THE SUPREME JUDICIAL COURT OF TENLEY

FALL TERM, 2019

DOCKET NO. 18-2143

ELMORE LANSFORD,

Petitioner,

v.

SILVIA COURTIER,

Respondent.

ON WRIT OF CERTIORARI TO

THE SUPREME JUDICIAL COURT OF TENLEY

BRIEF FOR THE RESPONDENT

Team # 219833

Counsel for the Respondent

QUESTIONS PRESENTED

1. Can the "libel-proof plaintiff" doctrine deny a successful female entrepreneur, activist, and philanthropist her right to bring a defamation action solely because—decades ago—she served a two-year prison sentence for a nonviolent crime that never gained notoriety or public attention.

2. Can Lansford escape liability for his vicious attack on Courtier—which called into question her integrity and capabilities as a female entrepreneur—by claiming that his statement was rhetoric hyperbole.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

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

Factual Background

This case is about a young woman who transformed humble beginnings into financial abundance and an incumbent politician willing to say anything to stay in power. Silvia Courtier — a businesswoman, entrepreneur, and social activist — came from the harshest of backgrounds. (J.A. at 5.).

Courtier's parents were both addicted to drugs. *Id.* Her mother tragically died of a drug overdose when Courtier was only ten years old and her father was killed in prison while serving a fifteen-year sentence. *Id.* As a result, Courtier was forced to raise herself. Courtier's tragic upbringing was compounded when she was sexually abused by an older man. *Id.* Bereft of parental support and guidance, she coped the only way she knew — with drugs. *See id.* This led to a two-year prison sentence for possession of cocaine. *Id.* Fortunately, Courtier used the opportunities available to her in prison to rehabilitate herself. *Id.*

Her determination and hard work allowed Courtier to change her life. First, she earned her G.E.D. *Id.* Then, she enrolled in community college classes. *Id.* Destined to turn her life around, Courtier took every business class that she could find. *Id.* Upon her release, Courtier opened her first business — a small clothing operation. Achieving early success, she expanded her small clothing operation into a line of clothing stores that now rivals elite brands such as Gucci, Fendi, and others. (J.A. at 16.).

Unsatisfied with her own personal achievements, Courtier devoted the next few decades of her time and energy to altruistic endeavors. *Id.* She publicly advocated against private, for-profit prisons, and in favor of restoring voting rights for former felons, increasing adult literacy, and improving equity in education. (J.A. at 16.). She has also campaigned quite heavily against gentrification and the elimination of affordable housing. *Id.*

Silvia married Raymond Courtier, the former mayor of Silvertown who held public office for eighteen consecutive years until his death. (J.A. at 5.). During his career, Raymond served on the city council with the Respondent, Elmore Lansford. (J.A. at 16.). Raymond was not only an early supporter of Lansford, but even helped him enter the political arena. *Id.*

In his campaign for mayor, Lansford supported efforts by developers to displace low-rent and public housing residents in Silvertown. *Id.* He campaigned on the concept of "cleaning up Cooperwood." *Id.* To accomplish this, he targeted low income individuals for drug-related offenses, which resulted in allegations of racial profiling and instances of police brutality. (J.A. at 3.).

Courtier realized how far Lansford had strayed and supported his challenger, Evelyn Bailord, in the most recent mayoral election. She voiced her support, hoping to elect a leader that would care about social justice causes. (J.A. at 17.).

In response, Lansford viciously attacked Courtier. Instead of engaging in political commentary, Lansford attacked Courtier both personally and as a businesswoman. He made a statement that referred to her as:

"corrupt and a swindler";

"a whore";

"a pimp"; and

"a leech on society."

(J.A. at 18).

Procedural Background

Courtier sued Lansford for defamation of character and false light invasion of privacy. *Id.* In response, Lansford contends that his statements were true. *Id.* He also argues that his attack on Courtier was non-actionable rhetoric hyperbole. *Id.* Finally, he argues that Courtier falls within the libel-proof plaintiff doctrine, because her prison sentence that she served decades ago allegedly leaves her with no good reputation to protect. *Id.*

Lansford filed a special motion to strike Courtier's lawsuit as a Strategic Lawsuit Against Public Participation ("SLAPP") suit. (J.A. at 2.). Under the SLAPP statute, the initial burden is on Lansford to show that his claim arises from his exercise of free speech. (J.A. at 7.). If Lansford meets this burden, Courtier has to show a prima facie case of the underlying defamation claim. *Id.* This burden is not high. Only a cause of action that lacks "even minimal merit" constitutes a SLAPP.

The District Court and Appellate Court both determined that Courtier was not a libel-proof plaintiff and could file a lawsuit to protect her reputational interests. (J.A. at 11, 21.). The Appellate Court also held that Courtier could maintain a defamation suit because she has been called names that call into question her competence and professionalism as a businesswoman. (J.A. at 23.).

SUMMARY OF THE ARGUMENT

The libel-proof plaintiff doctrine is a narrow exception to defamation law that courts apply in the rare instance where a plaintiff's reputation is too diminished to possibly suffer injury beyond nominal damages. *Cardillo v. Doubleday, Co.*, 518 F.2d 638, 639–40 (2d Cir. 1975).

Because few people have reputations so irreparably tarnished, the doctrine is applied sparingly, if at all, and typically reserved for mafia members, murderers, and other career criminals. *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986). However, because publicity of a prior bad act is often the best evidence of reputational harm, even habitual criminals are not deemed libel-proof unless their underlying crime elicits substantial publicity and notoriety. *Thomas v. Telegraph Publg. Co.*, 929 A.2d 993, 1005 (N.H. 2007), *as modified on denial of reconsideration* (Aug. 29, 2007).

Here, Courtier's two-year sentence for a nonviolent crime served decades ago never garnered the public attention required to justify obliterating her reputation as a matter of law. *See id.* Additionally, because Courtier has spent decades establishing a reputation as an entrepreneur, activist, and philanthropist, she could not be more distinct from the narrow class of notorious criminals who courts typically deem libel-proof. *Lamb v. Rizzo*, 391 F.3d 1133, 1139–40 (10th Cir. 2004). Further, because the incremental harm doctrine is invalid under federal law, it is inapplicable in this matter. *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 2436 (1991). Moreover, even if this Court adopts the test, Courtier is still not libel-proof because her challenged comments impugn her professional reputation, and therefore, present a cognizable injury. *Guccione*, 800 F.2d at 303.

Rhetoric hyperbole is a narrow protection that applies to "lusty and imaginative" language that "even the most careless reader [would perceive as] no more than rhetorical hyperbole." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990). It does not extend to the statement at bar, which made factual allegations that charged Courtier with being corrupt and engaged in criminal conduct. Because Lansford's statement makes provably false factual

assertions, it cannot be said, as a matter of law, that a reasonable reader could not interpret his statement in a defamatory way.

ARGUMENT

I. SILIVIA COURTIER IS NOT A LIBEL-PROOF PLAINTIFF BECAUSE HER PRIOR CONVICTION IN HER EARLY TWENTIES NEVER GAINED THE PUBLIC ATTENTION OR NOTRIETY REQUIRED TO OBLITERATE HER REPUTATION AS AN ENTREPENUER, ACTIVIST, AND PHILANTHROPIST.

The libel-proof plaintiff doctrine is a narrow exception to defamation law that courts invoke only in the rare circumstance where a plaintiff's reputation—as a matter of law—is too diminished to suffer further damage at the time of the alleged defamation. *Cardillo v. Doubleday, Co.*, 518 F.2d 638, 639–40 (2d Cir. 1975). The doctrine operates on the premise that because defamation claims redress reputational harm, persons of irreparable public disrepute should be denied the right to proceed with the action. *See id.*; *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986). However, because the doctrine strips plaintiffs of their right to a jury, and because so "few plaintiffs will have so bad a reputation" that no conceivable falsity—no matter how absurd—could further damage their reputation, courts exercise caution when determining whether a party is libel-proof. *See Guccione*, 800 F.2d at 303; *Lamb v. Rizzo*, 391 F.3d 1133, 1139–40 (10th Cir. 2004); *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976) (emphasizing that the libel-proof plaintiff doctrine is "a limited, narrow [principle]"); *Finklea v. Jacksonville Daily Progress*, 742 S.W.2d 512, 516 (Tex. App. 1987), *writ dismissed w.o.j.* (Mar. 30, 1988) ("There are few so impure that cannot be traduced.").

As such, a plaintiff cannot be deemed libel-proof unless she has committed an anti-social act so egregious and infamous so as to obliterate her reputation in general, or as to a specific

matter.[1] *See Cardillo*, 518 F.2d at 639; *Guccione*, 800 F.2d at 303 (deeming pornographer libel-proof on specific subject of adultery because reports that he openly lived with a girlfriend while legally married to another woman appeared in "widely circulated publications"). Courts typically resort to this doctrine in the case of mafia members, convicted murderers, and other career criminals. *See Lamb v. Rizzo*, 391 F.3d 1133, 1136 (10th Cir. 2004); *Ray v. Time, Inc.*, 452 F.Supp. 618, 622 (W.D. Tenn. 1976) (holding man who assassinated Martin Luther King, Jr. libel-proof). Significantly, however, even plaintiffs with "habitual criminal record[s]" are not libel-proof unless the "publicity surrounding the crimes and the attendant level of notoriety are quite high." *Thomas v. Telegraph Publg. Co.*, 929 A.2d 993, 1005 (N.H. 2007), *as modified on denial of reconsideration* (Aug. 29, 2007). Thus, publicity is the sine qua non of the libel-proof plaintiff doctrine. *See id.*; *McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6, 10 (Tex. App. Austin 1994); *see also Jackson v. Longcope*, 476 N.E.2d 617, 620 (Mass. 1985) (emphasizing conviction alone insufficient grounds to deem plaintiff libel-proof).

Here, Courtier's two-year sentence for a nonviolent crime committed decades ago never gained the public attention or notoriety required to justify obliterating her reputation under this doctrine. *See Thomas*, 929 A.2d at 1005. Moreover, Courtier's reputation as an entrepreneur, activist, and philanthropist could not be more distinct from the narrow class of career criminals whom courts typically deem libel-proof. *See Lamb*, 391 F.3d at 1136. Lastly, the "incremental harm" branch of the doctrine does not change the analysis because the challenged language presents a cognizable injury to Courtier's reputation as a businessperson. *See Guccione*, 800 F.2d

[1] Some courts refer to this as the "issue-specific" doctrine, which is considered a branch of the libel-proof plaintiff doctrine that involves a reputation that is tarnished as to a specific matter, and is distinguished from the "incremental harm" doctrine, under which a plaintiff is deemed libel-proof if challenged statements would only result in "incremental harm" to reputation. This brief addresses the incremental harm portion separately. *See e.g.*, *Thomas v. Telegraph Publg. Co.*, 929 A.2d 993, 1002–04 (N.H. 2007), *as modified on denial of reconsideration* (Aug. 29, 2007).

at 303. In short, because Courtier still has a reputational interest to protect, the libel-proof plaintiff doctrine does not and cannot apply to her.

C. Prior Convictions That Do Not Garner Public Attention Or Notoriety Do Not Sufficiently Infringe On a Plaintiff's Reputational Interest and, Therefore, Do Not Render a Plaintiff Libel-Proof Under Defamation Law.

"Publicity is part and parcel of the damage to a reputation necessary to trigger the libel-proof plaintiff doctrine." *Thomas*, 929 A.2d at 1005; *see also Guccione*, 800 F.2d at 303. Put simply, without proof of widespread reporting or news coverage surrounding prior bad acts, a defendant cannot establish that those acts harmed a plaintiff's reputation *beyond* repair. *Cf. Jackson*, 476 N.E.2d at 620 (finding inmate libel-proof because his crimes received "substantial publicity" and were the subject of "scores" of newspaper articles). Moreover, absent evidence of the publicity surrounding a crime, courts are left "without a means to assess [a plaintiff's] standing in the community." *McBride*, 894 S.W.2d at 10. Thus, a criminal conviction alone is an insufficient basis for invoking the libel-proof plaintiff doctrine. *Id.*; *Wynberg v. Nat'l Enquirer*, 564 F.Supp. 924, 928 (C.D. Cal. 1982) (deeming plaintiff libel-proof because at least seventeen local, national, and international newspapers reported his criminal convictions).

Here, it is an undisputed fact that Courtier's prior conviction was never the subject of public attention. The record contains not a single reference to a newspaper or other media outlet covering Courtier's two-year sentence. Thus, Courtier is akin to the plaintiff in *McBride*. 894 S.W.2d at 10. There, the court refused to unnecessarily extend the libel-proof plaintiff doctrine to a plaintiff whose crimes—just like Courtier—had received no media attention. *Id.* Thus, even though the plaintiff in *McBride* had three prior convictions and the alleged defamation occurred just three years after his most recent offense, the court held the convictions alone were an insufficient basis for dismissing his case. *Id.*

So too here. In fact, Courtier's transformative history makes an even stronger case for the doctrine's inapplicability. First, Courtier's sole conviction is more than decades old. (*See* J.A. at 5.). The scant reputational harm that may have resulted from that single indiscretion has had the better part of twenty years to dissipate. (*See* J.A. at 5.). Moreover, Courtier's single conviction is not only less damaging than the three convictions in *McBride*, but also differs significantly from the plaintiff in *Thomas* who was not libel-proof despite a history of over *twenty* convictions. *McBride*, 894 S.W.2d at 10 (emphasizing that the number of offenses is a key criterion in determining whether party is libel-proof); *Thomas,* 929 A.2d at 325.

Second, unlike in *McBride* or *Thomas*, Courtier has rehabilitated her reputation to an unpresented degree by dedicating her adult life to her business and her community. (J.A. at 16.). For example, determined to turn her life around following her conviction, Courtier spent her two-year sentence studying for and obtaining her G.E.D. (J.A. at 5.). Immediately following her release, she enrolled in community college and—determined to be a positive influence in her community—began taking every business class she could find. (*See* J.A. at 5.). Courtier's dedication soon paid off, as she became the owner of a small-scale clothing operation. (J.A. at 5.). Since then, Courtier's business grew exponentially, and is now an elite brand akin to Fendi, Chanel, Gucci, and Louis Vuitton. (J.A. at 16.).

Unsatisfied with her personal accomplishments, Courtier has devoted her adult life to altruistic endeavors. (J.A. at 16.). Leaning on her influence as a business magnate in the community and as the former first lady of Silvertown, Courtier has spent years contributing heavily to philanthropic and charitable activities, and regularly campaigns for programs to improve the quality of life for Silvertown's poor. (*See* J.A. at 2.) (supporting causes related to educational equity, restorative justice, and affordable housing, to name a few). As a result of her

contributions to the community, Courtier has amassed a sizeable following in Silvertown and beyond. (*See* J.A. 16.). As such, Courtier surpasses the plaintiff's in *McBride* and *Thomas* because in addition to showing that her conviction did not result in public opprobrium, she can also affirmatively show she has a reputation to protect as a successful businessperson, an activist for the poor and disenfranchised, and a philanthropist.

Third, any argument that *Cofield v. The Advertiser Co.*, 486 So. 2d 434, 434–35 (Ala. 1986), demands a contrary conclusion is without merit. There, the court found an inmate who had spent most of his life in prision for over five separate convictions of theft was libel-proof even though there was no evidence that his crimes made national headlines. *Id.* However, the contrast between the inmate in *Colfield* and Courtier is stark: while the inmate spent most of his life in prision, Courtier has spent most of her life helping her community. *Id.* Thus, the two had distinct reputations at the time of the alleged defamation. Moreover, unlike the inmate in *Cofield*, Courtier does not have a history of bringing libel suits against news outlets, which again, speaks to the inherent disparity between Courtier and the inmate in terms of community standing. *Id.*

In the same vein, the nonexistent publicity surrounding Courtier's two-year sentence conveys the nonviolent nature of her crime, which distinguishes her case from the narrow class of notorious career criminals over whom the doctrine typically applies. As noted, the Second Circuit invented the libel-proof plaintiff doctrine to prohibit a specific evil: to prevent career criminals with no good reputation from wasting judicial resources just to obtain nominal damages, if any. *See, e.g.*, *Cardillo*, 518 F.2d at 639 (Finding inmate with mafia ties unlikely to receive anything in libel claim beyond nominal damages because of status as habitual criminal). As such, the most compelling cases for application of the doctrine are those in which a career criminal with a history of heinous crimes and widespread notoriety alleges libel relating to his

past criminal conduct. *Id.*; *Lavergne v. Dateline NBC*, 597 Fed. Appx. 760, 762 (5th Cir. 2015) (inmate serving two life-sentences for murders that garnered national media attention was libel-proof); *Davis v. McKenzie*, 16-62499-CIV, 2017 WL 8809359, at *16 (S.D. Fla. Nov. 3, 2017), *reconsideration denied*, 16-62499-CIV, 2018 WL 1814044 (S.D. Fla. Mar. 6, 2018) (convicted sex trafficker libel-proof in suit against PBS broadcast about his crimes).

Lamb v. Rizzo, 391 F.3d 1133, 1136 (10th Cir. 2004) instantiates such a case. There, a convicted murderer and kidnapper currently serving three consecutive life sentences was deemed libel-proof as a matter of law. *Id.* In that case, the inmate claimed he was defamed by a newspaper article that, inter alia, inaccurately described how he was dressed during one of his kidnappings. *Id.* Thus, "given the utter heinousness" of his offenses, the "widespread notoriety attached to the convictions," and the inmate's trivial potential damages, the court found the inmate's "reputation-destroying actions" were beyond any doubt. *See id.* at 1139.

Courtier could not be more distinct. She has not been convicted of a crime in over two decades and her conviction never garnered notoriety of any kind. (*See* J.A. at 5.). Moreover, she served two years in prision for commission of a nonviolent crime, during which time she studied for her G.E.D.—instead of executing multiple violent prision-escape attempts, involving hostages and high-speed chases like the inmate in *Lamb*. 391 F.3d at 1136. Significantly, unlike the murderers in *Lamb* and *Lavergne*, the mafia associates in *Cardillo* and *Cerasani v. Sony Corp.*, 991 F.Supp. 343, 346, 352–55 (S.D.N.Y. 1998), or the sex trafficker in *Davis*, 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.). Simply put, because the libel-proof plaintiff doctrine was intended to bar career criminals, not career community activists, the doctrine cannot apply to Courtier.

Accordingly, Courtier's reputation is not merely a "monolith." *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986). We need not forget that the libel-proof plaintiff doctrine requires assessment of the plaintiff's reputation at the *time of the defamation*. *Cardillo*, 518 F.2d at 639; *Guccione*, 800 F.2d at 303. Thus, Courtier's standing in the community is not derived solely from a decades-old drug possession charge that no one in her community likely ever heard about or felt compelled to widely report. Rather, Courtier's current reputation is shaped by her role in the community over the past few decades, which as noted, completely overshadows any reputational harm derived from her troubled upbringing.

In all, the publicity requirement is a necessary feature of the libel-proof plaintiff analysis because it eschews declaring "open season" on everyone who has ever committed a crime. *See Wolston v. Readers Digest Ass'n*, 443 U.S. 157, 168 (1979). Thus, because Courtier's two-year sentence decades ago never elicited public attention, and because she has spent her adult life championing altruistic endeavors, she is not libel-proof as a matter of law.

D. The "Incremental Harm" Branch of The Libel-Proof Plaintiff Doctrine Does Not Compel a Contrary Conclusion Because the Challenged Comments Inflict Cognizable Damage to Courtier's Reputation As An Honest Businessperson.

1. *Any reliance on the incremental harm doctrine is misplaced because the doctrine is invalid under Federal law.*

Because this Court has already unequivocally held that the incremental harm doctrine has no grounding in the First Amendment and is expressly invalid under federal law, any argument purporting its applicability is without merit. *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 2436 (1991) ("we reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech."); *see also Church of Scientology Intern. v. Behar*, 238 F.3d 168, 176 n. 2 (2d Cir. 2001) (noting that "continued vitality after *Masson*" of the

libel-proof plaintiff doctrine is open question); *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 390 n. 29 (S.D.N.Y. 1998) ("Because *Masson* rejected any basis for grounding the incremental harm defense in federal constitutional terms, the libel-proof plaintiff doctrine seems similarly vulnerable."). Additionally, while *Masson* leaves states free to adopt the doctrine, no court in the State of Tenley has ever relied on the incremental harm branch in arriving at a decision. (J.A. at 19–20.) (acknowledging incremental harm version of the doctrine in dicta, but at no point comparing relative harm of Courtier's challenged comments against the unchallenged comments). Thus, there is no legal basis for applying the incremental harm doctrine in this case, especially since none of Courtier's challenged comments refer to her prior conviction, which is the relevant inquiry on this writ of certiorari. (J.A. at 24.).

2. *Even if this Court finds the incremental harm doctrine instructive, the challenged comments present a cognizable injury to Courtier's reputation as a businessperson.*

The enigmatic and oft criticized "incremental harm" branch of the libel-proof plaintiff doctrine implores courts to examine a defendant's entire communication and determine whether the unchallenged comments therein inflict substantially more damage to the plaintiff's reputation than the challenged comments. *See* Kevin L. Kite, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine*, 73 N.Y.U.L. REV. 529, 548 (1998) (arguing that incremental harm should be treated as separate doctrine). Thus, a plaintiff is only libel-proof under the incremental harm doctrine when the challenged statements could cause "no cognizable damage" in light of any damage "presumed to attend the unchallenged part of the communication." Note, *The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909, 1912–13 (1975). In other words, this theory does not trigger dismissal unless a plaintiff's reputation is "so badly damaged by true statements in a particular publication that minor false accusations within the same publication cannot result in further meaningful injury." *Guccione*, 800 F.2d at 303; but

see id. at 304 (deeming pornographer libel-proof on subject of adultery because reports that he openly lived with a girlfriend while legally married to another woman appeared in "widely circulated publications").

Here, the incremental harm doctrine does not bar Courtier's claim because her challenged comments are anything but "minor." (*See* J.A. at 18.). As such, her case differs dramatically from *Jones v. Globe Intl. Inc.*, 3:94:CV01468 (AVC), 1995 WL 819177, at *10 (D. Conn. Sept. 26, 1995). In that case, the court dismissed the claim of a publicist who sued three publications that portrayed him as a convicted felon with a sexual fetish for women's shoes. *See id.* There, the publicist only challenged minor details of the articles, such as the type and size of shoes he stole, whether he stole bras in addition to shoes, and whether he had a "shrine" of Marla Trump's shoes. *See id.* Eventually, the record revealed that the publicist had three felony convictions, was sexually attracted to women's shoes, and had previously engaged in a "physical sexual relationship" with Trump's shoes. *Id.* Accordingly, the court found the publicist's challenged statements did not "add materially to the injury caused by the truths in articles," and disposed of the case. *Id.*

In stark contrast to the publicist in *Jones*, Courtier's challenged comments directly contravene her reputation as an honest and trustworthy businessperson. For example, by labeling Courtier as "corrupt" and a "swindler," Lansford conveys that Courtier cannot be trusted or that Courtier in some way cheats her clients. (J.A. at 18.). However, the record does not contain a single complaint about the manner in which Courtier conducts business. (*See generally* J.A.). In fact, Courtier's documented success, her sizable following, and her influence in the community suggest just the opposite. (*See* J.A. 16.). Thus, were Lansford's comments allowed to be made

with impunity, they would likely destroy Courtier's standing in the community, as her business relationships would suffer and her credibility as an activist would dwindle.

Moreover, a comparison of Courtier's challenged comments with those she left unchallenged similarly precludes application of the incremental harm doctrine. For example, Lansford references Courtier's status as a "former druggie." (J.A. at 18.). While that comment may be unflattering, it speaks only to Courtier's past, if at all. It inflicts minimal injury to Courtier's current status as a successful entrepreneur, and in fact, a reasonable juror could find that Courtier's ability to overcome youth drug dependence—after losing her mother to an overdose at ten years old—makes her story more remarkable. (*See* J.A. at 5.). Conversely, Lansford's comments maligning her business practices attack her integrity, which only operates to threaten her current and future business relationships.

This is not a case where, in the words of then-judge Scalia, "an individual is said to have been convicted of 35 burglaries, when the correct number is 34," wherein a clear determination can be made as a matter of law. *See Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 n.6 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986). Rather, it is a case where a plaintiff with a rehabilitated reputation has challenged comments impugning her professional capacity. Because the potential injury resulting from the unchallenged statements does not overwhelmingly outweigh the potential negative business ramifications stemming from the challenged statements, application of the incremental harm doctrine is not compelled as a matter of law.

II. LANSFORD CANNOT ESCAPE LIABILITY FOR HIS VICIOUS ATTACK ON COURTIER—WHICH CALLED INTO QUESTION HER INTEGRETY AND CAPABILITIES AS A FEMALE ENTREPENUER—BY CLAIMING THAT HIS STATEMENT WAS RHETORIC HYPERBOLE

The First Amendment protects an individual's right to speak freely. It does not, however, grant an individual the right to publish a false and defamatory statement that attacks another person's integrity and capabilities as a businesswoman. This case is about Courtier's right to the protection of her reputation, a right which reflects "no more than our basic concept of the essential dignity and worth of every human being[.]" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

The First Amendment protects "imaginative expression" and "rhetorical hyperbole." *Milkovich*, 497 U.S. at 20 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53–55 (1988)). This is a narrow protection that only applies to "lusty and imaginative" language that "even the most careless reader [would perceive as] no more than rhetorical hyperbole." *Id.* at 17. Classifying Lansford's accusations of corruption and criminal conduct as rhetoric hyperbole would dramatically extend the category of statements afforded protection and eliminate the ability of individuals to protect their reputation from false and disparaging statements.

A. Accusations of Corruption and Criminal Conduct Are Defamatory, Provably False Statements of Fact – Not Rhetoric Hyperbole.

A defamation claim requires the statement at issue to "reasonably be interpreted to state actual facts about an individual." *Milkovich*, 497 U.S. at 25. There is no exemption for opinions; rather, opinions are actionable if they imply a provably false statement. *See Modela v. New York Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994). The threshold question is, "whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion." *Milkovich*, 497 U.S. at 21. This determination requires courts to consider: (1) whether the language of the statement has a precise and readily understood meaning, bearing in mind that hyperbolic language negates the impression that the statement presents facts, (2) whether the statement is susceptible of being objectively verified as true or false, and (3) whether the general

tenor of the statement negates the impression that the statement was intended to convey factual information. *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995); *see also Snyder v. Phelps*, 580 F.3d 206, 219 (4th Cir. 2009).

It cannot be seriously maintained that Lansford's statement is incapable of having a defamatory meaning as a matter of law. First, Lansford's statement has a precise meaning that would be readily understood by a reader. The statement did not contain loose and figurative language; it made factual accusations that Courtier was corrupt and engaged in illegal activity. Second, the statement is capable of being objectively proven true or false. Not only did Lansford admit this in his initial argument, but his statement also accused Courter of criminal conduct, which means that the allegations must be objectively provable. Finally, the general tenor and context surrounding Lansford's statement does nothing to negate the implication that his statement was intended to convey factual information. Accordingly, his statement is capable of having a defamatory meaning and a jury must decide whether the statement would be understood in a defamatory way by a reasonable reader. *See Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1040 (9th Cir. 1998) ("[s]o long as the publication is reasonably susceptible of a defamatory meaning, a factual question for the jury exists").

B. The Statement Makes Specific, Fact-Based Accusations of Corruption and Criminal Conduct.

Lansford's statement made specific, fact-based accusations of corruption and criminal conduct that irreparably harmed Courtier's reputation. These unsubstantiated allegations directly charged Courtier with being "corrupt and a swindler", a "whore", and a "pimp". Lansford continued to degrade Courtier by classifying her as a "leech on society". These words have precise and readily understood meanings. There is no hyperbolic language present to negate the statement's factual assertions. Thus, a reader could reasonably interpret Lansford's statement in

accordance with the ordinary meaning of his words. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69 & 78 (West 2012) ("Words are to be understood in their ordinary, everyday meanings").

1. Courtier is "Corrupt and a Swindler"

Lansford's statement alleged that Courtier was "corrupt and a swindler." These words are not loose, figurative, or hyperbolic language, but rather have an ordinary, everyday meaning that would be readily understood by a reader. *See Milkovich*, 497 U.S. at 21. The word corruption is defined as "dishonest or illegal behavior." Merriam-Webster On-line Dictionary, https://www.merriam-webster.com/dictionary/corruption [accessed September 28, 2019]. The word swindler is defined as, "to obtain money or property by fraud or deceit." Merriam-Webster On-line Dictionary, https://www.merriam-webster.com/dictionary/swindle [accessed September 28, 2019]. These are factual assertions that charge Courtier with being engaged in criminal activity and illegal business practices. *See Grayson v. Ressler & Ressler*, 271 F.Supp.3d 501, 516 (S.D.N.Y. 2017) (citing *Trump v. Chicago Tribune*, 616 F.Supp. 1434, 1435 (S.D.N.Y. 1985)) ("When the criticism takes the form of accusations of criminal or unethical conduct, or derogation of professional integrity[,] the borderline between fact and opinion has been crossed."). Indeed, these words would be particularly defamatory when used to describe a business owner, such as Courtier. Notably, Courts have repeatedly held that accusations of corruption and criminal conduct are defamatory. *See Milkovich*, 497 U.S. at 21 (accusations of perjury); *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002) (cert. denied 547 U.S. 1013 (2006)) (allegations of corruption); *Laughland v. Beckett*, 870 N.W.2d 466 (Wisc. Ct. App. 2015) (accusation that a professor was a preying swindler). Accordingly, a reader could reasonably interpret Lansford's statement to make factual assertions charging Courtier with being corrupt and a swindler.

2. Courtier is a "Pimp" and a "Whore"

Lansford further accused Courtier of being a "pimp" and a "whore". This is a factual assertion which implies that Courtier was engaging in activity that comes within the commonly understood meaning of the words "pimp" and "whore." *See* RESTATEMENT (SECOND) OF TORTS § 566 (1977) (stating that when a person says that another person is a thief, it implies that that person has committed acts that come within the common connotation of thievery). The word pimp is defined as "a man who controls prostitutes, especially by finding customers for them, and takes some of the money that they earn." Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/pimp [accessed September 28, 2019]. The word whore is defined as "a person who engages in sexual intercourse for pay: prostitute." Marriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/whore [accessed September 28, 2019]. Thus, a reader could reasonably interpret the statement to mean that Courtier had at one time engaged in pimping activity and prostitution.

It has been argued that the word "pimp" is capable of conveying another meaning. See *Knievel v. ESPN*, 393 F.3d 1068 (9th Cir. 2005). However, even if this Court were to determine that the meaning of the word pimp is ambiguous, it is the responsibility of the jury to determine how the statement would be understood by a reader. *See Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 624 (Tex. 2018) (citing *Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 655 (Tex. 1987)) ("[I]f the court determines the language is ambiguous, the jury should determine the statement's meaning."). This is exemplified by the court's analysis in *Hughes v. Hughes*, where it held that the statement "Our dad's a pimp" would be defamatory if it were false, because the word pimp can be reasonably understood to mean that a plaintiff had at one time engaged in pimping activity. 19 Cal.Rptr.3d 247, 251 (Cal. Ct. App. 2004). In like manner, Lansford's accusation that Courtier was a "pimp" and a "whore" could be reasonably interpreted

to mean that Courtier had at one time engaged in pimping activity and prostitution. Accordingly, it is the role of a jury to determine how Lansford's statement would be interpreted by a reader.

3. Courtier is a "Leech on Society"

Lansford also accused Courtier of being a "leech on society." This phrase has a long history of being used to describe individuals who take advantage of society, usually through illegal activity. *See State v. District Court of Eighteenth Judicial Dist.*, 268 P. 501, 505 (Mont. 1928) ("I have no patience with a peddler of drugs, and feel that they are despicable leeches on society[.]); *see also Donlun v. State*, 550 P.2d 369, 371 (Alaska 1976) ("[H]is lifestyle was one that he just was a leech on society living off of it somehow or other, probably illegally[.]"). When coupled with Lansford's other accusations – that Courtier was corrupt, a swindler, a pimp, and a whore – a reader could reasonably interpret the statement to allege factual information about Courtier's lifestyle and participation in illegal activities. Thus, a reasonable reader could interpret the phrase "leech on society" to imply a provably false factual assertion, and it is up to a jury to determine how it would be interpreted by a reader.

In summary, Lansford's statement charged courtier with specific, factual accusations. It accused Courtier of being corrupt, a swindler, a pimp, a whore, and a leech on society. These words are not the lusty and imaginative language that can be characterized as rhetoric hyperbole. These words have precise meanings that would be readily understood by a reader. Accordingly, it cannot be said, as a matter of law, that Lansford's statement is incapable of being interpreted to convey a defamatory meaning.

C. Lansford's Statement is Capable of Being Objectively Proven True or False Since it Directly Charges Courtier With Engaging in Criminal Activity.

Lansford's accusation that Courtier was engaged in criminal activity is capable of being objectively proven true or false, since she either did or did not engage in the alleged behavior.

Lansford himself admitted that his accusation was an objectively provable statement of fact when he initially claimed that his statements were **true**. (J.A. at 18). Since an opinion cannot be proven true or false, this is an admission that his accusation was not only a statement of fact, but also that it is objectively verifiable.

To the extent that Lansford puts forth any argument that his statement cannot be objectively verified, it should be noted that the words "corrupt", "swindler", and "pimp" are specifically mentioned in criminal statutes. Clearly these allegations are objectively provable if a jury in a criminal case can be asked to determine whether the facts support a finding of corruption, swindling, or pimping. Indeed, courts have routinely held that similar statements are capable of being proven true or false. *See, e.g.*, *Bentley v. Bunton*, 94 S.W.3d 561, 581–82 (Tex. 2002) (corruption is a statement of fact that can be proven true or false). Accordingly, Lansford's statement, which makes factual allegations that Courtier was engaged in criminal activity, is capable of being objectively proven true or false.

D. The General Tenor of the Statement Does Nothing to Negate the Impression That it Was Meant to Assert Factual Information

The general tenor of Lansford's statement does nothing to negate the impression that Lansford was seriously maintaining that Courtier committed criminal acts. In fact, the context of the statement makes it even more certain that a reasonable reader could interpret the statement to convey factual information. Lansford's statement was not a heat of the moment statement; it was not even made orally. Rather, it was published by the mayor of Silvertown to his personal social media account, where town residents go to obtain important town updates from their elected mayor. *See, e.g.*, @BilldeBlasio ("Today we introduced free, high-quality pre-k for three year olds in all five boroughs of New York City."). Lansford knew that residents would not only be able to see his statement, but also that residents would be able to share and spread his statement

through their own social media accounts. A reader could reasonably believe that their mayor would only publicly accuse Courtier of criminal acts if he had factual information to support his accusations.

Additionally, the Ninth Circuit's decision in *Knievel v. ESPN* supports a finding for Courtier, not Lansford. 393 F.3d 1068 (9th Cir. 2005). In explaining why the picture of Evel and his wife was not actionable, the court stated that the picture was posted to a website that targeted teens and young adults using "humor and slang that was not meant to be taken seriously[.]" 393 F.3d at 1077. The Ninth Circuit noted that if the suggestion that Evel was a pimp was "taken in isolation and given a literal interpretation", it would be sufficient to state a defamation claim. *Id.* at 1078. Applying the Ninth Circuit's reasoning, the context of Lansford's statement does nothing to negate the factual assertions made in his tweet, and the statement that Courtier was a "pimp" is actionable.

It is also insignificant that Lansford's statement was made in a political context. *See Zervos v. Trump*, 171 A.D.3d 110, 129 (N.Y. App. Div. 2019) ("[C]laims for defamation may arise out of acrimonious political battles."). It would be detrimental if this Court were to allow individuals to publish false, defamatory accusations of criminal conduct solely because of their status as political figures. Here, Lansford engaged in precisely the type of defamatory conduct described in *Sildorf v. Levine,* where a letter claimed that the mayor was "corrupt", that "it pays to do business with the mayor", and that the mayor was engaged in illegal activity. 59 N.Y.2d 8, 11 (1983), *cert. denied* 464 U.S. 831 (1983). In fact, Lansford's allegations are even worse, because Courtier has less power to clear her name in the community than a mayor does. Thus, as the court in *Sildorf* held, this Court should hold that Lansford's statement could be reasonably interpreted to have a defamatory meaning by a reader. *Id.* at 16.

In conclusion, Lansford's statement has a fact-based meaning which is objectively provable, the statement was not presented in a context that negates its factual implication, and it purports to be based on facts. Therefore, a reader could reasonably interpret Lansford's statement to convey a defamatory meaning, and a jury must determine whether a reader would have interpreted the statement according to that meaning.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that the judgement of the Supreme Judicial Court of the State of Tenley be affirmed.