Docket No. 18-2143

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

ELMORE LANSFORD, Petitioner

v.

SILVIA COURTIER, Respondent

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF TENLEY

BRIEF FOR RESPONDENT

Team 219950
Counsel for Respondent

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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STATEMENT OF JURISDICTION

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

STATEMENT OF CASE

Respondent is Silvia Courtier, a successful entrepreneur, social activist, and widow of the late Mayor of Silvertown, Tenley. Petitioner is Elmore Lansford, current Mayor of Silvertown. Ms. Courtier filed this defamation suit against Lansford on the basis of a harmful public statement he made about her.

Born Silvia Montoya, Ms. Courtier faced a traumatic childhood. (J.A. at 5.) Her mother and father both suffered from drug addiction: her father served time in prison for selling drugs and was killed there, and her mother died of a drug overdose when Silvia was only ten years old. (*Id.*) Without her parents to raise and provide for her, Silvia was forced to support herself from a young age by stealing from grocery stores. (*Id.*) During that trying time, an older man took advantage of her and sexually abused her. (*Id.*) Trapped by her circumstances, Ms. Courtier was declared a juvenile delinquent after committing simple possession of marijuana, indecent exposure, vandalism, possession of cocaine, and simple assault, and was she was sent to a boot camp for teenage female offenders. (*Id.* at 15.) In her early twenties, she served two years after pleading to a charge for possession of cocaine. (*Id.* at 16.)

Silvia's prison sentence turned out to be a blessing in disguise, as it allowed her an opportunity to reach her full potential: she earned both her G.E.D. and a business degree. (*Id.* at 5.) Immediately following her release, she leveraged her business education to open her own clothing store. (*Id.* at 16.) What started as a small-scale operation soon blossomed into a line of successful stores. (*Id.*) Building upon the momentum of her success, Ms. Courtier expanded and opened additional stores, establishing her position in the business community. (*Id.*) In fact, Ms. Courtier developed her brand to feature clothing from world-renowned names such as Chanel, Gucci, Fendi, and Louis Vuitton. (*Id.*) While growing her business she met Raymond Courtier,

who became her primary investor. (*Id.* at 5.) They married and embarked on journeys of public advocacy—Silvia as a champion for educational equity, restorative justice, and affordable housing, (*id.* at 16), and Raymond as a City Councilman and Mayor of Silvertown. (*Id.* at 2–3.) Specifically, Ms. Courtier has campaigned for increasing adult literacy and restoring voting rights for former felons, while also condemning gentrification and the elimination of affordable housing in Silvertown. (*Id.* at 16.) She has a considerable social media following and maintains a website dedicated to her social justice causes. (*Id.*)

Mr. Courtier met Elmore Lansford while serving together on the Silvertown City Council. (*Id.* at 3.) As an early ally, Mr. Courtier helped Lansford launch his political career. (*Id.*) Mr. Courtier passed away after eighteen years of public service, after which Lansford went on to serve as Mayor as Silvertown. (*Id.*) While in office, Lansford has stepped up law enforcement in Cooperwood, a Silvertown neighborhood known for its affordable and public housing communities. (*Id.*) He has also encouraged zealous enforcement against drug offenders by targeting Silvertown's poverty-stricken community for heightened police patrol. (*Id.* at 3, 16.) Although this policy provoked allegations of racial profiling and resulted in incidents of police brutality, Lansford remained steadfast in his "tough-on-crime" campaign, and used "Cleaning up Cooperwood" as his slogan. (*Id.*) Staying true to this slogan, Lansford also endorsed building high-rise developments in Cooperwood. (*Id.*)

Although her husband helped Lansford find his political footing in Silvertown, Ms. Courtier believes Lansford's policies have become increasingly detached from the needs of his constituents. (*See id.* at 17) (calling Lansford "out of touch with 21st century America and the need for social justice," and implying he "just [cares about] the wealthy developers" and not "the less fortunate in [Silvertown]"). This led Ms. Courtier to lead the campaign of Evelyn Bailord,

Lansford's opponent in the recent mayoral election. (*Id.*) In a post on her website, she contrasted Bailord's policies with Lansford's by pointing to his "war on the economically-strapped denizens of Coopewood," which had led to "gentrification and the displacement of Cooperwood residents." (*Id.*)

In response to Ms. Courtier's critique of his policies, Lansford responded with an attack on her character—a statement riddled with classism, misogyny, and bigotry. (*See id.* at 4, 17) (characterizing Lansford's statement as a "fusillade of insults"). Rather than seizing this opportunity to engage in a public discourse with Ms. Courtier about meeting the needs of their community, Lansford resorted to degradation, humiliation, and personal animus:

> It is ironic that Silvia Courtier blasts me as uncaring toward the less fortunate. No wonder she is a coddler of criminals. In her early years, Silvia Courtier was a lewd and lusty lush, **a leech on society**, and a woman who walked the streets strung out on drugs. She is nothing more than a former druggie. It is also ironic that she casts herself as the defender of the less fortunate. Last time I checked, she is the proprietor of a bunch of upscale, hoity-toity clothing stores that are lacking in class and substance.
>
> How ironic that she pimps out these clothes to the rich and lavish. She is **corrupt and a swindler**, who hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood. I guess she learned something from the streets.
>
> Now, this businesswoman is a **pimp for the rich** and **a whore for the Poor**. What a Joke!

(*Id.* at 16) (emphasis added).

On the basis of these deeply harmful remarks, Ms. Courtier sued Lansford for defamation of character and false light invasion of privacy and focused her claims on the emboldened phrases above. (*Id.* at 18.) Lansford filed a special motion to dismiss this case pursuant to Tenley's anti-

SLAPP statute (*Id.* at 2) (citing Tenley Code Ann. § 5 – 1 – 704(a)).[1] He raised two affirmative defenses to Ms. Courtier's defamation claim: that Ms. Courtier is a libel-proof plaintiff and that his statements are protected rhetorical hyperbole.[2]

The Tenley District Court held Lansford failed to establish that Ms. Courtier is libel-proof, (*see id. at* 11) (finding Ms. Courtier "is anything but an inveterate criminal," "underwent a transformation in prison," and hence "is not a libel-proof plaintiff"), but dismissed the case after holding Lansford's statement was rhetorical hyperbole. (*Id.* at 12.) On appeal, the Supreme Judicial Court of Tenley affirmed the lower court's holding that Ms. Courtier is not libel-proof. (*Id.* at 19.) It deemed Ms. Courtier "a perfect example of someone who . . . has restored and rehabilitated herself" and concluded she has a "reputation to protect from defamatory and false statements." (*Id.* at 20.) However, Tenley's highest court reversed with respect to rhetorical hyperbole, specifically

[1] The Supreme Judicial Court of Tenley noted the following: Lansford had the burden of showing he exercised his right to free speech, (J.A. at 15) (citing Tenley Code Ann. § 5 – 1 – 705(a)); he met this burden, (*id.*); and the burden shifted to Ms. Courtier to show she met the elements of her defamation claim. (*Id.*) The Tenley District Court found Ms. Courtier had established two of those elements, specifically that Lansford's statement identified her and was published. (*Id.* at 8). The court did not analyze the remaining four elements but instead turned to Lansford's affirmative defenses. (*Id.* at 8–9.) Importantly, the remaining elements of Ms. Courtier's defamation claim only come into play if this Court remands this case for trial.

[2] Lansford also raised the affirmative defense of substantial truth, (*id.* at 6), but that is not an issue before this Court.

reasoning that Lansford "not only engage[d] in name-calling [but also] vociferously attacked [Ms. Courtier's] abilities and integrity as a businessperson." (*Id.* at 22–23.)

SUMMARY OF ARGUMENT

The First Amendment's protection of freedom of speech is a pillar of American society. It serves to assure the unfettered, public exchange of political and social ideas. While the Constitution requires a robust commitment to that ideal, the law secures a plaintiff's right to obtain redress for speech that harms her reputation. Defamation law preserves that right by recognizing the value and dignity inherent in every human being—a tenet of any system of ordered liberty. Courts are responsible for balancing these two ideals: they must decide whether the defendant's speech is protected as useful in maintaining public debate or unprotected as harmful to a plaintiff's reputation and dignity.

When balancing these ideals, courts employ the libel-proof plaintiff doctrine in exceptional circumstances as a tool of judicial efficiency. Specifically, a court holds a plaintiff libel-proof when it finds that defamatory statements could not cause any legally compensable harm to a plaintiff's reputation. Courts reason that the plaintiff would not recover even nominal damages at trial. Because a libel-proof plaintiff is one without a judicial remedy, courts dismiss such a plaintiff's claim as an inefficient and burdensome use of judicial resources. Under the umbrella of the libel-proof plaintiff doctrine are two sub-doctrines: the incremental harm doctrine and the issue-specific doctrine.

Ms. Courtier is not libel-proof under the incremental harm doctrine, which applies when the unchallenged portions of a communication are equally or more harmful than the challenged portions. The underlying motivation for this doctrine is to discourage plaintiffs from cherry-picking portions of a communication to challenge while ignoring portions that are equally or more

incendiary. Similarly, the incremental harm doctrine applies when unchallenged portions of a communication are not actionable for failure to establish one or more of the six prongs of a defamation claim. Thus, courts dismiss defamation claims by plaintiffs who fail to challenge all of the potentially defamatory portions of the communication at issue. Here, Ms. Courtier challenges the four portions of Lansford's statement that amount to incendiary, sexist, and personal attacks. The surrounding language was not equally harmful, but rather served to explain and contextualize each of the four challenged insults. When considered in the context of the surrounding, unchallenged portions, the harm Ms. Courtier suffered from the challenged portions is hardly incremental but substantial.

Ms. Courtier is not libel-proof under the issue-specific doctrine, which applies when the plaintiff challenges a statement concerning a specific issue on which the plaintiff's reputation is already so low that it could not be further damaged. In such cases, the plaintiff is deemed libel-proof with respect to that specific issue. Courts often apply this doctrine to plaintiffs with a criminal record that garnered significant publicity and notoriety. Publicity is the cornerstone of the issue-specific sub-doctrine. The plaintiff whose crimes are highly publicized and notorious might be incapable of suffering further reputational damage on account of a statement accusing her of additional crimes. But the plaintiff whose criminal record was not subject to the same publicity would undoubtedly suffer reputational harm due to a statement laden with criminal accusations. Therefore, even a plaintiff with several criminal convictions cannot be libel-proof if those convictions were not the subject of significant publicity.

In this case, there is not a modicum of evidence in the record suggesting that Ms. Courtier's criminal convictions in her youth garnered significant publicity, let alone any publicity at all. The portions of Lansford's statement mocking her criminal record—by labeling Ms. Courtier a "leech

on society"—are capable of causing significant harm to her reputation. Accordingly, those statements are actionable, and Ms. Courtier is not libel-proof with respect thereto. Moreover, the only mentions in the record of Ms. Courtier's reputation refer to her successful line of clothing stores and her public campaign for social justice reforms. Indeed, Ms. Courtier has a reputation to protect, making the libel-proof plaintiff doctrine inapposite. But even if this Court deems Ms. Courtier libel-proof with respect to her long-past criminal convictions, the remainder of Lansford's remarks would be actionable for the harm they inflict on her reputation as a businesswoman and social advocate.

Lansford's statement does not constitute rhetorical hyperbole and is therefore subject to Ms. Courtier's defamation claim. Rhetorical hyperbole is untethered and emblematic language that serves to illuminate public discourse. Because such language cannot be proven true or false, it is not actionable under defamation law. However, a statement does not constitute rhetorical hyperbole when it appears to a reasonable person to assert facts about a plaintiff. A statement's capacity to assert facts about a plaintiff depends on its surrounding context, as words have different meanings when used in different circumstances. But, when the context establishes that a statement is laden with facts a reasonable person could believe to be true, that statement is not rhetorical hyperbole. Importantly, the veracity of a fact-laden statement is irrelevant to whether that statement constitutes rhetorical hyperbole; rather, the dispositive inquiry is whether a reasonable person could conclude that the facts asserted in a statement are true about the plaintiff. Here, Lansford's statement is not rhetorical hyperbole because its context renders it fact-laden; a reasonable person would believe Lansford's onslaught on Ms. Courtier's integrity as a social justice advocate and businesswoman were premised on facts about her.

Because Ms. Courtier is not libel-proof and because Lansford's statement does not constitute rhetorical hyperbole, this Court should remand this case to the Tenley District Court and allow her to prove to a jury that Lansford's statement is unprotected defamation.

ARGUMENT

At its core, defamation law "reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., dissenting); *see also Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1075 (3d Cir. 1985) ("Once again this Court is called upon to chart the proper course between the Scylla of inadequately guaranteeing First Amendment protections and the Charybdis of diminishing an individual's right to reputation"). Defamation claims must be weighed against the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The First Amendment reflects this principle and "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Still, defamation law serves the countervailing purpose of protecting society's "pervasive and strong interest in preventing and redressing attacks upon reputation." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 22 (1991). Thus, while "libel can claim no talismanic immunity from constitutional limitations" and "must be measured by standards that satisfy the First Amendment," *Sullivan*, 376 U.S. at 269, defamation law aims to "resolve the 'tension' between th[at] particular constitutional interest . . . and the interests of personal reputation." *Curtis Publ'g. Co. v. Butts*, 388 U.S. 130, 148 (1967).

I. MS. COURTIER IS NOT A LIBEL-PROOF PLAINTIFF BECAUSE LANSFORD'S STATEMENT INFLICTED LEGALLY COMPENSABLE HARM UPON HER REPUTATION.

Lansford cannot establish that Ms. Courtier falls within the narrow purview of the libel-proof plaintiff doctrine. This doctrine allows courts to dismiss a defamation suit brought by a plaintiff who, because her reputation cannot be legally harmed by a disparaging statement, would not recover more than nominal damages at trial. *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639 (2d Cir. 1975). The Second Circuit Court of Appeals was first to apply the libel-proof plaintiff doctrine. *See McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6, 9 (Tex. App. 1994) (chronicling the development and application of the doctrine). It did so in *Cardillo v. Doubleday & Co.*, where the plaintiff was a "habitual criminal" serving twenty-one years in federal prison for numerous felony convictions across three districts. 518 F.2d at 639–40. The plaintiff had sued a former Mafia associate who authored a tell-all book accusing the plaintiff of committing additional crimes. *Id.* at 640. As the plaintiff had been convicted of a slew of felonies referenced in the book, the court found no reason to adjudicate whether the additional alleged crime would cause further harm to the plaintiff's reputation. *Id.* ("With Cardillo himself having a record and relationships or associations like these, we cannot envisage any jury awarding, or court sustaining, an award under any circumstances for more than a few cents' damages . . . ."). The Second Circuit dismissed the claim and held the plaintiff "libel-proof, i. e., so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages," and affirmed the dismissal of the libel claim. *Id.* at 639.

Just one year later, the Second Circuit recognized the doctrine it had "enunciated [in *Cardillo*] is a limited, narrow one." *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). In *Buckley*, the court declined to apply the libel-proof doctrine, instead "leav[ing it] confined to its basic factual context. *Id.*; *Liberty Lobby, Inc. v. Anderson*, 746

F.2d 1563, 1569 (1984) (explaining that in *Buckley* the Second Circuit "narrowed" the doctrine "to the facts presented in its earlier cases," and calling the doctrine a "fundamentally bad idea"), *rev'd on other grounds*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Although the Second Circuit originally applied the doctrine in cases where the plaintiff would recover only nominal damages, *Cardillo*, 518 F.3d at 639, it soon cautioned against applying the doctrine in such cases: in *Guccione v. Hustler Magazine, Inc.*, the court reasoned that "few plaintiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements, even if their damages cannot be quantified and they receive only nominal damages." 800 F.2d 298, 303 (2d Cir. 1986). Accordingly, the court recognized that libel claims should be dismissed only in cases where "even nominal damages are not to be awarded." *Id.*; *see, e.g.*, *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 319 (D.C. Cir. 1994) ("[I]f, for example, an individual is said to have been convicted of 35 burglaries, when the correct number is 34, it is not likely that the statement is actionable." (quoting *Liberty Lobby*, 746 F.2d at 1568 n.6)).

Past criminal convictions, including a felony, that have gained no notoriety or public attention are insufficient for holding a plaintiff libel-proof. *Thomas v. Tel. Publ'g Co.*, 929 A.2d 993, 1005 (N.H. 2007) ("[C]riminal convictions, alone, are not enough to justify application of the doctrine."), *modified & reh'g denied*, 2007 N.H. LEXIS 156 (Aug. 29, 2007); *see also Cardillo*, 518 F.2d at 640 ("We by no means intend to suggest that prison inmates can be deprived of access . . . to obtain redress of wrongs, including libels, committed against them whether they are in or out of prison."). Importantly, the purpose of the libel-proof plaintiff doctrine is to bar a claim by a plaintiff who has "so bad a reputation" that she cannot recover damages. *Guccione*, 800 F.2d at 303. Only in exceptional circumstances does that purpose outweigh the fundamental right of every plaintiff to have her day in court. *See Buckley*, 539 F.2d at 889 (calling the libel-proof plaintiff

doctrine "limited" and "narrow"); *Thomas*, 929 A.2d at 1005 (warning that the libel-proof plaintiff doctrine should "be applied with caution and sparingly"); *Horn-Brichetto v. Smith*, No. 3:17-CV-163, 2019 U.S. Dist. LEXIS 29428, at *25 (E.D. Tenn. Feb. 25, 2019) (quoting *Graham v. Nat'l Collegiate Athletic Ass'n*, 804 F.2d 953, 959 (6th Cir. 1986)) (explaining "[i]t is beyond dispute that the right of access to the courts is a fundamental right protected by the Constitution"), *appeal dismissed on other grounds*, 2019 U.S. App. LEXIS 12885 (6th Cir. Apr. 26, 2019); *id.* at *48 (holding plaintiff, a convicted felon, was not libel-proof on the basis of her conviction). This Court should decline to apply the libel-proof plaintiff doctrine to summarily dismiss this case and remand to allow Ms. Courtier her day in court.

A. Ms. Courtier is Not Libel-proof Under the Incremental Harm Doctrine Because she Challenges the Most Incendiary Portions of Lansford's Statement, All of Which Inflicted Substantially More Harm Than the Unchallenged Portions.

Under the incremental harm doctrine, Ms. Courtier far from qualifies as a libel-proof plaintiff because she challenges the most defamatory and hurtful portions of Lansford's offensive statement. This doctrine reasons that a defamation claim should be dismissed when the challenged portion of a communication causes no more harm to the plaintiff than the unchallenged portion within the same communication. *Simmons Ford, Inc. v. Consumers Union of U.S., Inc.*, 516 F. Supp. 742, 750 (S.D.N.Y. 1981) (granting summary judgment in favor of defendant, holding that a publication's suggestion of a car not meeting federal safety standards—although potentially defamatory—did not further harm the plaintiff's reputation when published alongside damaging, accurate safety statistics). Thus, "the doctrine requires a court to measure the harm flowing from the challenged statement as compared to the harm flowing from the rest of the publication." *Church of Scientology Int'l v. Time Warner*, 932 F. Supp. 589, 594 (S.D.N.Y. 1996).

Cardillo illustrates the purpose of the incremental harm doctrine: to avoid using judicial resources on a defamation claim where the plaintiff does not or cannot challenge all potentially

defamatory portions of a communication. 518 F.2d at 639 (holding the plaintiff libel-proof because he challenged only certain harmful statements in a book but failed to challenge comparably harmful statements that were not actionable because they were true). It was intended to and therefore should be applied extremely narrowly. *Buckley*, 539 F.2d at 889. Since *Cardillo*, this Court eschewed the notion that the incremental harm doctrine has any basis in the First Amendment. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991) ("Here, we reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech."); *Church of Scientology Int'l v. Time Warner*, 932 F. Supp. 589, 594 (S.D.N.Y. 1996) ("The proposition that the incremental harm doctrine is grounded in the First Amendment has been rejected by the Supreme Court in *Masson*."). Even the doctrine's foundational cases failed to "clearly articulate[] the source of law for [its] genesis." *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 390 (S.D.N.Y. 1998). This has led courts to inconsistently apply the incremental harm doctrine and even confuse it with other doctrines of defamation law. *Id.* (citing cases and noting the incremental harm doctrine has been confused with the substantial truth defense and the libel-proof plaintiff doctrine, and noting "the need to clearly distinguish between the three").

Here, the unchallenged portions of Lansford's statement, calling Ms. Courtier a "lewd and lusty lush" and "a proprietor of a bunch of upscale, hoity-toity clothing stores" who "hoodwinks the poor," contextualize and explain the challenged portions. (J.A. at 18.) In those portions, Lansford degrades Ms. Courtier by labeling her "a leech on society," "corrupt and a swindler," "a pimp for the rich," and "a whore for the Poor." (*Id.*). These portions cause significantly more harm to Ms. Courtier's reputation than the unchallenged portions. *See, e.g.*, *Masson*, 501 U.S. at 523 (noting the most "provocative, bombastic statements" quoted by the defendant author are those

complained of by the plaintiff, rendering the incremental harm doctrine inappropriate in that case). The unchallenged portions of Lansford's statement consist of crude and distasteful name-calling but serve primarily to modify and support the four challenged character attacks, each of which stabs at the essence of Ms. Courtier's integrity, honesty, and humanity. Because each of these four insults causes substantially rather than incrementally more harm to Ms. Courtier's reputation, this Court should allow Ms. Courtier to prove her defamation claim and defend her good name at trial.

Even assuming that Ms. Courtier could be libel-proof under the incremental harm doctrine on the basis of her criminal convictions alone, Lansford's statements do not explicitly refer to her long-past criminal record. Under this assumption, the incremental harm doctrine would only apply if the unchallenged portions of Lansford's statement asserted either (i) true facts about her criminal record (rending them inactionable) or (ii) false statements that were only incrementally more harmful than the portions she challenged. Because neither the challenged nor unchallenged portions of Lansford's statement mention Ms. Courtier's past convictions, all of the four challenged portions are actionable. This Court should preserve the balance between protecting free speech and Ms. Courtier's right to safeguard her reputation by trying her defamation claim before a jury.

B. Under the Issue-Specific Doctrine, Ms. Courtier is Not Libel-Proof with Respect to Her Criminal Record Because Lansford Has Not Established that Her Long-Past Criminal Record Was the Subject of Significant Publicity, Let Alone Any Publicity Whatsoever.

The issue-specific doctrine does not preclude Ms. Courtier's libel claim because Lansford cannot establish that her criminal record was well-known (or known at all) when he posted his offensive statement. The issue-specific doctrine reasons that "when a particular plaintiff's reputation for a particular trait is sufficiently bad, further statements regarding that trait, even if false and made with malice, are not actionable because, as a matter of law, the plaintiff cannot be

damaged in [her] reputation as to that trait." *Church of Scientology Int'l v. Time Warner, Inc.*, 932 F. Supp. 589, 593 (S.D.N.Y. 1996) (declining to apply the libel-proof plaintiff doctrine). "The law presumes that one possesses good character and that even the limited good reputation of a person of bad character could be worse." *McBride*, 894 S.W.2d at 10. Hence, the issue-specific doctrine applies to a plaintiff "whose reputation on the matter in issue is so diminished that, at the time of an otherwise libelous publication, it could not be further damaged." *Id.* at 9.

"Publicity is part and parcel of the damage to a reputation necessary to trigger the issue-specific version of the libel-proof plaintiff doctrine. Indeed, it is often the means by which such damage occurs and the most effective evidence of that damage." *Thomas v. Tel. Publ'g Co.*, 929 A.2d 993, 1005 (N.H. 2007), *modified & reh'g denied*, 2007 N.H. LEXIS 156 (Aug. 29, 2007). When the plaintiff's criminal activity was already highly publicized and notorious, a plaintiff is libel-proof with respect to statements accusing her of additional criminal activity. *See id.* (explaining that, "where courts have most persuasively applied the doctrine and deemed plaintiffs libel-proof, both the publicity surrounding the crimes and the attendant level of notoriety are quite high," and citing cases). For example, the plaintiff in *Cardillo* was "serving 21 years . . . for assorted federal felonies" and had been the subject of congressional testimony prior to publication of challenged statements about his criminal activity. 518 F.2d at 640. In *Jackson v. Longcope*, the plaintiff had been the subject of "scores" of newspaper articles and was serving a life sentence for several murders before the defendant published challenged statements about his criminal activity. 476 N.E.2d 617, 619–20 (Mass. 1985). Likewise, the court in *Wynberg v. National Enquirer* held the plaintiff libel-proof with respect to a magazine article implying he had taken financial advantage of Hollywood actress Elizabeth Taylor during their highly-publicized, fourteen-month relationship, reasoning the plaintiff had an undisputed "reputation for taking advantage of women

generally, and of Miss Taylor specifically" and had "been convicted for [related] criminal conduct on five separate occasions." 564 F. Supp. 924, 925, 927–29 (C.D. Cal. 1982) (noting plaintiff's relationship with Elizabeth Taylor had "generated at least 86 news articles"). And in *Ray v. Time, Inc.*, prior to publication of the challenged statements calling plaintiff a "'narcotics addict and peddler'" and a "robber," the plaintiff had confessed to and been convicted of murdering Dr. Martin Luther King, Jr. 452 F. Supp. 618, 622 (W.D. Tenn. 1976) (dismissing plaintiff's claim that such statements were libelous), *aff'd per curiam*, 582 F.2d 1280 (6th Cir. 1978). In each of these cases, the court held the plaintiff libel-proof with respect to the specific issue in the challenged statement because the plaintiff already had such a bad reputation on that issue prior to the publication of the statement.

Under the same principle, courts decline to hold the plaintiff libel-proof in cases where the plaintiff's reputation was not subject to significant publicity. *See, e.g.*, *Thomas*, 929 A.2d at 1005 (holding plaintiff was not libel-proof despite having "some twenty convictions between 1975 and 1990," and warning that the doctrine should "be applied with caution and sparingly"); *McBride*, 894 S.W.2d at 10 (denying summary judgment on plaintiff's libel claim after finding the record devoid of "evidence of the publicity, if any, [that the plaintiff's] convictions [had] received"). Without proof that a plaintiff's criminal "activities were widely reported to the public," courts "must assume . . . [the plaintiff's] reputation in the community was good." *McBride*, 894 S.W.2d at 10; *Liberty Lobby*, 746 F.2d at 1568 ("The law . . . proceeds upon the optimistic premise that there is a little bit of good in all of us -- or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse.").

Moreover, even if a plaintiff's criminal activity is well-known, the defendant must "establish that, as a matter of law, [the plaintiff's] reputation could not have suffered from the

[challenged] publication." *McBride*, 894 S.W.2d at 10–11 (concluding that, "even if [the plaintiff's] convictions were well known, his criminal history [was not] so extreme that no reasonable person could find further damage to his reputation by the false accusation of a new robbery"). To illustrate the narrow scope of this doctrine, one court invoked globally infamous criminals "Adolph Hitler" and "Charles Manson" and explained it only applies to "an individual with an equally despicable reputation." *Langston v. Eagle Publ'g. Co.*, 719 S.W.2d 612, 623 (Tex. App. 10th 1986) (denying defendant's motion for summary judgment on plaintiff's libel claim, and concluding the doctrine did not apply to plaintiff's "reputation, however tarnished by allegations of civil wrongdoing in [a] consumer-fraud suit"). In sum, a libel defendant must establish not only that the plaintiff's reputation (with respect to the specific issue in the defendant's statement) was the object of significant publicity, but also that it is so negative that it could not be further harmed. Hence, "criminal convictions, alone, are not enough to justify application of the doctrine." *Thomas*, 929 A.2d at 1005.

In light of the narrow contours within which courts apply the issue-specific doctrine, Ms. Courtier is not libel-proof. As the Tenley District Court observed, Ms. Courtier's criminal activity ceased "decades ago." (J.A. at 10.) There is nothing in the record to support a finding that, between then and now, Ms. Courtier's criminal activity as a juvenile and young adult garnered high notoriety, let alone any publicity whatsoever. In contrast to the libel-proof plaintiffs in *Cardillo*, 518 F.2d at 640, *Jackson*, 476 N.E.2d at 619–20, *Wynberg*, 564 F. Supp. 924, 927–29, and *Ray*, 452 F. Supp. at 622—all of whom were convicted of cruel and grave offenses and most of whom were incarcerated for long sentences when libelous statements about them were published—Ms. Courtier "rehabilitated herself," "turned her life around," and launched a successful business upon her release and built up her reputation as a social justice advocate. (J.A. at 3, 5, 16).

Lansford fails to establish that Ms. Courtier's distant criminal history is so extreme that no reasonable person could find his comments damaged her reputation further. Crucially, even plaintiffs who have been deemed not libel-proof had more extensive and more serious criminal records than Ms. Courtier's. *See, e.g.*, *Thomas*, 929 A.2d at 1005 (holding plaintiff not libel-proof, despite having "some twenty convictions between 1975 and 1990" and allowing his libel claim to proceed with respect to an article that detailed his arrest on charges of receiving stolen property and that he was suspected of committing thousands of burglaries); *McBride*, 894 S.W.2d at 10 (holding plaintiff not libel-proof with respect to a newspaper article implicating him in an aggravated robbery, even though plaintiff had been convicted of theft, burglary, and delivery of drugs). Those considerations—in combination with the fact that there is nothing in the record demonstrating that Ms. Courtier's criminal history was widely reported to the public, let alone reported at all—foreclose the finding that Ms. Courtier is libel-proof. In fact, the record evinces only that Ms. Courtier has a reputation in Silvertown as a successful entrepreneur and social reformer. (J.A. at 16.) (noting that Ms. Courtier "has advocated publicly," "campaigned quite heavily," and "uses her sizable social media presence to advocate for social causes"). Given Ms. Courtier's well-known humanitarian advocacy, this Court should find—as both state courts did—that Ms. Courtier "has a reputation to protect from defamatory and false statements." (*Id.* at 21); (*see also id.* at 10–11) (finding Ms. Courtier "is anything but an inveterate criminal," and concluding that she "is not a libel-proof plaintiff"). Accordingly, under the issue-specific doctrine Ms. Courtier cannot be libel-proof with respect to her criminal activity.

Even if this Court holds Ms. Courtier libel-proof with respect to the portions of Lansford's statement implicating her criminal record as a young adult, (J.A. at 18) (referring to Lansford calling Ms. Courtier a "leech on society"), Ms. Courtier's claim can still proceed based on the

harm inflicted by the three remaining portions. Those portions, calling Ms. Courtier "corrupt and a swindler," "a pimp for the rich," and "a whore for the Poor," (*id.*), are still actionable because they do not concern the specific issue for which Lansford claims Ms. Courtier is libel-proof: her criminal record. By stamping Ms. Courtier "corrupt and a swindler," he accuses her of being disingenuous in her fight for social justice reforms. (*Id.*) (referring to Lansford declaring that Ms. Courtier "hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood," which calls back to his earlier claim that she "casts herself as a defender of the less fortunate"). Similarly, when he brands her "a pimp for the rich" and "a whore for the Poor," he reiterates his jeer that she "pimps out [her business's] clothes to the rich and lavish." (*Id.*) These phrases are actionable because they attack her as a businesswoman and political advocate—two facets of her life in which the record indicates only a high-profile and even favorable reputation. (*See id.* at 16) (noting Ms. Courtier's "significant accomplishments in the business world" and that she "uses her sizable social media presence to advocate for social causes"). In fact, Ms. Courtier's clothing stores are highly successful. (*Id.*) Regardless of whether Lansford's remarks about Ms. Courtier's long-past criminal history are actionable, the record compels the conclusion that Lansford's accusatory diatribe against her business and political persona is actionable.

Curiously, Lansford argues Ms. Courtier's felony conviction from many years ago and two-year jail sentence render her reputation so diminished that it could not be further damaged, implying she is beyond rehabilitation. That implication is not only offensive but also highlights both Lansford's ignorance of the cycle of poverty and his lack of faith in rehabilitation. *See* Mark Robert Rank, *Poverty as a Structural Failing*, *in One Nation, Underprivileged: Why American Poverty Affects Us All* 53 (2005) (discussing the cycle of poverty and explaining that "the majority of Americans will experience poverty during their adult lifetimes, which suggests the systemic

nature of U.S. poverty"). Holding Ms. Courtier libel-proof would ignore that she rehabilitated herself in prison through access to educational and structural resources—resources otherwise inaccessible to someone similarly situated in poverty. *See id.* at 66 ("Essential to an initial understanding of poverty is the concept of economic vulnerability and an awareness of . . . the lack of human capital in accentuating such vulnerability. Individuals who are more likely to experience poverty tend to have attributes that put them at a[n economic] disadvantage . . . , [including] skills, education, and qualifications that individuals bring with them into the economy."). In prison, she achieved sobriety and earned both her G.E.D. and business degree, the combination of which spring boarded her into a successful entrepreneurial career. (J.A. at 5.) Ultimately, holding Ms. Courtier libel-proof would neglect even the possibility that her reputation could improve. *See Liberty Lobby, Inc.*, 746 F.2d at 1568 (rejecting the libel-proof plaintiff doctrine in its entirety because it rests on "the [faulty] assumption that one's reputation is a monolith, which stands or falls in its entirety"). Thus, to ensure the issue-specific doctrine's scope remains narrow and equitable, and because Ms. Courtier has a reputation to defend as both a successful business owner and a prominent voice in the Silvertown political arena, this Court should remand this case to give her an opportunity to defend her good name.

II. LANSFORD'S STATEMENT IS NOT RHETORICAL HYPERBOLE BECAUSE A REASONABLE READER WOULD INTERPRET IT AS ASSERTING OR IMPLYING FACTS ABOUT MS. COURTIER.

Lansford's statement does not constitute rhetorical hyperbole because a reasonable reader would interpret it as asserting facts; therefore, it is not constitutionally protected and is actionable under defamation law. "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (quoting *Sullivan*, 376 U.S. at 270). Thus, a plaintiff alleging defamation must prove the statement in

question "is sufficiently factual to be susceptible of being proved true or false." *Milkovich*, 497 U.S. at 21 (denying summary judgment to a defendant who made a statement connoting that the plaintiff committed perjury, and concluding such statement was "sufficiently factual" to be defamatory). Such a statement is unprotected defamation because a reasonable person hearing it would believe certain untrue facts about the person described therein and would consequently hold that person in lower regard. *Gertz*, 418 U.S. at 370 (White, J., dissenting) ("Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule."); *Levin v. McPhee*, 119 F.3d 189, 196 (2d Cir. 1997) (holding that, for a defamation claim to fulfill the falsity requirement, a reasonable reader must be able to perceive the alleged defamatory statements as statements of fact).

In *Milkovich*, this Court rejected the "artificial dichotomy between 'opinion' and fact," *id.* at 19, so when a statement of opinion "relating to matters of public concern" has "provably false factual connotations," it is not entitled to constitutional protection. *Id.* at 20 (citing *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 772 (1986)). This is because, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact," and "[s]imply couching such statements in terms of opinion does not dispel these implications . . . ." *Id.* at 18–19.

Distinct from unprotected defamation is rhetorical hyperbole, which is "'imaginative expression'" that illuminates vibrant discussion. *Milkovich*, 497 U.S. at 20 (noting that this Court has found rhetorical hyperbole has "traditionally added much to the discourse of our Nation"). It is loose and figurative language that cannot appear to a reasonable person to assert facts; because it is not susceptible of being proven true or false, such language is not actionable under defamation

law. *See, e.g.*, *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 13-14 (1970) (holding the word "blackmail" as used to describe a plaintiff's negotiation position was rhetorical hyperbole and could not reasonably be interpreted as imputing the crime of blackmail to the plaintiff). Because rhetorical hyperbole is not meant to be taken literally, it cannot damage the subject's reputation. *See id.* (finding "even the most careless reader" of the defamatory statement "must have perceived that [it] was no more than rhetorical hyperbole, a vigorous epithet" that could not have been reasonably understood as actually implying plaintiff "had been charged with a crime"). Accordingly, rhetorical hyperbole functions as an affirmative defense to a defamation claim. *See, e.g.*, *Int'l Galleries, Inc. v. La Raza Chi., Inc.*, No. 05 C 4991, 2007 U.S. Dist. LEXIS 83319, at *31–32 (N.D. Ill. Nov. 2, 2007) (holding plaintiff entitled to judgment as a matter of law on defendants' "affirmative defense that the [statement] is merely 'rhetorical hyperbole,' because "'a statement should only be considered rhetorical hyperbole when it is obviously an exaggeration, rather than a statement of literal fact'" (citations omitted)).

However, such artistic and imaginative expression is not entitled to constitutional protection when a reasonable person would understand it as asserting facts about the plaintiff. *Milkovich*, 497 U.S. at 20–21. ("The dispositive question in the present case [is] whether a reasonable factfinder could conclude that the [defendant's statements] imply an assertion that [plaintiff] perjured himself in a judicial proceeding."). "It is the use of figurative or hyperbolic language that separates rhetorical hyperbole from opinion, which is not absolutely protected." Eric Scott Fulcher, *Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation*, 38 Ga. L. Rev. 717, 736 (2004). Importantly, a finding as to whether the statement in question is true is not dispositive in determining whether a reasonable person would understand the statement to assert facts. *See*

Levinsky's, Inc. v. Wal-Mart Stores, 127 F.3d 122, 131 (1st Cir. 1997) (citing *Milkovich*, 497 U.S. at 20) (explaining "[t]he determination of whether a statement is hyperbole depends primarily upon whether a *reasonable person could interpret* the statement to provide actual facts about the [plaintiff]," and "is not inherently implausible" (emphasis added)). Instead, the falsity of a statement is one prong of the defamation claim that Ms. Courtier seeks to prove in front of a jury at trial. *See id.* (holding the statement at issue was not rhetorical hyperbole because it "can be verified or rebutted by objective evidence," and noting that "evidence of th[at] type [had], in fact, [been] adduced by the plaintiff" and heard by the jury at trial).

"[T]here is . . . no requirement that the defamatory meaning of a challenged statement correspond to its literal dictionary definition. It is sufficient . . . that the challenged statement reasonably implies the alleged defamatory meaning." *See, e.g.*, *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 153 (2d Cir. 2000) (explaining that "fact-laden" statements do not qualify as rhetorical hyperbole). In *Flamm*, the Second Circuit held the term "ambulance chaser" was not rhetorical hyperbole because it could be reasonably interpreted as stating that the plaintiff attorney was unethical in his practice. *Id.* at 155. Likewise, the word "corrupt," when used to refer to a judge, was not rhetorical hyperbole because it was sufficiently fact-laden—a reasonable person could believe it to be true. *Bentley v. Bunton*, 94 S.W.3d 561, 581–83 (Tex. 2002). Similarly, statements that a plaintiff was "corrupt" and a "preying swindler" were "variations of the underlying . . . factual assertion that [the plaintiff] engaged in fraudulent financial activity." *Laughland v. Beckett*, 870 N.W.2d 466, 475 (Wis. Ct. App. 2015). In sum, statements that assert *or imply* provable facts about a plaintiff do not qualify as rhetorical hyperbole. *See, e.g.*, *Kumaran v. Brotman*, 617 N.E.2d 191, 200 (Ill. App. Ct. 1993) ("The gist of the article - that plaintiff was

'working a scam' by filing frequent, unwarranted lawsuits to procure pecuniary settlements - concerned plaintiff's conduct and his character, which suggests that it was factual.").

Because words can have different connotations based on their surrounding context, a determination of whether a statement constitutes rhetorical hyperbole requires an inquiry into that context. *See Greenbelt Coop. Publ'g Ass'n,* 398 U.S. at 13 (finding context dispositive, and noting that "[i]f the [statement] had been truncated or distorted in such a way as to extract the [portion challenged as defamatory], this would be a different case"); *Dillworth v. Dudley*, 75 F.3d 307, 310 (7th Cir. 1996) (noting that words which other courts had deemed rhetorical hyperbole each had "both a literal and a figurative meaning," and that a "consider[ation of] the context in which the term appears" is dispositive). Rhetorical hyperbole "consists of terms that are either too vague to be falsifiable or sure to be understood as merely a label for the labeler's underlying assertions." *Dillworth*, 75 F.3d at 309 (finding the word "crank" to be rhetorical hyperbole, where it was used as an evocative insult against a professor). For example, this Court held that the words "scab" and "blackmail" were susceptible to different meanings depending upon how they were used against the plaintiff. *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 285–86 (1974) (holding defendants' use of the word "scab" was rhetorical hyperbole, based on its use in a newsletter calling non-union members "scabs," stating "where others have hearts, [scabs] carr[y] [tumors] of rotten principles," and that "Judas is a gentleman compared with a scab"); *Greenbelt Coop. Publ'g Ass'n*, 398 U.S. at 14 (holding defendant's use of the word "blackmail" was rhetorical hyperbole and could not be reasonably understood to accuse the plaintiff of that crime, because it was used at a public meeting where defendant was criticizing plaintiff's proposal for zoning ordinances).

Lansford's statements are not rhetorical hyperbole because they assert or imply provable facts about Ms. Courtier. Taken in their full context, his statements calling Ms. Courtier "a pimp

for the rich," "a leech on society," "a whore for the Poor," and "corrupt and a swindler" are not at all figurative; rather, a reasonable person would understand Lansford as asserting or implying that Ms. Courtier takes advantage of both her stores' customers and "the less fortunate in [the Cooperwood] community." (J.A. at 17.) Lansford's statements assert or imply that Ms. Courtier's wholehearted advocacy for social justice in her community is merely a façade for her own personal gain, and they discredit her capacity to improve her personal circumstances after her traumatic upbringing.

While Ms. Courtier was criticizing Lansford's policy record as Mayor of Silvertown, Lansford responded with a classist and misogynistic tirade of *ad hominem* attacks. When a reasonable person reads that "[i]n her early years, Silvia Courtier was a lewd and lusty lush, *a leech on society*, and a woman who walked the streets strung out on drugs," (*see id.* at 18) (emphasis added), they would understand Lansford as asserting or implying Ms. Courtier was a prostitute and drug addict. As "pimp for the rich" harkens back to Lansford's claim that Ms. Courtier "pimps out these clothes to the rich and lavish," a reasonable person would understand "pimp for the rich" as a direct attack on Ms. Courtier's entrepreneurial success and professional ethics. (*See id.*). Likewise, considering Ms. Courtier's fervent public advocacy for social justice issues, (*see* J.A. at 16) (finding that Ms. Courtier "has advocated publicly," "campaigned quite heavily," and "uses her sizable social media presence to advocate for social causes"), "whore for the Poor" asserts or implies to a reasonable person that Ms. Courtier's altruism is a masquerade to elevate her own public image. (*See id.*). Together these assertions and implications would lead a reasonable person to understand Lansford's last insult—that Ms. Courtier is "corrupt and a swindler"—as attacking her advocacy on behalf of marginalized communities as disingenuous because she is simultaneously profiting only from those who can afford to shop at her "hoity toity

clothing stores." (*See id.*). Hence, calling Ms. Courtier "corrupt and a swindler" asserts or implies she is "hoodwink[ing] the poor" to benefit her personal image as a champion of social justice and promote her businesses. (*See id.*). Finally, given that Lansford is the current Mayor of Silvertown and had a personal and professional relationship with Ms. Courtier and her late husband, (J.A. at 15), a reasonable person could assume Lansford had based his statement on his personal knowledge about Ms. Courtier.

Therefore, a reasonable person reading Lansford's statement would not understand it as rhetorical hyperbole but rather as asserting facts about Ms. Courtier and, consequently, would hold her in lower regard. *See Milkovich*, 497 U.S. at 13 (quoting Restatement (Second) of Torts § 566, cmt. a (Am. Law. Inst. 1977) ("Under the law of defamation, an expression of opinion could be defamatory if the expression was sufficiently derogatory of another as to cause harm to [her] reputation."); *Flamm*, 201 F.3d at 153 (holding "that the challenged statement is 'reasonably susceptible to the defamatory meaning imputed to it'" because, "[c]onsidering the 'general tenor' of the publication . . . it would not be unreasonable to think that the [defendant's] description of [plaintiff] conveyed an assertion of fact"). That damage to Ms. Courtier's reputation is actionable under defamation law. *See Milkovich*, 497 U.S. at 12 ("Defamation law developed not only as a means of allowing an individual to vindicate [her] good name, but also for the purpose of obtaining redress for harm caused by such statements."). Accordingly, this Court should allow Ms. Courtier an opportunity to obtain redress for the harm inflicted by Lansford's statement.

CONCLUSION

For the foregoing reasons, this Court should find that Lansford cannot establish that Ms. Courtier is libel-proof or that his statement qualifies as rhetorical hyperbole. Ms. Courtier

respectfully requests this Court to remand her case to the Tenley District Court to allow her to prove her libel claim against Lansford at trial.