IN THE SUPREME COURT OF THE UNITED STATES

ELMORE LANSFORD,

Case No.: 18-2143

Petitioner,

v.

SILVIA COURTIER,

Respondent.

ON WRIT OF CERTIORARI FOR THE SUPREME JUDICIAL COURT OF TENLEY

RESPONDENT'S BRIEF

Team: 219901

QUESTIONS PRESENTED

(1) 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?

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

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

STATEMENT OF THE CASE

This Court is being asked to affirm the decision of the Supreme Judicial Court of the State of Tenley which denied Petitioner's motion to dismiss, holding that Mrs. Courtier was not a libel-proof plaintiff, and the statements made by Petitioner were not rhetorical hyperbole. (J.A. at 19, 23.).

Mrs. Courtier is a public figure who contributes heavily within the Silvertown community to philanthropic and charitable activities. (J.A. at 2, 21.). In recent years following her husband, Mayor Raymond Courtier's, death, Mrs. Courtier has become increasingly politically active, advocating for educational equity, restorative justice, and affordable housing. (J.A. at 2.). In addition, Mrs. Courtier owns a line of clothing stores catering to the affluent in the city of Silvertown. (J.A. at 2.).

Petitioner, Elmore Lansford, is the current mayor of Silvertown and a former city council member. (J.A. at 3.). Mrs. Courtier has critiqued the leadership and motives of the Petitioner because he has supported efforts by developers to create new high-rise developments in Cooperwood, an area of town previously known for public housing complexes and low-rent housing options. (J.A. at 3.). His "cleaning up Cooperwood" campaign has consisted of sending police patrols to more vigorously enforce laws in Cooperwood which has resulted in allegations of racial profiling and police brutality. (J.A. at 3.).

In the most recent mayoral election, Mrs. Courtier avidly supported Petitioner's opponent, Evelyn Bailord. (J.A. at 3.). As a supporter of Ms. Bailord, Mrs. Courtier wrote online commentaries criticizing Petitioner's mayoral campaign. (J.A. at 3.). Some of the criticism labeled Petitioner as "a divisive leader," uncompassionate, and "someone who cares little for social justice issues." (J.A. at 3-4.). Petitioner was angered by Mrs. Courtier's criticism and retaliated by publishing an article full of insults, labeling Mrs. Courtier as a "pimp for the rich,"

"whore for the poor," "leech on society," and accusing her of being "corrupt" and a "swindler." (J.A. at 4.). Petitioner also brought up Mrs. Courtier's past and embellished a crime that she committed several decades ago, stating that Mrs. Courtier was a woman who walked the streets strung out on drugs and nothing more than a former druggie. (J.A. at 4.).

Sadly, Mrs. Courtier had a tough childhood that contributed to her run-ins with the law in her youth. (J.A. at 5.). Her father was addicted to drugs and unfortunately was killed in prison. (J.A. at 5.). Her mother was also addicted to drugs and died of an overdose when Mrs. Courtier was ten years old. (J.A. at 5.). Mrs. Courtier was also sexually abused by an older man as an adolescent. (J.A. at 5.). This all led to Mrs. Courtier committing several crimes during her teenage years, such as stealing, to support herself. (J.A. at 5, 15.). She was adjudicated delinquent during a judicial proceeding. (J.A. at 5.). In her early 20s, Mrs. Courtier developed an addiction to drugs like her parents and ultimately pled guilty to one count of possession which she served two years in prison for. (J.A. at 5, 15-16.).

In spite of her incarceration, Mrs. Courtier did not allow herself to end up like her parents and, instead, rehabilitated herself in prison. (J.A. at 5.). She earned her G.E.D. and enrolled in community college classes where she took every business class that the prison offered. (J.A. at 5.). Upon her release, she opened up her first business, a small-scale clothing operation. (J.A. at 5.). The venture quickly generated income and notoriety which led to it developing into the large business that she has now. (J.A. at 5.). Around that time, she also met Raymond Courtier who ultimately became her husband and served as the primary investor in her exclusive clothing stores. (J.A. at 2, 5.). Mrs. Courtier has not participated in criminal activities in several decades. (J.A. at 10.).

Because of the damaging and false statements published in the article, Mrs. Courtier sued Petitioner for defamation of character and false light invasion of privacy contending that Petitioner defamed her with the accusatory statements made in his published article including calling her "a pimp for the rich," "a leech on society," "a whore for the poor," and "corrupt and a swindler." (J.A. at 5-6, 22). These statements portrayed her in a false light by claiming that she was an inveterate criminal. (J.A. at 5-6.). In response, Petitioner filed a motion to dismiss/strike Ms. Courtier's lawsuit on the basis that her lawsuit was a strategic lawsuit against public participation. (J.A. at 6.). The state of Tenley has a law, called the Tenley Citizens' Public Participation Act, which protects defendants from lawsuits that target them for expression that should be protected by the First Amendment. (J.A. at 2, 6.). Such a law is often called an anti-SLAPP statute. (J.A. at 2.). Petitioner contended that his statements were true and that his defamatory statements were mere epithets or name-calling, protected as rhetorical hyperbole. (J.A. at 6.). Finally, he argued that Mrs. Courtier falls within the libel-proof plaintiff doctrine, because she is a former felon who has no good reputation to protect. (J.A. at 6, 18.).

The Supreme Judicial Court of the State of Tenley reversed the Tenley District Court's granting of Petitioner's motion to dismiss and held that Mrs. Courtier was not a libel-proof plaintiff and that the statements made by Petitioner could not be dismissed as rhetorical hyperbole. (J.A. at 19, 23.). Furthermore, the Court reasoned that even if Mrs. Courtier would not be able to prevail in her underlying defamation claim, the lawsuit should not be dismissed in such an early stage of litigation where Mrs. Courtier has been called names that called into question her competence and professionalism as a business person. (J.A. at 23.).

SUMMARY OF THE ARGUMENT

An individual should not automatically be considered 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. The issue-specific libel-proof plaintiff doctrine applies here, which states that a court may not render a plaintiff libel-proof based on past criminal convictions without notoriety. Furthermore, automatically rendering plaintiffs libel-proof solely based on prior criminal convictions raises constitutional concerns on due process and equal protection grounds.

This Court should adopt the issue-specific libel-proof plaintiff doctrine over the incremental harm doctrine. The incremental harm doctrine does not apply here because it has yet to be determined whether Petitioner's statements are actionable. Rather, this Court is being asked to make a determination about libel-proof plaintiff doctrine in a narrowed context which lends itself to the use of the issue-specific doctrine.

Under the issue-specific libel-proof plaintiff doctrine, criminal convictions alone, including felonies, do not render a plaintiff libel-proof. While courts have held that habitual criminals may be held libel-proof, Mrs. Courtier does not fall into that category. Furthermore, a genuine issue of material fact remains as to whether and to what extent Mrs. Courtier's reputation has been affected by Petitioner's defamatory statements.

Additionally, notoriety or public attention is an essential element for rendering a plaintiff libel-proof based on prior criminal convictions under the issue-specific libel-proof plaintiff doctrine. Courts have expressed that notoriety is even important for felony convictions. There is no evidence in the record to suggest that Mrs. Courtier's criminal history has received any notoriety or public attention.

Rendering a plaintiff libel-proof solely based on past criminal convictions that have gained no notoriety or public attention creates a class of individuals which triggers constitutional concerns. If adopted, this government classification would infringe on the fundamental right to due process by automatically excluding libel plaintiffs with criminal histories from the courts. Violations of fundamental rights trigger strict scrutiny which is rarely satisfied. Mrs. Courtier would be unable to bring any type of defamation action despite the fact that she has successfully rehabilitated her reputation.

Petitioner's statements about Mrs. Courtier should be classified as defamation and are not protected under the First Amendment. Defamatory statements cause reputational harm. Specifically, Petitioner's statements are libelous. Libel is a published false statement that damages a person's reputation.

There are several elements required for a valid defamation claim. These include identification, publication, defamatory meaning, falsity, statement of fact, and damages. The identification element is satisfied because it is clear that the person referred to in Petitioner's statements is Mrs. Courtier. Furthermore, the publication element is satisfied because Petitioner published the defamatory statements on his website.

Statements have defamatory meaning when they could be reasonably interpreted as stating actual facts and were made with actual malice. The element of defamatory meaning is satisfied here because Mrs. Courtier's community reputation has been tarnished by the statements. The defamatory statements by Petitioner are falsehoods stated as fact that could reasonably be interpreted as true. Petitioner's defamatory statements have exposed Mrs. Courtier to possible hatred, ridicule, and contempt. Finally, damages are warranted in this case because Petitioner's fabricated statements were made with actual malice.

Petitioner's statements do not satisfy the requirements for rhetorical hyperbole which is protected under the First Amendment. For a statement to be categorized as rhetorical hyperbole, it must not imply criminal conduct, and even the most careless reader should perceive the statement to be rhetorical hyperbole. Petitioner's use of words implied criminal activity. For those who do not know Mrs. Courtier, it would be difficult to discern which statements about her were true.

For these reasons, this Court should hold that an Mrs. Courtier should not automatically be considered 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 and that the statements made by Petitioner are unprotected defamation, not rhetorical hyperbole. This Court should affirm the Supreme Judicial Court of the State of Tenley's judgment.

ARGUMENT

I. AN INDIVIDUAL SHOULD NOT AUTOMATICALLY BE CONSIDERED 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.

An individual should not automatically be rendered a libel-proof plaintiff for purposes of defamation law solely on the basis of past criminal convictions, including a felony, that have no notoriety or public attention. Libel-proof plaintiffs' reputations are so bad that even defamatory statements do not damage their reputation, and therefore, they are barred from recovery. *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909 (1985). The doctrine was first utilized by the Second Circuit in *Cardillo* and has since been applied in a variety of state and federal courts. *Cardillo v. Doubleday & Co.*, 518 F.2d 639 (2d Cir. 1975); *see generally The Libel Proof Plaintiff*, *supra*.

Petitioner argues that Mrs. Courtier is a libel-proof plaintiff "because she is a former felon who has no good reputation to protect." (J.A. at 6, 18.). However, this is not the case. While an individual should not be considered libel-proof solely on the basis of past criminal convictions that have gained no notoriety or public attention under both iterations of the doctrine, this Court should adopt the issue-specific libel-proof plaintiff doctrine. Furthermore, the issue-specific libel-proof plaintiff doctrine does not render a plaintiff libel-proof solely on the basis of prior criminal convictions because notoriety is a required element for doing so. Creating a class of individuals excluded from bringing libel suits solely based on prior criminal convictions is concerning and creates constitutional due process and equal protection concerns.

A. THIS COURT SHOULD ADOPT THE ISSUE-SPECIFIC LIBEL-PROOF PLAINTIFF DOCTRINE.

There are two main branches of the libel-proof plaintiff doctrine, the incremental harm doctrine and the issue-specific libel-proof plaintiff doctrine. This Court should adopt the latter because the incremental harm doctrine is not suited to the issue this Court is presented with.

Under the incremental harm doctrine, the challenged statements are examined in the context of the entire communication. *The Libel-Proof Plaintiff Doctrine*, *supra* at 1912–13. The plaintiff may be held libel-proof if his or her reputation is harmed less by the challenged statements than the unchallenged parts of the communication. *Id.* at 1913. A court will dismiss the entire libel action if the challenged statements cause no additional damage in addition to the damage caused by the unchallenged portions of the communication. *Id.*

Proponents of the approach argue that it provides "a balance between the plaintiff's reputational interests on the one hand and the interests of judicial efficiency and protection of First Amendment interests on the other." Kevin L. Kite, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine*, 73 N.Y.U. L. Rev. 529, 548 (1998). The doctrine was first applied in *Simmons*, where alleged defamatory statements about a car's compliance with federal safety standards did not outweigh the unchallenged, negative results of various evaluations discussed in an article. *Simmons Ford, Inc. v. Consumers Union of U.S., Inc.*, 516 F. Supp. 742, 750-51 (S.D.N.Y. 1981). While this Court has held that the incremental harm doctrine is not compelled by the First Amendment, it has given states the freedom to apply the doctrine in their courts. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991).

However, most courts have adopted the issue-specific libel-proof plaintiff doctrine over the incremental harm approach. *The Libel-Proof Plaintiff Doctrine*, *supra* at 1910-11. Under the issue-specific libel-proof plaintiff doctrine, an individual may be held libel-proof on a specific

issue if he or she already has a bad reputation when it comes to that issue. *Id.* The plaintiff's poor reputation can be the result of prior published statements, but publication in writing is not required. James A. Hemphill, *Libel-Proof Plaintiffs and the Question of Injury*, 71 Tex. L. Rev. 401, 406 (1992). Proponents of the issue-specific approach argue that it alleviates concerns that the libel-proof plaintiff doctrine generally creates "blanket immunity for the press or an open season on libel plaintiffs." *The Libel-Proof Plaintiff Doctrine*, *supra* at 1911. The doctrine was first applied in *Cardillo*, the origin of the libel-proof plaintiff doctrine generally, though it was not explicitly labeled as such. Hemphill, *supra* at 406.

In *Thomas*, the court analyzed the application of both the incremental harm and issue-specific libel-proof plaintiff doctrines. *Thomas v. Tel. Publ'g Co.*, 929 A.2d 993, 1002-06 (2007), *as modified on denial of reconsideration* (Aug. 29, 2007). In that case, the plaintiff challenged 58 alleged defamatory statements in a news article published in the *Nashua Telegraph* about his involvement in criminal activities. *Id.* at 319. Plaintiff admitted to having an extensive criminal history as part of the discovery phase of the case. *Id.* at 1003. The court held that the incremental harm doctrine did not apply because it had not been determined which challenged statements were actionable. *Id.* at 1004. Rather, the court applied the issue-specific approach, reasoning that "a convicted criminal may have such a poor reputation that no further damage to it [i]s possible at the time of an otherwise libelous publication." *Id.* at 1004-05 (quoting *Jackson v. Longcope*, 476 N.E.2d 617, 620 (1985).

In the instant case, the Court has yet to determine whether the statements are actionable. (J.A. at 24). As a result, this Court should apply the issue-specific libel-proof plaintiff doctrine as the court did in *Thomas*. That court analyzed the libel-proof plaintiff doctrine in a limited context as this Court is being asked to do. (J.A. at 24.). A narrow, issue-specific approach to the libel-

proof plaintiff doctrine has been applied to this case over the course of litigation (J.A. at 10-11, 20-21.).

B. CRIMINAL CONVICTIONS ALONE, INCLUDING FELONIES, DO NOT RENDER A PLAINTIFF LIBEL-PROOF UNDER THE ISSUE-SPECIFIC LIBEL-PROOF PLAINTIFF DOCTRINE.

Prior criminal convictions can be a useful tool when determining whether a plaintiff is libel-proof. However, criminal convictions alone do not render a plaintiff libel-proof.

In *Cardillo*, plaintiff filed a complaint about alleged libelous statements published in the book entitled *My Life in the Mafia*. *Cardillo*, 518 F.2d at 639. Plaintiff was mentioned by the author as participating in the criminal activities described in the book. *Id.* At the time of publication, plaintiff was serving 21 years in federal prison for convictions on several felony offenses. *Id.* at 640. The court held that plaintiff was libel-proof because his extensive adult criminal record rendered him unable to seek relief for the alleged damage. *Id.* at 639-40.

In *Brooks*, however, the court declined to name the plaintiff libel-proof despite his lengthy criminal record. *Brooks v. Am. Broad. Companies, Inc.*, 932 F.2d 495, 501–02 (6th Cir. 1991). In that case, the plaintiff filed a complaint alleging that ABC had libeled him by broadcasting remarks made by television personality Geraldo Rivera about his alleged involvement with a criminal case on the popular television program "20/20." *Id.* at 496-97. Prior to Rivera's remarks, plaintiff had been taken into custody by law enforcement 20 times and convicted of several crimes including breaking and entering, grand larceny, first-degree manslaughter, and carrying a concealed weapon under disability. *Id.* at 497. Nonetheless, the court declined to hold that the plaintiff was automatically libel-proof based on his prior criminal history because "genuine issues of material fact remain[ed] as to whether defendants' statements could have done further damage to Brook's already tarnished reputation." *Id.* at 501-02. The

court reasoned that while some local residents knew of plaintiff's criminal history, his history had not been publicized on a national level nor in the terms that Rivera used. *Id.* at 502.

In the instant case, Mrs. Courtier's prior criminal history should not automatically render her libel-proof. Mrs. Courtier is situated differently from the plaintiff in *Cardillo* because her criminal record occurred primarily while she was a juvenile. (J.A. at 5, 15-16.). Furthermore, it would be a stretch to consider Mrs. Courtier a habitual criminal considering that she has not participated in criminal activities in several decades. (J.A. at 10.).

Similar to *Brooks*, there is a genuine issue of material fact to whether Mrs. Courtier's reputation has been negatively affected by Petitioner's defamatory statements. While the record is silent to the effects that Petitioner's statements have had on Mrs. Courtier's public reputation, it makes clear that Mrs. Courtier has made efforts to make a good name for herself after she completed her incarceration several decades ago including becoming a business owner, politically, active, and engaging in "altruistic, charitable, and philanthropic efforts." (J.A. at 2, 5, 21.).

C. NOTORIETY OR PUBLIC ATTENTION OF PAST CRIMINAL CONVICTIONS IS AN ESSENTIAL ELEMENT FOR RENDERING A PLAINTIFF LIBEL-PROOF BASED ON THOSE CONVICTIONS UNDER THE ISSUE-SPECIFIC LIBEL-PROOF PLAINTIFF DOCTRINE.

Notoriety is an essential element to be considered when determining whether a plaintiff is libel-proof based on prior criminal convictions. Courts have even held that notoriety is essential for rendering plaintiffs libel-proof based on prior felonies. *See Ray v. Time, Inc.*, 452 F. Supp. 618, 619 (W.D. Tenn. 1976), *aff'd*, 582 F.2d 1280 (6th Cir. 1978); *Davis v. The Tennessean*, 83 S.W.3d 125, 126 (Tenn. Ct. App. 2001). The notoriety element is essential for maintaining the safeguard that the issue-specific approach hopes to protect. *The Libel-Proof Plaintiff Doctrine*, *supra* at 1911.

In *Ray*, plaintiff filed suit against "Time" magazine for publishing "malicious article[s] with deliberate fabrications" about him. *Ray* 452 F. Supp. at 619. Plaintiff alleged that he was libeled by being referred to as a narcotics addict, and a robber in the articles at issue. *Id.* at 622. However, plaintiff had previously confessed to and been convicted of the murder of Martin Luther King Jr. *Id.* at 621. The court held that plaintiff was libel-proof "in light of all the circumstances" in the case. *Id.* at 622. While the court did not give specific details as to the extent of public attention that Ray's murder conviction received, it alluded to the effect its newsworthy nature had on plaintiff's reputation. *Id.* The assassination of Martin Luther King Jr. was so notorious that it gained international attention which the tragedy still retains today.

In *Davis*, plaintiff sued a newspaper that published a story stating that he killed a man when his co-conspirator was the one who actually committed the murder. *Davis v. The Tennessean*, 83 S.W.3d 125, 126 (Tenn. Ct. App. 2001). Plaintiff was convicted of aiding and abetting in the murder. Id. The court held that plaintiff was libel-proof because his reputation was "virtually valueless," echoing the lower court's decision. *Id.* at 131. The court reasoned that plaintiff's reputation with the public had already been tarnished by the crime he was convicted of, and the inaccurate attribution as murderer did nothing to harm that reputation *Id.* The court adopted the trial court's description of the prior plaintiff's conviction as "infamous." *Id.* at 127.

As noted above, the court in *Thomas* applied the issue-specific doctrine to a case involving a plaintiff who challenged fifty-eight alleged defamatory statements in a news article. *Thomas* 929 A.2d at 1000. While plaintiff had a lengthy criminal history, his prior convictions and arrests received little attention. *Id.* at 1005. Even though plaintiff admitted to having an extensive criminal history, the court held that plaintiff was not libel-proof. *Id.* at 1003, 1005. The court focused on the importance of notoriety when determining whether past criminal history

renders a plaintiff libel-proof, reasoning that "publicity is part and parcel of the damage to a reputation necessary to trigger the issue-specific version of the libel-proof plaintiff doctrine." *Id.* at 1005.

In contrast to the plaintiffs in *Ray* and *Davis*, there is no evidence to suggest that Mrs. Courtier's criminal history was well-known, if at all, by the public at the time of publication of Petitioner's libelous statements. Most of Mrs. Courtier's criminal activity took place while she was a juvenile. (J.A. at 5, 15.). It is possible that Mrs. Courtier's juvenile convictions have been destroyed, expunged or sealed, although the record does not say for sure. One of the purposes of the juvenile court system is to give individuals a chance to rehabilitate themselves and reintegrate back into society without as many consequences as an adult conviction. § 8:52. Destruction of records, 2 Children & the Law: Rights and Obligations § 8:52. Mrs. Courtier's only conviction as an adult involved pleading to drug possession. (J.A. at 16.).

Similar to the plaintiff in *Thomas*, there is no evidence in to suggest that Mrs. Courtier's criminal past was publicized in the media at the time of the offenses. If anything, Mrs. Courtier is "notorious" for her civic engagement, philanthropic efforts, and business acumen, not her criminal history. (J.A. at 2.).

Automatically holding a plaintiff libel-proof for prior criminal history without the notoriety element would invalidate one of the main purposes behind the issue-specific doctrine. As previously emphasized, the issue-specific branch of the doctrine was developed to prevent individuals from having free reign to say otherwise defamatory statements without legal consequences and to protect libel plaintiffs from unfair treatment. *The Libel-Proof Plaintiff Doctrine*, *supra* at 1911. It would be unfair to preclude Mrs. Courtier from seeking relief in the courts solely because of youthful indiscretions.

D. CLASSIFYING AN INDIVIDUAL AS A LIBEL-PROOF PLAINTIFF SOLELY ON THE BASIS OF PAST CRIMINAL CONVICTIONS THAT HAVE GAINED NO NOTORIETY OR PUBLIC ATTENTION CREATES DUE PROCESS AND EQUAL PROTECTION CONCERNS.

Classifications by the government that infringe on the fundamental rights held by the members of a class trigger an equal protection analysis subject to strict scrutiny. Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 Santa Clara L. Rev. 121, 148 (1989). Government actions that trigger strict scrutiny are likely to be held unconstitutional. *Id.* at 149. If this Court were to classify individuals as libel-proof solely on the basis of past criminal convictions with no notoriety, the class' Constitutional right to due process would be violated. U.S. Const. amend. V & XIV, § 1. The Fifth Amendment guarantees due process in the federal context, and the Fourteenth Amendment guarantees due process on the state level. U.S. Const. amend. V & XIV, § 1. The D.C. Circuit has noted that those with criminal histories "must be assured that they have a stake in our society, and that they can achieve justice by application to the law and its guardians." *Davis v. United States*, 409 F.2d 453, 457 (D.C. Cir. 1969).

Due process is a fundamental right because it is explicitly mentioned in the Constitution. Evelyn A. Peyton, *Rogues' Rights: The Constitutionality of the Libel-Proof Plaintiff Doctrine*, 34 Santa Clara L. Rev. 179, 199 (1993). There would be a violation of due process in this case because all libel plaintiffs with criminal histories would be precluded from seeking a remedy for alleged libelous statements in the courts, essentially putting these individuals outside the protections that the Constitution provides. *Id.* at 200-01.

Infringement on a fundamental right takes place when the "exercise of the right is backed by threat of legal sanctions." Galloway, *supra* at 149. While the application of the libel-proof plaintiff doctrine solely on the basis of criminal history is not an outright ban on the exercise of due process rights supported by legal sanctions, libel plaintiffs with criminal histories would be

both substantially deterred from pursuing libel actions and effectively barred from exercising their due process rights which this Court has also held to qualify as infringement of a fundamental right. *Id.*; *See also Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (where plaintiff's right to travel was substantially deterred by New York law).

In order to satisfy the strict scrutiny test, "the government must prove that the classification was designed to serve an actual legitimate and compelling . . . interest, that the classification is a substantially effective means for furthering that purpose, and that no less onerous alternative is available. Galloway, *supra* at 149–50. In the context of applying the libel-proof plaintiff doctrine automatically to individuals with criminal histories, the government would have difficulty satisfying these factors. While the courts have an interest in limiting frivolous suits, there is at least one less onerous alternative available to the blanket rule proposed by Petitioner, the issue-specific libel-proof plaintiff doctrine.

The exclusion of Mrs. Courtier from the courts solely based on her criminal history would be clear violation of her constitutional due process rights. Mrs. Courtier should have her day in court regardless of whether her claims will succeed on the merits.

II. THE STATEMENTS MADE BY PETITIONER ARE UNPROTECTED DEFAMATION AND NOT RHETORICAL HYPERBOLE.

Petitioner's false statements about Mrs. Courtier were defamatory because the statements could reasonably be interpreted as stating actual facts about Mrs. Courtier and were made with actual malice that harmed her good reputation, thus not affording the statements constitutional protection. The First Amendment of the Constitution states that Congress shall make no law "abridging the freedom of speech or of the press…" U.S. Const. amend. I. Petitioner is challenging Mrs. Courtier's suit based on the Tenley Citizens' Public Participation Act which

was enacted to protect defendants from lawsuits that target them for expression that is protected by the First Amendment. Tenley Code Ann. §5 – 1 – 701 et seq.

In order for plaintiffs to have a valid defamation claim, they must satisfy all of the elements of defamation, which include identification; publication; defamatory meaning; falsity; statement of fact; and damages. David L. Hudson, Jr. *First Amendment Law: Freedom of Speech*, §5:7. Further, to prove that a statement had defamatory meaning, the plaintiff must prove that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 134 (1967). Petitioner's statements about Mrs. Courtier were made with actual malice and defamed Mrs. Courtier's good reputation.

Petitioner's false statements were not rhetorical hyperbole or mere epithets and could reasonably be interpreted as stating actual facts and accusing Mrs. Courtier of actual crimes, consequently, defaming her. Statements that can reasonably be interpreted as stating actual facts about an individual are not considered rhetorical hyperbole and are not protected under the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). A rhetorical hyperbole is an imaginative expression of emotion not capable of being reasonably interpreted as stating actual facts about an individual. *Id.*

A. PETITIONER'S STATEMENTS ARE DEFAMATORY AND NOT PROTECTED UNDER THE FIRST AMENDMENT.

Petitioner's statements referring to Mrs. Courtier as "a pimp for the rich," "a leech on society," "a whore for the poor," and "corrupt and a swindler" are reasonably susceptible to having a defamatory meaning. (J.A. at 22.). Petitioner's accusations of Mrs. Courtier being corrupt, and a swindler damaged her good reputation as a business owner and a public figure advocating for the rights of the less fortunate and were libelous in nature. Libel is a published

false statement that is damaging to a person's reputation; a written defamation. *Libel, Merriam-Webster Dictionary* (11th ed. 2019). Libel law provides redress for injuries to a person's reputation caused by statements that "tend to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number in the community." *Golub v. Enquirer/Star Grp.*, 681 N.E.2d 1282, 1283 (1997). Where a statement on a matter of public concern implies false and defamatory facts regarding a public figure, the statement is not privileged if the public figure can show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. *Milkovich*, 497 U.S. at 20. If a reasonable factfinder can conclude that the statement at issue implies an assertion that the individual who the statement is about actually committed the conduct in the statement, then the statement is not privileged and is defamatory. *Id.* at 21.

The core of a defamation claim is reputational harm, and there are several elements that an individual must satisfy in order to have a valid defamation claim, including: identification; publication; defamatory meaning; falsity; statement of fact; and damages. Hudson, *supra*. Identification means that the challenged statement must be "of and concerning" the plaintiff. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964). A reasonable reader must be able to identify that the statement is about the plaintiff. *Id.* The publication element mandates that the challenged statement actually be published or broadcasted to a third party. Hudson, *supra*.

Next, the challenged statement must have a defamatory meaning. Hudson, *supra*. A challenged statement is capable of having a defamatory meaning if it is "reasonably susceptible to the defamatory meaning imputed to it" and when it tends to injure one's reputation in the community and to expose her to hatred, ridicule, and contempt. *Levin v. McPhee*, 119 F.3d 189, 195 (2d. Cir. 1997); *Hollenbeck v. Hall*, 72 N.W. 518, 519 (Iowa 1897). Additionally, "truth is a

complete defense to a defamation claim," so the challenged statement must be a statement of fact and must be false in order for the plaintiff to have a valid claim. *Andrews v. Prudential Sec.*, 160 F.3d 304, 308 (6th Cir. 1998); *Milkovich*, 497 U.S. at 13-14. Finally, the defamation must cause actual harm to the plaintiff. Hudson, *supra*. This Court has recognized the validity of claims brought by public figures, not just public officials, and has defined public figures as "nonpublic persons 'who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" *Milkovich*, 497 U.S. at 14.

Mrs. Courtier is a public figure. Not only does Mrs. Courtier own and operate a prominent clothing line with stores around the city of Silvertown, she also contributes greatly in her community by participating in philanthropic and charitable activities. (J.A. at 2, 21.). Moreover, she is the widow of the former mayor of the city who held office for eighteen consecutive years, so she is well known in Silvertown. (J.A. at 2.). Mrs. Courtier is politically active in her own right, speaking on issues that concern society at large such as educational equity, restorative justice, and affordable housing. *Id.* Thus, Mrs. Courtier is a public figure and is an individual within the purview of who this Court qualified as an eligible plaintiff for a defamation suit.

Speaking to the elements necessary to prove defamation, there is no question that Petitioner's statements are "of and concerning" Mrs. Courtier because Petitioner explicitly states Mrs. Courtier's full name, Silvia Courtier, in the beginning of his article before going into the defamatory language. *Id.* at 8. There is no doubt about who the statements are concerning to a reasonable reader. Petitioner's statements also satisfy the publication requirement because the statements were published and broadcasted to the public on Petitioner's website. *Id.* The first

truly contested element is whether the statements have defamatory meaning and they do because they injured Mrs. Courtier's reputation in the community and exposed her to possible hatred, ridicule, and contempt. Additionally, the statements are defamatory because they make factual assertions as a matter of law and therefore cannot be constitutionally protected as the opinions of the Petitioner. *Milkovich*, 497 U.S. at 8.

In *Milkovich*, a high school wrestling coach's team was involved in a physical altercation at a match, so the coach had to testify in county court under oath during a lawsuit brought by several parents. *Id.* at 4. The day after the court's decision in favor of the coach's team, a published newspaper column implied that the coach lied under oath in the judicial proceeding. *Id.* The coach then commenced a defamation action alleging that the column accused him of committing the crime of perjury, damaged him in his occupation of teacher and coach, and constituted libel per se. *Id.* at 6-7. This Court stated that the dispositive question in the case was whether a reasonable factfinder could conclude that the statements in the column implied an assertion that the coach perjured himself in a judicial proceeding. *Id.* at 21.

In balancing the constitutional guarantees of free speech under the First Amendment with the important social values that underlie defamation law, this Court held that the statements made in the column constituted defamation. *Id.* This Court reasoned that the statements were defamatory because a reasonable factfinder could conclude that the statements implied an assertion that the coach perjured himself in a judicial proceeding, the column did not use the sort of figurative or hyperbolic language that would negate the impression that its author was seriously accusing the coach of committing perjury, and ultimately, the suggestion that the coach committed perjury was sufficiently factual that it was susceptible to being proven true or false. *Id.*

In the instant case, Petitioner's statements about Mrs. Courtier constitute unprivileged defamation because his accusations imply assertions that are susceptible to being proven true or false. Like the statement made in *Milkovich*, accusations of corruption and swindling can be proven true or false, and the suggestion of corruption is sufficiently factual that it is susceptible to being proven true or false. Furthermore, corruption is fraudulent conduct and often times labeled as criminal behavior, so Petitioner's false statements had the effect of suggesting that Mrs. Courtier was involved in illegal activity, thus defaming her good reputation and exposing her to possible hatred, ridicule, and contempt from the community should individuals believe Petitioner's false accusations. *Corruption, Merriam-Webster Dictionary* (11th ed. 2019).

This Court has held that regardless of the truth or falsity of factual matters asserted in a statement, the attribution alone may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative trait or an attitude that the public figure does not hold or possess. *Masson v. New Yorker Mag.*, 501 U.S. 496, 511 (1991). In the same way, the publication of Petitioner's statements alone, labeling Mrs. Courtier as a "whore," "leech" and "swindler," resulted in injury to her reputation because the tone of the article and the context surrounding the statements attributed those negative connotations to her although she does not possess them. Therefore, the 'defamatory meaning' element is satisfied because the statements labeling Mrs. Courtier as "corrupt" and a "swindler," in particular, are reasonably susceptible to the defamatory meaning imputed to them.

The next element that needs to be proven for a valid defamation claim is falsity, meaning that the statements made by Petitioner must be false in order for Mrs. Courtier to prevail. *Milkovich*, 497 U.S. at 19. It has been held that substantial truth is a complete defense to a defamation claim and that under the substantial truth doctrine, minor inaccuracies are not

actionable as long as the gist is true. *Andrews v. Prudential Sec.*, 160 F.3d at 308. *Schirle v. Sokudo USA, L.L.C.*, 484 Fed. Appx. 893, 900-01 (5th Cir. 2012). The statements made by Petitioner are wholly inaccurate and are not minor inaccuracies—they are false statements of fact. A statement of fact is a statement that can reasonably be interpreted as stating actual facts about an individual. *Milkovich*, 497 U.S. at 17. Petitioner's statements labeling Mrs. Courtier as "a leech on society" and "corrupt and a swindler" could reasonably be interpreted as stating actual facts about her, especially to a reader that is researching public figures and does not know Mrs. Courtier personally.

Not only are Petitioner's accusations statements of fact, they are false statements of fact that cannot be substantiated. Although Mrs. Courtier had a tough childhood and was convicted of a single crime in her early twenties, nothing in her adult life after those incidents corroborate any of Petitioner's false accusations. (J.A. at 16.). Even while Mrs. Courtier was incarcerated, she spent the time rehabilitating herself, earned her G.E.D., and even enrolled in college courses that led to her starting her clothing business. (*Id.* at 5.). Since her release, Mrs. Courtier has been an exemplary citizen and has used her platform as a public figure to inform the community on important political issues. (*Id.* at 2.). That does not make her a "whore for the poor"; it makes her a concerned and caring citizen that is involved with matters of public concern. Additionally, the fact that Mrs. Courtier's clothing business caters to the affluent and has gained success and notoriety does not mean that she is a "pimp for the rich." (*Id.* at 5.). Petitioner has defamed Mrs. Courtier with his false statements by placing her in a false light and damaging the good reputation that she has earned for herself.

Lastly, the constitutional guaranties of freedom of speech and press prohibit recovery of damages for defamation unless it is proven that the alleged fabrication was made with actual

malice—that is, knowledge that it was false or with reckless disregard of whether it was false or not. *N.Y. Times Co. v. Sullivan*, 376 U.S. at 279. In *Sullivan*, an Alabama city commissioner brought a libel action against the New York Times for publication of a paid advertisement describing the maltreatment by the police department of black students protesting segregation. *Id.* at 256. Some of the statements in the advertisement were not accurate descriptions of events which occurred in Montgomery. *Id.* at 258. Some of the minor inaccuracies consisted of stating that "My Country 'Tis of Thee" was sung by the students protesting when it was actually the National Anthem and stating that Dr. King was arrested seven times when it was actually only four times. *Id.* at 258-59. This Court reversed the judgement of the lower court awarding damages to the city commissioner and held that the rule of law applied by the Alabama courts was constitutionally deficient for failure to provide a privilege for honest misstatements of fact. *Id.* at 288.

In this case, the statements made by Petitioner are not honest misstatements of fact. Petitioner's defamatory statements are not as minimal as misnaming a song sang at a demonstration. They are statements that have labeled Mrs. Courtier as a fraud and have embellished her crimes committed as a troubled young adult for the sole purpose of damaging her reputation. Petitioner knew of Mrs. Courtier's advocacy for the maintaining of public housing complexes and lower-rent housing options in Cooperwood. Because her views directly clashed with his "cleaning up Cooperwood" campaign, he chose to publish lies about Mrs. Courtier out of spite. Petitioner knew that his statements labeling Mrs. Courtier as a "pimp," "leech," "whore," "corrupt," and "swindler" were false but published them anyways, therefore Mrs. Courtier should be allowed to recover damages for Petitioner's defamatory statements.

Thus, Petitioner's statements about Mrs. Courtier were defamatory and should not be afforded any constitutional protection under the First Amendment. Aside from that, the question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law that should be left to a jury to decide. *Milkovich*, 497 U.S. at 17.

B. PETITIONER'S STATEMENTS DO NOT QUALIFY AS RHETORICAL HYPERBOLE.

Petitioner's statements referring to Mrs. Courtier as "a pimp for the rich," "a leech on society," "a whore for the poor," and "corrupt and a swindler" are not rhetorical hyperbole or mere epithets, they are statements of fact made with actual malice. The lower court noted that heated and emotional rhetoric deserves free-speech protection. (J.A. at 11.). However, in order for a statement to be considered rhetorical hyperbole, it must not be an imputation of criminal conduct and even the most careless reader must have perceived that the statement was no more than rhetorical hyperbole, meaning that the statement cannot have been reasonably interpreted as stating actual facts about an individual. *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1971).

In *Bresler*, a real-estate developer instituted a libel action against the publishers of a newspaper for allegedly libelous news articles that reported that certain citizens had characterized as "blackmail" his negotiating position with the city council. *Id.* at 7-8. The real-estate developer contended that the publishers should be held liable for the knowing use of falsehood, since the word "blackmail" was intended to charge him with the crime of blackmail, and since the publishers knew that he had committed no such crime. *Id.* at 8. The U.S. Supreme Court held that the term "blackmail" was used as rhetorical hyperbole more than an imputation

of criminal conduct because it was used as a vigorous epithet by the citizens who considered the developer's negotiating position as extremely unreasonable. *Id.* at. 14.

In this case, Petitioner's statements labeling Mrs. Courtier as "a leech on society"; and "corrupt and a swindler" were not mere epithets like the term "blackmail" in the *Bresler* case. The statements could reasonably be interpreted as stating actual facts about Mrs. Courtier, especially by a reader who does not know her personally. Specifically, calling Mrs. Courtier corrupt, in the context used by Petitioner, intended to charge Mrs. Courtier with the crime of corruption and insinuate that she was involved in fraudulent conduct. Even if this Court finds that that Petitioner's labeling of Mrs. Courtier as a "whore for the poor" and "pimp for the rich" was just name-calling and epithets, when he chose to accuse Mrs. Courtier of being corrupt that attacked her integrity as a businessperson and directly targeted her professional capacity. (J.A. at 22.).

Since Petitioner's statements were made with the intent of charging Mrs. Courtier with a crime even though he knew that Mrs. Courtier had committed no such crime, his statements were not rhetorical hyperbole and, instead, defamatory.

CONCLUSION

This Court should affirm the lower court's ruling that Mrs. Courtier is not a libel-proof plaintiff, and that the statements made by Petitioner were defamatory, not rhetorical hyperbole. This Court should adopt the issue-specific libel-proof plaintiff doctrine over the incremental harm doctrine which holds that criminal history alone does not render a plaintiff-libel proof. The issue-specific approach requires notoriety for rendering a plaintiff libel-proof based on prior criminal convictions. The government classification that would be created by automatically excluding plaintiffs with prior criminal histories from bringing libel suits creates constitutional due process and equal protection concerns which would not survive strict scrutiny. A jury issue exists as to 1) how Petitioner's statements were likely to be understood by the ordinary and average reader and 2) whether Petitioner's defamatory statements were made with actual malice. Petitioner's assertion that Mrs. Courtier is involved in corruption is sufficiently factual that it is susceptible to being proved true or false, thereby potentially accusing her of criminal conduct. Finally, it has long been held that society has a strong interest in preventing and redressing attacks upon reputation, and that there are important public policy and social values that support the ability to bring defamation claims. Therefore, Petitioner's motion to strike/dismiss the defamation claim should be denied.

Respectfully submitted,

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