No. 18-2143

In the Supreme Court of the United States

ELMORE LANSFORD, DEFENDANT-PETITIONER

v.

SILVIA COURTIER, PLAINTIFF-RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF STATE OF TENLEY

_____

BRIEF FOR THE PETITIONER

Team #: 219946

QUESTIONS PRESENTED

1. Whether Courtier's history of assault, indecent exposure, cocaine possession, and cocaine dealing makes her a libel-proof plaintiff.
2. Whether Lansford's use of exaggeration to convey his opinion constitutes rhetorical hyperbole that is a tradition in American political discourse and protected under the First Amendment to the United States Constitution.

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JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

In the midst of the highly competitive Silvertown mayoral race, Sylvia Courtier ("Courtier") initiated a political attack on Elmore Lansford ("Mr. Lansford") by writing a column on her website in which she criticized Mr. Lansford in his role as mayor and described him as a "plutocrat," who was engaged in a "war on the economically-strapped denizens of Cooperwood," and who only cared about the wealthy developers in town. She also implied he did not care about other Silverwood citizens including those of different races, genders, and ethnicities. (J.A. at 17.). In the column Courtier voiced her strong support for Mr. Lansford's opponent in the recent mayoral election. (J.A. at 17.). Mr. Lansford replied to Courtier's political attack with a social media post in which he expressed his opinion of Courtier using the hyperbolic phrases "a pimp for the rich," "a leech on society," "a whore for the poor," and "corrupt and a swindler." (these phrases will be collectively referred to as "Mr. Lansford's Statements") (J.A. at 18.).

Courtier is a businesswoman who owns a chain of high-end clothing stores (J.A. at 15.). She is also the widow of the long-term former mayor of Silvertown, Raymond Courtier. (J.A. at 2, 15.). In recent years she has engaged in social activism, including publicly advocating against private, for-profit prisons, restoring voting rights for former felons, increasing adult literacy, improving equity in education, and campaigning against gentrification. (J.A. at 16). Beginning in her youth and lasting through her early 20s, Coutier maintained a criminal lifestyle, accumulating offenses for assault, indecent exposure, vandalism, possession of cocaine, and distribution of cocaine. (J.A. at 15.). For these offenses, Courtier was incarcerated at a bootcamp for young female offenders and later served two years in a state prison for felony distribution. (J.A. at 15, 16.).

Mr. Lansford is the current mayor of Silvertown and a former city council member. (J.A. at 3.). Courtier's late husband and Mr. Lansford were political contemporaries and one-time allies who served on the city council together. *Id.* The late Mr. Courtier was even one of Mr. Lansford's early supporters. *Id.* However, in recent years, Courtier has been critical of Mr. Lansford's performance as mayor and in the recent mayoral race supported one of his challengers, Evelyn Bailord ("Bailord"), becoming one of her "chief proponents and advisors" (J.A. at 3, 17.). Courtier made several "noteworthy campaign contributions to Bailord", hosted several black-tie dinner affairs on her behalf, and wrote online commentaries in support of the campaign. *Id.* In her commentaries on her website, Courtier made statements calling Mr. Lansford a "relic of the past," "a divisive leader," and "someone who cares little for social justice issues." (J.A. at 3.). Beginning with "The Time is Now for Political Change!", the column which provoked Mr. Lansford's Statements criticized him as "out of touch with 21st century America and the need for social justice," a "plutocrat" engaged in a "war on the economically-strapped denizens of Cooperwood," and an "entrenched incumbent" who is "beholden to special interests,". The column also implied Mr. Lansford was a bigot who did not care "about all people of all races, genders, and ethnicities." (J.A. at 3, 4.). In response to these accusations, Mr. Lansford published the post containing the challenged statements at the heart of this issue.

SUMMARY OF THE ARGUMENT

Sylvia Courtier, due to her significant criminal history, is a libel-proof plaintiff under the incremental harm branch of the libel-proof plaintiff doctrine. The District Court and the Supreme Judicial Court of the State of Tenley ("Supreme Judicial Court"), failing to properly analyze Courtier under both branches of the libel-proof plaintiff doctrine, erred in their determinations that Courtier was not a libel-proof plaintiff, as the potential harm caused by Mr. Lansford's Statements about Courtier are far outweighed by the harm that could be potentially caused by

unchallenged statements in the same communication. Additionally, Courtier is unlikely to recover more than nominal damages in her suit against Mr. Lansford, necessitating dismissal under the libel-proof plaintiff doctrine, since the challenged statements are substantially true and, as a public figure, she is unable to prove actual malice.

The language in Mr. Lansford's social media post is protected rhetorical hyperbole under the First Amendment, and therefore is not actionable, for two reasons: (1) a reasonable reader would not interpret Mr. Lansford's use of the phrases "a pimp for the rich," "a leech on society," "a whore for the poor," and "corrupt and a swindler," as stating actual facts accusing Courtier of being a criminal and would understand Mr. Lansford's Statements to be imaginative expression of his own subjective opinion in a political debate; and (2) exaggerated expression of opinion in the context of political debate receives the broadest possible protection under the First Amendment.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE DETERMINATION OF SUPREME JUDICIAL COURT OF THE STATE OF TENLEY THAT SYLVIA COURTIER IS NOT A LIBEL-PROOF PLAINTIFF AS SHE IS A LIBEL-PROOF PLAINTIFF UNDER THE INCREMENTAL HARM DOCTRINE

This Court should find Sylvia Courtier a libel-proof plaintiff under the incremental harm doctrine and reverse the erroneous determinations of the lower courts that she is not a libel-proof plaintiff. First defined in *Cardillo v. Doubleday & Co.,* in which the court affirmed the dismissal of a libel suit by an incarcerated mobster against a book's author and publisher, a plaintiff is libel-proof when, by virtue of their past history, they would be unlikely "to recover anything other than nominal damages as to warrant dismissal of the case." *Cardillo v. Doubleday & Co.,* 518 F.2d 638, 639 (2d. Cir. 1975). As the Supreme Judicial Court properly acknowledged, there are two branches to the libel-proof plaintiff doctrine (the "Doctrine") – the incremental harm

doctrine and the issue-specific libel-proof plaintiff. (J.A. at 19.). When making their determinations, the District Court and the Supreme Judicial Court erred by solely examining Courtier under the issue-specific libel-proof plaintiff branch. (J.A. at 20, 21.). Had the courts examined Courtier under the incremental harm branch of the Doctrine, they would have found Courtier a libel-proof plaintiff. Additionally, by virtue of her past conduct and her current status as a public figure, Courtier, should she prevail in her suit against Mr. Lansford, is unlikely to recover more than nominal damages. As such, this Court should reverse the incorrect determination by the lower courts that Courtier is not a libel-proof plaintiff.

a. Sylvia Courtier is a Libel-Proof Plaintiff Under the Incremental Harm Branch of the Libel-Proof Plaintiff Doctrine

Courtier meets the definition of libel-proof plaintiff when examined under the incremental harm branch of the libel-proof plaintiff doctrine. First articulated by the 2nd Circuit's decision in *Cardillo v. Doubleday & Co.*, the Doctrine arose as a defense to libel claims. "In general, a person commits libel by publishing false and defamatory information about another person. To be defamatory, a statement must tend to lower the plaintiff in the esteem of the community. The defamatory element reflects libel law's concern with protecting individual reputations." Note, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine*, 73 N.Y.U.L. Rev. 529, 532-533.

The libel-proof plaintiff doctrine is also concerned with a person's reputation, specifically, whether one's reputation on an issue is so tarnished as to preclude recovery in a libel suit of anything but nominal damages. Initially specific to habitual criminals or perpetrators of notorious crimes, the Doctrine now applies in noncriminal contexts. *See Ray v. Time, Inc*., 452 F. Supp. 618 (W.D. Tenn. 1976) (where Martin Luther King, Jr. assassin, James Earl Ray, was held to be libel-proof by virtue of the notoriety of his crime); *Guccione v. Hustler Magazine*,

Inc., 632 F. Supp. 313 (S.D.N.Y. 1986) (in which an adulterer was found libel-proof on the issue); *Simmons Ford, Inc. v. Consumers Union of United States, Inc.*, 516 F. Supp. 742 (S.D.N.Y. 1981) (which found that the libel-proof doctrine was applicable in noncriminal contexts).

The libel-proof plaintiff doctrine has developed to include two branches: the issue-specific libel-proof plaintiff doctrine and the incremental harm libel-proof plaintiff doctrine. Under the issue-specific branch of the Doctrine, "[a] libel-proof plaintiff is one whose reputation on the matter … is so diminished that, at the time of an otherwise libelous publication, it could not be further damaged." *McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6, 9 (Tex. App. 1994). Traditionally, this branch of the Doctrine has been applied narrowly, "since few plaintiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements." *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 303 (2d Cir. 1986). Due to this concern, the issue-specific branch of the Doctrine has typically been reserved for habitual and/or notorious criminals, such as murderers or organized crime members. *See Coker v. Sundquist*, Appeal No. 01A01-9806-BC-00318, 1998 Tenn. App. LEXIS 708 (Ct. App. Oct. 23, 1998) (in which a Tennessee Appeals Court rejected the libel claim of a convicted murderer as he was libel-proof and could suffer no damage to his reputation by the challenged words); *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 354 (S.D.N.Y. 1998) (dismissing plaintiff's libel suit as he was libel-proof due to his history as a "convicted racketeer, Mafia associate, bank robber, and drug dealer.").

Given the class of individuals that the issue-specific branch of the Doctrine has customarily applied to, is it unsurprising that the lower courts found Courtier was not a libel-proof plaintiff. Although Courtier was engaged in significant and sustained criminal activity

beginning in her youth and lasting through her early twenties, her crimes gained no notoriety or public attention. (J.A. at 15, 16.). Additionally, as the Supreme Judicial Court noted, Courtier "has devoted much of her adult life to altruistic, charitable, and philanthropic efforts." (J.A. at 20, 21.). If examined solely under the issue-specific branch, as both the District Court and the Supreme Judicial Court did, Courtier's past criminal activity does not rise to the requisite level of habitual and notorious as needed under the issue-specific branch of the libel-proof plaintiff doctrine.

Although the District Court and the Supreme Judicial Court properly found Courtier not to be a libel-proof plaintiff under the issue-specific branch of the Doctrine, they erred by failing to analyze her under the incremental harm branch of the Doctrine. Had the lower courts analyzed Courtier under both branches of the Doctrine, they would have found that Courtier is a libel-proof plaintiff under the incremental harm branch. Unlike the issue-specific branch, which is concerned with the quality of a plaintiff's reputation as it relates to the defamatory communication, the incremental harm branch of the Doctrine focuses on the damage caused by challenged statements in relation to unchallenged statements in the same communication. Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1912-13 (1985). "If the challenged statement harms a plaintiff's reputation far less than unchallenged statements in the same article or broadcast, the plaintiff may be held libel-proof." *Id.*

In her complaint, Courtier alleges that Mr. Lansford defamed her character in his social media post when he called her "a pimp for the rich", "a leech on society", "a whore for the poor", and "corrupt and a swindler." (J.A. at 4, 5.). While these challenged statements were inappropriate and made in bad taste, they pale in comparison to implications in the unchallenged statements made by Mr. Lansford in the same post. Among these, Mr. Lansford calls Courtier "a

coddler of criminals", "a lewd and lusty lush", "a woman who walked the streets strung out on drugs", and a "former druggie." (J.A. at 4.). If this Court is to take Mr. Lansford's hyperbolic speech at face value, as Courtier has encouraged this Court to do, it is impossible to overlook the devastating implications of the unchallenged statements, particularly when compared to those that were challenged. Taken at their plain meaning, the challenged statements lend themselves to hyperbolic conclusions. The reasonable individual reading the challenged statements would be unlikely to conclude that Courtier was actually a sex worker for the "poor" or a "pimp" for "the rich". It would be equally implausible to read the phrase "a leech on society" and believe Mr. Lansford was alleging Courtier was a bloodsucking, aquatic worm. Even the phrase "corrupt and a swindler", when read in context with the rest of the sentence, is clearly a metaphor. ("She is corrupt and a swindler, who hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood." (J.A. at 4, 18.).) Mr. Lansford uses these words to refer to Courtier's attempts to manipulate public opinion and sympathy, fraudulently presenting herself as a champion for the poor while simultaneously participating in and benefiting from the same community she demonizes. When all of Mr. Lansford's Statements are viewed together, reasonable readers would likely – and correctly – recognize that the author of the statements was using exaggeration, however crass, to make a point.

In comparison, the unchallenged statements suggest Courtier is a promiscuous alcoholic and former drug addict who is intimately associated with criminals. These unchallenged statements, when taken at face value, are far more damaging to Courtier's reputation than the hyperbolic accusations of the challenged statements. "When a plaintiff challenges statements that damage [their] reputation substantially less than that caused by other, unchallenged statements in the same communication, common sense -- and common law and the constitutional roots of libel

law -- requires dismissal of the suit." Note, *The Libel-Proof Plaintiff Doctrine*, 98 Harv. L. Rev. 1909, 1925 (1985). As the unchallenged statements have the potential to damage Courtier's reputation and standing in the community far more than the challenged statements, this Court should find Courtier a libel-proof plaintiff under the incremental harm branch of the libel-proof plaintiff doctrine.

b. Sylvia Courtier is a Libel-Proof Plaintiff Who by Virtue of Her Past Conduct and Public Standing is Unlikely to Recover More Than Nominal Damages in Her Libel Suit Should She Prevail

Courtier, as a libel-proof plaintiff, is unlikely to recover more than nominal damages should she prevail in her libel suit against Mr. Lansford, necessitating the dismissal of her claims. Similar to other torts in which relief, including damages, is intended to make a plaintiff whole, damages in libel cases are meant to provide compensation for the harm done to an individual's reputation. Libel-proof plaintiffs, however, possess so tarnished a reputation that defamatory statements are unlikely to substantially impact it. Since libel-proof plaintiffs are unable to prove they have suffered additional, significant harm to their already damaged reputation, they are unlikely to recover more than nominal damages.

While libel laws can vary state to state, the 2nd Circuit has held that "a plaintiff must establish five elements to recover in libel: (1) a written defamatory statement of fact concerning the plaintiff; (2) publication to a third party; (3) fault (either negligence or actual malice depending on the status of the libeled party); (4) falsity of the defamatory statement; and (5) special damages or per se actionability (defamatory on its face)." *Celle v. Filipino Reporter Enters.*, 209 F.3d 163, 176 (2d Cir. 2000). Assuming facts most favorable to the respondent, Courtier has established that Mr. Lansford published defamatory remarks about her on social media. However, since she is a public figure challenging statements that are substantially true,

Courtier is unlikely to establish all the elements required for recovery in libel. As Courtier, due to the veracity of statements made regarding her past reputation, is unlikely to recover more than nominal damages should she prevail in her claim, this Court should find her a libel-proof plaintiff.

i. As a Public Figure Sylvia Courtier Must Prove Mr. Lansford's Statements Were Made With Actual Malice

Courtier is a public figure who must prove Mr. Lansford's statements were made with actual malice should she wish to recover damages in her libel claim. The courts have long held that public officials and public figures, due to the public interest, have a higher burden of proof when seeking to recover damages in a libel suit. "[C]onstitutional guarantees prohibit a public official from recovering damages for a defamatory falsehood relating to [their] official conduct or a public figure from recovering damages for a defamatory falsehood relating to a matter of public interest unless [they] prove that the statement was made with actual malice." *A. S. Abell Co. v. Barnes*, 258 Md. 56, 60, 265 A.2d 207, 210 (1970). The higher standard for public officials was set by this Court in *N.Y. Times Co. v. Sullivan*, holding that a public official was prohibited from "recovering damages for a defamatory falsehood relating to [their] official conduct unless [they] prove[d] 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." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726 (1964). Three years later, in *Curtis Pub. Co. v. Butts,* this Court extended the actual malice standard to apply to public figures who were not public officials, requiring a "showing of highly unreasonable conduct constituting an extreme departure from the standards … ordinarily adhered to[.]" *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155, 87 S. Ct. 1975, 1991 (1967).

While there is considerable overlap in the definitions for "public official" and "public figure" there are important differences. A public official is a government employee with substantial responsibility, who, due to the power of their position, generates interest from the public. *A. S. Abell Co. v. Barnes*, 258 Md. 56, 67, 265 A.2d 207, 214 (1970). A public figure, on the other hand, can be, but is not necessarily, a public official.

> A person, not a public official, may be a public figure by position alone … or [they] may become a public figure by purposeful activity amounting to a thrusting of [their] personality into the vortex of an important public controversy …, or by seeking to lead in the determination of policy, or, because, by any reasoning, [they are] a public [person] in whose public conduct society and the press have a legitimate and substantial interest.

Id.

Although Courtier is not a public official, as she holds no governmental position, she comfortably falls within the definition of public figure. She has purposefully and publicly inserted herself into the Silvertown mayoral race, in which Mr. Lansford is a candidate, beyond what is typical of the average private citizen. As one of the "chief proponents and advisors" to Mr. Lansford's opponent, Evelyn Bailord, Courtier brought herself to the public's attention in this election by making "noteworthy campaign contributions to Bailord" and hosting multiple black-tie dinner fundraisers on the candidate's behalf. (J.A. at 5, 19.). In addition, Courtier published several online commentaries in support of Bailord that targeted Mr. Lansford and denounced him as "a relic of the past," "a divisive leader," and "someone who cares little for social justice issues." (J.A. at 19.). The intention of these published commentaries, which sought to promote Bailord as a candidate over Mr. Lansford and encourage voters to support her on Election Day, was to influence the opinions of the Silvertown public-at-large in this matter of important public controversy.

The political screeds by Courtier against Mr. Lansford were published on a website

Courtier maintains specifically to advocate for social causes and promote policy change; a separate website managed by Courtier is devoted to her businesses. (J.A. at 2.). A businesswoman by profession, in recent years Courtier has "devoted much of her energy to altruistic endeavors." (J.A. at 18.). Leveraging her name recognition and "sizable social media presence", Courtier has publicly advocated "against private, for-profit prisons, and in favor of restoring voting rights for former felons, increasing adult literacy, and improving equity in education. She has also campaigned quite heavily against gentrification and the elimination of affordable housing." *Id.* According to Courtier's own writings, she believes Mr. Lansford, the incumbent mayor of Silvertown, is opposed to many of the policies she personally advocates for. (J.A. at 16, 17.). ("He has engaged in a war on the economically-strapped denizens of Cooperwood, imposing more and more police patrols. His repressive measures contribute to the process of gentrification and the displacement of Cooperwood residents …[.]" (J.A. at 17.).) This belief, and her desire to see the implementation of her preferred policies, led Courtier to support Mr. Lansford's opponent, declaring, "[Bailord] will put policies into practice that champion many of the social justice causes that are most important to our community [that] we have endeavored to share over the past several years." *Id.* One need only review the political commentaries published on her website dedicated to her social activism to determine that Courtier sought publicly to influence "the determination of policy." *A. S. Abell Co. v. Barnes*, 258 Md. 56, 67, 265 A.2d 207, 214 (1970).

Courtier is known in Silvertown not just as a prominent social activist but also a successful businesswoman who is the proprietor of a chain of high-end clothing stores. (J.A. at 2.). Additionally, "[s]he is the widow of the former mayor [of Silvertown], Raymond Courtier, who held office for eighteen consecutive years until his death." (J.A. at 2.). While spouses of

political figures may find themselves in the public eye through no voluntary action of their own, Courtier through her philanthropic and business endeavors, deliberately inserted herself into the public arena. This sustained and heightened public presence for, at minimum, the last eighteen years establishes Courtier as a public person "in whose public conduct society and the press have a legitimate and substantial interest." *A. S. Abell Co. v. Barnes*, 258 Md. 56, 67, 265 A.2d 207, 214 (1970).

As a public figure, Courtier must prove that Mr. Lansford's statements were made with actual malice. This burden requires a showing that Mr. Lansford published his statements with the knowledge that they were false or with a reckless disregard for the truth. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726 (1964). As this Court explained in *St. Amant v. Thompson,* which similarly dealt with defamatory speech against a public figure,

> reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.
>
> *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325 (1968).

There is nothing in the record to suggest that at any time prior to or at the time of the publication of his statements Mr. Lansford "entertained serious doubts as to the truth of his publication." *Id.* In fact, Mr. Lansford contends, and public records affirm, "that his statements were true, or at least substantially true." (J.A. at 6.). As the facts demonstrate that Mr. Lansford neither believed his statements were false or entertained serious doubts as to their veracity, Courtier will be unable to meet the actual malice burden as required by public figures in order to recover damages in a libel suit.

ii. Sylvia Courtier is Unlikely to Demonstrate the Falsity of Mr. Lansford's Statements As His Statements Are Substantially True

In order to recover damages in a libel suit, Courtier must also prove that Mr. Lansford's statements were false; a burden she will be unable to meet as Mr. Lansford's statements were substantially true. A statement is substantially true even if "every word of the alleged defamatory matter [cannot be justified]; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details." *Masson v. New Yorker Magazine,* 501 U.S. 496, 516-17, 111 S. Ct. 2419, 2433 (1991). Despite her reform in later years, Courtier spent the first quarter of her life engaged in significant criminal activity, ultimately resulting in a prison sentence for felony distribution of cocaine. (J.A. at 5, 15.). Her "litany of offenses" during this time included "simple assault, simple possession of marijuana, indecent exposure, vandalism, and possession of cocaine." (J.A. at 15.). She also developed a cocaine addiction during this time. (J.A. at 5.). Although her criminal past gained no notoriety, the information concerning her charges and convictions are publicly available and independently verifiable.

Even if Mr. Lansford's statements regarding Courtier contained minor inaccuracies, when taken in context as a whole, his statements accurately portrayed her past. "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" *Masson v. New Yorker Magazine*, 501 U.S. 496, 517, 111 S. Ct. 2419, 2433 (1991). "Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced."" *Id.* Courtier claims that Mr. Lansford's statements defame her character because "her troubled past occurred decades earlier." (J.A. at 6.). At no point, however, does she dispute the underlying facts of Mr. Lansford's accusation – that she has a complicated past which includes significant criminal activity and drug abuse. While Courtier has undoubtedly reformed her ways, this in no way

diminishes or discharges her criminal past, nor does it undercut the substantial truth of Mr. Lansford's statements. Unable to prove the falsity of the alleged defamatory statements, Courtier is unlikely to meet the burden required to recover damages in a libel suit.

II. THE COURT SHOULD RULE IN FAVOR OF MR. LANSFORD'S ANTI-SLAPP MOTION BECAUSE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECTS MR. LANSFORD'S STATEMENTS AS RHETORICAL HYPERBOLE THAT IS A TRADITIONAL AND COMMON FEATURE OF POLITICAL DEBATE

Mr. Lansford's Statements are protected rhetorical hyperbole because they were exaggerated emotional rhetoric used to convey his disagreement with a political adversary in a political context and could not have reasonably been understood to be statements of fact. Mr. Lansford used the phrases "It is ironic that…" and "It is also ironic that…" to precede his statements and indicate he was expressing his opinion about circumstances he found ironic. Furthermore, the allegedly defamatory statements were surrounded by loose, figurative, and hyperbolic language, demonstrating that his social media post was not making statements of objective fact, but rather, statements about his subjective opinion. Mr. Lansford's opinion had a basis in fact because Courtier's profession is selling high-end designer clothing, a product that caters to the rich, while advocating for the rights of the poor. Mr. Lansford found this ironic and expressed his opinion using imaginative epithets and loose, figurative language that constitute rhetorical hyperbole.

The United States Constitution protects statements that cannot reasonably be interpreted as stating actual facts about an individual made in debate over public matters, so as to assure that public debate will not lack the "rhetorical hyperbole" which has traditionally contributed to this nation's discourse. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). The phrase "rhetorical hyperbole" has been used in the context of defamation claims to describe language

that constitutes "imaginative expression" and "exaggerated rhetoric" in the expression of feelings or opinions. *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 285-86 (1974). While a political candidate may not defame their hecklers, they do not have to "suffer them silently"—one who uses "fractious and factious" language in a political context, as Courtier did in labeling Mr. Lansford as a "relic of the past," "a divisive leader," and "someone who cares little for social justice issues," cannot expect silent deference and submission from the target of their ire. *Miller v. Block*, 352 So.2d 313, 314 (La. Ct. App. 1977). While Mr. Lansford's statement of "a pimp for the rich," "a leech on society," "a whore for the poor," and "corrupt and a swindler," may not be in the best taste, "The First Amendment does not police bad taste." *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 164 (Tex. 2004).

A. A Reasonable Reader Would Understand Mr. Lansford's Statements to be Imaginative Expression Embellishing His Subjective Opinion of Courtier in the Context of a Mayoral Election

Mr. Lanford's Statements were in response to a political attack that Courtier launched and were used to bring imaginative expression to his criticism—they could not reasonably have been understood to be asserting factual statements. Courtier had publicly portrayed herself as a political adversary to Mr. Lansford through hosting several black-tie dinner affairs and authoring several online commentaries in support of Mr. Lansford's opponent in the mayoral election, and Mr. Lansford is entitled under the First Amendment to respond to her criticisms using loose, undefined figurative language to express his subjective opinion. Mr. Lansford's Statements were loose figurative language in the context of political debate and therefore a reasonable reader would understand that Mr. Lansford's Statements did not convey factual assertions and merely contained his subjective impression and opinion of Courtier.

Under the First Amendment to the United States Constitution, allegedly libelous statements are analyzed through a "reasonable reader" standard. *McKimm v. Ohio Elections*

Comm'n, 89 Ohio St. 3d 139, 143 (2000) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)). Under this objective standard, allegedly defamatory statements are evaluated in the light of their proper context and under the totality of the circumstances, not in isolation. *Miller v. Watson*, No. 3:18-cv-00562-SB, 2019 U.S. Dist. LEXIS 70930, at *30 (D. Or. Feb. 12, 2019). Hyperbolic statements, or statements using loose, figurative language, are protected so long as no reasonable reader could interpret the statement as providing actual objective facts about the individual the statement concerns. *Ayyadurai v. Floor64, Inc.*, 270 F. Supp. 3d 343 (D. Mass. 2017). Loose language and undefined slogans (such as "traitor," "unfair," "fascist," and other terms the Court has held to be loose and undefined language) are part of the "give-and-take in our economic and political controversies" and to use such language in this context does not constitute falsification of facts. *Old Dominion Branch No. 496*, 418 U.S. at 284 (quoting *Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 295 (1943)). Such language is understood to demonstrate opinion in political debate. *Austin*, 418 U.S. at 284 (holding that a union's use of the word "traitor" was used in a "loose figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization"). These imaginative expressions of opinion in political debate are protected rhetorical hyperbole under the First Amendment. *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (holding that the use of the term "blackmail" to criticize a private real estate developer's negotiation strategy with a city was rhetorical hyperbole protected under the First Amendment).

Mr. Lansford's Statements are similar to statements made in other cases where courts have ruled that the statements in question were rhetorical hyperbole and could not reasonably have been interpreted as stating actual facts, and therefore were protected under the First Amendment. In *Clifford v. Trump*, 339 F. Supp. 3d 915 (C.D. Cal. 2018), Mr. Trump tweeted

regarding Ms. Clifford's release of a sketch portraying a man that she alleged had threatened her on the orders of Mr. Trump: "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!" There, the court held that Mr. Trump's tweet constituted "rhetorical hyperbole" because it displayed an "incredulous tone" that suggested the content of the tweet was not meant to be understood as a statement of literal fact about the Ms. Clifford. The court interpreted Mr. Trump's statement as a vehicle to challenge Ms. Clifford's account which was protected under the First Amendment because "a published statement that is 'pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage' cannot constitute a defamatory statement." *Clifford*, 339 F. Supp. at 926-927 (quoting *Milkovich*, 497 U.S. at 32).

Here, Mr. Lansford's Statements also displayed an incredulous tone demonstrating that his statements were not meant to be understood as a statement of literal fact. Mr. Lansford's Statements were filled with exaggerated emotional rhetoric and filled with moral outrage about the criticism Courtier launched at him—criticism which Mr. Lansford expressed was at least in part hypocritical of Courtier. Mr. Lansford's Statements were used to challenge Courtier's credibility as a reliable critic of Mr. Lansford and could not reasonably be understood to be making statements of fact. As such, Mr. Lansford's statements constituted protected rhetorical hyperbole, just as the court understood Mr. Trump's exaggerated statement of "total con job" to be emotional rhetoric in debate of matters of political concern expressing his disagreement, rather than a statement of fact that Ms. Clifford was lying.

In *Ayyadurai v. Floor64, Inc.*, 270 F. Supp. 3d 343 (D. Mass. 2017), Plaintiff sued the Defendants for statements made in a series of articles claiming that Plaintiff was a "fraud" and "fraudulent" for claiming to have invented email. The Court there noted that words such as

"fraud," "snake-oil job," "rip-off," and "scam" are generally protected rhetorical hyperbole. The Court concluded that no reasonable reader could interpret "fraudulent" in that context as stating that the Plaintiff had committed the crime of fraud. The context in *Ayyadurai* was critical, as the Court stated that it was clear from the surrounding language describing the Plaintiff's claims as "bogus" and "easily debunked" that Defendants' articles were using colorful figurative language and were not making any fact-based accusations of fraud against the Plaintiff. Mr. Lansford's statements are much like those in *Ayyadurai*, both in substance and in context. The terms "corrupt," "swindler," "pimp," "leech," and "whore" are of the same nature as "fraud" or "fraudulent," and all are used to embellish opinion. Furthermore, as with the context in *Ayyadurai*, Mr. Lansford's Statements were immersed within other language that demonstrated the hyperbolic, opinion-based nature of Mr. Lansford's social media post: "coddler of criminals"; "lewd and lusty lush"; "upscale, hoity-toity clothing stores that are lacking in class and substance"; "hoodwinks"; "modern-day Robinita Hood"; "What a joke!" Mr. Lansford also began two of three paragraphs with the statements "It is ironic that…" and "It is also ironic that…", indicating that his following statements were commenting on his opinion of circumstances he found to be ironic.

A. Mr. Lansford Used the Phrases "Corrupt" And "Swindler" As Imaginative Expression of Subjective Opinion and They Were One-Time Statements That Did Not Allege Specific Criminal Acts

The Supreme Judicial Court of the State of Tenley cites several cases to support its conclusion that Mr. Lansford's use of the words "corrupt" and "swindler" are possibly defamatory because these cases below have found those terms to be defamatory in their respective contexts. (J.A. at 21-22). These cases are distinguishable because allegedly defamatory statements are evaluated in light of their proper context and totality of the circumstances, and the context and circumstances here warrant different treatment. *Miller* at *30.

The Supreme Judicial Court makes the point that "[m]ost words have more than one meaning" (J.A. at 21) (quoting *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1358). The Supreme Judicial Court then states that "[s]ometimes a word can be considered a mere epithet or rhetorical hyperbole in one context but can also be considered a statement of fact that can be proved true or false." (J.A. at 21) (citing *Bentley v. Bunton*, 94 S.W.3d 561, 581-82). However, while Mr. Lansford's Statements could potentially have a different meaning in isolation, in their proper context they only mean to convey Mr. Lansford's subjective opinion of Courtier's motives and personality.

Mr. Lansford's use of the phrases "corrupt" and "swindler" were used in a vague manner that did not state any specific, detailed allegations or verifiably false statements, unlike the cases the Supreme Judicial Court cites. Mr. Lansford's use of these phrases was in the context of commenting on Courtier's motives and personality, as he used "corrupt" and "swindler" in the context of his opinion that she was hoodwinking the poor. The key distinction between Mr. Lansford's use of the phrases "corrupt" and "swindler" is that Mr. Lansford was expressing an opinion about Courtier's motivations and personality, while the cases the Supreme Judicial Court cites involved using the phrases "corrupt" and "swindler" in relation to specific factual statements that were verifiably false.

Statements regarding a person's motivations are not generally the type of statements that can be objectively verified. *Miller v. Watson*, No. 3:18-cv-00562-SB, 2019 U.S. Dist. LEXIS 70930, at *33 (D. Or. Feb. 12, 2019). One's motives cannot be definitively known for sure and anyone is entitled to speculate on a person's motives from the known facts of their behavior. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993). Statements that reflect opinions of someone's motivations and personality are not provable as true or false because these

statements do not rest on a "core of objective evidence." *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 367 (9th Cir. 1995). If it is plain that a statement is expressing a "subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-21 (1990).

In *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002), a local judge sued a radio host for defamation based on the radio host's repeated accusations of corruption. However, that case is not comparable to the facts here because in *Bentley* the radio host used the phrase "corrupt" in conjunction with specific factual statements, including alleging that the judge held a criminal case open for the purpose of leveraging the open case against the criminal defendant's father, a mayoral candidate at the time. *Id*. at 568. The radio host stated stood by his statements on the air, stating that they were "true." *Id*. at 569. Furthermore, the radio host's statements were repeated over a period of time in multiple instances on his radio show. *Id*. at 567. Here, Mr. Lansford's use of the phrases "corrupt" and "swindler" were used once, not repeatedly, and were not accompanied by any verifiably false statements of the same nature of the radio host's accusations.

In *Burrill v. Nair*, 217 Cal. App.4th 357, 364-65 (2013), the Defendant wrote on a website accusing a counselor of "criminal fraud and modern day slavery using Parental Alienation SCAM, enslavement of children for $ $ $ $ $ $ in California…Corrupt Criminals like [Plaintiff] and their good-ol-network are today's 'modern slave traders' trading 'children' with vindictive retribution and for money." The Defendant's post also accused the Plaintiff of "child abuse," "financial extortion," practicing psychology without a license, and illegally prescribing medication. *Id*. There, the court's ruling did not hinge on the phrase "corrupt" being used, but

rather, the court took the whole context into consideration. The whole context of the Defendant's post there shows that the Defendant was using "corrupt" in conjunction with specific, verifiably false, allegations of criminal acts on Plaintiff's part. Here, this is not the case, as while Mr. Lansford used "corrupt" and "swindler" to color his opinion of Courtier, he did not use it in conjunction with specific allegations of criminal acts that are verifiably false. Additionally, *Burrill* was not in the context of political debate between political adversaries, and therefore the statements there did not receive the same higher level of protection that "rhetorical hyperbole" doctrine offers to Mr. Lansford's use of "corrupt" and "swindler."

In *Laughland v. Beckett*, 365 Wis.2d 148, 157 (2015), the Defendant set up a Facebook page in the Plaintiff's name and used this page to call the Plaintiff a "preying swindler" who manipulated "people, banks, and credit card companies" and that it was "due to people like this that [b]anks are in trouble, we pay more to use our credit cards, and it is hard to trust people." Furthermore, Defendant's Facebook posts were repeated and made over the course of January 2010 through April 2010. *Id*. Again, this is unlike Mr. Lansford's use of the phrases "corrupt" and "swindler." In *Laughland* the Defendant's use of the phrase "swindler" was to accuse the Plaintiff of manipulating people and banks, thereby causing banks to be in trouble and causing credit cards to cost more to use, while here, Mr. Lansford's use of the phrases "corrupt" and "swindler" do not make such specific accusations and are merely vague expressions to convey his subjective opinion of Courtier. As in *Burrill*, *Laughland* also did not occur in a political context, and so the statements there did not receive the same higher level of protection that rhetorical hyperbole doctrine offers to Mr. Lansford's use of the phrases "corrupt" and "swindler."

In *Kumaran v. Brotman*, 247 Ill.App.3d 216, 227 (1993), the court found that the article at issue portrayed the Plaintiff as a swindler and that this prejudiced his teaching ability and integrity. However, the article did not just simply use the word "swindler" as an insult to Plaintiff; rather, the article published numerous accounts of the Plaintiff filing allegedly frivolous lawsuits to extort settlements, and these accounts contained detailed factual statements outlining the Plaintiff's motive being to extort settlement money and how the Plaintiff allegedly carried out these acts. Mr. Lansford's use of the phrases "corrupt" and "swindler" are accompanied by a vague reference to her hoodwinking the poor "into thinking she is some kind of modern-day Robinita Hood." This is a vague statement conveying Mr. Lansford's opinion of Courtier, he does not allege any specific factual instances of Courtier engaging in corruption or swindling of the poor and these are not verifiably false statements.

In *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144 (2nd Cir. 2000), the Defendants maintained a referral service of attorneys that was a directory containing attorneys' names, contact information, and a short blurb about each respective attorney. Plaintiff sued the Defendants, and won, because his descriptive blurb stated that he was an "ambulance chaser" that was only interested in "slam dunk cases." *Id.* at 147. The Supreme Judicial Court compared the phrase "ambulance chaser" with Mr. Lansford's phrases of "corrupt" and "swindler" by arguing that these phrases directly target Courtier's abilities and integrity as a businessperson. (J.A. at 22). However, the phrase "ambulance chaser" as used in *Flamm* is not comparable to Mr. Lansford's use of the phrases "corrupt" and "swindler" because the context in *Flamm* was entirely different to the context here. In *Flamm*, the court concluded that "ambulance chaser" implied that the Plaintiff had engaged in unethical business practices because the "directory in all other respects states facts: names, addresses and phone numbers; a note that Ms. R "will not be

able to consult with anyone affiliated with the Florida State University system because of a conflict of interest" and other statements of that nature. *Id.* at 151. Whereas here, Mr. Lansford's use of "corrupt" and "swindler" did not appear in a directory portraying itself as a source of factual information; rather, his statements appeared in his social media post, which did not hold itself out as a source of factual information and did not contain specific facts like the directory in *Flamm*. Furthermore, social media is a medium commonly associated with a place for one to express their opinions, while a directory of attorneys is associated with a place to gain factual information. Because of these significant differences in context between *Flamm* and here, Mr. Lansford's use of "corrupt" and "swindler" cannot reasonably be understood as statements of fact based on a core of objective evidence, and therefore cannot reasonably be understood as making factual claims.

B. Mr. Lansford's Statements Receive the Fullest Protection Possible Under the First Amendment And He Should Therefore Be Given Broad Leeway in Embellishing His Opinion Because His Statements Were Made in Response to Courtier's Criticism of His Role as Mayor in the Context of Mr. Lansford's Campaign for the Mayor's Office

Courtier's statements criticized Mr. Lansford in his role as mayor, disapproved of him as a candidate in the recent mayoral election and voiced support for Mr. Lansford's political opponent. For political debate to flourish with creativity of speech that is free from a chilling effect, it is essential to protect Mr. Lansford's ability to respond to criticism with exaggeration of his subjective opinion. The constitutional guarantee to free speech under the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Although Courtier herself is not running for political office against Mr. Lansford, her statements were made in a public forum and specifically referred to Mr. Lansford's mayoral campaign while expressing support for the opposition candidate, and therefore Mr. Lansford's Statements in response applied to the conduct

of a campaign for political office. Because Mr. Lansford's Statements occurred in the context of political debate, they receive the broadest possible protection under the First Amendment, and he should therefore be given broad leeway as to how much he can embellish his opinion without fear of lawsuits. While speech used for political ends does not automatically place it under the protection of the Constitution, it is "the use of the known lie as a tool" that brings political speech out of the protection of the Constitution. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). Mr. Lansford's Statements were not known lies about factual information, they were subjective expression of his opinion, which places them firmly within the protection of the First Amendment.

Here, Mr. Lansford's Statements were made in a political debate with a political adversary because his statements were in response to public criticism from a supporter of his opposition in the campaign for mayor. Protecting speech in the political realm goes to the very core of what the Constitution protects: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system." *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 11 (1970) (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)). *Bresler* involved the phrase "blackmail" being used at public meetings where citizens were weighing in on local governmental matters, namely, a local real estate developer's negotiation with the city for a zoning variance. The court described this matter as being of "particular First Amendment concern" and that because the threat of liability for defamation may impair the exercise of these First Amendment rights in the political realm, "the Constitution imposes stringent limitations upon the permissible scope of such liability." *Bresler* 398 U.S. at 11-12. These concerns about limiting speech in the political arena

contributed toward finding that the phrase "blackmail" was not defamatory as used to describe the real estate developer's negotiating tactics.

Much like the phrase "blackmail" was used to comment on a local governmental matter at a public forum, Mr. Lansford's Statements were also were also used to comment on a local governmental matter in a public forum (Courtier's comments were posted on her website and Mr. Lansford's Statements in response were posted on social media, a public forum). Mr. Lansford's Statements were of a similar nature to the phrase "blackmail" in that they were colorful imaginative expressions of opinion; therefore, Mr. Lansford's Statements should receive the same protections of stringent limitations upon the scope of liability that can be imposed on speech in the political realm.

CONCLUSION

This Court should reverse the Supreme Judicial Court's ruling and rule in favor of Mr. Lansford's anti-SLAPP motion to dismiss/strike as Courtier is a libel-proof plaintiff challenging obviously hyperbolic speech. The libel-proof plaintiff doctrine requires dismissal of a libel suit when a plaintiff, by virtue of their past conduct as it relates to the challenged speech, is unlikely to recover more than nominal damages. When examined under the incremental harm branch of the libel-proof plaintiff doctrine, Courtier qualifies as a libel-proof plaintiff by virtue of her criminal history which includes offenses for, among other things, assault and cocaine distribution. Mr. Lansford's Statements, which focus on Courtier's criminal background, are substantially true and independently verifiable through public sources. Additionally, as a public figure, Courtier must prove that Mr. Lansford's Statements were made with actual malice, requiring knowledge of the falsity of the statements or reckless disregard for the truth. Since Mr. Lansford's Statements are substantially true Courtier would be unable to prove actual malice as required for recovery of damages. As Courtier is unlikely to recover anything more than nominal

damages in her libel suit against Mr. Lansford, this Court should grant Mr. Lansford's motion to dismiss.

Mr. Lansford's Statements were made in the context of responding to a political attack from Courtier, a person who had positioned herself as political adversary to Mr. Lansford. Mr. Lansford used imaginative epithets and loose, figurative language that constitutes rhetorical hyperbole to be creative in voicing his critical opinion of Courtier. Allegedly defamatory language is evaluated based on its proper context and totality of the circumstances. So, while in isolation it is possible for terms such as "corrupt" and "swindler" to be actionable defamatory statements, previous cases show that these terms have been defamatory when placed in a context that strongly suggests objective factual information is being conveyed; but, this type of language has been held to be rhetorical hyperbole when placed in a context where a reasonable reader would understand that specific facts and allegations based on objective evidence are not being conveyed, and when there is language accompanying the allegedly defamatory statements that suggest that the communication is not a serious assertion of specific objective facts—this is particularly the case in the context of public political speech.

Here, Mr. Lansford's Statements fall under the context where a reasonable reader would understand he is conveying subjective opinion, not objective facts because he posted the statements on his personal social media, began his statements with "It is ironic that…" (suggesting he is making an observation from his point of view), his statements are surrounded by other language that is loose, figurative, and hyperbolic, and his statements were made in response to a political attack from a political adversary who also used loose, figurative, hyperbolic language in her column. This context is entirely different from the cases the Supreme Judicial Court cites to support its conclusion that Mr. Lansford's Statements were not rhetorical

hyperbole—those cases all involved statements in a context where the communication was not portrayed as a personal opinion, where the statements were surrounded by objective factual information, and where the statements alleged specific, concrete acts that suggested the defendants possessed objective facts about the plaintiff.

Furthermore, imaginative expression and embellishment of opinion is a traditional part of American political discourse and is exactly the type of speech that the First Amendment protects as fundamental for citizens in a liberal democracy to comment on politics and exchange their opinions and ideas. Therefore, Mr. Lansford's Statements receive the broadest possible protection under the First Amendment such that he is given wide leeway to embellish his opinion and to use colorful, figurative language in doing so.

For these reasons, this Court should reverse the Supreme Judicial Court's ruling and rule in favor of Mr. Lansford's anti-SLAPP motion to dismiss/strike.