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

RESPONDENT'S BRIEF ON THE MERITS

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Counsel for Respondent

QUESTIONS PRESENTED

I. The libel-proof plaintiff doctrine applies where an individual's reputation is so tarnished, either by the individual's prior criminal record or by prior unchallenged damaging statements, that the individual has no good reputation left to protect. Respondent has a reputation worth protecting from defamatory and false statements. Can Respondent be a libel-proof plaintiff solely on the basis of her past criminal convictions, including a felony, that have gained no notoriety or public attention?

II. False statements of fact that inflict reputational harm to an individual are not protected by the First Amendment Free Speech Clause. Petitioner's statements at issue contain false statements of fact and inflict reputational harm to Respondent. Do Petitioner's statements qualify as unprotected defamation?

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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. Statement of Facts

Silvia Courtier ("Respondent"), a resident of Silvertown, Tenley, is an entrepreneur, social activist, and the widow of the town's former mayor, Raymond Courtier. (J.A. at 15.). In addition to owning a line of clothing stores in Silvertown, Respondent contributes heavily to philanthropic and charitable activities within the community. (J.A. at 2.). Elmore Lansford ("Petitioner") is the current mayor of Silvertown, and the subject of Respondent's recent criticism regarding his political platform. (J.A. at 16,17.). In recent years, Respondent has used her significant social media presence to participate in politics by publicly advocating for social causes such as educational equity, restorative justice, and affordable housing. (J.A. at 2,16.). However, before she attained her current status as an activist, philanthropist, and successful business woman, Respondent grappled with a troubled past. (J.A. at 2,16.).

Respondent was born as Silvia Montoya. (J.A. at 5.). As a child, she lost both of her parents—her mother to a drug overdose and her father to a fifteen-year prison sentence. (J.A. at 5.). Her father was ultimately killed in prison. (J.A. at 5.). During her teenage years, Respondent resorted to illegal activities in order to support herself, such as stealing money from grocery stores. (J.A. at 5.). A juvenile court declared Respondent delinquent of several offenses ranging from simple assault to drug possession. (J.A. at 15.). In her early twenties, Respondent was charged with two felonies for distribution of cocaine; she pled guilty to one of the felonies and served two years in state prison. (J.A. at 5.).

While incarcerated, Respondent rehabilitated herself and turned her life around. (J.A. at 5,16.). She earned her G.E.D., enrolled in community college classes, including several business classes, and obtained a business degree. (J.A. at 5.). Upon her release, Respondent opened a

successful small-scale clothing store. (J.A. at 5.). The business grew into a line of clothing stores catering to high-end consumers. (J.A. at 16.). After achieving business success, Respondent began dedicating much of her time to supporting altruistic efforts and social causes. (J.A. at 16.).

Petitioner and Respondent's former husband, Raymond Courtier, were one-time allies who served on the city council together. (J.A. at 3,16.). In fact, Mr. Courtier was one of Petitioner's first supporters. (J.A. at 3,16). Though her former husband helped Petitioner into the political arena, Respondent has recently publicly criticized Petitioner in his role as the mayor of Silvertown. Specifically, Respondent publicly disagreed with his "tough-on-crime" platform and his efforts to develop high-rise condominiums in areas known for public housing and low-rent options. (J.A. at 3,16.). In the most recent mayoral election, Respondent was an avid supporter of Petitioner's challenger, Evelyn Bailord. (J.A. at 17.). As one of Bailord's chief proponents and advisors, Respondent made noteworthy campaign contributions and hosted several dinner events in support of Bailord's campaign. (J.A. at 17.).

During the election, Respondent wrote several online commentaries touting Bailord as the superior candidate for the mayor of Silvertown. (J.A. at 17.). She also used her commentaries to call out Petitioner as "a relic of the past," "a divisive leader," and "someone who cares little for social justice issues." (J.A. at 17.). One of Respondent's columns read:

> The Time is Now for Political Change!
>
> The choice is clear for citizens of Silvertown. Our current mayor, Elmore Lansford, is out of touch with 21st century America and the need for social justice. We need a mayor who cares about all of the citizens of Silvertown, not just the wealthy developers who seek to reap excess profits over the less fortunate in our community.
>
> Lansford's time is past. He once was a caring politician, but now he is simply an entrenched incumbent; beholden to special interests. He has engaged in a war on the economically-strapped denizens of Cooperwood, imposing more and more police patrols. His repressive measures contribute to the process of gentrification

> and the displacement of Cooperwood residents to other neighborhoods or other cities.
>
> In short, Mayor Lansford is a plutocrat. He needs to be replaced by a compassionate politician, one who cares about all people of all races, genders, and ethnicities.
>
> That candidate is Evelyn Bailord. She has devoted her life to social justice causes. She was a former member of the United States Peace Corps years ago. In her law practice, she devoted countless hours to pro bono service. She will put policies into practice that champion many of the social justice causes that are most important to our community we have endeavored to share over the past several years.
>
> The choice is clear for Silvertown – Out with the Old and In with the New.
>
> Vote for Bailord on Election Day!

(J.A. at 17.). Upset by this post, Petitioner responded to Respondent's commentary with the following insults:

> 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 18.).

As a result, Respondent sued Petitioner for defamation of character and false light invasion of privacy. (J.A. at 18.). She alleged that several comments within Petitioner's social media post defamed her, causing reputational harm. (J.A. at 1,18.). In particular, Respondent contends that the phrases "a pimp for the rich"; "a leech on society"; "a whore for the poor"; and "corrupt and a

swindler" constitute unprotected defamation. (J.A. at 18.). In response, Petitioner claims that his statements were merely rhetorical hyperbole, and as such, are protected under the First Amendment. (J.A. at 18). Additionally, Petitioner also claims that Respondent cannot even bring her defamation lawsuit because she is a libel-proof plaintiff due to her troubled past and thus, has no good reputation to protect. (J.A. at 18.).

B. Procedural History

Respondent filed suit against Petitioner in the Tenley District Court, alleging defamation of character and false light invasion of privacy. (J.A. at 5.). In response, Petitioner filed a special motion to strike and dismiss Respondent's defamation claim under the Tenley Public Participation Act ("an anti-SLAPP statute"), which provides: "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.). Although the district court concluded that Respondent was not a libel-proof plaintiff, it ultimately found that Petitioner met his initial burden of showing that his statements were an exercise of his right to free speech. (J.A. at 10,12,15.). Under the statute, the burden then shifted to Respondent to establish a prima facie case of the underlying defamation claim. (J.A. at 7.). The district court held that Respondent did not meet this burden, and therefore granted Petitioner's special motion to strike/dismiss the defamation claim. (J.A. at 13.).

Respondent appealed the dismissal to The Supreme Judicial Court of the State of Tenley. (J.A. at 14.). After a discussion of both issues, the appellate court affirmed in part and reversed in part. (J.A. at 21, 23.). First, the appellate court agreed that Respondent was not a libel-proof plaintiff. (J.A. at 21.). Second, it found that Petitioner's statements could be considered defamatory

and held that the district court erred in dismissing Respondent's claim under the Tenley anti-SLAPP statute. (J.A. at 23.). This Court then granted Petitioner's writ of certiorari. (J.A. at 24.).

C. Standard of Review

The questions before this Court are questions of law that are subject to a de novo standard of review. *United States v. First Nat'l Bank*, 386 U.S. 361, 368 (1967). As such, this Court need not give any deference to the legal conclusions made below by the lower court. *Salve Regina Coll. v. Russell*, 449 U.S. 225, 231 (1991).

SUMMARY OF THE ARGUMENT

This Court should find that an individual cannot be a libel-proof plaintiff solely on the basis of past criminal convictions, including a felony, that have gained no notoriety or public attention. In doing so, this Court should find that Respondent is not libel-proof under either branch of the libel-proof plaintiff doctrine. Respondent is not libel-proof under the issue-specific branch because her convictions did not receive the notoriety or public attention required to render her reputation incapable of sustaining further harm. Respondent is not libel-proof under the incremental harm branch because the challenged statements inflict greater harm to Respondent's good reputation than the unchallenged remainder of the publication. Furthermore, the libel-proof plaintiff doctrine should be applied narrowly and in limited circumstances, as the doctrine lacks a constitutional basis and places individuals outside the protections of the law. Accordingly, this Court should find that Respondent is not a libel-proof plaintiff.

Petitioner's statements constitute unprotected defamation in violation of the First Amendment. Under the State of Tenley's anti-SLAPP law, the burden falls on Respondent to make out a prima facie case of defamation in order to avoid early dismissal of her claim. That said, Respondent can prove each essential element of her defamation claim because the challenged

statements false statements of fact that have a defamatory meaning. Additionally, Respondent satisfies her burden under the anti-SLAPP law regardless of whether she is considered a private individual or a public figure. If this Court finds her to be a private individual, Respondent can show that Petitioner published his statements negligently, as is required under state law defamation actions. However, even if this Court considers Respondent a public figure, she can still prevail with her claim because Petitioner published the statements with actual malice, that is, with reckless disregard for their falsity.

ARGUMENT

III. THIS COURT SHOULD FIND THAT RESPONDENT IS NOT A LIBEL-PROOF PLAINTIFF UNDER THE ISSUE-SPECIFIC BRANCH OR INCREMENTAL HARM BRANCH BECAUSE RESPONDENT HAS A REPUTATION WORTH PROTECTING FROM DEFAMATORY AND FALSE STATEMENTS.

The libel-proof plaintiff doctrine applies when a plaintiff's reputation is already so damaged, either by the plaintiff's criminal record or prior negative publicity (the issue-specific branch) or by prior unchallenged repetition of damaging statements (the incremental harm branch), that the plaintiff should be barred from receiving damages as a matter of law. Jay Framson, Note, *The First Cut Is the Deepest, but the Second May Be Actionable: Masson v. New Yorker Magazine, Inc., and the Incremental Harm Doctrine*, 25 Loy. L.A. L. Rev. 1483, 1483 (1992); Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1909 (1985). Although Respondent has criminal history, her reputation is not so damaged that she should be barred from bringing her defamation claim. As the appellate court noted, Respondent "is a 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.). This Court should find that Respondent is not libel-proof for three reasons. First, Respondent is not libel-proof under the issue-specific branch because the record does not establish that Respondent's reputation was so tarnished by her criminal convictions that it could not have suffered further harm. Second, Respondent is not libel-proof under the incremental harm branch because the challenged statements inflict reputational harm above that caused by the unchallenged statements. Lastly, the libel-proof plaintiff doctrine should not be applied to Respondent solely on the basis of past criminal convictions that received no notoriety or public attention, as the doctrine should be applied narrowly and only in limited circumstances. As such, this Court should affirm the holding of the lower court and find that Respondent is not a libel-proof plaintiff.

A. Respondent is not libel-proof under the issue-specific branch because she is not a habitual criminal and her prior felony conviction received no notoriety or public attention.

The issue-specific branch bars plaintiffs from bringing a libel claim where the plaintiff's reputation is already so damaged with regard to specific issues that the plaintiff cannot demonstrate that the challenged statements cause any further reputational injury. *The Libel-Proof Plaintiff Doctrine*, *supra* at 1910-11. This version of the doctrine originated in the context of habitual criminals and is often applied to plaintiffs with reputations that have been tarnished by extensive criminal history. *See Cardillo v. Doubleday & Co*., 518 F.2d 638, 639 (2d Cir. 1975) (holding that appellant was "so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages . . . ."); *Finklea v. Jacksonville Daily Progress*, 742 S.W.2d 512, 515 (Tex. App. 1987) ("The cases that most compellingly invite its application are those cases, like *Cardillo*, in which criminal convictions for behavior similar to that alleged in the challenged communication are urged as a bar to the claim."). However, "the doctrine is not limited to plaintiffs with criminal records." *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986). The issue-specific damage to plaintiff's reputation can be caused either by the plaintiff's criminal record or by widespread negative publicity. *The Libel-Proof Plaintiff Doctrine*, *supra* at 1909. Here, Respondent is not a libel-proof plaintiff under the issue-specific branch because she has a reputation worth protecting from defamation. (J.A. at 20.). Although she has criminal history (including a felony conviction), Respondent's reputation has not been tarnished by her prior criminal history or by prior negative publicity, and therefore she should not be barred from bringing a defamation claim.

The libel-proof plaintiff doctrine was first enunciated in *Cardillo*, in which the plaintiff brought a defamation claim challenging statements alleging that he had been involved in a number

of crimes. *The Libel-Proof Plaintiff Doctrine*, *supra* at 1910-11. In *Cardillo*, the Second Circuit found that the plaintiff, who had multiple criminal convictions and was incarcerated on a twenty-one-year prison sentence, was libel-proof with regard to the challenged statements. *Cardillo*, 518 F.2d at 640. The court reasoned that due to the plaintiff's extensive criminal record and admitted ties to high-ranking members in organized crime, no court or jury would be able to award more than a few cents' damages. *Id.* As a result, the plaintiff was barred from bringing his libel claim. *Id.*

Since *Cardillo*, courts have applied the libel-proof plaintiff doctrine in cases where the plaintiff, often a prison inmate, is characterized as a habitual or notorious criminal. *See Lavergne v. Dateline NBC*, 597 F. App'x 760, 762 (5th Cir. 2015) ("[C]ertain plaintiffs with criminal convictions who are notorious for their past criminal acts have such poor reputations that they are unlikely as a matter of law to recover more than nominal damages for an allegedly defamatory publication."); *Ray v. Time, Inc.*, 452 F. Supp. 618, 622 (W.D. Tenn. 1976), *aff'd*, 582 F.2d 1280 (6th Cir. 1978) (holding plaintiff libel-proof with regard to statements about his background and criminal activities because he was notoriously recognized as a "convicted habitual criminal"). Importantly however, the mere fact that a plaintiff has been a convicted of a crime (or crimes) does not automatically establish the plaintiff's reputation as a notorious criminal, or establish that the plaintiff's reputation has been so tarnished that he or she should be barred relief as a matter of law. In other words, criminal convictions alone are not enough to render a plaintiff libel-proof under defamation law. *Thomas v. Tel. Publ'g Co.*, 929 A.2d 993, 1005 (N.H. 2007). In recent years, courts have recognized that the doctrine is most appropriately applied in situations where the plaintiff's criminal conviction received a high degree of notoriety or public attention." *Id.* As the Supreme Court of New Hampshire recognized, "in . . . cases where courts have most persuasively

applied the doctrine and deemed plaintiffs libel-proof, both the publicity surrounding the crimes and the attendant level of notoriety are quite high." *Id.*

In *Thomas*, the New Hampshire Supreme Court held that in order to justify the application of the issue-specific branch, "the evidence of record must show not only that the plaintiff engaged in criminal or anti-social behavior in the past, but also that his activities were widely reported to the public." *Id.* The nature of the plaintiff's conduct, number of offenses, and degree and range of publicity surrounding the plaintiff's convictions "must make it clear, as a matter of law, that the plaintiff's reputation could not have suffered" as a result of the challenged statement. *Id.* The court further explained that "publicity is part and parcel of the damage to a reputation necessary to trigger the issue-specific version of the libel-proof plaintiff doctrine." *Id.* Where no such publicity is present, the plaintiff should not be considered libel-proof. *Id.*

The Tenth Circuit has also recognized that whether or not the plaintiff's reputation is sufficiently low enough to warrant application of the doctrine "[d]epend[s] upon the nature of the conduct, the number of offenses, and the degree and range of publicity received . . . ." *Lamb v. Rizzo*, 391 F.3d 1133, 1137 (10th Cir. 2004) (citing *Wynberg v. Nat'l Enquirer,* 564 F. Supp. 924, 928 (C.D. Cal. 1982)). In *Rizzo*, the Tenth Circuit considered whether the plaintiff, a convicted murderer and kidnapper, was libel-proof as a result of his criminal record. *See id.* The plaintiff's crimes were widely covered by the news media. *Rizzo*, 391 F.3d at 1139. Emphasizing the level of notoriety and publicity surrounding the plaintiff's convictions, the court found the plaintiff libel-proof as a result of the damage to his reputation, notwithstanding the fact that over thirty years had passed since his convictions. *Id.* at 1139-40. The widespread publicity and notoriety attached to the plaintiff's criminal convictions rendered plaintiff's reputation incapable of suffering further harm. *Id.*

The U.S. District Court for the Southern District of Florida also considered this issue in *Davis v. McKenzie.* There, the court found the plaintiff libel-proof under the issue-specific branch where the plaintiff, who had been indicted on a variety of charges including sex-trafficking and kidnapping, pled guilty to a charge of federal sex-trafficking involving a minor. *Davis v. McKenzie*, 2017 WL 8809359, at 10 (S.D. Fla. Nov. 3, 2017), *report and recommendation adopted*, 2018 WL 1813897 (S.D. Fla. Jan. 19, 2018). The plaintiff's case received extensive and widespread publicity from media sources across the country. *Id.* In finding the plaintiff libel-proof, the court stated that "the evidentiary details of [plaintiff's] sex trafficking activities [had] been widely disseminated, not only through media outlets with regional and international audiences, but also in several publically available court orders and opinions." *Id.* The court reasoned that the plaintiff's heinous criminal activities, in combination with the widespread negative publicity, had so tarnished his reputation that it could not suffer further damage. *Id.* at 19.

The emphasis on publicity was again echoed as recently as February 2019 by the U.S. District Court for the Eastern District of Tennessee. In *Horn-Brichetto v. Smith,* the plaintiff, like Respondent in this case, had a single felony conviction on his record. *Horn-Brichetto v. Smith*, 2019 WL 921454, at 15 (E.D. Tenn. Feb. 25, 2019), *appeal dismissed*, 2019 WL 2601566 (6th Cir. May 15, 2019). The court held that the plaintiff was not libel-proof where the only fact that the court could consider was one felony conviction that received no notoriety or public attention. *Id.* Distinguishing the plaintiff from notorious criminals, the court determined that the plaintiff was not libel-proof because the plaintiff was neither notorious nor infamous for his single felony conviction. *Id.*

In accordance with established case law, this Court should find that, under the issue-specific branch, an individual cannot be libel-proof solely on the basis of past criminal convictions

that have gained no notoriety or public attention. As such, this Court should find that Respondent is not a libel-proof plaintiff under the issue-specific branch of the libel-proof plaintiff doctrine. Based on *Rizzo* and *Thomas*, this Court should not view Respondent's criminal record in a vacuum when conducting the issue-specific analysis. Instead, this Court should consider the number of Respondent's criminal convictions, the nature of Respondent's conduct, and the degree of publicity that Respondent's convictions received in order to determine whether she is libel-proof under the issue specific branch.

Here, the entirety of Respondent's criminal record consists of juvenile adjudications during her teens and a single felony conviction during her early twenties. (J.A. at 5.). Unlike the plaintiffs in *Cardillo*, *Rizzo*, or *McKenzie*, Respondent only has one adult conviction on her record. Additionally, all of Respondent's convictions occurred "decades ago," prior to Respondent's name changing from her maiden name, Montoya, to her married name, Courtier. (J.A. at 6,10.).

With regard to the nature of Respondent's conduct, the record does not establish that Respondent committed violent or heinous crimes, unlike the plaintiffs in *McKenzie* and *Rizzo*. Rather, the record indicates that Respondent's only felony conviction was for a drug distribution charge—a non-violent crime. (J.A. at 5.). The non-violent nature of Respondent's felony conviction is drastically different than the murder or kidnapping charges in *McKenzie* and *Rizzo*.

Furthermore, the record does not establish that Respondent's prior criminal convictions ever received any notoriety or public attention. In fact, the question presented before this Court presumes that Respondent's prior convictions did not receive any notoriety or attention from the public. (J.A. at 24.). As the courts below stated, Respondent "is anything but an inveterate criminal." (J.A. at 10.). Any damage that *may* have been caused to her reputation has been restored by Respondent's significant efforts to rehabilitate herself, including earning a business degree,

starting a successful business, and "devot[ing] much of her adult life to altruistic, charitable and philanthropic efforts." (J.A. at 10,16,21.).

Under this reasoning, it cannot be said that Respondent's reputation is so tarnished that she should be barred from bringing a libel claim. "Convicted murderers and certain inveterate criminals are one thing, but applying the doctrine to anyone with a felony on their record would be problematic." David L. Hudson Jr., *Shady Character Examining the Libel-Proof Plaintiff Doctrine*, Tenn. B.J., July 2016, at 14, 16. Without the required publicity, Respondent's criminal convictions have not caused enough reputational damage to trigger the application of the doctrine. This Court should adopt a narrow holding of the doctrine and find that a plaintiff cannot be found libel-proof under the issue-specific branch solely on the basis of a past criminal conviction that received no notoriety or public attention. This is consistent with the doctrine's purpose: allowing courts to prevent a person with no good reputation from bringing a libel claim as a measure of judicial economy. David Marder, Note, *Libel Proof Plaintiffs—Rabble Without A Cause*, 67 B.U. L. Rev. 993, 993 (1987). In cases where the plaintiff's conviction received no notoriety or publicity, courts should not assume that simply because the plaintiff was convicted, the plaintiff's reputation is automatically so damaged that they cannot recover more than nominal damages. Such a holding would, as this Court has warned, "create an open season for all who sought to defame persons convicted of a crime." *Wolston v. Reader's Digest Ass'n*, Inc., 443 U.S. 157, 158 (1979). As such, this Court should find that Respondent is not libel-proof under the issue-specific branch.

B. Respondent is not libel-proof under the incremental harm branch because the challenged statements cause more harm to Respondent's reputation than the unchallenged statements.

The incremental harm branch of the libel-proof plaintiff doctrine does not apply to Respondent because the statements that Respondent challenged create reputational harm above

that caused by the unchallenged statements. Unlike the issue-specific branch, the incremental harm branch does not operate based upon a finding of a previously damaged reputation. *Thomas*, 929 A.2d at 1003. Rather, the doctrine applies to bar libel claims "when the plaintiff's potentially actionable claims cause no incremental harm to the plaintiff's reputation compared to the effect of the remaining, nonactionable portions of the publication." Kevin L. Kite, Note, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine*, 73 N.Y.U. L. Rev. 529, 530 (1998). The court must evaluate the defendant's publication in its entirety, considering the effects of the challenged statements in the context of the full publication. *The Libel-Proof Plaintiff Doctrine*, *supra* at 1910-11. If the challenged statements cause far less harm to the plaintiff's reputation than the unchallenged statements in the same publication, the court may find the plaintiff libel-proof. *Id.*

The U.S. District Court for the Southern District of New York is credited with first applying the incremental harm branch of the libel-proof plaintiff doctrine in *Simmons Ford, Inc. v. Consumers Union of the United States*. Kevin L. Kite, *supra* at 543–44. In *Simmons*, the plaintiff, an automobile manufacturer and retailer, brought a libel claim against the publisher of Consumer Reports magazine for publishing an article that negatively reviewed plaintiff's electric car. *Simmons Ford, Inc. v. Consumers Union of U.S., Inc.*, 516 F. Supp. 742, 744 (S.D.N.Y. 1981). The Consumer Reports article indicated that, after putting the vehicle through a series of extensive safety and performance tests, the vehicle suffered from "extensive faults." *Id.* As a result, the article gave the vehicle a rating of "Not Acceptable." *Id.* The only portion of the article that plaintiff challenged involved an incorrect claim by Consumer Reports that the vehicle did not meet certain federal standards. *Id.* at 744-45. The plaintiff did not challenge the article's conclusion that the vehicle was extremely unsafe based on the Consumer Reports test standards. *Id.* Because the

defendant had performed tests on the vehicle prior to reaching a conclusion, the court stated that there was an adequate basis to rate the vehicle as "Not Acceptable," even apart from the incorrect comment challenged by plaintiffs referencing federal standards. *Id.* at 750. The court found that the plaintiff was libel-proof because the incorrect statement about federal standards could not harm the plaintiff's reputation "in any way beyond the harm already caused by the remainder of the article" that concluded that the vehicle was unsafe based on Consumer Reports test standards. *Id.*

In this case, the incremental harm doctrine is not applicable to Respondent. The four challenged statements ("a pimp for the rich"; "a leech on society"; "a whore for the poor"; and "corrupt and a swindler") cause greater reputational harm than the unchallenged portions of Petitioner's publication, unlike *Simmons*, where the challenged statement did not make a difference when compared to the rest of the publication. This case is distinguishable from *Simmons*, because in *Simmons*, the defendant's conclusion was founded upon an adequate basis. Here, it has not been established that Petitioner had an adequate basis for making the four statements about Respondent. The fact that Respondent has criminal convictions has no bearing on the incremental harm analysis. As the New Hampshire Supreme Court has recognized, a plaintiff's criminal convictions alone are not dispositive under the incremental harm branch. *Thomas*, 929 A.2d at 1003. Furthermore, unlike *Simmons*, it cannot be said that Petitioner's article would have been equally as damaging had it not included the four challenged statements. The four challenged statements cause significant harm to Respondent's reputation because they call into question Respondent's competence and integrity as a businessperson. As a result, the challenged statements subject Respondent to more reputational damage than the unchallenged remainder of the publication.

The D.C. Circuit has "squarely rejected" the incremental harm branch because it operates on the presumption that a plaintiff's reputation is "a monolith which stands or falls in its entirety" to bar the plaintiff's libel claim. *Moldea v. New York Times Co.*, 15 F.3d 1137, 1149 (D.C. Cir. 1994); *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984). The incremental harm doctrine is especially menacing to plaintiffs who have prior criminal convictions. The automatic application of the incremental harm branch to plaintiffs with criminal records allows defendants to escape liability for defamation by combining false defamatory statements about the plaintiff with true ones. As the Tenth Circuit has cautioned, in such a scenario, as long as a defendant included a true statement regarding the plaintiff's conviction among the false and defamatory statements, the plaintiff's claim would be dismissed, leaving the defendant free to publish "even the most outrageous and damaging lies." *Bustos v. A & E Television Networks*, 646 F.3d 762, 766 (10th Cir. 2011).

This Court should not apply the incremental harm branch to this case solely because Respondent has past criminal convictions. Petitioner should not be afforded a license to freely defame Respondent as long as he includes a single nonactionable statement referencing her criminal past in his publication. Furthermore, the four challenged statements cause more harm to Respondent's reputation than the unchallenged statements. For these reasons, this Court should find that Respondent is not libel-proof under the incremental harm branch of the libel-proof plaintiff doctrine.

C. The libel-proof plaintiff doctrine should only be applied to a narrow class of plaintiffs.

A number of critics have raised concerns about the broad application of the libel-proof plaintiff doctrine. While some have stressed that the doctrine should be applied narrowly and only in limited circumstances, others have questioned whether the doctrine is "sound policy," arguing

that the justifications for the policy are "deeply flawed." David L. Hudson Jr., *supra* at 14, 16; Evelyn A. Peyton, Note, *Rogues' Rights: The Constitutionality of the Libel-Proof Plaintiff Doctrine*, 34 Santa Clara L. Rev. 179, 191 (1993). Though the doctrine seeks to preserve judicial resources, legal commentators have argued that the doctrine is an "unjustified over-expansion of first amendment protections at the expense of victims of conscious and malicious falsehoods." David Marder, *supra* at 994; Evelyn A. Peyton, *supra* at 191.

In *Masson v. New Yorker Magazine, Inc*., this Court rejected the suggestion that the incremental harm branch of the libel-proof plaintiff doctrine is compelled by the First Amendment. Joseph H. King, Jr., Note, *The Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian Knot" Syndrome*, 29 Hofstra L. Rev. 343, 359 (2000). This Court "reasoned that '[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.'" *Id.* (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991)). This reasoning also extends to the issue-specific branch of the doctrine, because the issue-specific branch "is likewise not derived from the state of mind element." Joseph H. King, Jr., *supra* at 359. Furthermore, in *Liberty Lobby*, then-Judge Scalia declared that the doctrine is not part of federal constitutional law. *Liberty Lobby*, 746 F.2d at 1569. Referring to the doctrine as a "fundamentally bad idea," Judge Scalia asserted that the doctrine does not further any significant First Amendment values. *Id.*

Additionally, because the doctrine operates to bar libel claims, effectively placing certain individuals outside of the protections of the law, the libel-proof plaintiff doctrine should only be applied in limited circumstances to a narrow class of plaintiffs. As then-Judge Scalia stated in *Liberty Lobby*, "the law . . . 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." *Liberty Lobby*, 746 F.2d at 1568. As the Second Circuit has advised, "few plaintiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements . . . ." *Guccione*, 800 F.2d at 303. Therefore, courts should exercise caution in determining whether a plaintiff's reputation is so tarnished that the plaintiff should be barred from recovery.

Ultimately, whether the libel-proof plaintiff doctrine is applied under the issue specific branch or the incremental harm branch, courts should apply the doctrine sparingly, as it lacks a constitutional basis and places individuals outside of the protections of the law. This Court should use this case to establish a precedent that the libel-proof plaintiff doctrine should be applied narrowly and in limited circumstances. The doctrine should not be applied to render a plaintiff libel-proof solely on the basis of past criminal convictions that have received no notoriety or public attention. As such, this Court should answer the first certified question in the negative, and find that Respondent is not a libel-proof plaintiff under defamation law.

II. THE CHALLENGED STATEMENTS MADE BY PETITIONER CONSTITUTE UNPROTECTED DEFAMATION, AND AS SUCH, RESPONDENT IS ENTITLED TO MOVE FORWARD WITH HER DEFAMATION CLAIM.

"A person's reputation and good name is of inestimable value to him and once it has been besmirched by another through carelessness or malice restoration is virtually impossible." *Denny v. Mertz*, 318 N.W.2d 141, 151 (Wis. 1982). Dating back to 1974, this Court emphasized the legitimate state interest of protecting individuals from reputational harm because "the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being . . . .'" *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)). Although this Court has recognized that the Constitution protects rhetorical hyperbole, that is, "statements that cannot

reasonably [be] interpreted as stating actual facts about an individual," most words have more than one meaning and can still be considered defamatory. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Burns v. McGraw-Hill Broad. Co.*, 659 P.2d 1351, 1358 (Colo. 1983) (noting that "[a] speaker is not accorded free speech protection for attacks on an individual's reputation interests by framing the attack as 'opinion'").

Under the law of the State of Tenley, if an individual is sued in response to his or her exercise of the right of free speech, the State's anti-SLAPP law provides for a procedural mechanism to dispose of the suit in the early stages of litigation. Tenley Code Ann. § 5-1-704(a). Tenley's anti-SLAPP law initially places the burden on the party asserting protection from suit. Tenley Code Ann. § 5-1-705(a). Thus, once an individual establishes that the suit against him or her is based on, relates to, or is in response to that individual's free speech rights, the burden shifts to the other party to establish a prima facie case for each essential element of the underlying claim. Tenley Code Ann. § 5-1-705(b).

In this case, Respondent concedes that her defamation claim was in response to Petitioner's expression. But that expression, while claimed by Petitioner to be protected as rhetorical hyperbole, vociferously attacked Respondent's competence and integrity as a businesswoman. As such, Respondent can make out a prima facie case of defamation irrespective of whether this Court considers her a private plaintiff or a public figure. *See Gertz*, 418 U.S. at 347 (holding that "so long as [States] do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual"); *cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that in order for a public figure to recover damages for a defamatory falsehood related to his conduct, he

must show that the statements were made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

Petitioner's published statements that identify Respondent as a corrupt businesswoman who swindles the poor and pimps the rich defame Respondent in such a way that directly targets her professional and business capacity. *See Greenberg v. Spitzer*, 62 N.Y.S.3d 372, 387-88 (N.Y. App. Div. 2017) (noting that words that affect a person in his or her profession by imputing to him or her any kind of fraud, dishonesty, misconduct, or unfitness in conducting one's profession may be actionable as defamation); *Burrill v. Nair*, 158 Cal. Rptr. 3d 332, 351 (Cal. Ct. App. 2013) (noting that false statements tending directly to injure a plaintiff with respect to his or her profession by imputing dishonesty or questionable professional conduct are defamatory per se); *Kuraman v. Brotman*, 617 N.E.2d 191, 198 (Ill. App. Ct. 1993) (noting that words are defamatory per se if they prejudice the plaintiff in his or her trade, profession or business). Thus, at a minimum, Respondent can establish a prima facie case of defamation whether it be under a private plaintiff or a public figure analysis. As such, Respondent's claim should have survived an early dismissal at the trial court level because she can establish that the challenged statements are unprotected defamation.

A. As a private plaintiff, Respondent has satisfied her burden under Tenley's anti-SLAPP law because she can show that the challenged statements have a defamatory meaning and that Petitioner published the statements negligently.

The Supreme Judicial Court of Tenley was correct in determining that the trial court erred in granting Petitioner's motion to dismiss pursuant to the State's anti-SLAPP law. As mentioned, Respondent concedes that the first obligation under the law was satisfied, as her suit was in response to Petitioner's defamatory publication. However, the trial court erred in prematurely dismissing Respondent's defamation suit because once the burden shifted, she established a

showing of each essential element of defamation. Because Respondent can make this showing, the challenged statements qualify as unprotected defamation. As such, this Court should affirm the appellate court's decision.

At the trial court level, when a party seeks to dismiss a claim under anti-SLAPP laws, the standard of review is that of a typical motion to dismiss for failure to state a claim. *See Clifford v. Trump*, 339 F. Supp. 3d 915, 922 (C.D. Cal. 2018) (finding that "[i]f a defendant moves to strike/dismiss [under anti-SLAPP grounds] based on purely legal arguments and the fact that a complaint does not allege sufficient facts to support its stated cause[] of action, [the] Court analyzes the motion under the standards set out in Federal Rule of Civil Procedure 8 and 12(b)(6)"); *see also Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834-35 (9th Cir. 2018). Thus, Respondent can survive Petitioner's anti-SLAPP motion to dismiss because her claim contains sufficient factual matter which must be accepted as true and states a claim for defamation that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The elements of a valid defamation claim include identification; publication; defamatory meaning; falsity; statement of fact; damages; and fault. The element of fault varies depending on the plaintiff's status as a private individual or a public figure. *See generally New York Times*, 376 U.S. at 267; *Gertz*, 418 U.S. at 347-48. Regardless of whether this Court views Respondent as a private individual (requiring a negligence standard) or a public figure (requiring actual malice), Respondent can establish a prima facie defamation claim by showing each essential element. In this case, there is no question that the challenged statements identified Respondent and were published. (J.A. at 18.). Thus, the starting point is whether the statements are capable of a defamatory meaning, that is, whether the words complained of are reasonably capable of

conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by the plaintiff is a natural and probable one. *Laughland v. Beckett*, 870 N.W.2d 466, 473 (Wis. Ct. App. 2015) (citing *Bauer v. Murphy*, 530 N.W.2d 1, 3 (Wis. Ct. App. 1995)).

"A statement is defamatory if it exposes an individual 'to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, disgrace, or . . . induce[s] an evil opinion of one in the minds of right-thinking persons, and . . . deprives one of their confidence and friendly intercourse in society.'" *Greenberg*, 62 N.Y.S.3d at 393 (quoting *Chau v. Lewis*, 771 F.3d 118, 127 (2d Cir. 2014)). Additionally, statements that tend to directly injure a plaintiff's capacity as a business person or attack the plaintiff's professional conduct are considered defamatory per se. *See Kuraman*, 617 N.E.2d at 198. For instance, in *Kuraman*, the plaintiff was a substitute teacher and brought a defamation claim against a newspaper who published defamatory comments about him. *Id.* at 193. In its published article, the defendant newspaper stated that the plaintiff was "scamming" the court system by filing "unwarranted suits for settlement money." *Id.* at 199. In determining whether such statements had a defamatory meaning, the court pointed to the fact that the word "scam" was defined as "a fraudulent business scheme" or "to cheat or swindle." *Id.* at 198. Thus, the court found that such statements "could be found to be defamatory per se because [the statements] . . . prejudiced him in his profession or trade as a schoolteacher." *Id.* at 199; *see also Burrill*, 158 Cal. Rptr. 3d at 362 (finding that a counselor who was called a "corrupt criminal" stated a claim of defamation sufficient to overcome a dismissal); *Laughland*, 870 N.W.2d at 474-75 (finding that a professor being called a "preying swindler" was defamatory).

The case of *Flamm v. American Association of University Women* is also illustrative in determining whether a statement is defamatory. 201 F.3d 144 (2d Cir. 2000). There, the attorney

plaintiff sued the defendant for publishing statements about him in the defendant's attorney referral directory. *Id.* at 146-47. Specifically, the plaintiff argued that the publication's description was defamatory because it referred to him as an "ambulance chaser," who only took "slam-dunk cases." *Id.* The Second Circuit considered whether the statements qualified as unprotected defamation or whether they were simply rhetorical hyperbole. *Id.* Ultimately, the Second Circuit agreed with the plaintiff, and held that the statements were defamatory because they *could* reasonably be understood as implying that the plaintiff was engaging in unethical solicitation—an accusation that could be proven false. *Id.* Additionally, the Court opined that such statements directly targeted the plaintiff's competence as a professional, further supporting the conclusion that the statements were defamatory as opposed to mere rhetorical hyperbole. *Id.*

Here, Petitioner's statements constitute defamation rather than rhetorical hyperbole because they call into question Respondent's abilities and integrity as a businessperson. Like the plaintiffs in *Flamm* and *Kuraman*, Respondent has a business reputation to protect. As the owner and operator of several successful clothing stores in Silvertown, Respondent has achieved significant accomplishments in the business world. After she opened her first small-scale store, Respondent's business became so successful that she was able to open additional stores that cater to high-end consumers. Petitioner's statements suggesting that Respondent is "corrupt and a swindler," "a leech on society" and "a pimp for the rich" qualify as unprotected defamation because they directly attack Respondent's competence as a business professional. As in *Kuraman* and *Flamm*, Petitioner's statements can reasonably be understood as implying that Respondent is a corrupt businessperson or that she engages in unethical business practices. Additionally, the fact that the statements are capable of being proven false further supports the conclusion that they are defamatory statements as opposed to mere rhetorical hyperbole. Furthermore, the statements

qualify as defamation per se because they directly injure Respondent with respect to her business capacity by imputing unethical or dishonest conduct. As such, damages are presumed. *Burrill*, 158 Cal. Rptr. 3d at 351; *see Kumaran*, 617 N.E.2d at 198 (stating that defamation per se is so obviously damaging that damages are presumed and the plaintiff is not required to show special damages). At the very least, even if this Court does not consider Petitioner's statements to be defamation per se, the statements still convey a defamatory meaning, and therefore general damages are presumed. *Laughland*, 870 N.E.2d at 476 (citing *Dalton v. Meister*, 188 N.W.2d 494, 504) (explaining that general damages are presumed in a defamation action and are often recoverable without proof of injury).

With regard to the element of fault, the analysis turns on whether a plaintiff is considered a private individual or a public figure. In *Gertz*, this Court made clear that the states are not to award damages to a private individual in a defamation action absent a showing that the defendant published the defamatory statements with some standard of fault. *Gertz*, 418 U.S. at 347. The *Gertz* decision left it up to the states to choose and implement their own standard of fault for private plaintiffs in a defamation action. *Id.* (holding that "so long as [States] do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual."). After the *Gertz* decision, several States have adopted an ordinary negligence standard for defamed private individuals. *See Troman v. Wood*, 340 N.E.2d 292, 299 (Ill. 1975); *Stone v. Essex Cty. Newspapers, Inc.*, 330 N.E.2d 161, 168 (Mass. 1975); *Gobin v. Globe Pub. Co.*, 531 P.2d 76, 83 (Kan. 1975); *Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co.*, 334 N.E.2d 494, 498 (Ohio 1974). Under a negligence standard, the plaintiff must show that the defendant knew or had reason to know that the statements were false and defamatory. *Gobin*, 531 P.2d at 83.

If this Court determines that Respondent is a private plaintiff, Respondent can establish a prima facie case of defamation by showing that Petitioner published the challenged statements negligently. As such, Respondent can satisfy her burden under Tenley's anti-SLAPP law. The courts below made a point of explaining the relationship between Respondent's former husband, Raymond Courtier, and the Petitioner, noting that the two were one-time allies and they served together on the city council. (J.A. at 3,16.). In fact, Mr. Courtier was one of Petitioner's early supporters and helped Petitioner into the political arena. (J.A. at 3,16.). Because of Petitioner's relationship with Respondent's former husband, Petitioner knew or should have known Respondent's reputation in the community. Though Respondent once had a troubled past, she took great efforts to restore her reputation; she has successfully operated two clothing stores and devoted much of her energy to altruistic endeavors. (J.A. at 16.). These facts support the conclusion that Petitioner knew or should have known that the statements he published about Respondent were not indicative of her reputation in the community as a philanthropist and businessperson. Therefore, Petitioner's statements were false and defamatory, and as such, were published negligently. As a private plaintiff, Respondent can establish each essential element of her underlying defamation claim. Having satisfied her burden under Tenley's anti-SLAPP law, this Court should affirm the Supreme Judicial Court of Tenley and allow Respondent to move forward with her defamation claim.

B. Even if this Court considers Respondent to be a public figure, Respondent has still satisfied her burden under Tenley's anti-SLAPP law because Petitioner published the challenged statements with actual malice.

This Court should find that Respondent has satisfied her burden under the anti-SLAPP law because Respondent can establish a prime facie defamation claim even as a public figure. In *New York Times*, this Court established that constitutional guarantees require "a federal rule that

prohibits a public [figure] from recovering damages for a defamatory falsehood . . . 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 280-81. In *Gertz*, this Court expanded on the actual malice standard, explaining that the "standard defines the level of constitutional protection appropriate to the context of defamation of a public person." 418 U.S. at 342. Justice Powell further stated that "[t]hose 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." *Id.* Additionally, the *Gertz* Court explained that "the [defendant] must act with a 'high degree of awareness of . . . probable falsity.'" *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Here, Respondent publicly advocated for social causes and made significant contributions within Silvertown's political arena. Respondent has used her sizable social media presence to participate in Silvertown's mayoral election. For these reasons, Respondent may be viewed as a public figure because of the notoriety of her achievements in the community as well as her participation in politics.

For a public figure plaintiff to succeed on a defamation claim, the plaintiff is required to prove the defendant published the statements with actual malice. *Annette F. v. Sharon S.*, 15 Cal. Rptr. 3d 100, 114 (Cal. Ct. App. 2004). To prove actual malice on part of the defendant, a plaintiff can use both direct and circumstantial evidence. *Id.* at 115. Courts have looked to factors such as failure to investigate, anger and hostility, and reliance on sources known to be unreliable which may indicate that the defendant published the statements with actual malice, or with reckless disregard for their truth. *Id.* (citing *Reader's Digest Ass'n. v. Superior Court*, 690 P.2d 610, 618-19 (Cal. 1984)). "[W]hen the publisher's allegations are so inherently improbable that only a reckless person would have put them in circulation, or where there are obvious reasons to doubt

the . . . accuracy of his reports," the defendant's actual malice can be inferred. *Burrill*, 158 Cal. Rptr. 3d at 357.

For instance, in *Burrill*, the California appellate court found that the public figure plaintiff made a prima facie showing of actual malice where the defendant made public statements accusing the plaintiff of extortion and perjury. *Id.* The court found that the challenged statements were made with actual malice because of the defendant's complete failure to cite any source for his defamatory accusations as well as his animosity towards the plaintiff. *Id.* Viewing the publication in its entirety, the court found that the defendant's statements contained significant hostility and resentment towards the plaintiff. *Id.* at 358. Ultimately, the court concluded that the public figure plaintiff had shown enough proof of actual malice to at least overcome an early dismissal of his defamation claim under an anti-SLAPP law. *Id.*

The Supreme Court of Texas in *Bentley v. Bunton* also illustrates how a public figure plaintiff can establish the actual malice standard. 94 S.W.3d 561 (Tex. 2002). There, the plaintiff was a local judge who brought a defamation action against the host of a call-in talk show. *Id.* at 567. On his talk show, the defendant continuously called the plaintiff judge corrupt and accused the judge of being dishonest, unethical, shady, and unscrupulous. *Id.* The high court in Texas held that the defendant made his defamatory statements with actual malice. *Id.* at 602. In so holding, the court highlighted that the defendant never made his allegations against the plaintiff in good faith, that he relentlessly hounded the plaintiff, and that the defendant was carrying out a personal vendetta against the plaintiff "without regard for the truth of his allegations." *Id.* For these reasons, the Texas Supreme Court concluded the defendant's statements constituted circumstantial evidence of actual malice. *Id.*

Like the defendants in *Burrill* and *Bentley*, Petitioner's statements demonstrate actual malice towards Respondent. Respondent can establish a prima facie defamation claim as a public figure because the circumstantial evidence shows that Petitioner's statements were made with reckless disregard for their truth. In his harsh response to Respondent's political commentary, Petitioner vociferously attacked her integrity as a successful businessperson and activist in the community. The statements are indicative of Petitioner's hostility and animosity for Respondent, which, according to *Burrill*, establishes circumstantial evidence of actual malice. Additionally, by bringing to light Respondent's troubled past, a part of Respondent's life that is clearly behind her, Petitioner's statements demonstrate his bad motive in attempting to harm her reputation. Furthermore, the fact that Petitioner had a longstanding relationship with Respondent's former husband provides for an inference that he knew Respondent was an upstanding member in the community of Silvertown. Thus, when Petitioner published the statements, he did so with a high degree of awareness of their probable falsity, demonstrating actual malice. Ultimately, if this Court views Respondent as a public figure, Respondent can still satisfy her burden in making a prima facie showing of each element of defamation, including the actual malice fault standard. Petitioner's statements are not merely rhetorical hyperbole. Instead, his statements are false, unprotected defamation. As such, this Court should affirm the lower court's decision and allow Respondent to move forward with her defamation claim.

CONCLUSION

This Court should find that Respondent is not libel-proof under the issue-specific branch or the incremental harm branch of the libel-proof plaintiff doctrine because Respondent's prior criminal convictions did not receive the required notoriety or public attention. Furthermore, in the decades following her convictions, Respondent rehabilitated herself and has demonstrated that she

has a reputation worth protecting from defamatory and false statements. Therefore, this court should affirm the decision of the Supreme Judicial Court of Tenley and find that an individual cannot be libel-proof solely on the basis of past criminal convictions, including a felony, that have gained no notoriety or public attention.

Additionally, Petitioner's published statements constitute unprotected defamation because they are false statements of fact that contain a defamatory meaning. Respondent established each essential element of her underlying defamation claim, thus satisfying her burden under Tenley's anti-SLAPP law. As such, the district court erred in dismissing Respondent's claim at such an early stage in the litigation. Accordingly, this Court should affirm the decision of the Supreme Judicial Court of Tenley.