he was responding to a political critic of his during his political campaign for Mayor of Silvertown. (J.A. at 3.).

Certain words may be defamatory based on who the words are being said to. *Bentley v. Bunton*, 94 S.W.3d 561, 566 (Tex. 2002). In that case, the word "corrupt" was used to defame a judge. *Id*. at 569. The court ruled that this was defamatory because of the judge's position; judges are public officials who serve communities. *Id*. at 583. While Mayor Lansford did call Respondent "corrupt", Respondent is not a public official. (J.A. at 5.). Therefore, the rule in *Bentley* does not apply to the present case. 94 S.W.3d at 566.

Mayor Lansford's language described his own personal opinions of Respondent. (J.A. at 4.). The First Amendment protects political speech, and further protects opinion statements regardless if they are positive or negative; "[t]he First Amendment does not police bad taste." *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 164 (Tex. 2004). Therefore, Mayor Lansford's statements are not defamatory because they are protected opinion statements.

C. <u>The challenged statements, if found not to be opinion statements, are not defamatory because they are true.</u>

Truth is the highest defense to a defamation claim. Statements need not be one-hundred-percent to protect against a defamation claim, they just must be at least "substantially true" or were made without "reckless disregard for the truth". *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 688 (1989). When a public figure makes a statement with a reckless disregard for

the truth, he is acting with actual malice. *Id*. This Court stated that, in order to prove actual malice, there must be sufficient evidence to prove that the defendant had a reason to believe the statements were false. *Id*. The First Circuit more recently emphasized this point, recognizing that this Court has ruled in this way for the last fifty years. *Lemelson v. Bloomberg L.P.*, 903 F.3d 19, 25 (1st Cir. 2018).

Mayor Lansford's statements made reference to Respondent's criminal history, which are facts that cannot be disputed. (J.A. at 4.). Respondent engaged in criminal activity for a decade as a teen and young adult and was subsequently convicted of felony drug charges. *Id*. at 5. When Mayor Lansford referred to Respondent as a "leech on society," he was referring to her past felony convictions of the distribution of cocaine. *Id*. at 4. Respondent's past criminal convictions cannot be disputed because they are solely based on the truth. *Id*. at 5.

In regards to Mayor Lansford's additional statements that are being challenged here, "whore for the poor"; "pimp for the rich"; and "corrupt and a swindler", these are also based on the substantial truth. *Id*. Respondent owns high-end clothing boutiques that only upper-class citizens can afford. *Id*. As the court said in *Isaaks*, "[t]he First Amendment does not police bad taste." 146 S.W.3d at 164.

Therefore, Mayor Lansford's statements cannot be defamatory because they were based on substantial truth, and he did not have a reckless disregard for the truth.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the lower court and grant Mayor Lansford's motion to strike and dismiss Respondent's complaint against him, as well as any other and further relief that this Court deems just and proper.

Respectfully Submitted,

Team 219801
Attorneys for the Petitioner

Dated: September 29, 2019
Washington, D.C.