No. 18-2143

In the Supreme Court of The United States

October Term, 2019

ELMORE LANSFORD,

PETITIONER,

v.

SILVIA COURTIER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF TENLEY

Brief for the Respondent

TEAM NO. 219810
COUNSEL FOR THE RESPONDENT

QUESTION PRESENTED

I. Whether an individual can be a libel-proof plaintiff under defamation law solely on the basis of 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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JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

A. Summary of the Facts

Silvia Courtier ("Mrs. Courtier"), is the widow of former Mayor of Tenley, Raymond Courtier who held office for eighteen consecutive years until his death. (J.A. 2, 15.). Mrs. Courtier has participated heavily in the community and owns a line of clothing stores around the city of Silvertown, which caters to expensive taste. (J.A. at 2.). In the community, she participates in philanthropic and charitable activities. *Id.* Ms. Courtier, in the past years, as become more politically active in supporting causes such as education equity, restorative justice and affordable housing. *Id.*

Elmore Lansford, ("Petitioner"), is the current mayor of Silvertown and a former city council member. (J.A. at 3.). Petitioner and the former Mayor Mr. Courtier were political contemporaries and one-time allies in the past, but in recent years, after her husband passed away, Mrs. Courtier has become a critic of him. *Id.* Petitioner has campaigned on "cleaning up Cooperwood", which has involved police officers vigorously enforcing laws which has resulted in racial profiling and police brutality. *Id.*

In the most recent mayoral election, Petitioner was challenged with competition from Evelyn Bailord, which Mrs. Courtier heavily supports. *Id.* Mrs. Courtier has contributed to Ms. Bailord's campaign and has written online commentaries in support of Ms. Bailord. *Id.* Through her online commentaries, Mrs. Courtier has also criticized Petitioner. *Id.* Her commentary has stated that Petitioner is a "relic of the past," "a divisive leader," and "someone who cares little for social justice issues." *Id.*

"In light of these postings, Petitioner responded with the following;

> It is ironic that Silvia Courtier blasts me as uncaring toward the less fortunate. No wonder she is a coddler of criminals. In her early years, Silvia Courtier was a lewd and lusty lush,

> a leech on society, and a woman who walked the streets strung out on drugs. She is nothing more than a former druggie.
>
> It is also ironic that she casts herself as 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.).

Prior to being married to the former mayor, Mrs. Courtier had a tough upbringing and past. (J.A. at 5.). Mrs. Courtier has come from a very troubled background, which consisted of many offenses as a juvenile and some offenses in her early 20s. (J.A. at 15,16.). Her upbringing did not involve her parents, because while her parents where alive they were both drug addicts and ultimately, her father died in prison and her mother died of an overdose when Mrs. Courtier was ten years old. (J.A. at 5.). The loss of her both her parents led her to have to support herself, which led her to stealing money and engaging in other illegal activity as a teenager. (J.A. at 5.). Mrs. Courtier was also sexually abused by an older man while she was a juvenile. *Id.*

Although she maintained a criminal lifestyle after her incarceration in a young female offender boot camp, she fortunately was able to turn her life around when she served two years in a state prison. *Id.* While in prison, Mrs. Courtier turned her life around by earning her GED and later enrolling into a community college to take every business class she could. *Id.* Turning her life around led to obtaining her business degree in order to open her first clothing store which she has had success. With the success of turning her life around and opening her clothing store, Mrs. Courtier has been able to devote much of her energy to altruistic endeavors by advocating for restorative voting rights for felons, improving equity in education, affordable housing and for other social causes. (J.A. at 16.).

B. Summary of the Proceedings

Early in the litigation of this case, Petitioner filed a special motion to dismiss/strike the plaintiff's lawsuit as a strategic lawsuit against public participation or SLAPP suit. (J.A. at 2.). Mrs. Courtier sued Petitioner for defamation of character and false light invasion of privacy. *Id.* She contended that the following comments defamed her:

> "a pimp for the rich";
> "a leech on society";
> "a whore for the poor"; and
> "corrupt and a swindler."

(J.A. at 4, 5.). Petitioner contends that the statements he made were true, or at least substantially true, and that the statements were mere epithets which is protected as rhetorical hyperbole. (J.A. at 6.). Petitioner also contends that Mrs. Courtier falls within the doctrine of libel-proof plaintiff, because as a former felon, she has no good reputation to protect. (J.A. at 18.). Petitioner argues that the defamation lawsuit filed by Mrs. Courtier is an attempt to punish or silence him from his freedom of expression, which he has the burden to show he is exercising free speech. (J.A. at 6, 7.)

Both the Tenley District Court and The Supreme Judicial Court of the State of Tenley have concluded that Mrs. Courtier is not a libel-proof plaintiff. (J.A. at 11, 19.). The District court determined that the defamation suit should be dismissed because Petitioner's comments are protected under the First Amendment. (J.A. at 13.). The Supreme Judicial Court of the State of Tenley reversed the lower court's ruling on dismissing the lawsuit because Mrs. Courtier was called names in which called in to question her competence and professionalism as a businesswoman. (J.A. at 23.). At which point, Petitioner then petitioned this Court for relief and this Court granted certiorari.

SUMMARY OF THE ARGUMENT

The libel-proof plaintiff doctrine puts this Court in a position in which they must balance the rights of Petitioner and Mrs. Courtier. Mrs. Courtier should not be placed in this narrow doctrine in which has been applied to habitual criminals as she is not a habitual criminal. Mrs. Courtier has a past of criminal conviction, but her reputation is not diminished as to be seen by society to have a bad reputation. A plaintiff who has turned their life around should not be considered a habitual criminal as it should be seen that with rehabilitation society could not deem their reputation so diminished that they would not be damaged by defamatory statements made against about them.

This doctrine when applied is unconstitutional as it takes away the right of a person to be protected against unprotected speech as deemed by the First Amendment. It further is unconstitutional as if applied to Mrs. Courtier, she would not have the right to defend her claim with proper due process and equal protection under the law. Mrs. Courtier has the right to protect her reputation from statements said by the Petitioner has they are false and paint Mrs. Courtier in a way that has not been widely publicized.

As to the libel-proof plaintiff doctrine there are two branches in which the court has applied one being the issue specific analysis and the other being the incremental harm analysis. This court should look at the issue specific analysis has it has been applied in most cases when the defendant contends that the plaintiff has a reputation so diminished that their reputation could not suffer. This is not the case here, as Mrs. Courtier is not similar to other plaintiffs who are considered by the court to be libel proof.

The statements challenged in this case qualify as unprotected defamation as the statements were about Mrs. Courtier, who is a private figure and those statements Petitioner has made should

be considered false. As a private individual, Mrs. Courtier, has a lower standard in which she must prove fault by the Petitioner, because false statements receive no value, they also receive no constitutional protection. The ability for free political discussion is essential to this government and fundamental to the United States Constitution. Incorrect statements are also part of a free debate and to protect freedom of expression is given leeway and room in its protections. This breathing space created the concept of rhetorical hyperbole.

The constitutional protections, of rhetorical hyperbole, has its limits and it is one of the reasons why the law of defamation was created. Society has an interest in protecting free speech, but that, alone should not allow attacks on reputations. Every person has a right from an unjustified invasion and harm which is reflected in the concept of the essential dignity and worth of every person. The United States Supreme Court created a rule that allowed recovery for public officials asking proof of falsehood of the statement and knowledge of the falsity in the statement. This Court later allowed public figures also to recover under this rule. Public official and figures can recover under the ruled created but private individuals have a different standard. Public official or figure enjoy access to effective commutation to the public that other do not have. Private individuals have a different rule when they are harmed by defamatory false statements, they only must prove the falsehood of the statements. Mrs. Courtier, a private individual was therefore defamed by the false statements made by the Petitioner.

ARGUMENT

I. THE APPLICATION OF THE LIBEL-PROOF PLAINTIFF DOCTRINE SHOULD NOT BE APPLIED IN THIS CASE AS MRS. COURTIER DOES NOT FIT THE NARROW ANALYSIS DIRECTED BY THE COURTS AND EVEN IF SHE DID THE DOCTRINE SHOULD BE DEEMED UNCONSTITUTIONAL, AS IT TAKES AWAY FROM BEING PROTECTED UNDER THE FIRST AMENDMENT.

"This case requires the Court to balance the right of freedom of expression against the ability of a person to preserver her reputational interest," as Judge Henrey stated in the District Court of Tenley memorandum. (J.A. at 1.). "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." Patricia C. Kussmann, Annotation, *Construction and Application of Libel-Proof Doctrine*, 54 A.L.R. 6th 165, 2. As this doctrine seeks to protect those rights of the speaker, this court should seek to protect the rights of Mrs. Courtier's right to protection under the First Amendment from unprotected speech, and she has the right to protect her reputation from these defamatory statements made by the Petitioner. *U.S. Const. amend I.* As the law of defamation was enacted to "protect a person's reputation from harm caused by false statements." David L. Hudson, Jr, *Shady Character: Examining the Libel Proof Plaintiff Doctrine*, 52 Tenn. B.J. 14, (2015). Further, allowing Mrs. Courtier to be considered a libel-proof plaintiff would deny her the right to due process and the equal protection of the law, which is afforded by the Fifth and Fourteenth Amendment. *U.S. Const. amend V. & XIV.*

This doctrine originated in the Second District Court of Appeals as the court stated that a plaintiff, who is an innate with ties to the mob 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, involving as it does First Amendment considerations." *Cardillo v. Doubleday & Co. Inc.*,

518 F. 2d 683, 639 (2d Cir. 1975). That court implied that a person who is a persistent criminal has damaged their reputation in such a way they should not be able to bring a claim as it would be deemed meritless in the eyes of the court. By implying that a person has such a damaged reputation they would not be able to bring a case that is valid in the eyes of the court, the doctrine has placed a burden "on our judges in a position they have usually assiduously avoided - that of deciding who is and who is not characteristically worthy of legal respect and protection from defamatory attack." Joseph H. King Jr. *The Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian Knot" Syndrome*, 29 Hofstra L. Rev. 343, 346 (2000). Allowing this doctrine to be applied, allows the judges to pick and choose who deserves the right to bring a legal action in order to protect their reputation, as Mrs. Courtier has the right to do per the First Amendment. This Court should not deny Mrs. Courtier the ability to plead for legal protection from the defamatory statements made by the Petitioner.

The Second Circuit Court further stated that this doctrine should be narrow and be left to the basic facts of the context in which it is seen. *Buckley v. Littell,* 539 F.2d 882, 889 (2d Cir. 1976). Indicating that the doctrine should to be applied to every plaintiff who has a reputation that is not spotless. This Court has warned that if this doctrine was applied to a broad set of plaintiffs it would lead to an unfair amount of defamation "of persons who have been convicted of a crime". *Wolston v. Readers Dohesy Ass'n,* 443 U.S. 157, 168 (1979). In, *Buckley* the court denied the application of this doctrine because the plaintiff was "one that could suffer under the onus of defamation". 539 F.2d at 889. Like *Buckley*, Mrs. Courtier is one who could suffer from these defamatory statements said by the Petitioner, in which this court should not apply the doctrine to Mrs. Courtier. The statements made by the petitioner painted Mrs. Courtier in a light in which she had not been painted before. He stated that she was "a pimp for the rich", "a leech on society", "a

whore for the poor" and "corrupt and a swindler." (J.A. 4, 5.). These statements could cause Mrs. Courtier reputation to suffer, as the statements in Buckley could cause his reputation to suffer.

A. The application of the libel-proof plaintiff doctrine, if applied, should only be applied to those with a criminal past in which a court would deem a habitual criminal in which Mrs. Courtier is not.

As this Court stated in 1971, "damage to reputation is, of course, the essence of libel." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275, 91 S. Ct. 621, 627 (1971). The statements made about Mrs. Courtier by the Petitioner damaged her reputation as her troubled past was decades earlier and Petitioner painted her as an inveterate criminal. (J.A. at 6.). It was noted in 1975, that courts were facing many meritless cases in which "plaintiffs who challenged published statements that do not in fact damage their already sullied reputation" would not receive relief as a matter of law is not the case for Mrs. Courtier claim to this court. Note, *The Libel-Proof Plaintiff Doctrine,* 98 Harv. L. Rev. 1909.

"The libel-poof plaintiff doctrine is most commonly applied in the context of individuals having multiple criminal convictions; as a general rule, a habitual criminal is libel proof as a matter of law." Patricia C. Kussmann, Annotation, *Construction and Application of Libel-Proof Doctrine,* 54 A.L.R. 6th 165, 15. As the court in *Ray v. Times, Inc.*, applied this doctrine to a hard-core criminal as the plaintiff in this case was the murder of civil rights leader Dr. Martin Luther King Jr., he was considered to be libel-proof. 452 F.Supp. 618 (W.D. Tenn. 1976). Another example in which the court has applied this doctrine to a hardcore criminal is when a plaintiff was serving a 99-year sentence was considered libel-proof. *Davis v. The Tennessean,* 83 S.W. 3d 125 (Tenn. Ct. App. 2001). Mrs. Courtier should not be considered a hardcore criminal, as that part of her life is decades in the past. (J.A. at 6.).

Although Mrs. Courtier had a troubled youth, because of not having her parents around and having to support herself when she was just ten years old, she was able to turn her life around by going to school while she was incarcerated. (J.A. at 5.). Unlike Mrs. Courtier, in *Cardillo*, the plaintiff was a prisoner, who was serving 21 years for an assortment of felonies. 518 F.2d at 640. Unlike that plaintiff, Mrs. Courtier was a juvenile when she was declared a delinquent and then she did two years in prison, when she was in her 20s. (J.A. at 15,16.). Ms. Courtier was able to turn her life around while she was incarcerated, as she was able to obtain a business degree and open a successful clothing business. (J.A. at 16.). Not only did Ms. Courtier turn her life around, she devoted her energy to advocate for social causes. *Id*. Unlike Ms. Courtier, Cardillo was presently incarcerated for various crimes he committed, in his adult life, and was suing the person who wrote a book about their crimes together. *Cardillo,* 518 F.2d at 638. Mrs. Courtier was defamed in an online commentary by Mr. Lansford, who did not know whether those statements were true or not. (J.A. at 4, 18.). As *Cardillo* is the case in which set the precedent for this doctrine, this court should note that Mrs. Courtier and that plaintiff are not the same, and as such should not be placed in the same narrow classification.

In *Chastain v. Hodgdon*, 202 F. Supp. 3d 1216 (D. Kan. 2016)(applying Kansas law), the court indicated that the doctrine "must be applied with caution, because few plaintiffs will have a reputation which is so awful that they are not entitled to obtain redress." Patricia C. Kussmann, Annotation, *Construction and Application of Libel-Proof Doctrine*, 54 A.L.R. 6th 165, 5. In *Chastain*, the defendant argued that the plaintiff held himself out to be a womanizer and as such the defendant using those words should hold the plaintiff libel-proof as he has admitted to being a womanizer. . 202 F. Supp. 3d at 1222. The court indicated that the claim by defendant that plaintiff is libel-proof is premature and the court should not consider it, as the evidence did not support

using this doctrine. *Id*. at 1223.The record is clear that Mrs. Courtier was able to make a new life for herself after her incarceration and did not hold herself out to be anything but a businesswoman and social activist. (J.A. at 4, 15.). The District Court in Kansas held that the plaintiff was not libel proof because the statements made against him "could experience harm to his reputation from an accusation of sexual assault or attempted rape." *Chastain,* 202 F. Supp. 3d at 1223. This court should note, that Mrs. Courtier could experience harm from the statements the Petitioner made by making her seem to be a "a pimp for the rich", "a leech on society", "a whore for the poor"; and "corrupt and swindler." (J.A. at 4, 5.).

In *McBride v. New Braunfels Herald-Zeitung,* the court concluded that the plaintiff did not fit the narrow class of cases in which the plaintiff could be considered a libel proof plaintiff. 894 S.W.2d 6, 10 (Tex. App. 1994). "When, for example, an individual engages in conspicuously anti-social or even criminal behavior, which is widely reported to the public, his reputation diminishes proportionately." *Wynberg v. National Enquirer,* 564 F. Supp. 924, 928 (C.D. Cal. 1982). The District Court for the Central District of California ruled and extended this doctrine to a plaintiff who had only a criminal record but that criminal recorded was highly publicized. *Id*.

In that case, the plaintiff prior criminal conviction and the fact that they were highly publicized had already damaged his reputation sufficiency in which he was not able to recover anything but nominal damages in this action. *Id.* at 928. The record does not indicate that Mrs. Courtier's criminal past was publicized. Although she does have a criminal history, her reputation is not so tarnished as to any issue, because her troubled past was decades ago. (J.A. at 10.). The evidence that should be looked at is "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 or libelous statement".

McBride, 894 S.W.2d 6, 10 (Tex. App. 1994). When the plaintiff's criminal conviction has not yet been published or reported on, she would probably not be considered under this doctrine. Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909.

Like Mrs. Courtier, McBride had been convicted of a crime but there was no evidence that it was publicized, which the court concluded that this meant his reputation in the community was good. 894 S.W.2d at 10. Mrs. Courtier does not deny her past but does alleged that it is in the past, decades in the past. (J.A. at 5, 6.). The court further analyzed that "even if McBride's convictions were well known, we could not say that his criminal history is so extreme that no reasonable person could find further damage to his reputation by the false accusation of a new robbery." *McBride*, 894 S.W.2d at 10-11. Mrs. Courtier's criminal past is not so extreme, as she was trying to support herself and was alone to survive when she was ten years old. (J.A. at 5.). "The law presumes that one possesses good character and that even the limited good reputation of a person of bad character could be worse." *McBride*, 894 S.W.2d at 10.

"A defendant should not be put to the burden of further defending such suits after it becomes apparent that there is little, if any, likelihood of plaintiff prevailing." *Urbano v. Sondern*, 41 F.R.D. 355 (D. Conn. 1966). The plaintiff in that case filed "rash of suits" after The Federal Bureau of Investigation was released with the several crimes he had committed, this plaintiff tried to file suit on all of the newspapers in which published the FBI's statement, the court concluded that "the chances of success in a suit of this nature are virtually nonexistent, and if there were any recover, it would be at most minimal." *Id.* at 357. The defendant in that case, unlike Petitioner should not have the burden of defending such a frivolous suit. Unlike this case, Mrs. Courtier has been already labeled not a libel-proof plaintiff as a matter of law by both the District Court of Tenley and the Supreme Judicial Court of State of Tenley, and Petitioner should bear the burden

of defending this claim by Mrs. Courtier. (J.A. at 11, 19.). As it was stated in the opinion of the Supreme Judicial Court of State of Tenley, that Mrs. Courtier "is the perfect example of someone who has restored and rehabilitated herself and has a reputation to protect from defamatory and false statements." (J.A. at 20.).

Mrs. Courtier is before this court, not to plead a meritless case, but to protect her reputation as it was put into false light, by the statements of the Petitioner. Unlike *Urbano*, Mrs. Courtier is not serving a life sentence, she has served her time already and has been reformed. In that case, "the court reasoned that the articles could not have further damaged his reputation, except possibly among his criminal associates in prison, and therefore his chances of success were virtually nonexistent, and any recovery would be nominal." Patricia C. Kussmann, Annotation, *Construction and Application of Libel-Proof Doctrine*, 54 A.L.R. 6th 165, 9. The record does not show that Mrs. Courtier has criminal associates and the damage to her reputation would be in the town in where she is a businesswoman and former mayor's wife. (J.A. at 5.).

B. Prior precedent has indicated that the reputation of a plaintiff must be so tarnished on the specific issue in which they are being defamed to be considered libel proof.

As the ruling in Cardillo developed, two branches of the libel-proof plaintiff doctrine formed. *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 322, 929 A.2d 991, 1002 (2007). The first, the incremental harm doctrine

> involves an examination of the challenged communication rather than a finding of a previously damaged reputation. The 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.

Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1912-1913. This branch of the doctrine does not apply here because the unchallenged statements do not paint her in a light that would damage her reputation. The statements stating that she is a "coddler of criminals" would not be diminishing to her reputation as she is a social activist and has tried to improve the rights of former criminals. (J.A. 16, 18.). As for the statement that she is a "former druggie," Mrs. Courtier has a past of drug possession and distribution, which she has rehabilitated herself from and as it is a true statement she cannot be defamed from as it is not false. (J.A. at 16.).

The second branch that was formed is the issue specific doctrine in which the courts have applied by indicating "[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,* 894 S.W.2d 6, 9 (Tex. App. 1994). This branch of the doctrine has been "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, 476 N.E.2d 617, 619 (Mass. 1985). "Under the issue-specific approach, a plaintiff's libel claim is barred when previous publicity or criminal convictions for behavior similar or identical to that described in the challenged communication have so tarnished his reputation that he could only recover nominal or minimal damages as a matter of law." *Langston v. Eagle Pub. Co.*, 719 S.W.2d 612, 621 (Tex. App. 1986).

We will apply the issue specific doctrine as it pertains more to the matter at hand. "Under the issue-specific branch, a court may determine that a plaintiff's reputation is so tarnished with respect to a particular issue that, as a matter of law, the plaintiff is libel-proof regarding that issue." Evelyn A. Peyton, Comment, *Rogues' Rights: the Constitutionality of the Libel-Proof Plaintiff Doctrine,* 34 Santa Clara L. Rev. 179, 185 (1993). Mrs. Courtier reputation in the Town of

Silvertown is not “a pimp for the rich”; “a leech on society; “a whore for the poor; and “corrupt and a swindler,” as the Petitioner painted her out to be, she is known in the community as a businesswoman because of her prominent clothing store. (J.A. at 2, 5.). Mrs. Courtier’s prior convictions do not have any similarities in which the statements Mrs. Courtier has claimed to be defamatory by the Petitioner. As the court in *Langston* explained, “a convicted bank robber would be libel-proof under the issue-specific branch of the doctrine if he is falsely reported to be a shoplifter.” 719 S.W.2d at 621-22.

In the case of *Logan*, the court came to the conclusion that because the plaintiff admitted to his drug use and that admission was used in a book with all of his past convictions, if he was to in some way prevail on a defamation case that he would not be able to recover damages other than nominal damages, he was considered a libel-proof plaintiff. 447 F. Supp. 1328, 1332 (D.D.C. 1978). Although Mrs. Courtier has admitted to one of the felony charges, the record does not indicate whether or not it was of public knowledge. (J.A. at 5.). Because the statements made about Mrs. Courtier did not pertain to her past criminal convictions, as a matter of law she should not be considered a libel-proof plaintiff.

II. THE CHALLENGED STATEMENTS IN THIS CASE QUALIFY AS UNPROTECTED DEFAMATION BECAUSE THE STATEMENT WAS ABOUT A PRIVATE FIGURE AND FALSE.

“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931). The ability for free political discussion is essential to this government and fundamental to is United States Constitution. An “erroneous

statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they 'need . . . to survive,'" *New York Times Co.*, 376 U.S. at 271-72. Incorrect statements are also part of a free debate and to protect freedom of expression is given leeway and room in its protections. This breathing space created the concept of rhetorical hyperbole. The Supreme Court allowed the use of blackmail because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6,14 (1971).

"This conclusion does not ignore the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). The constitutional protections, of rhetorical hyperbole, do have limits and that is why the law of defamation was created. Society has an interest in protecting free speech, but that does not allow attacks on reputations. In *Rosenblatt v. Baer,* Justice Stewart clarified that "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." 383 U.S. at 86. Every person has a right from an unjustified invasion and harm which is reflected in the concept of the essential dignity and worth of every person.

In *New York Times Co. v. Sullivan*, this Court created, to satisfy the limits of the protections of rhetorical hyperbole, a " rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. The United States Supreme Court created a rule

that allowed recovery for public officials asking proof of falsehood of the statement and knowledge of the falsity in the statement. “There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *Time, Inc. v. Pape*, 401 U.S. 279, 291-92 (1971). The United States Supreme Court, in *Times Inc. v. Pape*, said that if there are doubts in the to the truth of the statement that doubt shows actual malice.

The Supreme Court later allowed another class to recover under the rule created, in *New York Times Co. v. Sullivan.* “We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent. . ..” *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967). This Court later allowed public figures also to recover under this rule. Public official and figures can recover under the ruled created but private individuals have a different standard. “Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.” *Gertz v. Robert Welch*, 418 U.S. 323, 344 (1974). Public official or figure enjoy access to effective commutation to the public that other do not have, which is why *Gertz* later gave private individuals an easier requirement to recover from defamatory comments.

A. Mrs. Courtier is a private individual and thus receives a lower standard to prove fault.

In *Rosenbloom* Justice Harlan “argued that a different rule should obtain where defamatory falsehood harmed a private individual.” *Gertz*, 418 U.S. at 338. Private individuals have a different rule when they are harmed by defamatory false statements. Justice Harlan also “noted that a private person has less likelihood ‘of securing access to channels of communication sufficient to rebut

falsehoods concerning him' than do public officials and public figures and has not voluntarily placed himself in the public spotlight." *Id.* at 338-39. Private individuals are given a different standard because they do not have the same ability fight against false statements than public officials or figures have. "Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Id.* at 344. Private individuals are more vulnerable than public officials or figures because of inability to fight back.

"More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs." *Id.* at 344. More importantly than the ability to fight back private individuals do not thrust themselves in public affairs.

This Court has held that "the instances of truly involuntary public figures must be exceedingly rare." 418 U.S. at 345. Sometimes there can be involuntary public figures, but those are the rarest of cases. "More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." *Id*. The most common way to become a public figure is to try to become one by seeking public attention to effect public controversies. "Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures . . .." *Gertz*, 418 U.S. at 342. Public figures are individual who receive prominence through their success and looking for public attention. The United State Supreme Court has reasoned that "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual." *Gertz* 418

U.S. at 345 It can be assumed that public officials and figures have exposed themselves to the risk of defamatory but private individuals have no such assumption. “Mr. Justice Harlan concluded that the States could constitutionally allow private individuals to recover damages for defamation on the basis of any standard of care except liability without fault.” Id.at 339. States are given the room to use any standard, but liability without fault, to allow for private individuals to recover.

In *Hutchinson v. Proxmire*, Hutchinson was not declared a public figure even though he had been thrust into the public light by the defamatory comments because there was no public concern for Hutchison to be trust into the public eye. 443, U.S. 111 (1979). He published articles in professional journals and applied for federal grants and it was declared that those did not invite public attention. Hutchinson was successful enough in his profession and winning awards. Hutchinson had gained limit access to the media because of his success, especially when responding to the announcement of receiving the Golden Fleece Award. “He did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure.” *Hutchinson*, 443 U.S. at 136.

In the *Gertz v. Robert Welch*, Gertz was also declared to be a private figure. Gertz at the time had a long history of being active in the community and professional affairs. He has served as an officer of local civic groups, of various professional organizations, and he has published several books and articles on legal subjects. He was consequently well known in some circles, but he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of him prior to this litigation. “We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes.” *Gertz*, 418 U.S. at 352. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. Moreover, he never discussed

either the criminal or civil litigation with the press, therefore, he had no access to the media and never had access to the media. He plainly did not thrust himself into the of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.

"It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* Both *Hutchinson* and *Gertz* are similar to this case because like Mrs. Courtier they were thrust into the public eye by the false statements of another that were not of public concern. (J.A. at 4.). Mrs. Courtier was politically active and wrote commentaries about trying to persuade other about a political campaign, but Mrs. Courtier was not trusting herself into the public eye but trying to put Evelyn Bailord into the public eye. (J.A. at 2-3.). Mrs. Courtier's participation in politics does not mean that she assumed to becomes a public figure. Mrs. Courtier wrote commentaries, of the Petitioner, online she has no access to the media and there is no evidence of her having access to the media of any kind let alone regular and continuing. (J.A. at 3.). There is no evidence of Mrs. Courtier having any fame or notoriety much like Gertz. Like Hutchinson and Gertz, Mrs. Courtier was successful in her profession, but gained no fame through her success. Mrs. Courtier should be declared as a private citizen making Mrs. Courtier must prove that the statements about her were false.

B. Under the constitutional protections of defamation law, false statements receive no protection.

Second is false statements, in *Bose Corp. v. Consumers Union,* the Supreme Court states that "on the basis of proof which it considers clear and convincing, that the plaintiff has sustained its burden of proving that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity." *Bose Corp. v.*

Consumers Union, 466 U.S. 485, 497 (1984). The plaintiff has the burden to proof the falsity of the statement made by the defendant. “Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas and are such a slight value… Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967). Calculated falsehoods are statements that are not essential and give no benefit to society, which is why knowledge of the false statement are not protected. This court states that “the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function. We held in *New York Times* that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct.” *Time, Inc.*, 385 U.S. at 389-90. Never has the Supreme Court added any protections to calculated falsehoods, but the Court has allowed sanctions against calculated falsehoods.

“The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.” *Gertz*, 418 U.S. at 341. States have an interest in rewarding damages to harm inflicted by defamation because “as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name” *Id.* State have an intertest in protecting the citizens reputation. “The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication.” *Masson v. New Yorker Magazine*, 501 U.S. 496, 516 (1991). “It overlooks minor inaccuracies and concentrates upon substantial truth.” *Id.* In falsity minor inaccuracies do not matter, but the overall message or truth of the statement. “Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would

have produced." *Masson,* 501 U.S. at 517. It is not false unless the effect of the statement would be different if it was true statement being made.

"False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counter speech, however persuasive or effective." *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988). False statements are valueless, they interfere with the truth and damage reputations of others that cannot be easily repaired or refuted. This Court decided that "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." *Phila. Newspapers v. Hepps*, 475 U.S. 767, 777 (1986). There are "two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure or is instead a private figure. The second is whether the speech at issue is of public concern." *Phila. Newspapers*, 475 U.S. at 775.In the creation of how to recover form a defamatory statement first thing that is looked at is the persons status as a private or public person, then the issue of the statements being of public concern. "In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest [in preserving private reputation] adequately supports awards of presumed and punitive damages -- even absent a showing of 'actual malice.'" *Phila. Newspapers*, 475 U.S. at 774-75, quoting *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985). Damages can be awarded to private figures of defamatory statements without proving actual malice because there is a reduced constitutional value when there is no public concern. "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz*, 418

U.S. at 347. State are given freedom with the task of creating a standard for private individuals when it comes to the standard of fault, as long as it is not liability without fault.

This Court has clarified “where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). When any statement opinioned or otherwise on a matter of public concern has false or defamatory facts about public officials or figures, these individuals have a way to recover. “Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by Gertz.” *Milkovich*, 497 U.S. at 20-21. If these statements are about involves a private figure, they can also recover, and private individuals get the benefit of a lower hurdle to prove fault.

In this case the Petitioner was called Mrs. Courtier “a pimp for the rich”; “a leech on society; “a whore for the poor; and “corrupt and a swindler.” (J.A. at 4-5.). Mrs. Courtier had a tough upbringing as a child, with both of her parents addicted to drugs, her father was killed in prison and her mother died from a drug overdose. (J.A. at 5.). To support herself, she engaged in illegal activity as a teenager and later became addicted to drugs and spent two years in prison. (J.A. at 5) Mrs. Courtier was a criminal but is not anymore, she changed her life around, and became a successful businesswoman with a line of clothing stores that caters to consumers of high-end designers (J.A. at 16). There is no current evidence of being a pimp for the rich, a leech on society, a whore for the poor, a corrupt person, a swindler, engaging in any illegal activities.

The petitioner statements about Mrs. Courtier are all false statements that are valueless, and completely unprotected by the First Amendment, the United States Constitution, or by the United States Supreme Court. These statements are not of public concern because they are retaliatory attacks against Mrs. Courtier, her competence, and her professionalism as a businessperson. They have nothing to do with a social or public cause and are just attack on her reputation. The Petitioner's statements were false making them receive no protections. The false statements were about a private figure making the unprotected defamation not rhetorical hyperbole. This court should not grant the motion to strike because Mrs. Courtier has a case of defamation and damages because the defamatory statements by the Petitioner called into question and damaged Mrs. Courtier reputation and, moreover, her business reputation. Courts following this Courts holding decided that the words "corrupt" and "swindler" is defamatory. *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002) (stated that calling a judge "corrupt" has a possibly of being defamatory); *Laughland v. Beckett*, 870 N.W.2d 466 (Wis. Ct. App. 2015) (a professor was defamed by being called a "preying swindler").

CONCLUSION

Based upon the foregoing, Respondent respectfully request that this court affirm the judgment of the Supreme Judicial Court of State of Tenley.

Respectfully Submitted,

_____
TEAM NO. 219810
ATTORNEYS FOR RESPONDENT