No. 18-2143

IN THE SUPREME COURT OF THE UNITED STATES

ELMORE LANSFORD,

Petitioner

v.

SILVIA COURTIER,

Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF TENLEY

BRIEF FOR RESPONDENT

Team 219805
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether an individual can be a libel-proof plaintiff under defamation law solely on the basis on past criminal convictions, including a felony, that have gained no notoriety or public attention.

II. Whether the challenged statements in this case qualify as unprotected defamation or protected 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. Summary of the Facts

Silvia Courtier ("Respondent") is a successful businesswoman, political advocate, and altruistic philanthropist. J.A. at 2. Respondent owns and operates a line of high-end clothing stores in and around the City of Silvertown. J.A. at 2. Unfortunately, Respondent's late husband, Raymond Courtier, passed recently. J.A. at 2. Mr. Courtier served as the mayor of Silvertown for eighteen consecutive years until his death. J.A. at 2. Recently, Respondent has become politically active, supporting worthwhile causes and manages two websites, one for her business and one for her political and social advocacy. J.A. at 2.

In the city's most recent mayoral election, Elmore Lansford ("Petitioner") defeated Evelyn Bailord, who Respondent was a avid supporter. J.A. at 3. Respondent contributed to Ms. Bailord's campaign by hosting events and writing commentaries on her behalf. Petitioner was at one time a political contemporary and one-time ally of Respondent's late husband. J.A. at 3. Respondent and Petitioner do not share many of the same political positions. J.A. at 3. For example, Respondent supports efforts around educational equity, restorative justice, and affordable housing. J.A. at 2, whereas Petitioner supports development and gentrification of the city's Cooperwood neighborhood which is know for its public housing complexes. J.A. at 3.

During the recent election, Respondent wrote an online commentary to support Ms. Bailord. J.A. at 3. In her commentary, Respondent criticized Petitioner as a "relic of the past," "a divisive leader," and "someone who cares little for social justice issues." J.A. at 3. Her post was focused on promoting Ms. Bailord as candidate who will "champion many social justice causes that are important to [Silvertown]." J.A. at 4. Petitioner responded by posting on his website the following commentary:

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

J.A. at 4 (emphasis added).

Respondent was born into an unfortunate and tragic situation, but fortunately transformed her life and became a successful businesswoman. J.A. at 5. Both of Respondent's parents were addicted to drugs and her father was killed was serving a fifteen-year prison sentence for selling drugs. J.A. at 5. When Respondent was ten years old, Respondent's mother died of a drug overdose. J.A. at 5. As a juvenile growing up without parental support, Respondent engaged in minor criminal offenses that included simple assault, marijuana possession, indecent exposure, vandalism, and possession of cocaine. J.A. at 5. A juvenile court judge declared her delinquent and later, Respondent served a two-year prison sentence for pleading guilty to one count of felony possession of cocaine. J.A. at 5. While in prison, Respondent reformed her life by earning a G.E.D. and enrolling in community college courses. J.A. at 5. Upon her release, Respondent applied her business knowledge and opened her first small-scale clothing store, and she grew her business over time. J.A. at 5. Later, Respondent married Mr. Courtier. J.A. at 5.

II. Procedural History

Respondent filed a defamation of character and false light invasion of privacy action against Petitioner over the immature comments he made on social media in Tenley District Court. J.A. at 5. Petitioner filed a motion to dismiss/strike Respondent's lawsuit pursuant to the

Tenley Citizens' Public Participation Act.[1] Respondent claimed that Petitioner defamed her by referring to her as "a pimp for the rich," "a leech on society," "a whore for the poor," and "corrupt and a swindler." J.A. at 5–6. Petitioner responded that his statements were protected as rhetorical hyperbole under the First Amendment and that Respondent is libel-proof because she is a former felon who has no good reputation to protect. J.A. at 6. The Tenley District Court granted Petitioner's motion to dismiss finding the challenged statements constituted protected rhetorical hyperbole, but found that Respondent did not qualify as a libel-proof plaintiff. J.A. at 11, 13.

On appeal, the Tenley Supreme Judicial Court, reversed the decision of the Tenley District Court. J.A. at 23. The court refused to dismiss the lawsuit because Respondent is not a libel-proof plaintiff and held that it is possible that the phrase "corrupt and a swindler" may not be protected as rhetorical hyperbole. J.A. at 21, 23. The court, however, did adopt the libel-proof plaintiff doctrine, however, it did not reference which version of the doctrine it applied. J.A. at 20.

[1] Tenley Code Ann. §5–1–701 et. seq. protects defendants from lawsuits that target them for expression that should be protected by the First Amendment. J.A. at 2. The law 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. J.A. at 6.

SUMMARY OF THE ARGUMENT

This Court should affirm the holding of the Supreme Judicial Court of Tenley's ruling that Respondent is not a libel proof plaintiff and subsequently hold that Petitioner's speech is not rhetorical hyperbole, and thus is not protected by the First Amendment. This Court should also hold that an individual cannot be a libel proof plaintiff solely on the basis of her past criminal convictions that have gained no notoriety. This Court should apply the issue specific version of the libel proof plaintiff doctrine in analyzing this issue.

The issue specific doctrine adequately balances a plaintiff's reputational interests with a defendant's right to free speech under the First Amendment. The issue-specific doctrine, rather than the incremental harm doctrine, allows the court to consider the totality of the circumstances surrounding the libelous publication, other than just the written words and generates less inequitable results. The incremental harm doctrine is not required by the First Amendment to protect free speech, presupposes that one's reputation is not multi-faceted, and its application produces inequitable results. Under this doctrine, statements may be deemed actionable in one publication, but non-actionable in another solely on the basis of their location.

If this Court does not determine that Respondent is not libel proof, then it should hold that Petitioner's speech is not rhetorical hyperbole and thus is not protected under the First Amendment. Petitioner's statements can reasonably be interpreted as stating actual facts regarding respondents political and professional capacity. Petitioner's statements cannot be rhetorical hyperbole under all three tests that courts have implemented. All three tests call for a court to look at the totality of the circumstances surrounding the statements. Respondent is politically active and is a prominent businesswoman in her community. Petitioner's statements all attack Respondent's ethics and professional capacity as a businesswoman. Petitioner uses

language that asserts Respondent had a former drug addiction, defrauds her wealthy customers, and is dishonest in running her clothing business. Additionally, the former political connection between Petitioner and Respondent's late husband, it is possible to infer that Petitioner's statements may have merit.

In light of these reasons, this Court should apply the issue specific version of the libel proof plaintiff doctrine, and hold that Respondent cannot be a libel proof plaintiff solely on the basis of her past criminal convictions that have gained no notoriety and that Petitioner's statements are not rhetorical hyperbole.

ARGUMENT

I. UNDER EITHER APPLICATION OF THE LIBEL-PROOF PLAINTIFF DOCTRINE, AN INDIVIDUAL IS INCAPABLE OF BEING LIBEL-PROOF SOLELY BASED ON PRIOR CRIMINAL CONVICTIONS THAT HAVE GAINED NO NOTORIETY OR PUBLIC ATTENTION.

Generally, a communication is defamatory if it harms the reputation of another "as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[2] *See* Restatement (Second) of Torts §559 (1977). A plaintiff proves defamation by demonstrating that the defendant "failed to exercise reasonable care in publishing a false and defamatory statement of fact about the plaintiff to a third party, assuming no valid privilege applies to the communication." *Pierson v. Hubbard*, 147 N.H. 760, 763 (2002); *see also* Restatement (Second) of Torts §558 (1997).

In many jurisdictions, however, a plaintiff may be barred from bringing a libel action where the court characterizes the plaintiff as libel-proof. *See The Libel-Proof* Plaintiff Doctrine, 98 Harv. L. Rev. 1909, 1909–10 (1985) (tracing the development of the libel-proof plaintiff doctrine). The libel-proof plaintiff is one whose reputation, as a matter of law, is so tarnished with respect to the subject matter of the defendant's allegedly libelous statement that the plaintiff's reputation could not be further harmed. *See* David Marder, *Libel Proof Plaintiffs—Rabble Without a* Cause, 63 B.U. L. Rev. 993, 993 (1987). The doctrine originally developed as a means of "determining the appropriate accommodation between the law of defamation and the freedoms protected by the First Amendment." *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 928 (C.D. Cal. 1982). The Second Circuit first recognized this doctrine in *Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638 (2d Cir. 1975), where the court narrowly held that a prison

[2] Libel consists of the publication of defamatory matter by written or printed words, whereas slander consists of the publication of defamatory matter by spoken words. *See* Restatement (First) of Torts §568 (1938).

inmate was libel-proof regarding his involvement in various criminal organizations because he was "so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case . . . ." *See Cardillo v. Doubleday & Co., Inc.,* 518 F.2d 638, 639–640 (2d Cir. 1975).

Courts have since developed two applications of the libel-proof plaintiff doctrine: (1) the incremental harm and (2) the issue-specific doctrines. *See Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 322 (2007); *The Libel-Proof* Plaintiff Doctrine, 98 Harv. L. Rev. 1909, 1909–10. The incremental harm doctrine examines the challenged communication rather than the plaintiff's prior reputation. When applying the doctrine, a judge

> evaluates the defendant's communication in its entirety and considers the effects of the challenged statements on the plaintiff's reputation in the context of the full communication. If the challenged statement harms a plaintiff's reputation far less than unchallenged statements in the same article or broadcast, the plaintiff may be held libel-proof. Finding that the challenged statements could cause no cognizable damage in addition to that presumed to attend the unchallenged part of the communication, the court dismisses the entire libel action.

The Libel-Proof Plaintiff Doctrine, *supra* at 1912–13. Under the issue-specific version, however, the court will find a plaintiff libel-proof where his or her reputation on the matter in issue is so diminished that, at the time of an otherwise libelous publication, it could not be further damaged. *See Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 304 (2d Cir. 1986); *Cardillo*, 518 F.2d at 639–40. Generally, courts have restricted the issue-specific doctrine's application to plaintiffs who are habitual criminals; however, some courts have narrowly expanded the doctrine to apply to individuals who engage in anti-social behavior. *See* Guccione, 800 F.2d at 303 (holding individual libel-proof in relation to his highly-publicized adultery); *Buckley* v. *Littell*, 539 F.2d 882, 889 (2d Cir. 1976) (noting doctrine should be applied in limited factual situations);

Wynberg, *564* F. Supp. at 928. In these situations, the plaintiff would be deemed libel proof regarding the specific anti-social conduct. *Id*.

A. The Court Should Adopt The Issue-Specific Libel-Proof Plaintiff Doctrine Because It Allows The Court To Fairly Balance Petitioner's First Amendment Rights With Respondent's Ability To Protect Her Reputation.

This Court should adopt the issue specific version of the libel-proof plaintiff doctrine because courts can more effectively balance a plaintiff's right to maintain their reputation with a defendant's free speech rights. While courts criticize both strands of the libel-proof plaintiff doctrine, the issue-specific version more effectively balances a plaintiff's ability to protect his or her reputation and the defendant's First Amendment rights. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991) (rejecting idea that incremental harm doctrine compelled by First Amendment); *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984) (criticizing both versions of the libel-proof plaintiff theory). Courts have used both libel-proof doctrines as a means of resolving the tension between the law of defamation and the freedom of speech and press protected by the First Amendment. *See Wynberg*, 564 F. Supp. at 928. Specifically, using the issue-specific application, courts consider the totality of the circumstances by balancing the nature of the plaintiff's conduct, the number of offenses, and the degree and range of publicity received against the defendant's First Amendment right to free speech. *See id.* at 927–928. The issue-specific doctrine, rather than the incremental harm doctrine, allows the court to consider the totality of the circumstances surrounding the libelous publication, other than just the written words and generates less inequitable results. *See Thomas*, 155 N.H. at 325; Marder, supra at 1013–1014 (highlighting inequitable result of incremental branch). Therefore, the issue-specific version better accommodates both interests, and should be adopted by this Court. *See id.* This Court should adopt the issue-specific standard and then hold

that an individual cannot be considered libel-proof as a matter of law based solely on prior criminal convictions that have gained no notoriety or public attention. If, however, this Court decides to apply the incremental harm doctrine, the Court will still find that here Respondent is not libel-proof.

The Court should decline to adopt the incremental harm approach because it does not properly balance the parties' rights for the following three reasons: (1) the doctrine itself is not required by the First Amendment to protect free speech; (2) the doctrine improperly assumes that reputation is not multi-faceted; and (3) the doctrine is arbitrary and produces inequitable results.

In *Mason v. New Yorker Magazine*, 501 U.S. 496 (1991), this Court held that the incremental-harm doctrine is not necessary to afford a defendant First Amendment protections. 501 U.S. at 496. In *Mason*, the Court affirmatively "reject[ed] any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech." *See Mason* 501 U.S. at 523. In addition, the Court explained that the incremental harm doctrine does not further a defendant's already existing First Amendment safeguards in libel actions. *See Id.* ("[t]he question of incremental harm does not bear upon whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not."); *see also New York Times v. Sullivan* 376 U.S. 254 (1964) (requiring public officials prove actual malice in libel actions); *Gertz v. Robert Welch*, 418 U.S. 323 (requiring private plaintiffs "prove knowledge of falsity or reckless disregard for the truth" to recover punitive damages in libel actions). Further, there are other established First Amendment safeguards to libel actions such as the affirmative defense of truth and the defense of rhetorical hyperbole. *See Andrews v. Prudential Sec.*, 160 F.3d 304, 308 (6th Cir. 1998) (holding truth is a complete defense for libel);

Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) (holding rhetorical hyperbole is a defense for libel).

In *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Circ. 1984), then-Circuit Court Judge Antonin Scalia illustrated that inherent in its application, the incremental harm doctrine does not acknowledge that an individual's reputation can be affected in a myriad of ways and presupposes that it is possible for one's reputation to be irreparably damaged. 746 F.2d at 1568. The court stated that the incremental harm doctrine

> must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us—or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity.

Id. Judge Scalia further illustrates that even though some challenged statements may be less harmful than those that are unchallenged, the statements can nonetheless still negatively impact one's reputation. *Id.* ("Even if some of the deficiencies of philosophy or practice which the appellee's articles are lawfully permitted to attribute to the appellants are in fact much more derogatory than the statements under challenge, the latter cannot be said to be harmless"). Because the incremental harm doctrine is based solely on analyzing the language contained within a publication, it fails to acknowledge that challenged statements can still be libelous.

Due to the arbitrariness inherent in the incremental harm doctrine, its application produces inequitable results. Since the doctrine assumes that "harm to the plaintiff stems only from the nonactionable portion of the article, [it] ignores the fact that challenged passages may add a note of validity to the main proposition advanced by the entire article." *See* Marder, *supra* at 1013. As such, the doctrine does not account for situations where the challenged statements

provide meaning and context to the unchallenged statements, and that together, harm the individual's reputation far more than they could separately. *Id*. Additionally, under the doctrine, challenged statements may be deemed inactionable in one publication due to the presence of more-harmful unchallenged statements, but actionable in another publication that is absent other damaging statements. In essence, the doctrine ignores whether statements are libelous in nature and provides a remedy "simply because of the fortuitous location of other falsehoods." *Id.*

For the above mentioned reasons, this Court should apply the issue-specific version of the libel-proof plaintiff doctrine and then hold that an individual cannot be considered libel-proof based solely on criminal convictions that gained no notoriety.

B. Nonetheless, Respondent Cannot Be Considered Libel-Proof Based Solely On Criminal Convictions That Have Gained No Notoriety Or Public Attention Under Either Application Of The Libel-Proof Doctrine.

Under either application of the doctrine, criminal convictions alone that gained no notoriety or public attention are not sufficient to justify applying the libel-proof doctrine as a defense to a libel action, because even habitual criminals' reputations can be further harmed, and courts will have difficulty evaluating whether the plaintiff's reputation has been irreparably tarnished. *See Thomas*, 155 N.H. at 325 (recognizing practical concerns raised by *Liberty Lobby* court); *see also* Marder, *supra* at 1013 (documenting inequities created by incremental harm doctrine's application). Additionally, either version of the doctrine should be narrowly applied because the law should not strip a plaintiff, even a serious criminal, of a legal remedy to protect their reputation. *See* Evelyn A. Peyton, Comment, *Rogues' Rights: The Constitutionality of the Libel-Proof Plaintiff Doctrine*, 34 Santa Clara L. Rev. 179, 180 (1993).

1. Under The Issue-Specific Libel-Proof Plaintiff Doctrine, An Individual Cannot Be Considered Libel-Proof As A Matter Of Law Based On Prior Criminal Convictions That Have Gained No Notoriety Or Public Attention Because The Court Must Consider The Totality Of The

Circumstances.

Under the issue-specific doctrine, the court will be unable to measure the reputation of the plaintiff to determine as a matter of law whether the plaintiff is libel-proof absent adequate notoriety or publicity of prior criminal convictions. In *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), the court declined to adopt either version of the libel-proof plaintiff doctrine partly because of doctrine's difficult application.[3] 746 F.2d at 1568. Specifically, the court noted that it could not "envision how a court would go about determining whether someone's reputation had been 'irreparably damaged.'" *Id.* Other courts, either directly or indirectly recognizing this difficulty, have required that the plaintiff's activities be "widely reported to the public" or have looked to the public record to evaluate the plaintiff's reputation. *See Guccione*, 800 F.2d at 303–304; *Thomas*, 155 N.H. at 325.

In *Thomas v. Telegraph Publishing Co.*, the New Hampshire Supreme Court directly addressed the *Liberty Lobby* court's concern by adopting the issue-specific version of the doctrine and narrowing its application to a plaintiff who "engaged in criminal or anti-social behavior in the past" where "his activities were widely reported to the public."[4] *See Thomas*, 155 N.H. at 325. The "degree and range of publicity received" must factor into the court's

[3] In *Liberty Lobby v. Anderson*, the plaintiff, Jack Anderson, published several articles about Liberty Lobby, a conservative advocacy group, referring to the group as racist, fascist, and anti-sematic. 746 F.2d 1563, 1567 (D.C. Cir. 1984). The trial court granted the defendant's motion for summary judgment because the plaintiff was unable to establish the elements of libel. *Id.* After the D.C. Circuit declined to adopt the libel-proof plaintiff doctrine, the Supreme Court granted certiorari but declined to review the decision regarding the doctrine. *See The Libel-Proof* Plaintiff Doctrine, 98 Harv. L. Rev. 1909, 1912 (1985).

[4] In *Thomas v. Telegraph Publishing Co.,* the plaintiff filed a defamation action against a newspaper publisher challenging fifty-eight statements regarding publisher's article that alleges the plaintiff engaged in past criminal behavior. 155 N.H. 314, 319 (2007). The trial court granted summary judgment deeming the plaintiff libel proof. *Id.* at 325. The trial court, however, found that the requisite publicity necessary for finding a plaintiff libel-proof was absent. *Id.*

determination about whether a plaintiff is capable of being libeled. *Id.* Under New Hampshire libel-law, the doctrine is therefore inapplicable in situations where a plaintiff experienced prior criminal convictions that received no publicity or notoriety. *See id.* The court reasoned that "[p]ublicity is part and parcel of the damage to a reputation necessary to trigger . . . the libel-proof doctrine," because publicity is the "means by which such damage occurs and the most effective evidence of that damage." *Id.* Without notoriety, the New Hampshire Supreme Court, agreeing with the D.C. Circuit in *Liberty Lobby*, held that an individual could not be libel-proof based on prior criminal convictions alone because the court would be unable to evaluate the plaintiff's reputation. *See id.*; *see also Wynberg*, 564 F.Supp. at 928 (noting criminal convictions with attendant publicity may make plaintiff libel-proof). To apply the issue-specific version, the "evidence on the nature of the conduct, the number of offenses, and the degree and range of publicity received must make it clear, as a matter of law, that the plaintiff's reputation could not have suffered from the publication of the false and libelous statement." *Thomas*, 155 N.H. at 325. This court should adopt the holding and reasoning offered by the New Hampshire Supreme Court and hold that an individual is incapable of being libel-proof for a past criminal conviction that has gained no notoriety.

Furthermore, many courts require that prior criminal convictions received attendant notoriety to find a plaintiff libel-proof. For example, the court in *Guccione v. Hustler Magazine, Inc.* determined whether the plaintiff was libel-proof under the issue-specific doctrine by considering evidence concerning the notoriety and publicity surrounding Guccione's adultery. 800 F.2d at 299. The plaintiff, Robert Guccione, was the publisher of *Penthouse* magazine and sued *Hustler* magazine regarding an article that accused Guccione of being an adulterer. *Id.* The facts disclosed at trial indicated that Guccione was living with another woman while still married

to someone else. *Id.* The trial court found that the defendant's article constituted libel. *Id.* at 301. On appeal, the court specifically considered evidence about the public nature of Guccione's adulterous relationship. *See id.* The court noted that Guccione on several occasions told reporters that he was separated from his wife and that he was living with another woman. *Id.* The court held that Guccione was libel-proof because the evidence indicated his adultery was highly publicized and newsworthy and that he did not restore his reputation between the time where the statements were true and the article was published. *Id.* at 303. Similarly, in *Cerasani v. Song Corp.*, the district court determined that the plaintiff was libel-proof as a matter of law regarding his participation in organized crime that was depicted in a film. 991 F.Supp. 343, 353 (S.D.N.Y. 1998). In establishing the plaintiff's reputation as irreparably tarnished, the defendant asked the court to rely on,

> (a) Cerasani's criminal record, *(b) the publication and widespread dissemination of the book's depiction of Cerasani as Bonanno Family career criminal*, (c) Agent Pistone's testimony at the trial in *United States v. Napolitano* about Cerasani's alleged involvement in the murders of three Bonanno captains, and *(d) national news coverage of Cerasani's involvement in criminal activity, including recent widespread press coverage of his alleged involvement in a Mafia scheme to manipulate the stock market.*

Id. (emphasis added). Similar to the court in *Thomas v. Telegraph Publishing Co.*, the courts in *Guccione* and *Cerasani* relied on evidence regarding the publicity of the plaintiffs' activities to evaluate their reputations. A plaintiff, therefore, would be incapable of being deemed libel-proof for criminal convictions alone, because the court would be unable to determine if the plaintiff's reputation is irreparably damaged. *See also McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6, 10 (Tex. App. 1994) (requiring public reporting of prior criminal or anti-social behavior to apply doctrine).

When applying the issue-specific version to an individual with prior criminal convictions,

many courts heavily weigh the publicity the convictions received. For example, in *McBride v. New Brunsfels Herald-Zeitung*, the plaintiff brought a libel action against a newspaper for an article commenting that the plaintiff had been arrested and charged with aggravated robbery. 849 S.W.2d at 7. The court in *McBride* emphasizes that the doctrine is "particularly suitable when plaintiffs who are notorious for past criminal behavior assert that they have been libeled by communications charging them with identical or similar behavior." *Id.* at 9. To justify applying the doctrine, the court considered evidence on the nature of the conduct, the number of offenses, and the degree and range of publicity received." *Id.* at 10. In this case, the court held that the plaintiff is not libel-proof because the record contained no evidence that his criminal convictions received any notoriety, and therefore, the court reasons that it has no means to assess the plaintiff's reputation within the community. *Id.*; *Cf. Wynberg*, 564 F.Supp. at 928 (noting that several newspapers reported plaintiff's criminal convictions); *Jackson v. Longcope*, 394 Mass. 577, 582 (1985) (noting plaintiff's criminal convictions received substantial publicity). The court assumed that because the criminal activity was not reported to the public, the plaintiff's reputation within the community was good. *Id.*

Here, when applying the issue-specific version, this Court should hold that Respondent is incapable of being libel-proof solely on the basis of past criminal convictions that have gained no notoriety or public attention. When considering the totality of the circumstances, Respondent's reputation regarding her business and political affairs is not so tarnished to the point that she is libel-proof because Respondent has a strong, positive reputation within her community and her past criminal convictions are minor, inconsequential, and gained little to no media attention. Petitioner's attack on Respondent criticizes her for being a "former druggie" "who walked the streets." J.A. at 4. Respondent, a victim of an unfortunate upbringing who grew up exposed to

illegal drug use, pled guilty to only one count of felony distribution of cocaine and served two years in prision. J.A. at 5. Respondent also was convicted of a few minor juvenile offenses such as simple assault and simply possession of marijuana. J.A. at 15. Respondent is therefore not a serious or habitual criminal. *C.f. Cardillo*, 518 F.2d at 638 (noting plaintiff was involved in organized crime); *Ray v. Time, Inc.*, 452 F.Supp. 618 (W.D. Tenn. 1976) (finding convicted assassin of Dr. Martin Luther King, Jr. libel-proof); *Davis v. The Tennessean*, 83 S.W.3d 125 (Tenn. Ct. App. 2001) (holding armed robber sentence to 99 years in prison as libel-proof). Unlike in *Cerasani v. Song Corp.*, where the court held that the plaintiff was libel-proof as a matter of law regarding his participation in organized crime, here, Respondent committed less serious, drug-related crimes for a significantly shorter period of time before deciding to change her life.

Furthermore, the record does not indicate whether Respondent's criminal convictions were publicized or received any notoriety. Like the court in *McBride v. New Brunsfels Herald-Zeitung*, where the court refused to find the plaintiff was libel-proof based on convictions that received no public attention, here, this Court should not find the plaintiff libel-proof. Without the publicity surrounding Respondent's criminal convictions, this Court, similar to *McBride,* should assume that Respondent's reputation is good. Therefore, without evidence that Respondent's prior criminal convictions received public notoriety, the Court should not deem the plaintiff libel-proof. *See Thomas*, 155 N.H. at 325 (holding doctrine inapplicable in situations where a plaintiff experienced prior criminal convictions that received no publicity or notoriety).

Even without this assumption, Respondent's reputation is strong, and therefore this Court should not deem her libel-proof based solely on past criminal convictions that received no publicity. Unlike in *Guccione,* where the court noted that the plaintiff failed to repair his

reputation regarding his adultery before the allegedly libelous article was published, here, Respondent has repaired and bolstered her reputation within her community over the last decade. Respondent is now a successful businesswoman who operates high-end clothing stores and a prominent political advocate, who devotes much of her attention to altruistic endeavors. J.A. at 16. This Court, when considering the totality of the circumstances under the issue-specific doctrine, including the nature of Respondent's previous criminal conduct, the number of offenses, and the degree and range of publicity, cannot hold that Respondent is libel-proof.

2. If This Court Decides To Apply The Incremental-Harm Version Of The Libel-Proof Doctrine, Respondent Cannot Be Considered Libel-Proof As A Matter Of Law Based On Prior Criminal Convictions That Have Gained No Notoriety Or Public Attention Because The Court Must Consider The Totality Of The Circumstances.

If this Court applies the incremental-harm analysis, the Court should not deem Respondent libel-proof based solely on past criminal convictions that have gained no notoriety or public attention. When performing the incremental harm analysis, this Court should evaluate Petitioner's statement in its entirety and consider the effects of the of he challenged statements on Respondent's reputation in the context of the full communication. Specifically, if the challenged statements harm Respondent's reputation more than the unchallenged statements, Respondent is not considered libel-proof. *See Thomas*, 115 N.H. at 324. In *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F. Supp. 742 (S.D.N.Y. 1981), the court found that the plaintiff was libel-proof under the incremental harm approach. The plaintiff manufactured and sold an electric car, and the defendant published an article in the *Consumer Report* magazine giving the car a poor rating. *Simmons Ford, Inc.*, 516 F. Supp. at 744. The Consumer Report mentioned that regular cars needed to conform to Federal safety standards and that electric cards were exempt from these standards. *Id.* The plaintiff challenged these

comments are defamatory. *Id.* The court found that the challenged portion of the statements, about the exemption from Federal safety standards does not harm the plaintiff's reputation beyond the harm caused by the unchallenged statements about the electric cars poor safety performance. *Id.* at 750.

Here, Respondent is not libel-proof under the incremental harm approach because the challenged statements, "a pimp for the rich;" "a leech on society;" "a whore for the poor;" and "corrupt and a swindler," damage Respondent's reputation more than the unchallenged statements. J.A. at 18. The challenged statements specifically target Respondent's current reputation as a prominent businesswoman and a political advocate, while the unchallenged statements reference her previous criminal activity that occurred decades prior. J.A. at 18. Because the challenged statements attempt to tarnish her current reputation, those statements are far more damaging than the Petitioner's unchallenged statements. Specifically, the unchallenged statements referring to Respondent as "a woman who walked the street strung out on drugs" and a "former druggie" do not have a significant impact on her current reputation. While it is factually true that Respondent decades prior suffered from a substance-abuse problem, Respondent has turned her life around. At the time that those statements were true, Respondent was a victim of sexual assault and drug addiction. Because Respondent was a victim of her environment, those statements are not significantly damaging to her reputation—those statements actually make her sympathetic in light of how she has since transformed her life. Therefore, the challenged statements that attack her current reputation are far more damaging to her current personal and professional reputation. The high-end clothing lines that Respondent works with and her political allies will likely view the comments that she is "corrupt and a swindler" as far more damaging to her reputation than comments referencing her previous

position in life where she grew up with parents who suffered from serious drug additions. Therefore, since the challenged statements are far more damaging than the unchallenging statements, this Court should not deem Respondent libel-proof.

This Court should adopt the issue-specific application of the libel-proof plaintiff doctrine for the reasons stated above and hold that Respondent is not libel-proof based solely on previous criminal convictions that have gained no notoriety or public attention. If, however, this Court decides to apply the incremental-harm approach, the Court should also find that Respondent is not libel-proof because the challenged statements are more damaging to her reputation than the challenged statements.

II. PETITIONER'S STATEMENTS ARE NOT PROTECTED AS RHETORICAL HYPERBOLE UNDER THE FIRST AMENDMENT, BECAUSE PETITIONER'S STATEMENTS CAN BE REASONABLY INTERPRETED AS STATING ACTUAL FACTS REGARDING RESPONDENT'S POLITICAL AND PROFESSIONAL CAPACITY.

The United States Supreme Court has held that loose, figurative language can fall within the scope of First Amendment protection—an unconditional privilege for so-called rhetorical hyperbole. *Greenbelt Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970). Statements that cannot be "reasonably interpreted as stating actual facts about an individual made in debate over public matters" have been protected by the Constitution as a means of preserving imaginative expression or so-called rhetorical hyperbole. *Milkovich*, 497 U.S. at 20.

The Oxford American Dictionary defines "rhetorical" as "expressed in a way that is designed to be impressive" and "hyperbole" as "an exaggerated statement that is not meant to be taken literally." Oxford American Dictionary 581 (Eugene Ehrlich et al. eds., 1980); *Id*. at 322; *see also Milkovich*, 497 U.S. 1 at 20. Petitioner's attacking statements toward Respondent are defamatory when read literally as they do assert or imply actual facts. *See Horsley v. Rivera*, 292

F.3d 695, 699, 701-02 (11th Cir. 2002) (addressing talk-show host's statements that guest was "accomplice to homicide"); *Ollman v. Evans*, 750 F.2d 970, 982 (D.C. Cir. 1984) (discussing remark that television sports reporter was "'the only newscaster in town who is enrolled in a course for remedial speaking"' (quoting *Myers v. Boston Magazine Co.*, 403 N.E.2d 376, 376-77 (Mass. 1980))); *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314, 1329 (W.D. Pa. 1974) (addressing statements that man was "paranoid" and "schizophrenic"); *Thuma v. Hearst Corp.*, 340 F. Supp. 867, 871 (D. Md. 1972) (addressing statement referring to police officer who had shot sixteen-year-old boy as committing "cold-blooded murder"); *Pease v. Int'l Union of Operating Eng'rs Local 150*, 567 N.E.2d 614, 618-23 (Ill. App. Ct. 1991) (addressing statements that plaintiff lied about innocence in libel charges).

In *Milkovich*, the Supreme Court granted certiorari to address the defamation claim made by a high school wrestling coach against a local newspaper. 497 U.S. 1 at 3–4. Milkovich and his team were involved in a fight during a wrestling match with another school. *Id*. After several injuries, the coach and superintendent of the high school testified in court. *Id*. at 4. Later, a newspaper article accused the coach of committing the crime of perjury. *Id*. at 6-7. The trial court granted summary judgment for the newspaper on the grounds that the statements were protected opinions. *Id*. at 8. On appeal, the United States Supreme Court reasoned that there is "not a wholesale defamation exemption for anything that might be labeled 'opinion,'" and that "expressions of 'opinion' may often imply an assertion of objective fact.'" *Id*. at 18. The Court ultimately held that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law." *Id*. at 19-20. The Court in *Milkovich* established the controlling test for determining whether speech is protected as rhetorical hyperbole under the First Amendment. *Id.* at 21. Speech is not protected as rhetorical hyperbole

where a reasonable factfinder could conclude that the statement implies an assertion of provable fact. *Id*. at 21.

After the decision was rendered in *Milkovich*, federal and state courts applied the rhetorical hyperbole test in three ways. The Ninth Circuit Court of Appeals adopted a totality of the circumstances test. *See Underwager v. Channel 9 Austl.*, 69 F.3d 361, 366 (9th Cir. 1995); *see also Burrill v. Nair*, 217 Cal. App. 4th 357 (2013) (holding under the totality of the circumstances test that there was a sufficient defamation claim where a counselor was called a "corrupt criminal"). Similarly, the Supreme Court of Ohio applies a four- prong totality of the circumstances test to assess the difference between factual assertions and opinion-based speech. *Vail v. Plain Dealer Publ'g Co*., 649 N.E.2d 182, 185 (Ohio 1995). Finally, the Appellate Court of Illinois applies a test that analyzes the precise meaning of the statements before assessing their trueness. *Hopewell v. Vitullo*, 701 N.E.2d 99 (Ill. App. Ct. 1998).

A. Under the Ninth Circuit Court of Appeals Totality of the Circumstances Test, a Reasonable Person Would Interpret Petitioner's Challenged Statements as Stating Actual Facts in Light of the Context in Which the Statements Appear.

The Ninth Circuit in *Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995) adopted a three-part totality of the circumstances test to analyze whether statements constitute rhetorical hyperbole. 69 F.3d at 366.

> To determine whether a statement implies a factual assertion, we examine the totality of the circumstances in which it was made. (1) First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. (2) Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. (3) Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

Id.

The Ninth Circuit applied this test in *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002) where the court addressed the issue of whether Mattel, Inc. had defamed a music company through statements regarding the theft of their "Barbie" doll music. 296 F.3d at 899. Mattel stated that the music company was engaging in theft and in response, the music company sued for defamation. *Id*. at 908. With the first two prongs having been clearly met, the court focused its attention on the third prong for trueness. *Id*. In addressing the theft accusations, the court analogized them with Mattel accusing the music company of piracy. *Id*. Mattel stated, "It's akin to a bank robber handing a note of apology to a teller during a heist. It neither diminishes the severity of the crime, nor does it make it legal." *Id*. He then went on to characterize the song as a "theft" of "another company's property." *Id*. After stating that no reasonable person could believe "infringers are nautical cutthroats with eyepatches and peg legs who board galleons to plunder cargo," the court held that these statements were protected under rhetorical hyperbole. *Id*.

The United States District Court of Montana applied the Ninth Circuit's *Underwager* test in *Knievel v. ESPN, Inc. Montana in Knievel v. ESPN, Inc.*, 223 F. Supp. 2d 1173, 1179-82 (D. Mont. 2002). The court addressed accusations of defamatory statements made by ESPN, Inc., which involved a picture of Knievel hung at an awards show depicting him with his arms around both his wife and another woman and the caption "Evel Knievel proves that you're never too old to be a pimp." *Id*. at 1176. The court stated that under the broad context of the statement, the tone of the website was not meant to be taken seriously as seen from other links on ESPN's website. *Id*. at 1180. When analyzing the specific context, the court considered that the photo with the caption was posted on a website targeting a younger audience that adopted a "loose, figurative, and hyperbolic" tone. *Id*. Within this context, no reasonable person would

understand the website as accusing Knievel of being a pimp. *Id*. at 1181–1182. Under the third prong of the analysis, the court stated that the term "pimp," used as slang, was capable of different, subjective meanings, and therefore, was incapable of being proven true or false. *Id*. Overall, the court held that a reasonable person would not understand the caption on the photo as accusing Knievel of being a criminal pimp and therefore, the statement constituted rhetorical hyperbole. *Id.* at 1183–1184.

Finally, and most recently in the Central District of California, the court applied Texas law in *Clifford v. Trump*. *Clifford v Trump*, 339 F.Supp 3d 915 (C.D. Cal. 2018). The court analyzed President Trump's negative tweets about Stephanie Clifford, a.k.a. Stormy Daniels, in which he alleged that Clifford was involved in a "total con job." *Id*. at 919. The court applied the *Milkovich* test in which the total context of the statement was analyzed. *Id*. at 926. The court found that Trump's tweets contained verifiable true/false statements, however failed at the second prong because the "tweet displays an incredulous tone, suggesting that the content of his tweet was not meant to be understood as a literal statement about Plaintiff." *Id*. The court went on to note that "the United States Supreme Court has held, a published statement that is 'pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage' cannot constitute a defamatory statement." *Id*. (citing *Milkovich*, 497 U.S. 1, 32). The court held that the statement constituted rhetorical hyperbole as it was "a single excited reference". *Clifford*, 339 F.Supp 3d at 928.

Here, if this Court decides to apply the *Underwager* test, the Court must hold that Petitioner's statements are not protected as rhetorical hyperbole. Under the test's first prong, the Court considers the broad context of the statements by analyzing its tone, subject, and format. Petitioner responded to a political column written by Respondent attacking her with references to

her past drug addiction. J.A. at 4. Petitioner also attacked Respondent as a business professional, stating that she is, "corrupt and a swindler," "a pimp for the rich," and "a whore for the poor." J.A. at 5. Unlike *Knievel*, where the caption and photo appeared on an informal website, here, Petitioner posted on *his* website, using a more serious tone to criticize and demean Respondent. J.A. at 8. When read in its entirety in a specific context, Petitioner's statements are not merely "loose, figurative, slang language," but rather serious, factual statements demeaning Respondent in both a social and professional capacity. Similarly, Petitioner's statements are different than *Clifford*, as they are more than a "single excited reference." Again, unlike in *Knievel*, where the caption and photo was couched within many photos that all adopted a loose, slang-like tone, here, Petitioner's statements were published to his website as a direct response to her political advocacy. J.A. at 8. Finally, when applying the third step of the analysis, the Court must find that a reasonable person would find that the statements were susceptible to being proven true. Unlike *Mattel* and *Knievel*, where the slang statements, particularly "pimp" were incapable of being proven true or false because they were used in a subjective context, here, Petitioner's statements can be proven true or false. J.A. at 5.

Petitioner attacks Respondent personally and professional by referencing her past drug addition and business dealings. J.A. at 4. Specifically, Respondent is a self-made entrepreneur, who grew her line of high-end clothing stores. J.A. at 5. The comments "corrupt and a swindler," "a pimp for the rich," and a "whore for the poor" are all susceptible to being proven true or false. J.A. at 5. They do not carry the same tone or context that the *Clifford* court found to be "pointed, exaggerated and heavily laden with emotional outrage," as Petitioner's statements consistently attack Respondent on a verifiably factual level. Under the *Underwager* test, this Court must hold that the statements used by Petitioner are not protected as rhetorical hyperbole

because when analyzed within the broad and specific contexts, a reasonable factfinder would conclude that the statements are capable of being proven true or false, and therefore can reasonably be interpreted as stating actual facts.

B. Under the Supreme Court of Ohio's Application of *Milkovich*, a Reasonable Person Would Interpret Petitioner's Challenged Statements as Stating Actual Facts in Light of the Context in Which the Statements Appear.

In a similar analysis to the Ninth Circuit, the Supreme Court of Ohio also applies a totality of the circumstances test. Under the Ohio test, a court considers "(1) the specific language at issue, (2) whether the statement is verifiable, (3) the general context of the statement, and (4) the broader context in which the statement appeared." *Vail v. Plain Dealer Publ'g Co.*, 649 N.E.2d 182, 185 (Ohio 1995); *Scott v. News–Herald*, 496 N.E.2d 699 (Ohio 1986) (holding that, "the totality of the circumstances test can only be used as a compass to show general direction and not a map to set rigid boundaries.")

In *Vail*, the court analyzed speech included in a public column against Senate candidate, Vail, calling her a, "'gay-basher,' 'neo-numbskull,' 'bigot,' and 'hate-mongering.'" 649 N.E.2d 182 at 184. In applying the totality of the circumstances test, the court began with the context in which the statements appear. *Id*. at 185. The court reasoned that the words "forum" and "commentary" are indicative of opinion-based speech. *Id*. Second, the court looked to the full context of the statement and stated that the column as a whole was sarcastic and when considering the author's reputation, found no evidence of factual reporting. *Id*. at 186. Third, the court, in reviewing the specific language of the challenged statements, found that there was no precise meaning that would define the homophobia portrayed in the statements but that the characterization of Vail as a liar could be a factual, objective statement. *Id*. *Id*. Finally, the court found a lack of evidence that referred to Vail as a factually dishonest person and ultimately

held that the column and challenged statements were opinion based. *Id*.

Here, this Court should hold that Petitioner's statements are not protected as rhetorical hyperbole. Under this analysis, the Court would review Petitioner's statements, as seen in *Vail*, in accordance with the specific language at issue, the statement's verifiability, the general context of the statement and finally, the broader context in which the statement appears. In accordance with the Rules of Civil Procedure, all inferences this Court draws surrounding the context of the statements, must be in a light most favorable to Respondent. Unlike *Vail*, Petitioner's statements are not published to a forum or column, but rather his own personal, political website. J.A. at 8. As the *Vail* court found that titles such as "forum" and "column" were indicative of opinion-based speech, this Court should find that there is no such indication here.

This Court would most likely reason that the full context of the statement is not meant to be sarcastic like *Vail*, but meant to harm the reputation of Respondent. When factoring in the author's, a politician, reputation as an individual in Silvertown's society, the full context depicts him attacking Respondent as a former drug addict and then as a "corrupt" "swindler" who is acting out of character by owning and operating high end clothing stores. J.A. at 3, 5. Further, in looking specifically at the challenged statements and their precise meanings, Respondent would draw this Court's attention to "corrupt and a swindler." J.A. at 5. Although when taken in a broad context, all of the challenged statements are not protected under rhetorical hyperbole, the precise meaning of "corrupt" is "morally degenerate and perverted." *Corrupt*, *Merriam-Webster* (11th ed. 2016). Further, the term "swindler," precisely means "to take money or property from by fraud or deceit." *Swindler*, *Merriam-Webster* (11th ed. 2016). This is like *Vail* where the court held that the characterization of Vail in a precise meaning analysis could support

the inference of stating actual facts.

Finally, the *Vail* court then looked to the broader context in which the statement is found and even searched for evidence that would support the truth in the accusations against Vail. Although the court in *Vail* was unsuccessful in finding evidence to support the characterization of Vail being a liar, this Court would be successful in reviewing the broader context of Petitioner's statement. Petitioner had a great deal of knowledge about Respondent, as inferred by his close relationship and alliance with Respondent's late husband, the former Mayor of Silvertown. J.A. at 3. Petitioner, in a broad context, attacked Respondent by characterizing her as a "former druggie" and went on to state that she was "corrupt and a swindler." J.A. at 4. Evidence of Respondent's past includes her being declared a delinquent, serving two years in prison after pleading guilty for felony distribution of cocaine, as well as her addiction, simple assault, possession of marijuana, indecent exposure, and vandalism, support the notion that Petitioner's statements are not merely epithets but defamation. J.A. at 5. Following her prison sentence, Respondent worked hard to turn her life around as she attained her GED, a college business degree, and eventually became an entrepreneur. J.A. at 5. Under the *Vail* test and the surrounding context, a reasonable person can find that Petitioner was stating actual facts against Respondent in an effort to harm her reputation.

C. In Applying the Precise and Readily Understood Meaning of Petitioner's Statements, a Reasonable Person Would Interpret Them to Objectively be Statements of Actual Facts.

The Appellate Court of Illinois applies a three- part test to determine whether a statement constitutes rhetorical hyperbole.[5] *Hopewell v. Vitullo*, 701 N.E.2d 99 (Ill. App. Ct. 1998). As first seen in the court's decision in *Hopewell v. Vitullo*, the court considers the precise meaning

[5] The court in *Kumaran v. Brotman*, 247 Ill. App. 3d 216, 217 (1993) found that portraying the plaintiff as a swindler, prejudiced his teaching ability and integrity because he would no longer be viewed as a role model by students.

of the statement's language in a balancing test against "overly loose, figurative, rhetorical, or hyperbolic language." *Id*. at 103. The court then analyzes the remaining two elements together — the context of the statement and whether it can objectively be proven as true or false. *Id*.

In *Hopewell*, the court ruled on a defamation suit brought by Hopewell, the former chief financial officer of a Senate Committee campaign, against Vitullo, a committee member and lawyer for the Senator. *Id*. at 101. After Hopewell was discharged, as a result of failing to report irregularities in the finances, he brought suit for breach of contract and retaliatory discharge. *Id*. Vitullo responded in a press conference that Hopewell was released for "incompetence" and Hopewell brought suit for defamation. *Id.*

The court, in applying the totality of the circumstances test, ultimately found the statement to be nonactionable. *Id.* at 104. There was no finding of a precise or readily understood meaning of the word, "incompetent," because the court could not place the word in context. *Id*. With regards to the context of the article in which the statement appeared, there were no other assertions found within the article that would suggest that the statement was anything but an opinion. *Id*. Finally, the statement could not be proven true as it was, "too broad, conclusory, and subjective to be objectively verifiable." *Id*. Although the statements were found to be nonactionable, the *Hopewell* court noted that it distinguished the cases cited by Hopewell where the statements were found to be defamatory. *Id*. (citing *Barakat v. Matz*, 648 N.E.2d 1033 (1995) (defendant's remarks that "defendant 'had patients from [plaintiff] before;' that defendant 'found nothing wrong with his patients;' that plaintiff's 'practice was a joke;' that plaintiff was not 'any good as a doctor;' and that plaintiff's 'opinion wasn't any good'" were found to be at least statements mixed with fact and opinion because the court believed that there was "an underlying factual basis which could be verified, i.e., previous patients from plaintiff

which were examined by defendant"); *Quality Granite Construction Co. v. Hurst–Rosche Engineers, Inc.*, 632 N.E.2d 1139 (1994) (court found the defendant's statement that "the [plaintiff's] failure to complete the project in a timely manner, substandard workmanship, reluctance to complete punch list items and inability to correctly interpret the contract documents, plans and specifications as bid" were actionable statements of mixed opinion and fact because the assertions were verifiable); *but see McGuire v. Jankiewicz*, 290 N.E.2d 675 (1972) (the court found the statement "you could not have chosen a worse attorney" to be defamatory per se, but the court never sought to determine whether it was one of fact or opinion)).

Here, Petitioner's statements, when applying the Appellate Court of Illinois' test, do not constitute rhetorical hyperbole. As previously discussed, under a precise meaning analysis, Petitioner's challenged statements clearly intend to characterize Respondent as one who defrauds her clients and is morally degenerate. J.A. at 5. Unlike *Hopewell* where the court could not determine the context of the term "incompetent", here, this Court can establish a precise meaning and a context in which Petitioner's statements are found. The statements are beyond mere name calling; they are actionable and they are defamation.

Under the Appellate Court of Illinois' test, the Court would then look to the context of the statement as well as the ability to prove the statements true or false. Petitioner, in responding to Respondent's column, which stated the need for change in society through politics, attacked Respondent in a personal and professional capacity. Petitioner uses language that can be reasonably inferred to be true that Respondent had a former drug addiction, defrauds her wealthy customers, and is two-faced in the way that she runs her high-end clothing business. J.A. at 5. Given the connection between Petitioner and Respondent's late husband, it is possible that the

statements have merit. J.A. at 3. If this Court were to apply the Appellate Court of Illinois' test it will find that the statements are not mere epithets or name-calling, they are true or at least substantially true thus they are not rhetorical hyperbole.

The United States Supreme Court in *Milkovich*, determined that rhetorical hyperbole could be analyzed through a totality of the circumstances test. This test has since then been applied in three main ways in state and federal courts. Regardless of which application this Court chooses to implement, this Court should find that Petitioner's statements, when viewed in a broad context are not protected as rhetorical hyperbole.

CONCLUSION

Petitioner's statements are not protected speech under the First Amendment. The Supreme Court has restricted plaintiff's ability to seek redress for libel out of concerns for protecting a defendant's First Amendment right to free speech. This Court now has the opportunity to clarify and properly balance the right of freedom of speech against the ability of a person to preserve her reputational interests. In applying either the incremental harm or issue-specific libel-proof plaintiff doctrines, an individual is incapable of being libel-proof solely based on prior criminal convictions that have gained no notoriety or public attention. Further, Petitioner's statements are unprotected as rhetorical hyperbole because Petitioner's challenged statements when taken in context can be reasonably interpreted as stating actual facts regarding Respondent's political and professional capacity. Therefore, Respondent asks that this Court affirm the holding of the Supreme Judicial Court of State of Tenley in that she is not a libel-proof plaintiff and hold that Petitioner's statements are not rhetorical hyperbole and are thus, unprotected.