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 219843
Counsel for Respondent

QUESTIONS PRESENTED

I. Can Silvia Courtier be a libel-proof plaintiff solely based on one, distant, non-violent felony that gained no notoriety or public attention?

II. Are Elmore Lansford's comments protected by the First Amendment as rhetorical hyperbole when a reasonable factfinder could conclude that the comments implied factual assertions about Silvia Courtier?

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JURISDICTION STATEMENT

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

STANDARD OF REVIEW

This is an appeal from the Supreme Judicial Court of Tenley's reversal of the trial court, which dismissed Respondent Silvia Courtier's defamation claim because it found Petitioner Elmore Lansford's comments were protected by the First Amendment. Interpretation of the United States Constitution is subject to *de novo* review. *Ornelas v. United States*, 517 U.S. 690 (1996); *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948).

STATEMENT OF THE CASE

A. Factual Background.

The life of Silvia Courtier is a comeback story: from an unfortunate beginning to personal and professional success. By the young age of ten, Silvia was left to fend for herself because of the death of both her parents. (J.A. at 5.). This time in Silvia's life was fraught with misfortune. *Id*. Like any child in a desperate situation, Silvia sometimes turned to extreme measures just to get by. *Id*. As a result, her juvenile record was spotted with minor offenses. (J.A. at 15.). Making matters worse, she was sexually abused by an older man. *Id*. Silvia turned to drug usage to cope, which led to addiction, and eventually a two-year jail term for a felony drug conviction. *Id*. But, these facts—which Silvia does not hide from—are only half of Silvia's story and they make her the woman she is today.

During her time in prison for the felony drug conviction, Silvia turned her life around. (J.A. at 5, 16.). She discovered a passion for business, earned her G.E.D., and enrolled in community

college classes. *Id*. Upon her release, put these new-found passions and skills to work and opened a high-end clothing store, which blossomed into several stores as Silvia found great success in the industry. *Id*. It was during this time that Silvia met her husband, Raymond. (J.A. at 5.). Raymond, who served as mayor of Silvertown for eighteen years, offered Silvia support and peace of mind. *Id*. Unfortunately Raymond's sudden passing in recent years has added another tragic chapter to Silvia's story. (J.A. at 2.). But, instead of turning to drugs like she did in her youth, this time Silvia coped by doubling down on her commitment to the community and helping others. *Id*.

Elmore Lansford, a former mentee of Raymond, succeeded Raymond as mayor after Raymond's passing, and now supports the re-development of Cooperwood, an area once reserved for low-income residents. (J.A. at 3.). In practice, Lansford's policy equates to rapid gentrification through high-rise buildings, and vigorous police enforcement in the community. *Id*. This heightened police presence resulted in allegations of racial profiling and police brutality. *Id*.

Because of Silvia's own impoverished upbringing, she strongly disagrees with Lansford's approach and passionately advocates for communities like Cooperwood. (J.A. at 3-4.). As a result, when Lansford ran for reelection, Silvia supported his opponent, Evelyn Bailord. *Id*. In showing her support for Bailord, Silvia wrote an online column referring to Lansford as a "relic of the past," "a divisive leader," and "someone who cares little for social justice issues." *Id*.

Lansford erupted when he learned of Silvia's and others' comments. (J.A. at 4.). Using his bully pulpit, he singled out Silvia in a one-off post on his website and brutally attacked her reputation. *Id*. More specifically, Lansford called into question the integrity of Silvia's business practices by referring to her as "corrupt," "a swindler," a "leech on society," "a pimp for the rich," "a whore for the poor," and a "joke." *Id*. Mixed in with Lansford's diatribe about Silvia were

references to her distant drug and criminal past. *Id*. In one fell swoop, Lansford decimated the come-back-story reputation that Silvia had spent years cultivating.

B. Procedural History.

To recover for the reputational damage inflicted by Lansford's comments, Silvia brought an action for defamation of character and false light invasion of privacy in the Tenley District Court. (J.A. at 4-6.). In his defense, Lansford contended that his comments were protected by the First Amendment as rhetorical hyperbole and that Silvia was a libel-proof plaintiff with no reputation to harm. (J.A. at 1-2, 6.). Lansford filed a special motion to dismiss Silvia's lawsuit under the Tenley Citizens' Public Participation Act ("Act") claiming that the action was a strategic lawsuit against public participation ("SLAPP"). (J.A. at 2.); *see* Tenley Code Ann. §§5-1-701 *et seq* (2019).

The District Court granted Lansford's special motion to dismiss Silvia's defamation claim. (J.A. at 13.). First, the court held that Silvia was not libel-proof and that the doctrine was not applicable to the case. (J.A. at 11.). However, the court also found that Lansford's comments were protected as rhetorical hyperbole. (J.A. at 12-13.).

Upon appeal, the Supreme Judicial Court of Tenley affirmed the District Court's holding that Silvia was not a libel-proof plaintiff. (J.A. at 19.). However, the court reversed the District Court's finding on the issue of rhetorical hyperbole, reasoning that it could not "dismiss a lawsuit in which Petitioner has been called names that call into question her competence and professionalism as a businessperson." (J.A. at 23.). Now, Silvia asks this Court to affirm the Supreme Judicial Court of Tenley's decision because a dismissal would deprive her and other plaintiffs of the right to redress under defamation law.

SUMMARY OF THE ARGUMENT

While the First Amendment protects the free flow of ideas, it ***does not*** create a protective shield when speech goes too far in harming the reputation of others. This case involves a sitting mayor who seeks exactly that—a protective shield—to guard him from liability for the permanent damage he inflicted when he went too far. The fruits of Silvia's years-long effort to rebuild her reputation into a well-respected businesswoman were spoiled instantly. Yet the District Court found Silvia had no redress under defamation law. This Court has the opportunity to fix this injustice and to reaffirm the First Amendment's intended protections.

First, Lansford relies on the libel-proof plaintiff doctrine, which is generally reserved for people whose crimes make them so notorious that they ultimately have no reputation to harm. Lansford defends his remarks by arguing that Silvia is libel-proof and has no good name to damage. However, Lansford's argument falls short because the doctrine typically only applies to habitual criminals or those guilty of the most serious crimes. *McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6, 10 (Tex. App. 1994). While Silvia undoubtedly had a troubled childhood, she is the epitome of a rags-to-riches success story. That history has been made steadfast through her commitment to her own education, her business, and her philanthropic endeavors. Silvia's minor crimes—so distant in the past—are not valid grounds to support Lansford's libel-proof plaintiff defense.

Furthermore, Lansford's defense hinges on a overbroad application of the First Amendment's rhetorical hyperbole protections. Lansford contends that his comments could not have possibly been taken seriously by any of his constituents to harm Silvia. However, statements are only protected as rhetorical hyperbole when a reasonable factfinder could not conclude that the statements were asserting fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). Here, when

viewed in context—a sitting mayor using his otherwise fact-laden website to attack a constituent by sandwiching bits of truth in with veiled opinions—a reasonable factfinder could conclude Lansford was asserting facts about Silvia. As such, rhetorical hyperbole is also not a sufficient basis for dismissing Silvia's claims.

Moreover, dismissal is not warranted under the anti-SLAPP statute. This statute was meant to protect private citizens from oppression by highly visible individuals and large entities who have an interest in restraining speech. It was not intended to act as a shortcut for elected officials to attack a constituent's reputation, then prematurely dismiss the constituent's day in court when the attack goes too far. This Court should reject Lansford's ill-advised attempt to squash Silvia's right to redress, and instead allow Silvia's case to proceed and justice to be served.

Therefore, this Court should affirm the decision of the Supreme Judicial Court of Tenley because Silvia cannot be libel-proof and the First Amendment's protections of rhetorical hyperbole demand more than what is present here.

ARGUMENT

I. SILVIA COURTIER CANNOT BE A LIBEL-PROOF PLAINTIFF SOLELY BASED ON ONE, DISTANT, NON-VIOLENT FELONY THAT GAINED NO NOTORIETY OR PUBLIC ATTENTION.

The libel-proof plaintiff doctrine—the idea that plaintiffs cannot recover damages in a libel action when their reputations are beyond repair ("doctrine")—should either not be followed or applied sparingly. The doctrine originated in 1975, when the Second Circuit found a notorious mafia boss libel proof and denied his recovery on a defamation claim. *Cardillo v. Doubleday & Co.*, 518 F.2d 638 (2d Cir. 1975). In reaching its conclusion, the court reasoned that his reputation was already beyond repair "by virtue of his life as a habitual criminal." *Id*. at 639. Since *Cardillo,* several courts have questioned and declined to follow the doctrine because it is not part of federal constitutional law. *See, e.g., Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984) (noting that the libel-proof plaintiff doctrine is a "fundamentally bad idea"). This court should likewise decline to follow the doctrine for the same reasons.

Courts that follow the doctrine apply two different frameworks for determining whether a plaintiff is libel-proof: the "issue specific" approach and the "incremental harm" approach. *The Libel-Proof Plaintiff Doctrine*, 98 HARV. L. REV. 1909 (1985). The issue specific approach prevents a plaintiff from recovering for libelous statements "where the plaintiff's reputation in the community was so tarnished before the publication that no further harm could have occurred." *Schiavone Constr. Co. v. Time, Inc.,* 847 F.2d 1069, 1079 (3d Cir. 1988) (*internal citations omitted*). Alternatively, the incremental harm approach compares "the allegedly false statements about the plaintiff in a particular publication with unchallenged (or true) statements found in the same publication," permitting recovery "only if the false statements do some harm over and above the damage caused by the true ones." *Bustos v. A & E Television Networks,* 646 F.3d 762, 765

(10th Cir. 2011). Under either application, Silvia cannot be libel-proof on the limited facts of her case.

Silvia is a well-regarded member of the community, both as a businesswoman and a social advocate, and she has worked hard to build a good reputation, despite unfortunate beginnings. By declaring Silvia libel-proof, this Court would extend an unnecessary judicial creation and would further punish reformed citizens by denying their ability to recover under defamation law. Accordingly, this Court should decline to follow the libel-proof plaintiff doctrine or should restrict its application to cases with extreme criminal behavior and public attention.

A. The Libel-Proof Plaintiff Doctrine Should not be Applied to Silvia Because it is Based on Faulty Premises and is not Supported by the First Amendment.

The validity of both iterations of the doctrine has been questioned, with many courts reluctant to follow the doctrine in either form. To start, this Court firmly rejected "any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection" in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991). The Court noted that while state courts are free to adopt the incremental harm approach into state libel law, the approach is otherwise not grounded in the First Amendment. *Id*. Doubts surrounding the issue specific approach have additionally been raised by many federal circuits, including the doctrine's creator, the Second Circuit. In *Buckley v. Littell*, the court stated that the libel-proof concept "is a limited, narrow one, which we will leave confined to its basic factual context." 539 F.2d 882, 889 (2d Cir. 1976); *see also Schiavone*, 847 F.2d at 1081 (declining to rule on whether to adopt the libel-proof plaintiff doctrine and remanding the issue of whether the plaintiff suffered damages for the jury); *Brooks v. Am. Broad. Cos.*, 932 F.2d 495, 501 (6th Cir. 1991) (questioning "whether all aspects of the libel proof doctrine are sound policy" and remanding case for the trier of fact).

Just as this Court declined to follow the incremental approach, this Court should also decline to follow the issue specific approach. The issue specific branch of the doctrine is a "fundamentally bad idea," and is not supported by the First Amendment because it undermines the optimistic legal premise that "there is a little bit of good in all of us." *Liberty Lobby*, 746 F.2d at 1568. This faulty premise of the doctrine is similarly highlighted by Silvia's case.

The doctrine must not be followed "because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety." *Id*. The American legal system, however, is built upon the assumption that "no matter how bad someone is, he can always be worse." *Id*. Yet this undermines the libel-proof plaintiff doctrine, which states that further harm to a plaintiff's reputation is impossible. The *Liberty Lobby* court thus firmly rejected the notion that one's reputation is static, reasoning that "[e]ven the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential." *Id*. Far from a public outcast, Silvia's story is one of recovery and rehabilitation from troubled beginnings. The libel-proof doctrine is based on the faulty assumption that reputations cannot be improved, and that prior wrongdoings cannot be overcome. Lansford's comments about Silvia's business practices could certainly have damaged Silvia's hard-earned, upstanding reputation. As such, this Court should not disturb the decision of the Supreme Judicial Court of Tenley regarding the State of Tenley's libel law.

B. One, Distant, Non-Violent Felony Conviction is Insufficient for Silvia to be Libel-Proof.

Generally, under the issue specific approach, a plaintiff is deemed libel-proof "where the plaintiff's reputation in the community was ***so tarnished*** before the publication that no further harm could have occurred." *Schiavone*, 847 F.2d at 1079 (emphasis added). Courts consider several factors in assessing the extent to which a plaintiff's reputation has been tarnished. For example, when a plaintiff has a criminal record, courts look to the number of crimes committed, the amount

of time the plaintiff has had to redeem her reputation, and the seriousness of the crimes. *See, e.g.*, *McBride*, 894 S.W.2d at 10 (concluding that "the nature of the conduct" and "the number of offenses . . . must make it clear, as a matter of law, that the plaintiff's reputation could not have suffered from the publication of the false and libelous statement"); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1074 (5th Cir. 1987) (finding plaintiffs could not be libel proof after presenting evidence that the "passage of six years had allowed them to improve their standing" in the community). Here, because Silvia has committed only one, non-violent felony, and she has sufficiently redeemed her reputation in the community over two decades, her reputation was not so tarnished that she is libel-proof.

i. Silvia cannot be libel-proof because she is not a habitual criminal with multiple felony convictions.

Since its creation, application of the issue specific libel-proof plaintiff doctrine has been mostly reserved for "habitual criminals" who have committed multiple crimes. *See Cardillo*, 518 F.2d at 640 (plaintiff imprisoned for "assorted federal felonies")*; Lamb v. Rizzo*, 391 F.3d 1133, 1139 (10th Cir. 2004) (doctrine applied to plaintiff who was a convicted murderer and kidnapper); *Ray v. Time, Inc.*, 452 F. Supp. 618 (W.D. Tenn. 1976) (plaintiff murdered Dr. Martin Luther King, Jr., and had multiple prior felony convictions). Here, Silvia's sole felony conviction, and handful of minor juvenile offenses, pale in comparison to the hardened criminals who have earned the "libel-proof" label.

Silvia cannot be declared libel-proof because her case is noticeably distinguishable from cases where the doctrine is typically applied. For example, in *Ray v. Time, Inc.*, the court considered not only the fact that James Earl Ray assassinated legendary civil rights leader Dr. Martin Luther King, Jr., but also the fact that Ray had *numerous* prior felony convictions. 452 F. Supp. at 621. Here, Silvia has only one non-violent felony—a single drug offense—which is

completely different in both scope and number from the terrible crimes of James Earl Ray. (J.A. at 5, 15.).

Other federal courts have agreed that the doctrine cannot be applied where the only fact alleged to render plaintiff libel-proof is a sole felony conviction. For instance, in *Horn-Brichetto v. Smith*, the Eastern District of Tennessee declined to grant a motion to dismiss and find the plaintiff libel-proof where "the only fact" before the court on that issue was "that the plaintiff has been admittedly convicted of a felony which resulted in a sentence of diversion." No. 3:17-CV-163, 2019 U.S. Dist. LEXIS 29428, at *48 (E.D. Tenn. Feb. 25, 2019). The *Horn-Brichetto* court distinguished *Ray*, noting that "the plaintiff in that case was infamous in every sense of the word." *Id*. Where the libel-proof plaintiff doctrine was applied with certainty in *Ray*, it has not been extended broadly to include plaintiffs with only a single minor felony on their record. Certainly, Silvia's sole felony should not receive the same treatment as cases as infamous as *Ray*.

ii. The nature of Silvia's felony—a non-violent crime—is not serious enough to render her libel-proof.

Courts additionally only find plaintiffs libel-proof where they have committed the most notorious of crimes. Seriousness is a defining factor in the libel-proof caselaw. *See, e.g.*, *Davis v. Tennessean*, 83 S.W.3d 125 (Tenn. Ct. App. 2001) (an armed-robber serving a 99-year sentence found libel-proof); *Ray*, 452 F. Supp. 618 (murderer of Dr. Martin Luther King, Jr., could not recover in defamation action); *Cardillo*, 518 F.2d 638 (prison inmate serving a 21-year sentence held libel-proof as a matter of law).

For example, in *Davis*, the plaintiff was serving a 99-year sentence for aiding and abetting in the murder of a tavern owner. *Davis*, 83 S.W.3d at 127. The primary reason the *Davis* court held Davis libel-proof was because of the seriousness of his crime and the subsequent length of

his sentence. *Id*. Similarly, in *Lamb v. Rizzo*, the Tenth Circuit noted that the doctrine should be followed only in cases that "compellingly invite [it's] application," and found that Lamb—a murderer and kidnapper—was libel-proof because of "the utter heinousness of the offenses which led to the plaintiff's three consecutive sentences of life imprisonment." 391 F.3d at 1139. In reaching its conclusion, the court stated that Lamb's case was one of those narrow instances where "allegedly libelous statement[s] cannot realistically cause impairment of reputation." *Id*. at 1139 (citing *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298 (2d Cir. 1986)). Both *Davis* and *Lamb* highlight how the doctrine is appropriately applied where plaintiffs have committed serious or violent crimes, such that very little could impair their reputations.

Unlike the violent crimes of Davis and Lamb, Silvia's sole felony conviction is a simple drug offense, for which she served only two years in prison. (J.A. at 5.). A single non-violent felony like Silvia's cannot render her libel-proof because such a ruling would ignore the effect that differing degrees of seriousness have on one's reputation. A lowly drug offense is not comparable to murder.

iii. Enough time has passed for Silvia to rebuild her reputation in Silverwood.

Importantly, courts also look to the role of time in allowing plaintiffs to rebuild their reputations after wrongdoing. For example, in *Zerangue v. TSP Newspapers, Inc.*, the Fifth Circuit refused to hold the plaintiffs libel-proof as a matter of law where they had provided evidence "that the passage of six years had allowed them to improve their standing." 814 F.2d at 1074. Silvia, now decades on from her drug offense, similarly has improved her reputation in the community. This is evidenced in the record by her business success and philanthropic activities. (J.A. at 2.).

Other courts have considered this factor where the plaintiff is filing a defamation action from prison. *See Davis v. Tennessean*, 83 S.W.3d at 131; *Cardillo*, 518 F.2d 638. In *Davis*, the

court ruled that Davis had not sufficiently rebuilt his reputation where he was still serving a 99-year sentence at the time of his libel action. *Davis*, 83 S.W.3d at 131. Important in its analysis, the court noted that Davis would continue to be incarcerated for a long time after the article was published. *Id*. This fact rendered it unlikely that Davis could show "actual damage, with regard to his standing in the community, as a result of the article." *Id*.

Unlike in *Davis,* Silvia was reformed and released more than two decades ago. (J.A. 15-16.). Where Davis had no opportunity to rebuild his reputation while behind bars, Silvia has had twenty years to rehabilitate her good name and has done so effectively. *Id*. Overbroadly applying the libel-proof label to Silvia so many years after her release would deny Silvia—and millions of other Americans[1] —the opportunity to protect her good name.

C. Silvia Cannot be Libel-Proof Because her Past Felony Conviction did not Receive Sufficient Public Attention.

A plaintiff cannot be considered "libel-proof" without public attention or notoriety as public attention is the foundation of any reputation. Both federal and state courts that follow the doctrine stress the importance of the publicity a crime or wrongdoing received. *See, e.g., McBride,* 894 S.W.2d at 10 ("To justify applying the doctrine, the evidence of record must show not only that the plaintiff engaged in criminal or anti-social behavior in the past, but also that his activities were widely reported to the public."); *see also Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 325 (N.H. 2007) (following *McBride*); *Wynberg v. Nat'l Enquirer, Inc.*, 564 F. Supp. 924, 928 (C.D. Cal. 1982) (noting that when an individual "engages in conspicuously anti-social or even criminal behavior, which is widely reported to the public, his reputation diminishes proportionately").

[1] A 2017 study by the University of Georgia estimated that approximately 6.1 million Americans have felony convictions. https://news.uga.edu/total-us-population-with-felony-convictions/.

Damage to reputation "is, of course, the essence of libel." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971).

When defendants introduce little or no evidence that public attention was drawn to a prior bad deed or conviction, courts have rejected the defense. For example, in *Thomas v. Tel. Publ'g Co.*, the New Hampshire Supreme Court held that a trial court erred in finding a plaintiff with multiple convictions libel-proof when "the plaintiff [had] received little media attention regarding his prior arrests and convictions." 155 N.H. at 326. Similarly, in *McBride*, a Texas court found the plaintiff could not be libel-proof where the "record contains no evidence of the publicity, if any, [McBride's] convictions received." 894 S.W.2d at 10. Both the *McBride* and *Thomas* courts highlight the logical premise that in order for one's standing in the community to be beyond repair, the community must have knowledge of the events contributing to a bad reputation.

Here, like in *McBride* and *Thomas*, Silvia cannot be libel-proof where the record is devoid of *any* indication that her prior criminal offenses—those alleged to tarnish her reputation—received any media attention at all. Moreover, Lansford failed to present any evidence that Silvia's standing in the community was already damaged before his comments attacked her integrity. Rather, the record indicates Silvia was well-respected in the community because of her success in business, and her philanthropic endeavors. (J.A. at 2.).

II. LANSFORD'S COMMENTS ARE NOT PROTECTED BY THE FIRST AMENDMENT AS RHETORICAL HYPERBOLE BECAUSE A REASONABLE FACTFINDER COULD CONCLUDE THAT THE COMMENTS IMPLIED FACTUAL ASSERTIONS ABOUT SILVIA.

Generally, the First Amendment shields loose and figurative speech—known as rhetorical hyperbole—from liability to ensure an uninhibited marketplace of ideas. *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969). However, this Court has routinely recognized important

limitations on this principle when speech goes too far in defaming an individual's reputation. *See, e.g., Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (acknowledging that society "has a pervasive and strong interest in preventing and redressing attacks upon reputation"). Speech loses First Amendment protection when a reasonable factfinder could conclude that the defamatory statements imply factual assertions about the targeted individual. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). While this Court has yet to articulate a precise standard for determining which statements imply factual assertions, many of the circuits and state courts apply a "totality of the circumstances" test to distinguish between protected and unprotected assertions. *See, e.g.*, *Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995); *Campanelli v. Regents of Univ. of California*, 51 Cal. Rptr. 2d 891 (Cal. Ct. App. 1996); *Bosak v. Kalmer*, No. 01CA18, 2002 WL 1483884 (Ohio Ct. App. June 27, 2002). Under such a framework, Lansford's comments are ***not*** protected by the First Amendment as rhetorical hyperbole.

A totality of the circumstances test generally includes three elements. First, courts must analyze the statement in its broad context, including the general tenor, the subject, the setting, and the format of the statement. *See Underwager*, 69 F.3d at 366. Second, courts must review the specific context and content of the statement. *Id.* Third, courts must determine whether the statement is sufficiently factual to be susceptible of being proved true or false. *Id.* Here, a reasonable factfinder could conclude that Lansford's comments were factual assertions because (1) nothing in the broad context of the statements negated the impressions they were facts, (2) the specific assertions sandwiched half-truths with fiction, and (3) the falsity of many of Lansford's comments can be objectively verified. Accordingly, Lansford's statements are not protected.

A. When Viewed in a Broad Context—a Public Official Lashing Out on His Website at a Private Citizen—Lansford's Comments Imply Assertions of Fact.

Generally, in a totality of the circumstances test, the first element is assessing the statement in its broader context. *Underwager*, 69 F.3d at 366. As stated by the Ninth Circuit, this "includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work." *Id.* Here, Lansford's statements implied assertions of fact because he wrote the comments with a serious tenor about a matter of nonpublic concern on his personal website that was otherwise fact laden. Thus, the first element of the "totality" test indicates Lansford's comments are not protected by the First Amendment as rhetorical hyperbole.

i. The general tenor of Lansford's comments does not negate the impression that they were factual assertions.

The broad context weighs in favor of protecting the statement as rhetorical hyperbole when the general tenor of a statement "sufficiently negates any impression that the speaker is asserting actual facts." *Snyder v. Phelps*, 580 F.3d 206, 220 (4th Cir. 2009) (citing *Milkovich*). Several cases illustrate this principle. For example, in *Partington v. Bugliosi*, the Ninth Circuit held that the general tenor of a made-for-television "docudrama" negated the impression that the speaker was asserting actual facts and, thus, the content of the film was protected as rhetorical hyperbole. 56 F.3d 1147, 1154-55 (9th Cir. 1995) (reasoning that "[d]ocudramas, as their names suggests, often rely heavily upon dramatic interpretations of events and dialogue filled with rhetorical flourishes in order to capture and maintain the interest of their audience . . . ."). Similarly, in *Neumann v. Liles*, the Oregon Supreme Court held that the general tenor of a speaker's dramatic writing style can negate the impression that the speaker is asserting actual facts. 358 Or. 706 (Or. 2016). In *Neumann*, the speech in question was a business review post titled "Disaster!!!!!" *Id.* at 721. In finding the speech protected as rhetorical hyperbole, the court noted that "the title of the review—which starts with the word 'Disaster' and is followed by a histrionic series of exclamation marks—is hyperbolic and sets the tone for the review." *Id.*

Here, the facts are visibly distinguishable from *Partington* and *Neumann*. First, Lansford's comments were not part of a docudrama or similar media in which the tenor immediately negates the impression of fact in a reasonable viewer's mind. The comments were made on a website. (J.A. at 4.). Moreover, Lansford's explicit writing style indicates assertions of fact. Instead of setting the tone of his post with a figure of speech and five exclamation points, Lansford begins his post by stating semi-factual information about Silvia's past by bringing attention to the fact that Silvia struggled with substance abuse in her youth. *Id*. Anyone in the community who knows of Silvia's unfortunate upbringing is aware of this fact. When viewed in broad context, a reasonable reader could conclude from the tenor of Lansford's post that all of his comments were factual assertions.

ii. The subject matter of the Lansford's comments indicates that he was making factual assertions.

Another crucial component of the analysis into Lansford's comments is the subject matter. Generally, two types of statements receive heightened First Amendment protection: (1) statements about public figures and public officials and (2) statements about matters of public importance. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Milkovich*, 497 U.S. at 13. Here, Lansford's statements concerned neither. Thus, his statements were not protected by the First Amendment.

To start, Silvia is neither a public official nor a public figure. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and later in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), this Court protected speech concerning public officials and public figures—because of their outsized roles in their communities—by placing limitations on the ability of these individuals to recover when they are the subject of defamatory remarks. This Court suggested two justifications for the rule. First, public individuals have greater access to effective communication and "have a more realistic opportunity to counteract false statements than private individuals normally enjoy."

Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974). Second, these individuals "voluntarily exposed themselves to increased risk of injury. . . No such assumption is justified with respect to a private individual." *Id.* In the present case, Silvia's opportunity to counteract Lansford's false statements is limited. While she manages two websites, it is highly unlikely that her audience realistically competes with that of a sitting mayor. Moreover, merely expressing her political beliefs cannot equate to voluntarily exposing herself to the risk. The ramifications of such a holding would chill political speech in the community as private citizens would hesitate before sharing their own beliefs.

Additionally, Silvia is not a public official because she does not hold any public office. While some businesspersons have been declared "public figures," Silvia is notably different. For example, in *Greenbelt Co-op. Pub. Ass'n v. Bresler*, a businessman was deemed a "public figure" because he had entered into numerous, highly publicized development agreements with the city. 398 U.S. 6, 8-9 (1970). Here, the record does not indicate that Silvia has entered into any highly publicized government contracts that could qualify her as a "public figure" under *Greenbelt*; rather, she simply owns a handful of stores, and gives back to Silvertown philanthropically. (J.A. at 2.). Merely because Silvia is a proprietor that gives back does not mean she has the ability to counteract a current mayor's damaging statements about her. Nor does it mean that she voluntarily exposed herself to the risk of being berated by a high-ranking official.

Furthermore, Lansford's comments were not a sufficient matter of public concern to receive additional First Amendment protection. In *Clifford v. Trump*, a California District Court held that a sitting President's tweets were a matter of public concern—and thus protected by the First Amendment—when made in response to allegations that could have influenced the outcome of the 2016 presidential election. 339 F.Supp.3d 915, 925 (C.D. Cal. 2018). The court noted the

subject matter—potential election law violations—was a sufficient matter of public concern. *Id.* Here, the context is very different. Unlike in *Clifford*, where the plaintiff accused the President of covering up an affair to influence the outcome of a national election, Silvia simply shared her own political view—that she was supporting Lansford's opponent—before the mayoral election. (J.A. at 3.). Therefore, when Lansford responded by ruthlessly attacking Silvia's character on his website, he was not responding to a serious allegation that he somehow violated the law. Rather, he was simply attacking a constituent for expressing her own political views. As such, the subject matter of Lansford's comments was not a matter of public concern. Lansford should not receive the same First Amendment latitude received by President Trump.

iii. The format and setting of Lansford's comments suggest he was asserting facts about Silvia.

Another important factor in assessing the broad context of the statements is "whether the statements were made by participants in an adversarial setting." *See, e.g.*, *Ferlauto v. Hamsher*, 74 Cal.App.4th 1394 (Cal. Ct. App. 1999). Statements are more likely to receive First Amendment protection when made in an adversarial setting in which the "audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole." *Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596, 601 (Cal. 1976).

Several cases demonstrate sufficiently adversarial settings. For example, in *Greenbelt*, this Court held that a characterization of a businessman's negotiating style as "blackmail" during heated public debates at a city council meeting was protected speech. 398 U.S. at 13. The setting of these remarks—a heated city council meeting—played an outsized role in the Court's analysis because a reasonable factfinder would understand the adversarial nature of the statements. *Id.*; *see also Miller v. Brock*, 352 So.2d 313, 314 (La. Ct. App. 1977) (finding "a dispute between a political candidate at a political meeting" sufficiently adversarial setting to protect speech). Likewise,

strong protections have been extended to speech in other settings where a reasonable listener would understand by the adversarial nature of the setting that fact may be blended with opinion. *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 286 (1974) (finding labor disputes sufficiently adversarial).

In the present case, however, the setting is not adversarial enough for a reasonable factfinder to conclude that the statements are not assertions of fact. Unlike in a city council meeting, where everyone in the room understands the context of statements during a debate, it is not clear that the average Silvertown resident would understand the full context of Lansford's statements. The remarks were made on his website—not in a public debate—in response to Silvia's support of Lansford's political challenger, Evelyn Bailord. (J.A. at 3.). However, for a reasonable factfinder to understand the context of Lansford's statements they would need to know about Silvia's own website posts. There is no indication in the record that the average Silvertown resident even knew of Silvia's posts. As a result, a reasonable factfinder could conclude, upon reading Lansford's website post, that Lansford was righteously calling out a corrupt businesswoman in the community. The setting of Lansford's post was not adversarial enough to give the reasonable reader the impression that Lansford was asserting his opinion.

B. When Viewed in Specific Context—Sandwiching Bits of Truth with Indisputably False Statements—Lansford's Comments Clearly Imply Assertions of Fact.

The second factor in a "totality of the circumstances" analysis is looking at the statements in their specific context. This includes "analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation." *Underwager*, 69 F.3d at 366. Here, when viewed in their specific context, it is clear that Lansford's comments implied assertions of fact and should not be protected by the First Amendment.

First, Lansford couched his many false statements in with a few tidbits of truth. Of course, substantial truth is oftentimes an absolute defense to a defamation claim. *See, e.g.*, *Pacitti v. Durr,* 310 Fed.Appx. 526, 528 (3d Cir. 2009). However, the way in which Lansford intentionally inserted false statements in between half-truths about Silvia's past drug usage could lead the reasonable factfinder to believe that Lansford has inside knowledge about Silvia that has not yet been disclosed to the public.

Second, because there is no indication from the record that Lansford has a history of verbally attacking constituents, his rare negative comments among otherwise factual content on his website could give the reasonable factfinder the impression that Lansford is asserting facts about Silvia. For example, in *Flamm v. American Ass'n of Univ. Women,* the Second Circuit found that a non-profit organization's directory of lawyers was not protected speech when it described an attorney as an "ambulance chaser" only interested in "slam dunk cases." 201 F.3d 144 (2d Cir. 2000). The critical fact in the court's reasoning was that the defamatory comments about the attorney were the only negative comments in an entire directory with several hundred other entries. *Id.* at 151. The court stated, "[a] reasonable reader is more likely to treat as fact the description of [the defamed attorney] as an 'ambulance chaser' because there is nothing in the otherwise fact-laden directory to suggest otherwise." *Id.* at 152. Similarly, here, there is nothing else in the record to indicate that Lansford's website was anything but factual. Accordingly, Lansford's comments would lead a reasonable reader to conclude that the statements were asserting factual allegations.

C. Because the Truth or Falsity of Lansford's Assertions is Objectively Provable, His Comments Imply Assertions of Fact.

The final factor in a totality of the circumstances analysis is whether the statement itself is sufficiently factual to be susceptible of being proven true or false. *Underwager,* 69 F.3d at 366. To receive First Amendment protection, a statement must not be objectively provable. *Milkovich,*

497 U.S. at 23 (distinguishing between a "subjective assertion" and an "articulation of an objectively verifiable event"); *Underwager*, 69 F.3d at 367 (concluding that assertions were not provable because their content did not rest on "a core of objective evidence"). Here, however, several of Lansford's assertions are capable of being objectively disproven.

Many courts have held that speech targeting an individual as "corrupt" is objectively provable. For instance, the Maryland Supreme Court stated that "[t]he greater number of Courts have held that the imputation of a corrupt or dishonorable motive in connection with established facts is itself to be classified as a statement of fact . . . ." *A.S. Abell Co. v. Kirby*, 227 Md. 267, 274 (Md. 1961). Similarly, in *Bentley v. Bunton*, the Texas Supreme Court held that a local radio show host's claims that a local district judge was "corrupt" were objectively provable and, thus, not protected speech. 94 S.W.3d 561, 581-82 (Tex. 2002). In reaching its conclusion, the Texas Supreme Court noted the importance of a radio host's citation of "specific cases and occurrences" of the judge's supposed corruption. *Id.* at 583. Here, Lansford called Silvia corrupt in the same sentence that he stated she "hoodwinks the poor" and the same paragraph that he alleges Silvia somehow takes advantage of the rich. (J.A. at 4.). When viewed in context with the word's common definition—"characterized by improper conduct"—it is evident Lansford cited the requisite specificity to accuse Silvia of being corrupt. *Corrupt Definition*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/corrupt (last visited Sept. 21, 2019).

Moreover, Lansford's accusation of corruption is not the only assertion that is capable of being objectively proven. His assertion that Silvia is a "swindler" is also capable of being proven or disproven. For example, in *Kumaran v. Brotman*, an Illinois appellate court held that an accusation that an individual who filed multiple lawsuits was a "working scam" was not protected speech because the accusation was objectively verifiable. 247 Ill.App.3d 216 (Ill. Ct. App. 1993).

In reaching its conclusion, the court stated that "the word 'scam' has a precise core meaning for which a consensus of understanding exists, namely, ***swindle***, and it is verifiable by reviewing evidence in plaintiff's cases to discern whether the cases were bona fide or bogus." *Id.* at 228 (emphasis added).

Similarly, here, the term "swindler" has a precise meaning on which there is a consensus. Dictionaries uniformly state that a swindler is someone who "obtain(s) money or property by fraud or deceit." *Swindle Definition*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/swindler (last visited Sept. 17, 2019); *see also Swindle Definition*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/swindler (last visited Sept. 17, 2019) ("someone who gets money dishonestly by deceiving or cheating people"). Like in *Kumaran*, the factfinder could review evidence of Silvia's past business practices to determine, objectively, whether she has swindled her clients. Therefore, because Lansford's assertions are capable of objective verification, his statements are not protected as rhetorical hyperbole by the First Amendment.

D. Determining that Lansford's Comments are Protected Speech Would Disregard Decades of State Defamation Jurisprudence.

State courts across the country have simplified libel law in clear-cut cases through a doctrine called defamation *per se*. Under this doctrine, certain defamatory remarks automatically allow plaintiffs to recover. While there are differences between states, generally, comments are defamatory per se when (1) imputing the commission of a crime, (2) prejudicing someone in their profession, and (3) accusing an individual of unchastity. *See, e.g.*, *Chicago City Day Sch. v. Wade*, 297 Ill.App.3d 465, 470 (1998); *see also Cortes v. Twenty-First Century Fox*, 285 F.Supp.3d 629, 641 (S.D.N.Y 2018). Here, many states would likely find Lansford's comments defamatory *per se* under the categories enumerated above. Thus, this Court should avoid a finding of rhetorical

hyperbole because it would uproot well-established state precedent and violate principles of federalism.

First, many states would likely find Lansford's comments describing Silvia as a "whore for the poor" defamatory *per se* because they imply unchastity. *See, e.g.*, *Smith v. Atkins*, 622 So.2d 795, 800 (La. Ct. App. 1993) (comparing "slut" to comments about sexuality in finding of defamation *per se*); *Ogle v. Hocker*, 430 Fed.Appx. 373, 374-375 (6th Cir. 2011) (accusations of sexual misconduct fall under defamation *per se*). Notably, in *Bryson v. News Am. Publ'ns, Inc.*, the court analyzed the use of the word "slut" to see if it accused the plaintiff of being unchaste. 672 N.E.2d 1207, 1214 (1996). The defendant in *Bryson* unsuccessfully claimed that calling someone a "slut" can be innocently construed as meaning "bully." *Id*. at 1216. While the context is important, courts will not ignore the "natural and obvious meaning" of a word. *Id.* at 1217. Here, like in *Bryson*, the natural and obvious meaning of Lansford's comments is to impute unchastity upon Silvia and disparage her reputation in Silvertown. (J.A. at 4-5.).

Second, several states would also likely find Lansford's comment describing Silvia as a "swindler" defamatory *per se* because of the prejudicial effect on her professional reputation. *See, e.g.*, *McNamee v. Clemens*, 762 F.Supp.2d 584, 600 (E.D.N.Y. 2011) (citing *Curry v. Roman*, 217 A.D.2d 314, 317 (N.Y. App. Div. 1995) (statement by defendant referring to plaintiff as a "swindler" was defamation *per se*). For example, in *Kumaran*, an Illinois appellate court held that a newspaper's remarks were libelous *per se* because they accused a teacher of being a "swindler" and therefore prejudiced him in his profession as a schoolteacher by presenting him as someone who would not be an acceptable role model for young students. 247 Ill.App.3d at 216. Here, Silvia is a well-respected philanthropist and businesswoman in Silvertown. (J.A. at 2.). By calling Silvia a "swindler," Lansford directly attacked Silvia's business practices and harmed her reputation as

an entrepreneur. (J.A. at 4.). As a result, Lansford's statements would likely be actionable as defamation *per se* under state law.

With all of the foregoing in mind, Lansford's statements are likely actionable under many states' laws through a defamation *per se* theory. By holding, as a matter of law, that Lansford's statements are protected as rhetorical hyperbole, this Court would render an entire body of state jurisprudence ineffective. Such a ruling would violate long-standing principles of federalism. Instead, this court should avoid a sweeping rule and affirm the Tenley Supreme Court's ruling that sends Lansford's statements to a jury.

CONCLUSION

Because Silvia cannot be a libel-proof plaintiff and Lansford's remarks are not rhetorical hyperbole, this Court should affirm the decision of the Tenley Supreme Judicial Court.

Respectfully,

Team 219843

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