No. 18-2143

IN THE SUPREME COURT OF THE UNITED STATES

ELMORE LANSFORD,

Defendant -Petitioner,

v.

SILVIA COURTIER,

Plaintiff -Respondent,

On Appeal from The Supreme Judicial Court of State of Tenley

BRIEF OF RESPONDENT,
Silvia Courtier

Team Number: 219863
Attorney for Respondent

QUESTIONS PRESENTED

i. Whether an individual can be a libel-proof plaintiff under defamation law solely on the basis of past criminal convictions, including a felony, that have gained no notoriety or public attention?

ii. Whether the challenged statements in this case qualify as unprotected defamation or protected rhetorical hyperbole?

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

A. Statement of Facts

Silvia Courtier, the Respondent and Plaintiff, had a rather difficult upbringing, but she has not let that stop her from becoming a pillar in the Silvertown community. (J.A. at 5.). Mrs. Courtier's parents were both addicted to drugs. (J.A. at 5.). Her father, who was killed in prison, sold drugs and went to prison on a fifteen-year sentence as a recidivist offender. (J.A. at 5.). Unfortunately, the heartbreak for Mrs. Courtier did not stop here, and her mother overdosed when she was only ten years old. (J.A. at 5.). Because of the tragic death of both of her parents, Mrs. Courtier was forced to supported herself. (J.A. at 5.). Although she had to steal to do so, she had no other option as the child of two deceased drug addicts. (J.A. at 5.). During this time, Mrs. Courtier was also sexually abused by an older man. (J.A. at 5.). Despite her efforts to keep her life together, Mrs. Courtier was declared a delinquent. (J.A. at 5.). Unfortunately, Mrs. Courtier's troubles did not end there, and she succumbed to the disease both her parents had suffered with, drugs. (J.A. at 5.). Although this drug habit did result in two felony charges, her two-year sentence in jail for only one of these charges was the beginning of her rehabilitation. (J.A. at 5.).

Mrs. Courtier worked to earn her G.E.D., enrolled in community college classes, and took every business class she could find. (J.A. at 5.). Following her release, Mrs. Courtier opened a successful small-scale clothing operation which grew into a large operation consisting of multiple clothing stores within Silvertown. (J.A. at 5.). Additionally, Mrs. Courtier is the widow of Silvertown's former mayor, Raymond Courtier. (J.A. at 2.). Since Mrs. Courtier has transformed herself into a successful businesswoman, she gives back to her community of Silvertown tremendously. (J.A. at 2.). "She has advocated publicly against private, for-profit prisons, and in favor of restoring the voting rights for former felons, increasing adult literacy, and improving

equity in education." (J.A. at 16.). Moreover, she has become politically active as well, campaigning against gentrification and the elimination of affordable housing. (J.A. at 16.).

In recent years Mrs. Courtier has become a critic of Mr. Elmore Lansford, the Petitioner and current mayor of Silvertown. (J.A. at 3.). Petitioner campaigned with the slogan "cleaning up Cooperwood." (J.A. at 3.). Cooperwood is an area of Silvertown that contained "public housing complexes and lower-rent housing options." (J.A. at 3.). Petitioner kept his campaign promises of gentrification and "has supported efforts by developers to create new high-rise developments in Cooperwood." (J.A. at 3.). Petitioner's actions to remove affordable housing from Silvertown resulted in "allegations of racial profiling and a few instances of police brutality." (J.A. at 3.). Conversely, Mrs. Courtier is a strong supporter of Petitioner's political rival, Evelyn Bailord, who "has devoted her life to social justice causes . . . [and] countless hours to pro bono service" as an attorney. (J.A. at 3–4.). To this end, Mrs. Courtier has written online commentaries to support Ms. Bailord. (J.A. at 3.). In her online commentaries, Mrs. Courtier has described Petitioner, in his role as mayor, as a "relic of the past,", "a divisive leader," and "someone who cares very little for social justice issues." (J.A. at 3.). These comments regarding Petitioner's actions as mayor upset him to the point that he reacted with an onslaught of personal attacks against Mrs. Courtier. (J.A. at 4).

> 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.).

B. Course of Proceedings

After Petitioner's blitz of remarks, Mrs. Courtier sued him for defamation of character and false light invasion of privacy in Tenley District Court. (J.A. at 4.). Mrs. Courtier specifically contests four statements: "whore for the poor," "pimp for the rich," "corrupt and a swindler," and "leech on society." (J.A. at 18.). In response to her defamation suit, Petitioner "filed a special motion to strike/ dismiss the defamation lawsuit under the Tenley Participation Act" or anti-SLAPP laws (J.A. at 14). The Act states: "If a legal action is filed in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action." (J.A. at 14.) (quoting Tenley Code Ann. § 5 – 1 – 704(a)).[1]

Pursuant to the Public Participation Act, Petitioner had the burden of making a prima facie case that Mrs. Courtier's suit against him was based upon, related to, or in response to his online commentary. (J.A. at 15.). The Tenley District Court found that Petitioner met this burden. (J.A. at 15). Therefore, under this Act, Mrs. Courtier must prove a prima facie case of the underlying claim, defamation. (J.A. at 7.). In doing so, the District Court noted that the crux of the issue was the "defamatory meaning" element of a defamation claim. (J.A. at 8.). In defending his

[1] The term SLAPP stands for Strategic Lawsuits Against Public Participation and was created as a term to be "applied to lawsuits filed by developers and other large construction entities against citizen-activists who objected to alleged environmental abuses." (J.A. at 2.). Moreover, "[t]he idea behind so called 'anti-SLAPP' laws was that there should be a procedural mechanism in place to protect citizens who have been sued by wealthy corporate actors merely to intimidate and silence those citizens for exercising their First Amendment freedoms of petition or speech." (J.A. at 2.).

commentary, Petitioner put forth two arguments: (1) Mrs. Courtier is libel-proof ("she has no good reputation to protect"), and (2) the comments were rhetorical hyperbole. (J.A. at 9.). The District Court held that Mrs. Courtier is not a libel-proof plaintiff, (J.A. at 11.), but the comments were rhetorical hyperbole protected by the First Amendment, (J.A. at 12–13.). Therefore, the District Court granted Petitioner's special motion to strike/dismiss the defamation claim. (J.A. at 13.).

Mrs. Courtier appealed the dismissal of her defamation claim, and the Supreme Judicial Court of State of Tenley granted the appeal. (J.A. at 14.). After reviewing both of Petitioner's defenses, the Supreme Judicial Court affirmed the District Court's holding that Mrs. Courtier is not a libel-proof plaintiff. (J.A. at 18.). However, it reversed the District Court's motion to strike or dismiss the defamation suit. (J.A. at 22.).

> It may be that [Mrs. Courtier] will not be able to prevail in her underlying defamation claim. But at this early stage of the litigation where we are faced with an expedited motion to strike or dismiss the lawsuit, this court will not dismiss a lawsuit in which [Mrs. Courtier] has been called names that call into question her competence and professionalism as a business person.

(J.A. at 23.). Thus, Petitioner requested a writ of certiorari to the Supreme Court of the United States which was subsequently granted. (J.A. at 24.).

SUMMARY OF THE ARGUMENT

Both the district and appellate courts were correct in concluding that Mrs. Courtier is not a libel-proof plaintiff. Despite the utmost importance of the First Amendment's protection of the right to free speech, in certain situations, an individual's right to protection of reputational interests must prevail. The libel-proof plaintiff doctrine was created to protect the important right to free speech. However, neither branch of the libel-proof plaintiff doctrine applies to Mrs. Courtier, and thus, her individual rights must be upheld. The issue specific branch fails because Mrs. Courtier is not a notorious inveterate criminal but an upstanding businesswoman and philanthropist. Further, the incremental harm branch fails as well because the contested statements of Petitioner are not subsidiary to the entirety of the communication but cause more harm than the uncontested statements.

The appellate court accurately found that Mrs. Courtier's defamation claim should not be dismissed. Free speech is widely protected and rightly should be. However, attacking a private citizen with defamatory remarks is not an area which the principles of the First Amendment protect. Mrs. Courtier is a private citizen entitled to the higher standard of constitutional protection against defamation. Moreover, condemning comments that are not clearly exaggerated, but are quite open to literal interpretation against an upstanding businesswoman and philanthropist such as Mrs. Courtier, demand a finding that they are not rhetorical hyperbole. These are defamatory comments that Mrs. Courtier implores protection from.

ARGUMENT

I. This Court Should Affirm the District and Supreme Judicial Court's Finding that Mrs. Courtier is Not a Libel-Proof Plaintiff.

Both the District and Appellate Courts were correct in finding that Mrs. Silvia Courtier is not a libel-proof plaintiff. Therefore, this Court should affirm their finding that Mrs. Courtier is not a libel-proof plaintiff pursuant to either branch of the libel-proof plaintiff doctrine. At the heart of a defamation claim is protection of individual rights and the state interest of limiting reputational injury to persons. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). "[T]he individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" *Id.* (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). Moreover, private individuals are more vulnerable, and thus the state has a higher duty to protect them. *See id.* at 344. Further, the court has "long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern that is "at the heart of the First Amendment's protection."'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985). The Founding Fathers created the First Amendment's protection of free speech to allow for an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Therefore, to ensure that a defendant does abuse his right to free speech and go beyond an "unfettered interchange of ideas for the bringing about of political and social changes," a plaintiff may bring a defamation claim to recover for actual damages. *Gertz*, 418 U.S. at 350. Actual damages include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering" caused by a defendant's abuse of his First Amendment rights. *Id.*

However, while a plaintiff may suffer many harms because of defamation, the essence of a libel suit is damage to reputation. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). Thus, a defendant is liable for defamation when the contested communication caused the plaintiff reputational harm, and the key focus of the libel-proof doctrine is the harm caused by the contested communication. *See The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1925 (1985). When a plaintiff's reputation is damaged and she can recover more than nominal damages for the libelous statements the defendant has made, the plaintiff's individual rights to protect his dignity and worth trump the defendant's right to free speech. *See id.* Therefore, a plaintiff is libel-proof under only two, narrowly tailored, limited theories (1) the issue-specific theory, *see Cardillo v. Doubleday*, 518 F.2d 638, 639 (2d Cir. 1975), and (2) the incremental harm theory, *see Simmons Ford, Inc. v. Consumers Union of U.S., Inc.*, 516 F. Supp. 742, 751 (S.D.N.Y. 1981). The defendant has the burden to prove that the plaintiff is, in fact, a libel-proof plaintiff. *See Stern v. Cosby*, 645 F. Supp. 2d 258, 270-71 (S.D.N.Y. 2009). Further, because the libel-proof plaintiff doctrine is a question of law, the court will review the issue de novo. *See id.* (citations omitted). Here, Petitioner cannot prove that Mrs. Courtier is a libel-proof plaintiff under either (1) the issue-specific theory or (2) the incremental harm theory.

A. Mrs. Courtier is not a libel-proof plaintiff under the issue-specific branch because she is not a notorious criminal.

Mrs. Courtier is not a libel-proof plaintiff pursuant to the issue specific theory of the libel-proof plaintiff doctrine. "[T]here comes a time when [an] individual's reputation for specific conduct, or his general reputation for honesty and fair dealing is sufficiently low in the public's estimation that he can recover only nominal damages for subsequent defamatory statements." *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 928 (C.D. Cal. 1982). When this occurs, a plaintiff is rendered libel-proof plaintiff because he is "so unlikely by virtue of his life as a habitual

criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case." *Cardillo*, 518 F.2d at 639. Further, if a plaintiff has a publicized reputation for a specific aspect of his past, he may be a libel-proof in regards to only that specific characteristic or part of his past. *See, e.g.*, *Lamb v. Rizzo*, 391 F.3d 1133, 1139 (10th Cir. 2004). A defendant asserting the libel-proof plaintiff defense carries the burden of proving that the plaintiff has no good reputation to protect because he has (1) a criminal or anti-social past (2) that was widely publicized. *See, e.g., Wynberg*, 564 F. Supp. at 927–28; *Stern*, 645 F. Supp. 2d at 270-71. Here, Petitioner cannot prove that Mrs. Courtier's reputation in Silvertown regarding her past establishes her as a libel-proof plaintiff because she has not engaged in (1) anti-social or criminal behavior (2) that was widely, if at all, publicized.

1. <u>Mrs. Courtier's brush with the law decades ago does not constitute criminal behavior that would establish her as a libel-proof plaintiff.</u>

Mrs. Courtier's troubled past does not establish her as a libel-proof plaintiff, but as a reformed, altruistic businesswoman. A libel-proof plaintiff is a plaintiff with a criminal record so full of serious felonies he is labeled a "habitual criminal." *See Cardillo*, 518 F.2d at 640 (holding the plaintiff was libel-proof because he was involved in organized crime for the majority of his adult life); *Ray v. Time, Inc.*, 452 F. Supp. 618, 622 (W.D. Tenn. 1976) (holding the plaintiff, the convicted assassin of Martin Luther King, Jr., was libel-proof); *Davis v. The Tennessean*, 83 S.W.3d 125, 131 (Tenn. Ct. App. 2001) (finding that the plaintiff's "conviction resulting in incarceration for 99 years 'renders any reputation he may have virtually valueless and that he is in the eyes of the law "libel-proof"'"). Moreover, even if a plaintiff is not a habitual criminal, the libel-proof plaintiff doctrine will apply when the assertions contained in the challenged communication are similar, if not the same, as the behavior that is the subject of the plaintiff's

criminal conviction. *See Lamb*, 391 F.3d at 1139: *Finklea v. Jacksonville Daily Progress*, 742 S.W.2d 512, 515 (Tex. Ct. App. 1987). Thus, "a plaintiff's reputation with respect to a specific subject may be so badly tarnished that he cannot be further injured by allegedly false statements on that subject." *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986). However, when a plaintiff with a tarnished past has reformed herself, she will have a reputation to protect, and she cannot be found libel-proof based upon earlier transgressions. *See Da Silva v. Time Inc.*, 908 F. Supp. 184, 187 (S.D.N.Y. 1995).

Inveterate criminals cannot suffer reputational harm because they have no good reputation to protect. *See Davis*, 83 S.W.3d at 128. In *Ray v. Time, Inc.*, the plaintiff, the convicted assassin of Dr. Martin Luther King, Jr., brought a defamation suit because the contested publication said that he was a "narcotics addict and peddler" and a robber. *Ray*, 452 F. Supp. at 622. Despite the false nature of these two statements, the court held that the plaintiff was libel-proof because he had committed prior felonies and was a professed murdered. *Id.* at 621. Moreover, in *Cardillo v. Doubleday,* the court held that the plaintiff was libel-proof because he was a habitual criminal. *Cardillo*, 518 F.2d at 639. The plaintiff, who spent the majority of his adult life in the mob, was currently serving twenty-one years in prison for assorted federal felonies including stolen securities, bail-jumping, conspiracy, and interstate transportation of stolen securities. *Id.* at 640. Further, the plaintiff had prior convictions for receiving stolen property. *Id.* Here, unlike the plaintiffs in *Ray* and *Cardillo* who spent their adult lives involved in crime, Mrs. Courtier has not had any issues with the law in decades. Mrs. Courtier was the victim of her upbringing because she had two addicts for parents who were not a part of her life. (J.A. at 5.). Her mother died when she was only ten years old, and her father died in prison. (J.A. at 5.). After that, Mrs. Courtier was forced to engage in criminal activities to support and feed herself. (J.A. at 5.). Despite all of the

adversity, Mrs. Courtier has since rehabilitated herself. (J.A. at 5.). She is now a business woman who devotes "much of her energy to altruistic endeavors." (J.A. at 16.).

Moreover, even if a plaintiff is not a habitual criminal, he may be libel-proof if the assertions in the contested communication are similar to the behavior that is the subject of the plaintiff's criminal conviction. *Finklea*, 742 S.W.2d at 517–18. In *Finklea v. Jacksonville Daily Progress*, the court held that the plaintiff was "'libel proof' as to that area of his character touched by the challenged communications" when a newspaper published that he was a convicted methamphetamine dealer and convicted of operating a burglary ring even though his convictions were for burglary, theft, and drug possession. *Id.* Here, unlike the plaintiff in *Finklea* whose convictions were similar to the assertions in the contested publication, Mrs. Courtier's past convictions are not similar in the slightest to Petitioner's assertions. Petitioner asserted that Mrs. Courtier was "a pimp for the rich," "a leech on society," "a whore for the poor," and "corrupt and a swindler." (J.A. at 5.). However, Mrs. Courtier has no criminal history as a pimp, a whore or a swindler. Mrs. Courtier's offenses include simple assault, simple possession of marijuana, indecent exposure, vandalism, and possession of cocaine. (J.A. at 15.). None of these offenses are remotely similar to the assertions that Petitioner makes. Lastly, Mrs. Courtier is not a leech whatsoever but a philanthropist who gives back to her community. (J.A. at 2.).

Finally, when a plaintiff has a tarnished past, if she has since reformed her life, she cannot be found libel-proof. *See Da Silva*, 908 F. Supp. at 187. In *Da Silva v. Time Inc.*, the plaintiff spent the ages of twelve through eighteen as a prostitute to support herself. *Id.* at 186. Several years after she had given this life up, Time Magazine published a picture of her in a story about world-wide prostitution. *Id.* Despite the defendant's effort to establish that the plaintiff was libel-proof, the court found that she was not libel-proof because she had since reformed her life. *Id.* at 187. Thus,

the Time Magazine story could harm her reputation, *id.* at 187, because she had since "moved to a new community and established a new reputation therein and had been married for nine months," *id.* at 186. Here, like the plaintiff in *Da Silva* who reformed her life, Mrs. Courtier has since become an upstanding businesswoman and philanthropist in Silvertown. Mrs. Courtier earned her G.E.D. and took community college classes as well as business classes. (J.A. at 5.). She then opened up a small clothing store which expanded into a line of clothing stores within Silvertown. (J.A. at 16.). Moreover, Mrs. Courtier has not simply reformed her life but she has become an active participant in reforming her entire community. Mrs. Courtier supports "causes related to educational equity, restorative justice, and affordable housing." (J.A. at 2.). Further, unlike the plaintiff in *Da Silva* who had only been reformed for a few years before the contested publication, Mrs. Courtier reformed her life decades ago and has been an upstanding member of the community ever since. Therefore, Mrs. Courtier's difficult past does not establish her as a libel-proof plaintiff.

2. <u>Mrs. Courtier's troubled youth has gained no notoriety or public attention.</u>

Mrs. Courtier is not a libel-proof plaintiff because her past has neither been previously publicized nor gained any notoriety or attention. A plaintiff cannot be libel-proof when the subject of the contested communication has not been previously published. *Brooks v. American Broadcasting Co.*, 932 F.2d 495, 501–02 (6th Cir.1991). Without prior publicity surrounding the subject of the contested communication, the plaintiff's reputation cannot have been previously damaged. *See, e.g.*, *id.* Therefore, even if a plaintiff has a criminal or anti-social history, if that history has not been shared with the public, he is not a libel-proof plaintiff. *See, e.g.*, *id.*; *Wynberg*, 564 F. Supp. at 928–29. In *Brooks v. American Broadcasting Co.*, the contested communication resulted from a 20/20 segment about the plaintiff *Brooks*, 932 F.2d at 496–97. Although local newspapers had previously mentioned his criminal history, *id.* at 497, the court denied a finding

that the plaintiff was libel-proof because "no popular television program or other publicity had" reported on his criminal history, *id.* at 502. Conversely, in *Guccione v. Hustler Magazine, Inc.*, the court held that the plaintiff was libel-proof because, before the contested communication within the national magazine Hustler, the plaintiff's adultery was publicized within other national publications such as Newsweek, New York Magazine, and the Washington Post. *Guccione*, 800 F.2d at 304. Moreover, in *Marcone v. Penthouse International Magazine for Men*, local media had reported on the plaintiff's criminal and anti-social past before the defendant published the contested communication within a national publication. *Marcone v. Penthouse Int'l Mag. for Men*, 754 F.2d 1072, 1079 (3d Cir. 1985). Despite the prior publications, the court noted that even if the plaintiff's reputation had been sullied, that did not make him libel-proof. *Id.*

Here, Mrs. Courtier is not a libel-proof plaintiff because her troubled past has gained no publicity. Unlike the information in the contested communications in *Brooks* and *Guccione*, the information that Petitioner published had never been published before. Moreover, like the publication in *Brooks* that expanded the audience that knew of the plaintiff's history, the publication here expanded the audience that knew of Mrs. Courtier's troubled youth. There is no evidence that Mrs. Courtier's troubled past had ever been publicized or that it had ever gained any notoriety. Thus, even though Petitioner did not publish it in an official news source, the act of publishing it on social media, where it is available to everyone in Silvertown, constitutes a publication to the degree Mrs. Courtier had never experienced before. Additionally, unlike the plaintiff in *Marcone* who had a sullied reputation, Mrs. Courtier is an upstanding member of her community. Mrs. Courtier owns a successful line of clothing stores, and she is heavily involved within the community. (J.A. at 16.). She "has advocated publicly against private, for-profit prisons, and in favor of restoring voting rights for former felons, increasing adult literacy, and improving

equity in education." (J.A. at 16.). Further, she is politically active and supports "causes relat[ing] to educational equity, restorative justice, and affordable housing." (J.A. at 2.). Consequently, Mrs. Courtier has a good reputation in Silvertown, and the publication of her troubled youth has the potential to harm that good reputation. Despite Mrs. Courtier's issues in her youth, she cannot be libel-proof because those issues had never been publicized before Petitioner took it into his own hands to do so.

Therefore, Mrs. Courtier is not a libel-proof plaintiff because her brush with the law decades ago did not gain any notoriety, and thus she does have a good reputation to protect.

B. Mrs. Courtier is not a libel-proof plaintiff pursuant to the incremental harm theory because the unconsented portions of Petitioner's publication are not merely subsidiary.

Because the uncontested portions of Petitioner's communication are not more damaging than the portions that Mrs. Courtier contested, Petitioner cannot prove that she is a libel-proof plaintiff. Unlike the issue-specific theory of the libel-proof plaintiff doctrine, "[t]he incremental libel-proof doctrine involves an examination of the challenged communication rather than a finding of a previously damaged reputation." *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. at 1912. Pursuant to the incremental harm theory of the libel-proof plaintiff doctrine, a plaintiff is libel-proof when he "challenges statements that damage his reputation substantially less than that caused by other, unchallenged statements in the same communication." *Id.* at 1925. Further, a plaintiff is not libel-proof when the contested portion of the communication causes substantial harm to his reputation in comparison to the entirety of the communication. *See, e.g., Simmons Ford, Inc*, 516 F. Supp. at 750. However, if the contested statement, in comparison to other statements, causes only incrementally more harm than the entirety of the communication, the plaintiff may be libel-proof. *Id.* Moreover, if the main gist of the publication is not actionable,

"other statements—even those that might be found to have been published with actual malice—should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery." *Herbert v. Lando*, 781 F.2d 298, 312 (2d Cir. 1986).

In *Simmons Ford, Inc. v. Consumers Union of United States, Inc.*, the defendant wrote an article critiquing the plaintiff's electric car. *Simmons Ford, Inc*, 516 F. Supp. at 744. Within the article the defendant stated that the plaintiff's car "suffered from poor acceleration, low top speed, poor braking, poor handling, poor ride, poor comfort and generally negative performance" and thus declared the car "Not Acceptable." *Id.* at 744–745 ("[w]e believe any such crash would imperil the lives of persons inside these tiny, fragile, plastic-bodied vehicles"). Moreover, the article incorrectly asserted that the car failed to meet the "mandatory federal regulations." *Id.* The plaintiff brought a defamation suit citing only the portion of the article misstating the federal regulation standards. *Id.* at 745. Despite the misstatement regarding the car's compliance with federal regulations, the court held that the plaintiff was libel-proof under the incremental harm theory because "the portion of the article challenged by plaintiffs, could not harm their reputations in any way beyond the harm already caused by the remainder of the article." *Id.* at 750. Further, because of "the abysmal performance and safety evaluations detailed in the article, plaintiffs could not expect to gain more than nominal damages based on the addition to the article of the misstatement relating to federal safety standards." *Id.*

Additionally, in *Herbert v. Lando*, the court held that if the gist of the publication is not actionable, "other statements—even those that might be found to have been published with actual malice—should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery." *Herbert*,

781 F.2d at 312. The plaintiff brought a defamation claim against the defendants (the narrator, producer, and broadcaster of a news program) citing eleven libelous statements. *Id.* at 302–304. However, the district court ruled that nine of the eleven statements were non-actionable. *Id.* at 304.The defendants argued for summary judgement because the two remaining "statements could not possibly harm [the plaintiff's] reputation beyond the damage already done by the 'nonactionable' statements." *Id.* at 304. The circuit court then found that defamation actions cannot be based "on subsidiary statements whose ultimate defamatory implications are themselves not actionable" and dismissed the plaintiff's libel action in its entirety. *Id.* at 312.

Here, Mrs. Courtier is not a libel-proof plaintiff under the incremental harm theory because the contested portions of the publication are more damaging than the uncontested portions. Unlike the contested communication in *Simmons Ford, Inc.* which stated an inaccuracy about a federal regulation, the contested portion of Petitioner's publication is more than a misstatement or inaccuracy. Mrs. Courtier contests Petitioner calling her "a pimp for the rich," "a leech on society," "a whore for the poor," and "corrupt and a swindler." (J.A. at 5.). These are not mere inaccuracies or misstatements but aggressive accusations. Moreover, unlike the uncontested communications in *Simmons Ford, Inc.* that were far more damaging than the contested portions, the uncontested statements here are no more damaging than the contested statements. Petitioner calls Mrs. Courtier a "woman who walked the streets strung out on drugs," "nothing more than a former druggie," and a "proprietor of a bunch of upscale, hoity-toity clothing stores that are lacking in class and substance." (J.A. at 4.). Being a recovered drug addict and successful businesswoman is less damaging, if damaging at all, compared to the contested statements which are ripe to cause substantial reputational damage to Mrs. Courtier. Further, unlike the contested statements in *Herbert* that the court deemed subsidiary, the contested statements in Petitioner's publication are

not subsidiary. His statements harm Mrs. Courtier's reputation more than the uncontested portions because they are not an outgrowth of or subsidiary to the uncontested statements. Petitioner's statements calling Mrs. Courtier "a pimp for the rich," "a leech on society," "a whore for the poor," and "corrupt and a swindler" are brand new ideas that are in no way related to the uncontested statements and cause reputational harm to Mrs. Courtier. Therefore, Mrs. Courtier is not a libel-proof plaintiff pursuant to the incremental harm theory.

C. <u>There is no place in the United States for the libel-proof plaintiff doctrine.</u>

The concept of the libel-proof plaintiff was created to ensure protection of First Amendment rights. *See Cardillo*, 518 F.2d at 639. However, as then-Judge Antonin Scalia declared, "no significant First Amendment values would be furthered" by the libel-proof plaintiff doctrine. *Liberty Lobby, Inc. v Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984). Judge Scalia went on to say he could not possibly envision how courts would determine "that *no* new reader could be reached by the freshest libel." *Id.* (emphasis in original). Further, the court then rejected the incremental harm theory in totality. *Id.* The court stated that "the theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety." *Id.* Therefore, it is good public policy to believe there is good in everyone, or that no matter how bad a reputation a plaintiff may have, it could always be worse. *Id.* ("It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot").

Only a few years after then-Judge Antonin Scalia made scathing remarks about the libel-proof doctrine, the Supreme Court of the United States rejected the incremental harm branch of the libel-proof doctrine finding that it had no grounding in the First Amendment, and thus, was therefore not valid under federal law. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991) ("[W]e reject any suggestion that the incremental harm doctrine is compelled as a matter

of First Amendment protection for speech"); *see also Church of Scientology Int'l v. Behar,* 238 F.3d 168, 175 (2d Cir. 2001) (noting that the "'incremental harm' doctrine is not a creature of federal constitutional law"). Since one branch of the libel-proof plaintiff doctrine has been struck down, courts have called into question the validity of the issue specific branch as well. *See e.g., Stern*, 645 F. Supp. at 271 (finding that "[t]he libel-proof plaintiff doctrine is to be sparingly applied (if at all)"); *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 390 n. 29 (S.D.N.Y. 1998) ("Because *Masson* rejected any basis for grounding the incremental harm defense in federal constitutional terms, the libel-proof plaintiff doctrine seems similarly vulnerable") (citations omitted). Moreover, the courts that have not completely struck down the issue-specific branch have determined that it is to be applied in very limited and narrow circumstances. *See, e.g.*, *Guccione*, 800 F.2d at 303 ("The libel-proof plaintiff doctrine is to be applied with caution, since few plaintiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements") (citations omitted); *Chastain v. Hodgdon*, 202 F. Supp. 3d 1216, 1223 (D. Kan. 2016) (denying a finding that the plaintiff was libel-proof because "[a] 'womanizer' is distinct from someone who sexually assaults or attempts to rape women. Even a "mad womanizer" could experience harm to his reputation from an accusation of sexual assault or attempted rape").

Therefore, there is no place in the American system of law for the libel-proof plaintiff doctrine. As such, this Court should find that Mrs. Courtier is not a libel-proof plaintiff. Not only do neither of the two branches of the libel-proof plaintiff doctrine apply to Mrs. Courtier, but the doctrine as a whole should be struck down. Thus, Mrs. Courtier respectfully requests that this Court affirm the district and Supreme Judicial Court's finding that she is not a libel-proof plaintiff.

II. The Court should affirm the Supreme Judicial Court's finding for Mrs. Courtier because she is entitled to a higher degree of constitutional protection against defamatory statements as a private figure.

Petitioner's statements regarding Mrs. Courtier's personal history constitute defamation because she is a private figure whose past is not a matter of public concern. The First Amendment of the U.S. Constitution guarantees an individual's right to freedom of speech. *See* U.S. Const. amend. I. Historically, this Court reasoned that the "ultimate good" of society is better reached through "free trade in ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (citing *Roth*, 354 U.S. at 484) ("The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'"). Thus, the national commitment to debate should be "uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270. Notably, the valued exchange of ideas is not "always [made] with perfect good taste," *id.* at 269 (citing *Bridges v. California*, 314 U.S. 252, 270 (1941)), and therefore, the protection offered by the First Amendment does not depend upon "'truth, popularity, or social utility of the ideas and beliefs which are offered,'" *id.* at 271 (citing *N.A.A.C.P. v. Button*, 371 U.S. 415, 445 (1963)). Furthermore, even "erroneous" statements are constitutionally protected in order to give freedom of expression the "breathing space" needed to survive. *See N.A.A.C.P.*, 371 U.S. at 433.

Finally, when determining whether speech is constitutionally protected, the court must examine "the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect[s]." *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 508 (1984). Hence, the court will review the record *de novo*. *See id.* at 492. Here, Mrs. Courtier is not a public figure and is therefore entitled to the higher degree of constitutional protection against defamation afforded private citizens. Furthermore, Petitioner's statements regarding Mrs. Courtier's personal history go well-beyond

constitutionally protected rhetorical hyperbole and qualify as defamation because the statements involve matters not of public concern.

A. Petitioner's statements are not constitutionally protected speech because Mrs. Courtier is a private figure,

Mrs. Courtier qualifies as a private figure for purposes of her defamation claim. The distinction between a public and private figure is important because the Constitutional standard for proving defamation differs between public and private figures. *Compare Gertz,* 418 U.S. at 343 (holding that private individuals seeking compensation in defamation claim should not be held to rigorous standard set forth *N.Y. Times*), *with Sullivan*, 376 U.S. at 279 (requiring public officials to show "actual malice" in order to recover damages for defamatory statements relating to official conduct). Some individuals are public figures for all purposes by virtue of their "especial prominence in the affairs of society," while others obtain a limited public figure status by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved . . . [thereby] invit[ing] attention and comment." *Gertz*, 418 U.S. at 345. In order to determine whether an individual qualifies as a public figure courts will examine the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352. Absent evidence of general fame, notoriety, and pervasive involvement in the affairs of society, courts are not likely to find that the individual is a public figure. *See id.* Moreover, "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167 (1979). Notably, this Court rejected the notion that engagement in criminal conduct automatically qualifies an individual as a public figure "for purposes of comment on a limited range of issues relating to his conviction" because removing constitutional protection would create an "'open season' for all who sought to defame persons

convicted of a crime." *Id.* at 168-69. Additionally, public figures enjoy greater access to "channels of effective communication" and therefore have a better opportunity to "counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344. Thus, private individuals are not only "more vulnerable to injury," but are also "more deserving of recovery." *Id.* at 345.

In *Time, Inc. v. Firestone*, the petitioner, the wife of a wealthy businessman, brought a suit against Time Magazine for publishing allegedly false and defamatory reports regarding domestic relations litigation between her and her husband. *Time, Inc. v. Firestone*, 424 U.S. 448, 450 (1976). Time argued that she should not be allowed to recover damages unless it could be proven that the magazine acted with actual malice given petitioner's status as a public figure. *Id.* at 453. However, the court held that the petitioner qualified as a private individual because she did not assume any prominent role in societal affairs, outside of Palm Beach society, nor did she thrust herself into the forefront of any public controversy. *Id.* Instead, the petitioner was dragged into the forefront as a result of judicial proceedings. *Id.* at 454. Additionally, the court opined that the dissolution of a high-profile marriage, while of interest to the public, was not the type of public controversy that *Gertz v. Robert Welch* envisioned. *Id.*

Additionally, in *Wolston v. Reader's Digest Association*, the petitioner was called to testify in litigation surrounding his aunt and uncle's involvement in a Soviet spy ring. *Wolston*, 443 U.S. at 161. However, on one occasion the petitioner failed to appear and was held in criminal contempt of court. *Id.* The litigation surrounding the petitioner's failure to appear resulted in multiple news stories; eventually the publicity subsided, and he returned to a private life. *Id.* at 163. However, as a result of the litigation, Reader's Digest published a book alleging that the petitioner had been a Soviet agent indicted for espionage. *Id.* at 159. The petitioner subsequently sued Reader's Digest.

Id. Both the district and appellate courts found that the petitioner qualified as a public figure because his voluntary failure to appear "invited attention and comment in connection with the public questions involved in the investigation of espionage." *Id.* at 165. However, this Court held that just because the petitioner failed to appear, knowing that his action may attract public attention, was not dispositive of the petitioner's public figure status. *Id.* at 167. Thus, the Court held that the petitioner retained his status as a private figure because he did not seek to "invite public comment" or "relinquish[ ] . . . his interest in the protection of his own good name." *Id.* at 168.

Allowing for the protection of defamatory statements made against a private citizen simply because of the individual's involvement in community organizations is at odds with our Constitutional jurisprudence. Like the wife in *Firestone* who married a public figure, Mrs. Courtier was once married to the long-serving former mayor of Silvertown, Raymond Courtier. (J.A. at 2.). Moreover, much like the wife in *Firestone* who did not assume any prominent roles in societal affairs outside of Palm Beach society, Mrs. Courtier has not assumed any prominent roles in societal affairs outside of her social circles. Mrs. Courtier is only locally involved with several philanthropic and charitable organizations throughout the community, such as affordable housing and educational equity. (J.A. at 2.). Further, Mrs. Courtier may be a successful businesswoman, but she owns a line of high-end clothing stores throughout only Silvertown. (J.A. at 2.). Admittedly, Mrs. Courtier may be well-known throughout the community as a result of her late husband's political career and her own involvement; however, she has not become anymore involved in community affairs than the average citizen. Accordingly, qualifying Mrs. Courtier as a public figure would open the door for defamation of civic-minded citizens seeking to affect

change simply by default of their involvement. Such fallacy would greatly discourage the political and social involvement that our country thrives on.

Furthermore, Mrs. Courtier's past does not qualify her as a public figure, nor does her involvement with Evelyn Bailord's campaign. Like the petitioner in *Wolston* who plead guilty to criminal contempt of court, Mrs. Courtier plead guilty to a criminal offense as a result of her tough upbringing. (J.A. at 5.). Moreover, Mrs. Courtier recently posted a column on her website promoting mayoral candidate Evelyn Bailord. (J.A. at 3–4.). However, such involvement does not invite comment on Mrs. Courtier's past under the principles established by this Court in *Wolston*. Such reasoning would allow for an "open season" on any individual with a criminal background, no matter how distant their past. Likewise, even though Mrs. Courtier's post attracted public attention, including that of Petitioner, she did not seek to invite comment on her past or relinquish protection of her own hard-earned, upstanding reputation. Consequently, Mrs. Courtier respectfully requests that the Court affirm her status as a private figure for purposes of her defamation claim.

B. Petitioner's statements about Mrs. Courtier surpass rhetorical hyperbole and qualify as defamation.

Petitioner's statements regarding Mrs. Courtier qualify as defamation under the First Amendment of the U.S. Constitution. The First Amendment seeks to provide protection that will ensure the "'unfettered interchange of ideas for bringing about of political and social changes desired by the people.'" *See Sullivan*, 376 U.S. at 269 (quoting *Roth*, 354 U.S. at 484). Unfortunately, open debate often leads to "vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.* at 270. Hence, defamation law provides individuals with the opportunity to vindicate their "good name" while obtaining redress for harm caused by defamatory statements. *See Milkovich v. Lorain J. Co.*, 497 U.S. 1, 12 (1990). Additionally, this Court recognized the privilege

of "fair comment" as an affirmative defense for "honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Id.* at 13. Thus, fair privilege seeks to strike a balance between "vigorous public discourse" and "redress for injury to citizens wrought by invidious or irresponsible speech." *Id.* at 14.

Further, private individuals receive more constitutional protection from defamation than public figures. In order for a public figure or official to succeed in a defamation claim, the allegedly defamed individual must prove that the defamatory statement was made with "actual malice." *Sullivan*, 376 U.S. at 280. Actual malice, as defined by this Court, requires knowledge that the statement was false or made with "reckless disregard" for whether it was false or not. *See id.*; *see also Masson*, 501 U.S. at 499 ; *Bose Corp.*, 466 U.S. at 511. Moreover, this Court acknowledged that although reckless disregard cannot be explained in one all-inclusive definition, the defendant must possess a "'high degree of awareness of . . . probable falsity,'" *id.* at 667 (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)), or "'entertain[ ] serious doubts as to the truth of his publication,'" *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In addition to determining whether the allegedly defamed individual is a public or private figure, the court must determine whether the speech at issue is a matter of public concern. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). While speech concerning public matters made against public officials or figures requires the actual malice standard, speech that is of public concern when the plaintiff is a private figure allows states to "define for themselves the appropriate standard of liability" so long as they do not impose liability without fault. *See Gertz*, 418 U.S. at 347.

Finally, statements fall within the purview of rhetorical hyperbole when they cannot be "reasonably . . . understood as describing actual facts . . . or actual events." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 57 (1988). To determine whether a statement qualifies as rhetorical

hyperbole courts have evaluated the statement in light of surrounding circumstances and how a "person of ordinary intelligence would perceive it." *Campbell v. Clark*, 471 S.W.3d 615, 625 (Tex. Ct. App. 2015). Furthermore, courts are likely to find that a statement qualifies as rhetorical hyperbole when the statement employs exaggeration meant to deter a literal interpretation. *See Clifford v. Trump*, 339 F. Supp. 3d 915, 926 (C.D. Cal. 2018); *see also Greenbelt Co-op Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (holding use of the word "blackmail" to describe respondent's unreasonable negotiating position qualifies as rhetorical hyperbole because statement represented "vigorous epithet" that even the most careless reader would not perceive as truth); *Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) (holding appellant's use of the word "scab" to describe non-union members as rhetorical hyperbole). Specifically, this Court found that a statement "pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage" does not rise to the level of defamation. *See Milkovich*, 497 U.S. 1 at 32.

Here, precedent favors a finding that Petitioner's statements qualify as defamation. In *Overhill Farms v. Lopez*, disgruntled former employees of Overhill Farms issued a press release, conducted demonstrations, and distributed pamphlets and flyers alleging that their termination was the result of Overhill's racist and discriminatory policies. *Overhill Farms, Inc. v. Lopez*, 119 Cal. Rptr. 3d 127, 134–35 (Cal. Ct. App. 2010). However, the former employee-defendants misrepresented the circumstances surrounding their termination; in effect, the defendants were fired for failure to provide Overhill with valid social security numbers after Overhill made multiple requests to do so. *Id.* at 133. Overhill filed a complaint against defendants alleging, among other things, defamation and intentional interference with contractual relations. *Id.* at 134–35. Ultimately, the Court of Appeal held that because the defendants consistently characterized Overhill as a racist company while referencing its decision to terminate a large group of "Latino

immigrant workers," the assertion of racism "when viewed in that specific factual context" went beyond rhetorical hyperbole. *Id.* at 140. Furthermore, the court found that the defendants did not "fully and accurately" disclose the facts surrounding their termination; rather, Overhill provided ample evidence that the defendants made the statements with knowing or reckless disregard of the truth. *Id.* at 141–43.

Additionally, in *Hustler Magazine v. Falwell*, Jerry Falwell, a nationally known minister, sued Hustler after the magazine published a fake, satirical interview with Falwell. *Falwell*, 485 U.S. at 48. In the satirical interview, Falwell claimed that his first sexual encounter was a "drunken incestuous rendezvous" with his mother in an outhouse. *Id.* The court conceded that Hustler's publication, which included Falwell's name and picture, was offensive to Falwell and "repugnant in the eyes of most." *Id.* at 50. Nevertheless, the court found that Hustler's publication was not reasonably understood as describing actual facts about Falwell or actual events in which he participated. *Id.* at 57. As a result, the court determined that the publication constituted rhetorical hyperbole, and it held in favor of Hustler Magazine. *See id.*

In the instant case, Petitioner cannot prove that his statements qualify as rhetorical hyperbole, especially when compared with precedent. First, Petitioner accused Mrs. Courtier of being a "coddler of criminals" while mentioning the childhood struggles that resulted in Mrs. Courtier's imprisonment as a young adult before turning her life around. (J.A. at 4.). Even more reprehensible is Petitioner's use of such phrases as "pimp for the rich" and "whore for the poor" when describing the upscale retail businesses Mrs. Courtier worked hard to develop. (J.A. at 4.). Unlike the respondent in *Falwell* who was a nationally known minister, Mrs. Courtier is not even a regionally known public figure. She is simply an upstanding citizen in her small community of Silvertown. Furthermore, Petitioner's statements are distinguishable from the statements made in

Falwell because Petitioner did not make an embellished statement that no reasonable reader would believe; instead, Petitioner used derogatory language such as "lewd and lusty lush" and "woman who walked the streets strung out on drugs" to reference a factual part of Mrs. Courtier's past. (J.A. at 4.). Moreover, Petitioner picked a very specific and narrow part of Mrs. Courtier's past, intentionally omitting that while Mrs. Courtier may have been imprisoned at one point long ago, she rehabilitated herself, earned her G.E.D., enrolled in community college and started a successful business. (J.A. at 5). Additionally, Mrs. Courtier now gives back to the community through her involvement in multiple charitable organizations. (J.A. at 2.). Thus, Petitioner did not fully and accurately disclose all of the facts, thereby making his statement a mischaracterization much like the one in *Overhill*. Thus, Petitioner's statements are not rhetorical hyperbole but defamation of Mrs. Courtier.

For the aforementioned reasons, Mrs. Courtier is a private figure who has been attacked with defamatory and libelous language that cannot be deemed rhetorical hyperbole, denying her her individual right to protect her reputational interests. Therefore, Mrs. Courtier respectfully requests that this Court affirm the Supreme Judicial Court of State of Tenley's decision to not strike or dismiss Mrs. Courtier's defamation lawsuit.

CONCLUSION AND PRAYER FOR RELIEF

Protecting the constitutionally mandated freedom of speech is critical to preserving the "unfettered interchange of ideas" on which this country depends for the betterment of society. However, the societal betterment gained from open debate and discussion must remain balanced when weighed against the need to protect individuals from reputational harm caused by defamatory statements. In the instant case, Ms. Courtier is an upstanding member of the Silvertown community. Admittedly, she did have a rough start in life, but through hard work and perseverance, she turned her life around. Not to mention, Ms. Courtier continually seeks to improve her community through charity work and support of those candidates she considers most qualified for public office. As such, Ms. Courtier deserves the full breadth of constitutional protection afforded all private individuals who have worked hard to better themselves and their surrounding community.

For these reasons, Ms. Courtier respectfully requests that this Court affirm the Supreme Judicial Court's decision. Ms. Courtier specifically requests that this Court find that she does not qualify as a libel-proof plaintiff and that Petitioner's comments regarding Ms. Courtier's past qualify as defamation.

Respectfully Submitted,

/s/
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