No. 18-2143

IN THE SUPREME COURT OF THE UNITED STATES

ELMORE LANSFORD

PETITIONER,

V.

SILVIA COURTIER

RESPONDENT,

ON WRIT OF CERTIORARI TO THE

SUPREME JUDICIAL COURT OF TENLEY

BRIEF FOR RESPONDENT

TEAM NUMBER: 219836

QUESTIONS PRESENTED

(1) Can an individual be a libel-proof plaintiff under defamation law solely on the basis of past criminal convictions, including a felony, that have gained no notoriety or public attention?

(2) Do the challenged statements in this case qualify as unprotected defamation or protected rhetorical hyperbole?

TABLE OF CONTENTS

TALE OF AUTHORITIES

Constitutional Provisions

United States Supreme Court Cases

United States Circuit Court Cases

United States District Court Cases

State Court 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

Consider the cascading effect that external influences have on a developing mind. To make sense of our world, the human condition demands we either look to a guide or rely on often-harsh lessons experience provides. For tragically orphaned Silvia Courtier, experience was a cruel teacher. At the early age of ten, Mrs. Courtier's mother succumbed to a drug overdose while her father was confined to a prison cell – a place he would escape only in death. (J.A. at 5.). Maturing out of necessity, Mrs. Courtier resorted to stealing from grocery stores and other acts of desperation to support herself. (J.A. at 5.). Consequences soon caught up to Mrs. Courtier – immersed in the world of the neglected, she was sexually assaulted by an older man and declared a delinquent during one of her juvenile adjudications. (J.A. at 5.). Abused and branded by the system, Mrs. Courtier spiraled out of control, culminating in her guilty plea to a felony charge of cocaine distribution. (J.A. at 5.).

While serving two years in prison, Mrs. Courtier seized upon available educational opportunities and began developing into the outstanding citizen she is today. (J.A. at 5.). Able to consider a future beyond where to find her next meal, Mrs. Courtier earned her GED and took college-level business classes. (J.A. at 5.). Upon her release from prison, she opened a small-scale clothing operation which eventually blossomed into a larger business. (J.A. at 16.). A newly budding entrepreneur, Mrs. Courtier began associating with a different caste of society and eventually met Raymond Courtier – her future husband and eighteen-year mayor of Silvertown (J.A. at 2.).

Poverty and parental abandonment typically lead down the well-trodden path of despair and hopelessness, but Mrs. Courtier managed to achieve and succeed despite her circumstances. (J.A. at 2.). Her success, however, did not mean she would neglect the community that she once

called home. In a proactive and empathetic approach, Mrs. Courtier continually looks to improve the lives of those situated as she once was. (J.A. at 16.). Advocating for educational equality, opposing for-profit prisons, increasing adult literacy, and restoring voting rights to former felons are only a few of the many causes Mrs. Courtier thrusts her support towards. (J.A. at 16.). Recently ramping up her political activism, Mrs. Courtier provides a voice for the neglected and gives valuable insight as a former member of the marginalized citizens of Silvertown. (J.A. at 16.).

On a website designed to spread awareness for social causes, Mrs. Courtier wrote a politically focused column calling for a change in Silvertown's leadership. (J.A. at 2-4.). Criticizing the current mayor of Silvertown, Mrs. Courtier described Elmore Lansford's policies as deleterious for the less fortunate members of the community – referencing the erosion of public housing complexes and lower-rent housing options in favor of affluent, high-rise developments. (J.A. at 3-4.). Mr. Lansford's policies have also resulted in multiple allegations of racial profiling and police brutality. (J.A. at 3.). In the politically focused piece, Mrs. Courtier spoke in favor of a different mayoral candidate, championing Evelyn Bailord as a proponent for the less privileged members of the community. (J.A. at 17.).

Responding to Mrs. Courtier's politically motivated post, Mr. Lansford retorted with a viciously personal assault, digging into her vulnerable past attempting to tarnish her voice and reputation. (J.A. at 4.). In a post on his social media website, Mr. Lansford countered by saying:

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

> some kind of modern-day Robinita Hood. I guess she learned something from the streets. Now, this businesswoman is a pimp for the rich and a whore for the Poor. What a Joke."

(J.A. at 4.). Referring to Mrs. Courtier as a "whore for the poor" and "corrupt and a swindler," Mr. Lansford used the authority and credibility derived from his mayoral position to attack a political opponent. (J.A. at 4.). Mr. Lansford was no stranger to the Courtiers; he was once political contemporaries with Raymond Courtier – Mrs. Courtier's since-deceased husband. (J.A. at 3.). The closeness of the two is evidenced by Raymond's early support of Mr. Lansford, for his help marked the start of Mr. Lansford's political career. (J.A. at 3.). Extorting the relationship he once shared with the Courtiers, Mr. Lansford used aggressive and sexually charged language in an attempt to humiliate Mrs. Courtier into submission. (J.A. at 3-4).

Rather than being silenced, Mrs. Courtier sued Mr. Lansford for defamation of character and false light invasion of privacy. (J.A. at 4). Arguing that Mr. Lansford grossly misrepresented her, Mrs. Courtier asserts his statements went far past mere name-calling. Instead, Mrs. Courtier argues that the tactical revelation of private information went far past the protections assured under the First Amendment. Void of any reasonable political motivation, Mr. Lansford sought to tear down an inspirational figure for the disadvantaged people of Silvertown – a population with a most critical need for an advocate.

Mr. Lansford argues that his statements qualify as "mere epithets or name-calling" and are protected as rhetorical hyperbole in a society committed to freedom of expression. (J.A. at 18.). Further, Mr. Lansford attempts to strip Mrs. Courtier of all dignity by asserting she is a libel-proof plaintiff – that her past was so destructive to her reputation that nothing could inflict further harm. (J.A. at 18.). In other words, Mr. Lansford claims Mrs. Courtier has been so disgraced by mistakes in her tumultuous youth that she is entitled to no legal recourse when

defamed. However, through her business ventures and political advocacy, Mrs. Courtier has restored and rehabilitated her reputation to the degree of deserving protection from defamatory statements. (J.A. at 20.).

The Tenley District Court, Judge Felicia Henry, ruled that Mrs. Courtier is not a libel-proof plaintiff, citing her transformation of "Horatio Alger's proportions." (J.A. at 10-11.). The Supreme Judicial Court of Tenley affirmed, emphasizing that Mrs. Courtier "has restored and rehabilitated herself and has a reputation to protect." (J.A. at 20-21.). The Supreme Judicial Court of Tenley also ruled that at least some of the accusations by Mr. Lansford are not protected as rhetorical hyperbole, reversing the Tenley District Court. (J.A. at 22.). The court relied on the fact that Mr. Lansford's statements attacked Mrs. Courtier's "abilities and integrity as a businessperson." (J.A. at 22.). Arguing that his statements are not to be taking seriously and asserting that Mrs. Courtier has a worthless reputation underserving of protection, Mr. Lansford, the mayor of Silvertown, appealed to this Court. (J.A. at 24.).

SUMMARY OF THE ARGUMENT

Courts applying the libel-proof plaintiff doctrine have done so sparingly, employing the doctrine only in cases where the plaintiff's reputation is severely tainted by their notorious criminal history, or where the negative impact of a contested defamatory statement pales in comparison to other conceded statements. Generating trepidations in courts when applied, a claim seeking to expand the doctrine to anyone with a criminal history or felony on their record should be carefully scrutinized.

Specifically, Silvia Courtier committed her crimes decades ago and they received little to no public attention. Absent any notoriety for those crimes, and with her political influence and

business ventures booming, Mrs. Courtier certainly has reputational interests that are deserving of protection from defamation. To hold Mrs. Courtier a libel-proof plaintiff would be an undue expansion of the doctrine and would imply youthful acts of desperation can brand and define an individual for life. Therefore, the libel-proof plaintiff doctrine has no place in protecting a spiteful mayor from being held accountable for spewing a hateful, vindictive verbal assault at a political rival.

The dispositive question in determining if a statement qualifies as rhetorical hyperbole is whether a reasonable reader would understand the statement to communicate objectively verifiable facts. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). A reasonable reader in the city of Silvertown would understand Mr. Lansford's statements to communicate that Mrs. Courtier has orchestrated a corrupt, self-serving scheme through her business and political advocacy. The reasonableness of their understanding is grounded on the position of authority from which Mr. Lansford's articulates his opinion; as the mayor of Silvertown, his words are propelled through the authority of his office.

There is no question that the words "corrupt" and "swindler" communicate objectively verifiable facts. Their plain meaning alone imputes unlawful conduct upon Mrs. Courtier. The rest of the statement further amplifies these accusations of illicit acts. Even though it has some instances of colorful language, the statement's credibility is catapulted by the inherent authority that Mr. Lansford wields as the mayor of Silvertown. The colorful language is not enough to overcome this inherent impression of authority. Furthermore, and taking into consideration that Mr. Lansford speaks from his mayoral throne, his statement appears to imply that he has access to additional facts on which he basis his allegations. Therefore, a reader would be reasonable in

understanding and believing that Mrs. Courtier is using her business, her political advocacy, and some purported skills she acquired during her tumultuous past to engage in self-serving fraud.

Furthermore, even if Mr. Lansford's accusations could be categorized as opinion, the statement is still not protected because it "creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts." Restatement (Second) of Torts § 566 cmt. c (Am. Law Inst. 1977). Finally, the statement is plagued with sexual overtones designed to undermine Mrs. Courtier as a sexual-assault survivor. Simply put, this type of speech is not what the First Amendment is intended to protect.

ARGUMENT

The First Amendment safeguards freedom of speech. U.S. Const. amend. I. However, "it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Roth v. United States*, 354 U.S. 476, 483 (1957). "Libelous utterances are not within the area of constitutionally protected speech." *Id.* In this case, Mr. Lansford's statement, a libelous utterance, is not within the area of constitutionally protected speech for four reasons: First, Mrs. Courtier is not a libel-proof plaintiff. Only those with criminal convictions that receive substantial notoriety and public attention can render a plaintiff libel-proof. In contrast, Mrs. Courtier's criminal convictions lacked publicity and notoriety. Moreover, before the publication of Mr. Lansford's post, Mrs. Courtier enjoyed a prestigious reputation that eclipses the mistakes she made decades ago.

Second, Mr. Lansford's statement is not rhetorical hyperbole because it communicates objectively verifiable facts and satisfies three conditions. First, the language of Mr. Lansford's post does not negate the affirmation of these facts. Second, the general tenor of the statement

confirms the impression of the facts. Third, the implications of Mr. Lansford's assertions can be proven false.

Third, even if this court finds that Mr. Lansford's statements are not sufficiently capable of communicating objectively provable facts, it should still find that the statement is defamatory as non-protected opinion. Finally, Mr. Lansford's statement is underserving of constitutional protection because it is not the type of speech that the First Amendment is intended to safeguard.

I. Mrs. Courtier Is Not a Libel-Proof Plaintiff

The concept of a libel-proof plaintiff is understood as two different doctrines. First, the issue-specific doctrine asks whether a plaintiff's reputation is so tarnished – by either prior criminal convictions or negative publicity – that it is incapable of sustaining further significant damage. Second, the incremental harm doctrine applies when a broadcast or publication conveys harmful information, but the challenged statement harms the plaintiff's reputation far less than the unchallenged statements. Generally, the libel-proof plaintiff doctrine exists because "without damage to reputation, there is no actionable defamation." *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1912-13 (1985).

Courts applying the libel-proof plaintiff doctrine have done so cautiously, narrowly tailoring the doctrine and using it only in extreme cases. *See Ray v. Time, Inc.*, 452 F. Supp. 618 (W.D. Tenn. 1976) (holding Dr. Martin Luther King Jr.'s killer is libel-proof). "[I]tmust be clear, as a matter of law, that the reputation of a plaintiff, *even a convicted felon*, could not have suffered from the publication of the false and libelous statements." *Jackson v. Longcope*, 476 N.E.2d 617, 620 (Mass. 1985) (emphasis added). This follows from a concern expounded upon by then-Judge Scalia, asserting "[t]he law, however, proceeds upon the optimistic premise that

there is a little bit of good in all of us—or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse." *Liberty-Lobby v. Anderson*, 746 F.2d 1543, 1568 (D.C. Cir. 1984) (reversed on other grounds).

Determining whether a plaintiff can be libel proof, some courts have sidestepped the issue of whether defamatory statements affect the plaintiff's reputation. Instead, courts have skipped ahead and asked what the plaintiff could recover from a libel action. If the answer is mere nominal damages, it may be judicially prudent to dismiss the libel action. For example, the court in *Jackson* stated, "we accept the principle that a libel-proof plaintiff is not entitled to burden a defendant with a trial in which the most favorable result the plaintiff could achieve is an award of nominal damages." *Jackson*, 476 N.E.2d at 619-20. Thus, in the interest of preserving judicial resources and avoiding frivolous lawsuits, the libel-proof plaintiff doctrine has a shaky foothold within the courts.

A. Standard of Review

"Whether a plaintiff is libel-proof is a question of law" that this Court reviews *de novo*. *Stern v. Cosby*, 645 F. Supp. 2d 258, 270 (S.D.N.Y. 2009).

B. The Libel-Proof Plaintiff Doctrine Does Not Apply When Criminal Convictions Lack Publicity or Notoriety

Courts avoid labeling a plaintiff libel-proof if the plaintiff's criminal convictions lack widespread publicity and notoriety. Indeed, when "courts have most persuasively applied the doctrine and deemed a plaintiff libel-proof, both the publicity surrounding the crimes and the attendant level of notoriety are quite high." *Thomas v. Telegraph Publishing Co*., 929 A.2d 993,

1005 (N.H. 2007) (holding the trial court inappropriately applied the libel-proof plaintiff doctrine because there was no widespread publicity). The court in *Thomas* further noted "[p]ublicity is part and parcel of the damage to a reputation *necessary* to trigger the issue-specific version of the libel-proof plaintiff doctrine. Indeed, it is often the means by which such damage occurs and the most effective evidence of that damage." *Id*. (emphasis added) *See also Wynberg v. National Enquirer, Inc.*, 564 F.Supp. 924, 928 (C.D.Cal.1982) (stating an individual's reputation diminishes proportionally to the publicity of their criminal convictions).

It makes little sense to hold a plaintiff libel-proof if their previous conviction received little or no public attention. Generally, if the crime's effect on the public was minimal, the individual's reputation is likely salvageable and deserving of protection. This Court has previously demonstrated reservations in committing to any doctrine that "would 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, 169 (1979). To broaden the scope of the libel-proof plaintiff doctrine to anyone with criminal convictions or a felony would create perverse incentives for parties to unearth otherwise forgotten criminal history.

The libel-proof plaintiff doctrine was once called a "fundamentally bad idea" by then-Judge Antonin Scalia. *Liberty Lobby*, 746 F.2d at 1569. Specifically, Scalia stated, "we cannot envision how a court would go about determining that someone's reputation had already been 'irreparably' damaged." *Id.* at 1568. There is simply no objective test to determine the reputational worth of a plaintiff, and to ask a court to do so would overextend its role. However, common sense dictates that some crimes are so objectively and morally reprehensible that the perpetrator forfeits their right to bring a libel claim.

C. Criminal Convictions That Receive Substantial Notoriety and Public Attention Can Render a Plaintiff Libel-Proof

Some crimes can attach such notoriety to an individual's reputation that damages for defamation would be insignificant. For example, James Earl Ray – murderer of Dr. Martin Luther King Jr. – sought to recover for damages to his reputation following a Time publication which referred to him as a "narcotics addict and peddler." *Ray v. Time, Inc.*, 452 F. Supp. 618, 622 (W.D. Tenn. 1976). The court reasoned that, due to tremendous notoriety garnered from murdering a popular civil rights activist, James Earl Ray was libel-proof. *Id.* Understandably, courts have found some crimes generate such notoriety that it makes little sense to allow their perpetrators to pursue a libel action.

A plaintiff with a recent and perpetual record of criminal activity may also be libel-proof. For example, in *Cardillo v. Doubleday & Co.*, 518 F.2d 638 (2d. Cir. 1975), the plaintiff brought a libel claim alleging a book made multiple erroneous statements regarding his criminal involvement. *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 640 (2d. Cir. 1975). For example, while he denied fixing a specific horse race mentioned in the book, he was nonetheless indicted in Massachusetts for fixing other races at the same track. *Id.* In response, the court held the contested statement could not significantly defame an individual who "is serving 21 years, sentenced for assorted federal felonies." *Id.* Referencing plaintiff's life of organized crime and subsequent criminal history, the court could not "envisage any jury awarding, or court sustaining, an award under any circumstances for more than a few cents' damages." *Id.* Thus, the court dismissed the action in preservation of judicial time and resources.

Further, in *Logan v. District of Columbia,* 447 F. Supp. 1328 (D.D.C.1978), the plaintiff boasted of committing murder to impress undercover officers posing as members of the Mafia. *Logan v. District of Columbia*, 447 F. Supp. 1328, 1332 (D.D.C.1978). A self-proclaimed murderer with hitman aspirations, plaintiff was also an admitted drug user, had a book detailing

his drug use, and was convicted of a federal narcotics violation. *Id.* Plaintiff brought a libel claim regarding an article which falsely asserted he tested positive for drugs. *Id.* Questioning if this report could have a negative impact on the plaintiff's reputation, the court found it "highly unlikely . . . he would be able to recover damages and, therefore, he will be found "libel-proof" as a matter of law." *Id.*

D. Silvia Courtier Is Not A Libel-Proof Plaintiff Because Her Criminal Convictions Received Little Public Attention

The present case is a prime example of a plaintiff who should be immune from being marked libel-proof. Mrs. Courtier, having pled guilty to a felony in her early twenties, has spent the subsequent decades developing into a productive and influential member of society. Importantly, Mrs. Courtier's criminal history must be interpreted in context. Orphaned at ten-years old due to her parents' incessant drug addictions, a young and vulnerable Mrs. Courtier flouted the law out of necessity. There were no books published, and there were no widely dispersed articles detailing her convictions; the criminal past of Silvia Courtier made echoes only to those closest to her. Brought to attention only by the words of a spiteful mayor, the past of Mrs. Courtier was otherwise forgotten.

To dredge up Mrs. Courtier's criminal past and claim it inevitably intertwined with her identity is not only morally reprehensible, but also a gross misapplication of the libel-proof plaintiff doctrine. In support of the general principle that our mistakes do not define us, this Court should reject any application of the libel-proof plaintiff doctrine to Mrs. Courtier.

II. Mr. Lansford's Statements Are Not Rhetorical Hyperbole.

"Silvia Courtier's business is cover for a fraudulent scheme designed to benefit Mrs. Courtier alone." "Silvia Courtier's political activism is a façade for her self-serving goals." These are the facts that Mr. Elmer Lansford, speaking from his mayoral throne, asserts and implies through his statements; the facts a reasonable reader will understand and believe after reading the words of their city's maximum executive authority; the facts that could forever damage Mrs. Courtier's hard-earned reputation and community standing. Nothing in these facts suggest that they should not be taken literally. On the contrary, these statements are credible; as the mayor of Silvertown, Mr. Lansford's words are propelled through the authority of his office. These statements are not hyperbolic because a reasonable reader would not understand them to be hyperbolic; they are defamatory and thus undeserving of protection by the First Amendment.

A. Standard of Review

Whether a statement is protected as rhetoric hyperbole is a question of law that this court reviews *de novo*. *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982).

B. Mr. Lansford's Statement Communicates Objectively Verifiable Facts that Are Not Negated by the Statement's Language nor by Its General Tenor

This court has ruled that the rhetorical-hyperbole inquiry turns on whether a reasonable person would understand the alleged defamatory statement as asserting or implying objectively verifiable facts. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) ("The dispositive question . . . becomes whether a reasonable factfinder could conclude that the statements [at issue] imply an assertion that petitioner . . . perjured himself in a judicial proceeding"); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 285 (1974) (ruling that it would be impossible for a reader to understand the charging of the criminal offense

of treason by the use of the word "traitor" to describe a worker who refused to join a union); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (finding that it would be impossible for a reader to understand that the word "blackmail," in the context it was published, imputed on the defendant the commission of a criminal offense). Only if a reasonable reader is incapable of understanding provable defamatory facts from a statement that otherwise appears to communicate them, the statement is protected as rhetorical hyperbole. *See Milkovich*, 497 U.S. at 21. In *Milkovich* this Court found that the statement at issue – that a high school coach had lied during an investigatory hearing – was not protected because it satisfied three conditions. *See id.* First, it did not contain the "the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury." *Id*. Second, the article's general tenor did not negate this impression. *Id.* Third, the underlying connotation of the statement – that the coach had committed perjury – was "sufficiently factual to be susceptible of being proved true or false." *Id*. Therefore, the court found that a reader could have reasonably understood that the coach had committed perjury and that the statement was not rhetorical hyperbole. *Id*.

Under the *Milkovich* analysis, this Court must focus on how a reasonable reader would comprehend Mr. Lansford's post. Whatever Mr. Lansford intended is irrelevant. A reader acts reasonably in believing the words of an elected official. The language, tenor, and provability of Mayor Lansford's post do not create enough doubt for a reasonable reader to question its literalness. Therefore, this Court must find his statement is not protected under the First Amendment.

1. The Language of Mr. Lansford's Post Does Not Negate Its Affirmation of Objectively Verifiable Facts

a. The Phrase "Corrupt and a Swindler" Does Not Contain Loose, Figurative, or Hyperbolic Language that Negate the Assertion of Objectively Verifiable Facts

When analyzing whether a statement contains "loose, figurative or hyperbolic language" different courts have considered the definitions of the words used, whether the statement engages on metaphors and analogies, the presence of colloquialisms or other colorful language, and whether the language approaches a negative extreme. *See e.g.*, *Henderson v. Times Mirror Co*., 669 F. Supp. 356, 360 (D. Colo. 1987) (concluding that the phrase "*sleaze-bag* agent who *slimed* up from the bayou" was protected because the words "sleazebag" and "slimed" did not have readily available definitions)*; Sall v. Barber*, 782 P.2d 1216, 1218 (Colo. App. 1989) (finding that an analogy comparing plaintiff to animals was hyperbole); *Camer v. Seattle Post-Intelligencer*, 723 P.2d 1195, 1201 (Wash. App. 1986) (finding that a defendant's description of claimants as "constitutional crazies" and "not operating with a level bubble" was colloquial hyperbole); *Partington v. Bugliosi*, 56 F.3d 1147, 1160 (9th Cir. 1995) (ruling that the statement "not unlike steers being led to the slaughterhouse" used to describe plaintiff's [a lawyer] trial strategy was hyperbolic colorful language); *Turner v. Devlin*, 848 P.2d 286, 292 (Ariz. 1993) (finding that the extreme characterization of plaintiff's investigation as "bordering police brutality" was rhetorical hyperbole); *see also* Eric Scott Fulcher, *Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation*, 38 Ga. L. Rev. 717, 756-763 (2004). The statement "corrupt and a swindler" does not exhibit any colloquialisms or colorful language, does not employ metaphors or analogies, and does not approach a negative extreme. Therefore, the rhetorical-hyperbole analysis turns on the definitions of the words "corrupt" and "swindler."

The U.S. District Court for the District of Colorado found that the statement "*sleaze-bag* agent who *slimed* up from the bayou" was rhetorical hyperbole in part because there was not a

clear meaning for "sleazebag" and "slimed". *Henderson*, 669 F. Supp. at 360. In contrast, there are readily identifiable and clear meanings for "corrupt" and "swindler." Black's Law Dictionary defines "corrupt" as "having unlawful or depraved motives; given to dishonest practices, such as bribery." *Corrupt*, Black's Law Dictionary (11th ed. 2019). Merriam-Webster, in turn, defines "corrupt" as "morally degenerate and perverted: DEPRAVED; characterized by improper conduct (such as bribery or the selling of favors)." *Corrupt*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003). Courts have found that when read literally, the word "corrupt," unlike "sleazebag" or "slimed," can impute improper and potentially unlawful conduct. *Burrill v. Nair*, 158 Cal. Rptr. 3d 332, 336 (Cal. Ct. App. 2013) (allowing a defamation claim by a counselor who was called a "corrupt criminal"); *Bentley v. Bunton*, 94 S.W.3d 561, 602 (Tex. 2002) (finding that hosts of a TV show had defamed a judge by calling him "corrupt"). Therefore, "corrupt" is capable of communicating an objective provable fact: that the subject of the statement has engaged in improper – if not criminal – conduct, such as bribery.

Similarly, the word "swindler" is defined by Black's Law Dictionary as: "someone who willfully defrauds or cheats another." *Swindler*, Black's Law Dictionary (11th ed. 2019). Marriam-Webster defines the verb "swindle" as "to obtain money or property by fraud or deceit." *Swindle*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003). Unlike "sleazebag" or "slimed," the plain meaning of the word "swindler" conveys an objectively verifiable fact: the subject of the statement is engaged in fraudulent or deceptive activity. *Laughland v. Beckett*, 870 N.W.2d 466, 476 (Wisc. Ct. App. 2015) (finding that the statement "preying swindler" was defamatory); *Kumaran v. Brotman*, 617 N.E.2d 191, 199 (Ill. App. Ct. 1993) (ruling that a teacher was defamed by the word "swindler"). Therefore, the statement "corrupt and a swindler" satisfies the first condition of the *Milkovich* analysis.

b. The Words "Pimp," "Whore," and "Leech" Imply Objectively Verifiable Facts

Upon a cursory glance, "a pimp for the rich," "a leech on society," and "a whore for the poor" are statements that appear to fall squarely under the formulation of rhetorical hyperbole. Other language in Mr. Lansford's statement, such as "some kind of modern-day Robinita Hood," also appear to suggest a hyperbolic tone. However, when read together, in context, and considering the general tenor of Mr. Lansford's post, it becomes clear that these statements imply objectively verifiable facts; namely, that Mrs. Courtier is involved in an self-serving unlawful scheme through her business and political advocacy, using skills she learned during her tumultuous past.

While "pimp" and "whore" have readily available definitions with defamatory capacity, Mrs. Courtier does not contend that a reasonable reader would understand Mr. Lansford is accusing her of being "someone who solicits customers for a prostitute" nor "a woman who engages in sexual acts for money." *Pimp*, Black's Law Dictionary (11th ed. 2019); *Whore*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003). In a similar fashion, considering the dictionary definition of "leech" – "a hanger-on who seeks advantage or gain" – Mrs. Courtier does not contend that the use of the word communicates an objectively verifiable fact. *Leech*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003). One could even say that these words operate as metaphors or analogies.

However, these analogies operate in a significantly different manner than those metaphors that courts have found to be rhetorical hyperbole. For example, in *Sall*, the defendant criticized the plaintiff in a magazine article because of plaintiff's alleged ethnically charged harassment. *Sall*, 782 P.2d at 1217. To argue that the plaintiff's bigoted actions had no place in civilized society, the defendant equated the plaintiff to animals. *Id.* The court found that "the

metaphoric choice of words in the letter reveals that they . . . would be perceived [as] rhetorical hyperbole rather than fact." *Id.* at 1218. Similarly, in *Aroonsakul v. Shannon*, 664 N.E.2d 1094, 1100 (Ill. App. Ct. 1996), the defendant, a neurologist, considered that the physician plaintiff's treatment for Alzheimer's disease was ineffective. *Aroonsakul v. Shannon*, 664 N.E.2d 1094, 1100 (Ill. App. Ct. 1996). To prove her point, the defendant engaged "in hyperbole by comparing [the plaintiff's treatment] to treating Parkinson's disease with toenail polish." *Id.* As in *Sall*, the analogy in *Aroonsakul* serves as a tool to prove an underlying point.

In contrast, the comparisons and metaphors employed by Mr. Lansford are not used to prove a point; rather, he uses them as a way to impute conduct onto Mrs. Courtier. In both *Aroonsakul* and *Sall*, the defendants used metaphors to illustrate their underlying arguments. In this case, rather than proving an underlying point, the metaphors used by Mr. Lansford *are* his point. He uses metaphoric language to describe Mrs. Courtier's character: she handles her charity like a whore handles her clients; she handles her business like a pimp handles her prostitutes; she uses others for her own benefit like a leech sucks blood for its own survival. Thus, because there is no underlying premise, the use of these words implies objective verifiable facts; namely, that Mrs. Courtier operates her business in a dishonest, improper, criminal-like manner.

c. Mr. Lansford's Statement Suggests He Has Access to Additional Facts

Furthermore, "in examining whether a statement gives the implication of facts, a court must examine whether the declarant implies that he or she has access to and is basing the statement upon additional facts beyond those available to a general audience." Fulcher, *supra*, at 756-763. In *Horsley v. Feldt*, 304 F.3d 1125 (11th Cir. 2002), for example, the Eleventh Circuit found that the statements at issue were rhetorical hyperbole in part because the alleged defamer

did not imply that she had access to additional facts beyond those that were undisputed. *Horsley v. Feldt*, 304 F.3d 1125, 1133 (11th Cir. 2002). The plaintiff, an anti-abortion activist, had a website that listed the names of doctors who performed abortions with lines crossing out the names of the doctors who were no longer alive. *Id.* at 1130. He argued he had been defamed by a defendant who stated that the plaintiff had inspired and conspired in the murder of abortion doctors. *Id.* The Eleventh Circuit found that the defendant's statements were protected because they were hyperboles that relied on the information that was undisputed – that plaintiff had a website listing the names of doctors since deceased – instead of implying she had access to additional facts to support her statements. *Id.* at 1133.

In contrast, Mr. Lansford's statements do not rely on undisputed information. In the statement, Mr. Lansford implies that he has access to information that is not available to the general public. He accuses Mrs. Courtier of present conduct that is fraudulent, dishonest– and perhaps even criminal – without offering any proof. Mr. Lansford is the mayor of the city where this alleged conduct has taken place. Additionally, he had a personal relationship with Mrs. Courtier's husband which was well documented in the political sphere. It is highly likely that Mr. Lansford personally met Mrs. Courtier in several occasions. Therefore, any reader may reasonably assume that Mr. Lansford had access to privileged information to substantiate his assertions. This implication overcomes any indicia of triviality otherwise present.

2. The General Tenor of the Statements Confirms the Impression of Objectively Provable Facts

To analyze the general tenor of a statement, courts have considered the context in which the statement is made, the subject at issue, the medium in which the statement is made, and other communication between the parties. Fulcher, *supra*, at 764-67. The general tenor of Mr.

Lansford's statement is inherently linked to the office that Mr. Lansford holds – the mayorship of Silvertown. As the mayor, his statements are ingrained with authority and credibility that outweigh any indication of hyperbole.

"The specific context of a statement shades its meaning." *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113, 1123 (C.D. Cal. 1998). Therefore, in determining whether a reasonable person would understand the statement to communicate objectively verifiable facts, a court must look at the context in which the statement was made. *See Horsley v. Feldt*, 304 F.3d at 1132 ("The context of [the alleged defamatory] statements and their flavor convince us that they are rhetorical hyperbole"); *Campbell v. Clark*, 471 S.W.3d 615, 625 (Tex. App. 2015) (to assess whether a statement is rhetorical hyperbole, the statement must be analyzed "as a whole in light of the surrounding circumstances"); *Austin*, 418 U.S. at 286–87 ("in the context of this case, no such factual representation can reasonably be inferred") ; *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002) (The defendant's "statement is examined, as it must be, in its context of this debate").

Mr. Lansford is an elected official. As such, his words are inherently authoritative and credible, regardless of his intent. As the mayor of Silvertown, Mr. Lansford cannot distance himself from the office that he holds. As long as he is the mayor, his words are indistinguishable from the words of his political office. For a mayor's words not to be taken literally by the citizens that voted him into office, the words must clearly express that they should not be taken literally. The statement at issue in this case does not offer such clarity.

A person of ordinary intelligence acts reasonably when he believes the words of an elected official. Ruling otherwise would indicate that the leaders of our communities are not to be taken seriously. Or perhaps even more worrisome – that the offices our elected officials hold

carry no inherent believability. In a democracy like ours, it would be troublesome to accept that being voted into office does not evidence the public's faith in the credibility of the elected official. Reasoning otherwise would invite and encourage dishonesty in our political process.

Furthermore, the statement was made in the general context of a political election. As the incumbent, Mr. Lansford, without a doubt, has some level of support among the citizens of Silvertown. Those who support a candidate are more likely to believe him or her without second-guessing their statements. This is true considering how politically polarized our society has become. *See* Zaid Jilani & Jeremy Adam Smith, *What Is the True Cost of Polarization in America?*, Greater Good Mag. - Published by UC Berkeley's GGSC (Mar. 4, 2019), https://greatergood.berkeley.edu/article/item/what_is_the_true_cost_of_polarization_in_america. ("Instead of thinking for ourselves, we tend to reason 'toward conclusions that reinforce existing loyalties rather than conclusions that objective observers might deem 'correct.'"); Gordon Pennycook & David Rand, *Why Do People Fall for Fake News?*, The New York Times (Jan. 19, 2019) https://www.nytimes.com/2019/01/19/opinion/sunday/fake-news.html ("when it comes to politically charged issues, people use their intellectual abilities to persuade themselves to believe what they *want* to be true rather than attempting to actually discover the truth). Therefore, it is highly likely that at least Mr. Lansford's political supporters not only assumed his statements communicated objectively provable facts, but also believed them to be true. As to the reasonableness of their beliefs, it is likely beyond the competence of any court to determine if supporting and believing a certain candidate over another deems a person reasonable.

In analyzing the general tenor of the conversation, courts have also considered additional communication between the parties. In *Horsley v. Rivera*, for example, the court found evidence of rhetorical hyperbole on the plaintiff's own statements directed at the defendant. *Horsley v.*

Rivera, 292 F.3d at 702. The defendant, a TV host, accused the plaintiff of being complicit in the murder of abortion doctors by posting their names on a website. *Id.* The plaintiff countered that the defendant was complicit himself by broadcasting the same information on his show. *Id.* The court found that by accusing the defendant of being complicit – the allegedly defamatory word at issue in the case – the plaintiff "was creating the impression on the audience that the dialogue was taking place on an animated, non-literal plane." *Id.*

As opposed to the plaintiff's statements in *Horsley v. Rivera*, Mrs. Courtier's political column does not create the impression on the audience that the debate is taking place on an animated, non-literal plane. On the contrary, Mrs. Courtier's column, while critical of Mr. Lansford, is written in proper English, using technical terms and arguing points with specific examples and clear diction. The language is descriptive and concise. As indicated by the record, Mr. Lansford's statement is a direct response to Mrs. Courtier's column. While he fails to respond to the specific arguments levied against him by Mrs. Courtier, he nevertheless engages in a debate initiated by her. He gives no clear indication that the tenor of the debate has transformed. Therefore, it would be reasonable for a reader to perceive as much credibility from Mr. Lansford's statement as they did from Mrs. Courtier's column.

When the statement relates to a debate on a controversial issue, courts are more likely to find that the statement is protected as rhetorical hyperbole. *See Horsley v. Feldt,* 304 F.3d at 1132 ("[the parties] were engaged in heated debate on the highly controversial topic of abortion" *Bresler*, 398 U.S. at 13 ("The debates themselves were heated, as debates about controversial issues usually are"); *Austin*, 418 U.S. at 272 quoting *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 58, (1966) ("Labor disputes are ordinarily heated affairs").

A debate on an upcoming election can be "heated." However, when it involves the candidates themselves, the controversial nature of a political debate cannot justify the implication of false defamatory facts. Otherwise, political debates between candidates would rely on dishonesty, name-calling, and personal attacks – rather than policy and political views. The implications are worse when one of the candidates is an incumbent. It would allow any incumbent to hide behind the inherent authority and credibility of their office while launching barrages of defamatory claims at political opponents.

Courts also look at the medium to analyze the general tenor of a communication. *Sall*, 782 P.2d at 1218. (finding that an article published in a column entitled "Your Views" on a page titled "Opinion" was protected speech); *Knievel v. ESPN, Inc.*, 223 F. Supp. 2d 1173, 1176 (D. Mont. 2002) (ruling that photo caption on a website that "was obviously directed at a younger audience and contained loose, figurative, slang language" was not actionable). In this case, the medium was social media. If Mr. Lansford were a private citizen, the medium would support his rhetorical hyperbole argument; but Mr. Lansford is not a private citizen. His social media account is that of the mayor of Silvertown. As such, his posts reach a greater audience. It is likely that many of his followers, beyond wanting to see what Mr. Lansford has to say, want to see what the mayor of Silvertown has to say. The inherent authority and credibility linked to his office extends to his social media posts. Furthermore, the followers who politically support Mr. Lansford are more likely to perceive he is communicating objectively provable facts. Therefore, the general tenor of the communication does not negate his implication of objectively verifiable facts.

It is true that "a political candidate has no license to defame his hecklers, but he also has no obligation to suffer them silently." *Miller v. Brock*, 352 So. 2d 313, 314 (La. Ct. App. 1977).

This sentiment is illustrated by a recent case involving the President of the United States. *Clifford v. Trump*, 339 F. Supp. 3d 915 (C.D. Cal. 2018). In *Clifford*, Mr. Trump tweeted attacking the credibility of Ms. Clifford. *Id*. at 919. Ms. Clifford, an adult film star, alleged she was threatened by an agent of Mr. Trump after she considered revealing details of an affair she had with Mr. Trump. *Id*. Specifically, Mr. Trump attacked a sketch prepared by Ms. Clifford (portraying the man who allegedly threaten her) as "a sketch years later about a nonexistent man. A total con job." *Id.* The court found significant that Ms. Clifford had presented herself as a political adversary of Mr. Trump and ruled that Mr. Trump's statements were a hyperbolic response in an attempt to disprove her allegations. *Id.* at 927.

Mrs. Courtier does not dispute that Mr. Lansford had a right to respond to her statement. After all, like Ms. Clifford, Mrs. Courtier presented herself as a political adversary of Mr. Lansford. However, the circumstances of this case differ from those of *Clifford* in one important aspect. Mr. Trump's tweet directly contests the statement by Ms. Clifford: that she could identify a man who had threatened her under orders of Mr. Trump. In contrast, Mr. Lansford's statement does not attempt to disprove the allegations by Mrs. Courtier. In her column, Mrs. Courtier argues that Evelyn Bailord would serve as a better mayor of Silvertown than Mr. Lansford. In his response, Mr. Lansford does not even mention Evelyn Bailord. Instead, he launches a personal attack against Mrs. Courtier, imputing on her improper and unlawful conduct through assertions and implications. Such an unfounded attack deserves no protection under the First Amendment.

3. Mr. Lansford's Assertions and Implications Are Sufficiently Factual to Be Susceptible of Being Proved True or False

"If the content of a statement gives the impression of fantasy, impossibility, or improbability, it is more likely to be rhetorical hyperbole than an actionable assertion of fact."

Fulcher, *supra*, at 757. For example, in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the defendant published a satirical account of the plaintiff's, a religious personality, first sexual encounter. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988). In the account, the plaintiff was portrayed "as having engaged in a drunken incestuous rendezvous with his mother in an outhouse." *Id.* The court found that the account was so ridiculous that a reasonable reader could not understand it as communicating objectively provable facts. *Id.* at 50. Other courts have reached the same conclusion when the content of the statements alone negates the implication of asserting facts because of its impossibility. *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982). (finding that an account of how plaintiff made a coach levitate through her fellatio skills was not actionable); *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1193 (9th Cir. 1989) (concluding that an article that purports to be an interview of a body part was protected speech).

In this case, the facts asserted and implied are neither fantastic nor impossible. Unlike the accusations in *Pring* and *Dworkin*, a fraudulent scheme by a businesswoman is quite real and possible. Additionally, Mrs. Courtier has known connections to the political class of Silvertown; she was married to a man who held the mayoral office for 18 years. She also has a criminal past. Therefore, unlike the ridiculous accusations in *Fallwell*, accusing Mrs. Courtier of self-serving fraud will not necessarily provoke doubt on a reasonable reader.

In *Milkovich*, the court determined that the perjury accusations against the plaintiff were susceptible of being proved true or false. *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 21, (1990). The court reasoned that an objective determination could be made as to whether the plaintiff committed perjury by comparing his testimony at the investigative hearing to his subsequent testimony in the case. *Id.* Likewise, whether Mrs. Courtier has engaged in fraudulent

unlawful conduct can be objectively analyzed. A look into the financials of her business or into the reporting of her political advocacy initiatives would prove that the allegations against her are false. Therefore, the statement satisfies the third condition formulated in *Milkovich*.

III. Even If this Court Finds that Mr. Lansford's Statement Is Not Sufficiently Capable of Communicating Objectively Provable Facts, It Should Still Find that the Statement Is Defamatory as Non-Protected Opinion

In *Milkovich*, this Court clarified that there is not "a wholesale defamation exemption for 'opinion.'" *Id.* at 2. The Restatement (Second) of Torts states that a statement of opinion "is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Restatement (Second) of Torts § 566 (Am. Law Inst. 1977). Furthermore, "if the defendant expresses a derogatory opinion without disclosing the facts on which it is based, he is subject to liability if the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts." Restatement (Second) of Torts § 566 cmt. c (Am. Law Inst. 1977).

In this case, Mr. Lansford's statement expresses a derogatory opinion without disclosing the facts on which it is based. Mr. Lansford consolidates allegations about Mrs. Courtier's business practices, political advocacy, and tumultuous past into a single accusation, painting it as unlawful through the use of words that imply criminal wrongdoing. Therefore, even if the statement is found to be one of opinion, Mr. Lansford would be liable because his statement creates the reasonable inference that his opinion is justified by the existence of unexpressed defamatory facts. This inference is justified both by the language chosen and by his position as mayor if Silvertown. A reader would be reasonable in inferring that as the mayor, Mr. Lansford

has access to information that would otherwise be unavailable. The fact that Mr. Lansford has personal connections with Mrs. Courtier only supports the reasonability of such an inference.

IV. Beyond Its Defamatory Capacity, Mr. Lansford's Statement Is Underserving of Constitutional Protection Because It Is Not the Type of Statement the First Amendment Is Intended to Safeguard

"This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 n.5 (1985).

> "These include the lewd and obscene . . . [and] it has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Furthermore, this Court has ruled that there are reduced constitutional protections when the speech does not involve "matters of public concern." *See Dun & Bradstreet, Inc.*, 472 U.S. at 761. This Court has found that protest signs near a soldier's funeral were matters of public concern. *Snyder v. Phelps*, 562 U.S. 443, 454 (2011). Even though the signs did not directly concern "social or political commentary, the issues they highlight – the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy – are matters of public import." *Id.*

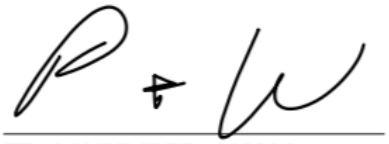
Mr. Lansford post is lewd and obscene. It is packed with connotations of sexual improprieties reducing Mrs. Courtier to her sexuality. The words "lewd," "lust," "pimp," "whore," and "woman who walked the streets" paint a picture of a meretricious person. However, nothing on the record suggests that Mrs. Courtier has ever engaged in sexual misconduct of any type. Rather, the only aspect of her sexual life that is known is that she was

sexually abused by an older man when she was young. By reducing Mrs. Courtier to a sexual self, Mr. Lansford is tapping into this traumatic instance in Mrs. Courtier's life. Mrs. Courtier's sexual life, and the sexual abuse she suffered in the past, are not matters of public import. The attack by Mr. Lansford goes well beyond the political debate under which he disguises his statement. This is exactly the type of statement which social value is clearly outweighed by the social interest in order and morality. Ruling otherwise would again subject Mrs. Courtier to abuse – verbal this time – by a man in a position of authority.

CONCLUSION

Mrs. Courtier's defamation claim must be given its day in court for four reasons. First, a criminal conviction that lacks attention or publicity does not automatically render a plaintiff libel-proof. As Mrs. Courtier's record demonstrates, a convicted felon can rehabilitate their reputation to the point where it can be significantly tarnished by a libelous utterance. Second, Mr. Lansford's statements are not protected as rhetorical hyperbole. Speaking from a position of power, Mr. Lansford's statements are credible and authoritative. Because they impute criminal conduct upon Mrs. Courtier through the assertion and implication of objectively verifiable facts, the statements deserve no First Amendment protections. Third, even if found to be statements of opinion, the statements are not protected because they imply provable facts. Finally, Mr. Lansford's statements do not deal with a matter of public concern.

Respectfully submitted,



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