Docket No. 18-2143

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

ELMORE LANSFORD, Petitioner,

v.

SILVA COURTIER, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF TENLEY

BRIEF FOR RESPONDENT

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Counsel for Respondent

QUESTIONS PRESENTED

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

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

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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

Summary of the Facts

Silvia Courtier, Respondent, owns a line of successful clothing stores in and around the city of Silvertown. (J.A. at 2). Ms. Courtier is the widow of the former Silvertown mayor, Raymond Courtier who served in office for the eighteen years prior to his death. *Id*. Since Mr. Courtier's untimely death, Ms. Courtier not only continued to grow her business and contribute heavily to local charity, but she also become a more politically active member of the community, advocating for educational equity, restorative justice, and affordable housing. *Id.* As a result, she manages a website for her clothing stores, as well as one for her advocacy efforts. *Id*.

Ms. Courtier achieved all of this despite an unfortunate and difficult childhood. As the child of two parents suffering from drug addiction, young Ms. Courtier witnessed her parents struggle. (J.A. at 5). While her father served time in prison for drug offenses, he was murdered, and when Ms. Courtier was 10, her mother also passed away as the result of a drug overdose. *Id.* Left to support herself, young Silvia Courtier stole money from grocery stores and found herself embroiled in other juvenile delinquencies. *Id.* During this time, she fell victim to sexual abuse at the hands of an older man. *Id.* Ms. Courtier's unfortunate background ultimaty resulted in her pleading guilty to a felony cocaine distribution charge in her early 20's and serving a two-year prison sentence. *Id*.

While serving her sentence, Ms. Courtier attempted to make the most of her circumstances. She worked to earn her G.E.D., enrolled in community college classes, and took every business class she was offered. *Id*. The effort Ms. Courtier put into her own education and self-improvement during her sentence enabled her to effectively rehabilitate herself. *Id.* Upon release, she used the business acumen she worked so hard to obtain and opened her first successful small-scale clothing

operation. *Id*. She was then able to turn her small business into a larger clothing store, which eventually grew to be an exclusive, popular and well-respected clothing store. *Id.*

Putting her past behind her, Ms. Courtier became involved in community philanthropy and political advocacy. (J.A. at 2, 5). When Elmore Lansford, Petitioner, ran for mayor in the most recent election, Ms. Courtier voiced her concerns about his political positions. (J.A. at 3) She authored pieces on her advocacy website opposing the policy choices of her late husband's former political ally. *Id*. Petitioner ran against Evelyn Bailord in the Silvertown mayoral election, and Ms. Courtier contributed greatly to Bailord's campaign. *Id.*

Over the course of the campaign, Ms. Courtier wrote numerous online commentaries expressing concerns over Petitioner's policies that favored installing high-rise developments in formerly low-rent housing complexes. *Id.* She critiqued him as a "relic of the past," "a divisive leader," and "someone who cares little for social justice issues." (J.A. at 3-4). She has advocated for Petitioner to be replaced as mayor by someone more "compassionate...who cares about all people of all races, genders, and ethnicities." (J.A. at 4). In response to Ms. Courtier's criticism, Petitioner launched into a series of insults targeted at Ms. Courtier. The publication reads:

> 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 Robina Hood. I guess she learned something from the streets.
>
> Now, this businesswoman is a pimp for the rich and a whore for the Poor. What a joke!

(J.A. at 4). Ms. Courtier filed suit against Petitioner for defamation, contending that several of his comments were false and libelous:

> "a pimp for the rich";
>
> "a leech on society";
>
> "a whore for the poor"; and
>
> "corrupt and a swindler."

(J.A. at 4-5). Petitioner now claims that these statements are rhetorical hyperbole and counters that Ms. Courtier is a "libel-proof plaintiff" based on her juvenile criminal record one felony conviction from her early 20's. *Id*.

Summary of the Proceedings

The Respondent, Silvia Courtier, filed a defamation suit against Petitioner in the Tenley District Court, asserting that Petitioner "uttered several false defamatory statements of fact that harmed her good name" and her reputation. (J.A. at 1). Petitioner then countered Ms. Courtier's lawsuit, filing a special motion to dismiss/strike the defamation lawsuit as a strategic lawsuit against public participation (an anti-SLAPP suit) through Tenley Code Ann. §5-1-701, arguing that (1) even if his statements are found to be defamatory, Ms. Courtier is not able to recover for defamation because her reputation makes her a libel-proof plaintiff, and (2) his statements should be considered rhetorical hyperbole and imaginative expressive epithets that are protected under the First Amendment of the Constitution. (J.A. at 1-2). Petitioner filed a special motion to dismiss through Tenley Citizens' Public Participation Act. (J.A. at 2).

The District Court rejected the Petitioner's claim that Courtier is a libel-proof plaintiff, noting that "the doctrine should be applied with great care." (J.A. at 11). The District Court went on to conclude that since Petitioner issued an "emotional response to a targeted political column," the

response was rhetorical hyperbole because the First Amendment protects harsh political rhetoric. (J.A. at 12). The court therefore granted Petitioner's special motion to strike and dismiss Courtier's defamation claim. (J.A. at 13).

Silvia Courtier appealed this decision to the Supreme Judicial Court of the State of Tenley. (J.A. at 14). The Supreme Judicial Court affirmed the District Court's determination that Silvia Courtier is not libel-proof, stating that Courtier was "a perfect of example of someone who...has restored and rehabilitated herself and has a reputation to protect from defamatory and false statements." (J.A. at 19, 20). However, the Supreme Judicial Court rejected the District Court's finding that Petitioner's statements are rhetorical hyperbole. (J.A. at 22). The Supreme Judicial Court found instead that Petitioner "vociferously attacked Courtier's abilities and integrity as a businessperson" and could not excuse his words as protected political rhetoric or "name-calling and mere epithets." (J.A. at 22). Thus, the court held that it is too early in the litigation process to dismiss a lawsuit in which Ms. Courtier has endured insults that question her "competence and professionalism as a businessperson." (J.A. at 23). Petitioner appealed this decision and this Court granted certiorari. (J.A. at 24).

Standard of Review

When reviewing an anti-SLAPP ruling, the court reviews *de novo*, looking to the standards governing similarly situated statutes. *Phoenix Trading, Inc. v. Loops LLC*, 732 F.3d 936, 941 (9th Cir. 2013) (citing *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1102 (9th Cir. 2003)). Furthermore, where or not a statement is considered rhetorical hyperbole is a question of law. *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 294 (4th Cir. 2008). As such, this court reviews questions of law under a *de novo* standard. *United States v. Ellis*, 527 F.3d 203, 205 (1st Cir. 2008).

SUMMARY OF THE ARGUMENT

This Court should affirm the Supreme Judicial Court of State of Tenley's decision denying the Petitioner's motion to dismiss Silvia Courtier's defamation lawsuit because Ms. Courtier is not a libel-proof plaintiff and Petitioner's statements do not fall under the protection of rhetorical hyperbole.

Plaintiffs with limited and less notorious criminal convictions and backgrounds do not qualify as libel-proof plaintiffs under current federal and state jurisprudence. Ms. Courtier has minimal and dated interactions with the criminal justice system, and she has made every effort to move forward and rehabilitate herself. It would be inappropriate to assume that a few criminal acts years in the past should forever tarnish her good name.

As the Second Circuit has correctly determined, limited criminal conduct alone is insufficient to justify a broad application of either the two forms of libel-proof doctrine: (1) the incremental harm doctrine, or (2) the issue-specific libel-proof doctrine. While many courts have determined that a broad application of the libel-proof doctrine would be inappropriate, others have outright opposed its implementation, considering the doctrine to be a fundamentally bad idea that is inconsistent with federal constitutional law. The lower courts in this case were correct in finding that such a limited interaction with the criminal justice system is insufficient to justify the application of the libel-proof doctrine.

Furthermore, if this Court were to decide that private persons in similar situations to Ms. Courtier can be classified as libel-proof plaintiffs, the decision would undoubtedly lead to poor public policy. As the lower court discussed, Ms. Courtier is the "perfect example of someone who —though they committed and were convicted of several crimes in their life—has restored and rehabilitated herself and has a reputation to protect from defamatory and false statements." (J.A.

at 20). Should this Court determine otherwise, it would be incorrectly deciding that plaintiffs who have limited criminal histories are branded for life and have no good reputation to protect. Furthermore, a decision favoring the broad application of the libel-proof doctrine would place a requirement on judges to make difficult, line-drawing decisions as to whose reputations are worth preserving. Therefore, this Court should affirm the lower courts' rulings against the sanctioning of character assassination and choose to protect private individuals from defamation as afforded by the First Amendment.

Additionally, the challenged statements in this case do not qualify as protected rhetorical hyperbole. This Court should adopt the test laid out in *Underwager v. Channel 9 Austl.*, for purposes of determining whether a statement qualifies as rhetorical hyperbole or is "provable as false." Following this test, the Court should find that Mr. Lansford's statements could reasonably be taken literally and, therefore, are not "rhetorical hyperbole." Under the *Underwager* test, Mr. Lansford's defamatory comments about Ms. Courtier should be treated as statements of fact because: (1) the broad context of the publication would not indicate that the statements should not be taken as factual assertions; (2) the specific context of the publication did not suggest he was engaging in "figurative or hyperbolic language"; and (3) the statements made in the publication were "susceptible of being proved true or false."

Petitioner's statements were not found in a context that would obviously indicate they were satirical or otherwise unserious. Here, the specific context actually heightens the concerns about potential defamation. Finally, the statements have definitive meaning and can be taken as "literally" true. However, even if the Court chooses to treat Petitioner's statements as opinion, it should still refuse the statement the protection of rhetorical hyperbole because they imply undisclosed facts that are themselves defamatory to Ms. Courtier. Petitioner has crossed the line

from opinion protected by the First Amendment to opinion that defames and is unprotected by the First Amendment. Statements cannot be shielded from the reach of defamation law merely by couching such statements as an opinion.

In the most generous light, the Petitioner's decision to label Ms. Courtier "a swindler" is susceptible to multiple meanings based on its location in the text. The label could refer to the facts disclosed in the commentary but could also refer to something not referenced at all. Petitioner's relationship with Ms. Courtier enhances the possibility that readers would believe there were undisclosed facts inform his "opinions." As such, even if the statements that Ms. Courtier has challenged are not factual statements, they are opinion built on mistaken or undisclosed facts and must be refused protection as "rhetorical hyperbole."

Therefore, the decision of the Supreme Judicial Court of Tenley should be affirmed.

ARGUMENT

"Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements." *Milkovich*, 497 U.S. 1, 12 (1990). This Court has long acknowledged the interests of private individuals in preserving their good reputation. *Gertz v. Welch*, 418 U.S. 323, 341 (1974) (noting the seriousness of the state interest in an individual's right to protect their own good name). Constitutional safeguards of the First Amendment do not extend so far to protect malicious and knowingly false attacks. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The First Amendment commands that "Congress shall make no law . . . abridging the freedom of speech, or of the press..." U.S. Const. amend. I, and one of the venerated purposes of the First Amendment is to protect free political debate and public discourse, *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). Stretching libel-proof doctrine to encompass plaintiffs with inconsequential criminal

records would not further this goal and runs afoul of the existing jurisprudence throughout federal and state courts.

I. THIS COURT SHOULD AFFIRM THE SUPREME JUDICIAL COURT OF TENLEY'S DECISION BECAUSE SILVIA COURTIER CANNOT BE LIBEL-PROOF SOLELY ON THE BASIS OF A FEW DATED CRIMINAL CONVICTIONS.

Silvia Courtier cannot be classified as a libel-proof plaintiff under the existing jurisprudence. *See Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638 (2nd Cir. 1975); *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984). The judgement of the Supreme Court of Tenley—denying the Plaintiff's motion to dismiss—must therefore be affirmed because it correctly found that Ms. Courtier had "rehabilitated herself" and has a good name to protect from false and libelous statements. (J.A. at 20).

First, this Court explicitly rejected the notion that a private individual automatically becomes less protected by libel statutes merely as a result of criminal conduct. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 168 (1979) (refusing to find a plaintiff to be a public figure simply for committing a crime). Second, the Supreme Judicial Court of Tenley correctly identified the public policy concerns that would arise if individuals were to be branded as "criminals" with no hope of restoring their reputation. (J.A. at 20). This Court should ensure that private persons do not lose their reputational interests merely as a result of juvenile indiscretion or singular criminal activity, affirming the lower court's holding.

A. Criminal Conduct Alone is Insufficient to Justify Broad Application of Libel-Proof Doctrine.

Libel-proof doctrine finds its origins in the Second Circuit's decision in *Cardillo v. Doubleday* where the court maintained that the appellant, serving a twenty-one-year prison sentence for multiple felony charges at the time of the suit, was such a habitual criminal that his reputation had

little value. 518 F.2d at 639. This Court has yet to establish clear constitutional rules regarding libel-proof doctrine, and as a result, the lower courts have been left to test out the boundaries of the doctrine on their own. In *Cardillo,* appellant asserted a defamation claim against appellees who published statements about him in a book entitled *My Life in the Mafia*. *Id.* The Second Circuit dismissed the case, determining that as a matter of law the appellant was libel-proof by virtue of being such a habitual criminal that he would be unable to recover anything other than a few cents in nominal damages. *Id* at 640. As the Tenley District Court explained, this articulation is now considered "the genesis" of the libel-proof plaintiff doctrine. (J.A. at 9).

Two forms of libel-proof plaintiff doctrine emerged post-*Cardillo v. Doubleday*: (1) incremental harm doctrine and (2) issue-specific libel-proof plaintiff doctrine. *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 322-22 (2007).

1. Incremental harm libel-proof doctrine is not implicated where the challenged defamatory statements are as damaging as the publication in context.

The incremental harm version of the libel-proof doctrine focuses on the publication containing the defamatory statements. It considers an "examination of the challenged communication." *Thomas,* 155 N.H at 322. The judge then evaluates the defendant's entire communication and "considers the effects of the challenged statements on the plaintiff's reputation in the context of the full communication." *Id*. If the judge determines that the plaintiff's challenged statements do not harm the plaintiff's reputation as much as the unchallenged statements, then the plaintiff will, ultimately, be found libel-proof. *Id*. Then Judge Scalia approached the incremental harm doctrine with hesitation, finding that "[t]his apparently equitable theory loses most of its equity when one realizes that the reason the unchallenged portions are unchallenged may not be that they are true, but only that appellants were unable to assert that they were willfully false. In any event, the theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which

stands or falls in its entirety." *Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568 (1984) *rev'd* on other grounds, 471 U.S. 1134 (1985).

When addressing incremental harm in *Masson v. New Yorker Magazine*, this Court found that incremental harm did not apply and that the doctrine is not compelled as a matter of First Amendment protection of speech, since it "does not bear on whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not." 501 U.S. 496, 523 (1991). As was the case in *Masson*, there is little indication that the incremental harm version of libel-proof doctrine is accepted by Tenley state law. *Id.* at 524. The Supreme Judicial Court of Tenley accepted libel-proof doctrine only in addressing the issue-specific version as it related to Courtier. (J.A. at 20). Thus, there is no mandate under First Amendment protections that this Court adopt the incremental harm doctrine in the instant case, and in fact, it would make little sense given the totality of the Petitioner's statement does no more damage to Courtier's reputation than the challenged statements.

2. Applying issue-specific libel-proof doctrine is inappropriate where Ms. Courtier's criminal record does not rise to the level of notoriety as a career criminal.

The issue-specific version of the libel-proof plaintiff doctrine is reputation focused. It considers a plaintiff's background, reputation, and whether the statement made has the potential to cause more than nominal harm to that reputation. *McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6, 9 (Tex. App. 1994). Under this doctrine, if a plaintiff's reputation is determined to be so poor that it cannot possibly be damaged, the plaintiff becomes exempt from defamation claims under the First Amendment. *Id.*

The Second Circuit further defines the appropriate application of the libel-proof doctrine:

> The libel-proof plaintiff doctrine is to be applied with caution, since few plaintiffs will have so bad a reputation that they are not entitled to obtain redress for defamatory statements, even if their damages cannot be qualified and they receive

> only nominal damages. But in those instances where an allegedly libelous statement cannot realistically cause impairment of reputation because the person's reputation is already so low…, even nominal damages are not to be awarded. Instead, the claim should be dismissed so that the costs of defending against the claim of libel, which can themselves impair vigorous freedom of expression, will be avoided.

Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 303 (2d. Cir. 1986). Issue-specific libel-proof doctrine is most commonly applied in situations where plaintiffs are continually convicted of multiple serious crimes or are so notorious to be considered career criminals. *See Cardillo* 518 F.2d at 638-39 (1996).

The Court of Appeals of Tennessee, for example, found a plaintiff libel-proof when the challenged statement erroneously claimed he was the shooter in a crime where the plaintiff was a co-defendant, serving a ninety-nine-year prison sentence for his involvement in the same crime. *Davis v. Tennessean*, 83 S.W.3d 125, 127 (Tenn. Ct. App. 2001) (noting, however, that individuals do not become libel-proof merely as a result of being incarcerated). This follows the Second Circuit in *Cardillo*, in which the plaintiff was serving a twenty-one-year prison sentence for crimes almost identical to those of which he was accused. 518 F.2d 638, 639 (1996).

At the federal appellate level, many circuits have recognized a version of issue-specific libel-proof doctrine, determining that only certain classes/groups of plaintiffs are eligible for protection under defamation laws. *See e.g. Brooks v. Am. Broadcasting Cos.*, 932 F.2d 495, 500 (6th Cir. 1991) (remanding the case to the district court to resolve the question of plaintiff's libel-proof status); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1074 (5th Cir. 1987) (holding that a jury trial is necessary to determine if plaintiffs are libel-proof plaintiffs); *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 304 (2d. Cir. 1986) (determining that a plaintiff's specific reputation as a long-term adulterer was sufficient to apply libel-proof plaintiff doctrine only to statements related to conceded adulterous behavior).

However, other federal and state courts have questioned the viability of the libel-proof doctrine or have wholly rejected its application because removing an individual's ability for reputational rehabilitation is a "fundamentally bad idea" and is not a "part of federal constitutional law." *See Liberty Lobby*, 746 F.2d at 1569.

In the case before the Court, Petitioner, asserts that Courtier is a "libel-proof plaintiff." (J.A. at 6). Petitioner contends that since Courtier has one felony conviction from her early 20s, she is incapable of receiving First Amendment consideration. (J.A. at 9). Yet as both lower courts correctly found, this limited interaction with the criminal justice system is insufficient to justify application of the libel-proof doctrine. (J.A. at 11, 21). Courtier had a rough childhood that led to some juvenile charges and a single felony conviction in her early 20's. (J.A. at 5). While fulfilling her two-year sentence, Courtier began working toward rehabilitation, earning her G.E.D., enrolling in community college classes, and taking every opportunity to learn more about business so she could improve her life upon release. *Id.* These actions enabled Courtier to re-enter society, open a successful and well-respected clothing store, and engage in social justice advocacy throughout the remainder of her life. *Id.*

Courtier is hardly a notorious criminal with a reputation so scarred that she could not possibly recover. Cases where lower courts apply libel-proof doctrine involve severe and continuing criminal conduct so serious that the court determined the individual's reputation was beyond repair. "The law presumes that one possessed good character and that even the limited good reputation of a person of bad character could be worse."[1] *McBride*, 894 S.W.2d at 10.

[1] The law presumes that individuals have some reputation to protect even if they may have notoriously bad reputations in other respects. "It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity." *Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984).

B. Finding Ms. Courtier to be a Libel-Proof Plaintiff Would Raise Public Policy Concerns by Expanding the Doctrine to Condemn All Those Who Have Ever Committed Crimes to a Life as a Branded Criminal.

First, the libel-proof doctrine if applied in this case would disrupt the function of defamation law and work against the First Amendment by sanctioning character assassination of individuals who engaged merely in limited criminal activity. *See Liberty Lobby*, 746 F.2d at 1568. The majority in *Liberty Lobby* held that "no significant First Amendment values would be furthered by the [libel-proof] rule appellees suggest, since, where a person has been widely libeled by reputable sources, the defendant's good faith reliance upon those sources provides…a complete defense." *Id.* at 1568.

Next, the broad application of libel-proof doctrine places a requirement on judges to make difficult line-drawing decisions as to the individual worth of a plaintiff's reputation. "[W]e are especially mindful of the Liberty Lobby court's apprehension about the difficulty courts will face in determining that a reputation has been irreparably damaged." *Thomas*, 155 N.H. at 325. Courts would have to determined which parts of an individual's reputation are worth protecting and exactly how much criminal activity would result in irreparable harm. Someone who has a history of shoplifting may still be defamed for being accused of murder, just as someone convicted of murder may be defamed by accusations of pedophilia. The Court should not be in the position to determine

Finally, applying libel-proof doctrine to any plaintiff who has a criminal conviction disrupts the function of defamation law and works against the First Amendment by sanctioning character assassination of individuals. *See Liberty Lobby*, 746 F.2d at 1568. The D.C. Circuit found that "no significant First Amendment values would be furthered by the rule [of libel-proof] appellees suggest, since, where a person has been widely libeled by reputable sources, the defendant's good

faith reliance upon those sources provides … a complete defense." *Id.* at 1568. Then Judge Scalia, writing for the majority, made his concerns clear regarding libel-proof doctrine, going so far as to call its implementation a "fundamentally bad idea." *Id.* at 1569. While not establishing a rule, this Court stated in *Masson* that First Amendment principles do not *compel* the acceptance of libel-proof doctrine, much less the broad application Petitioner seeks. 501 U.S. at 523 (1991). Individuals with a background similar to Ms. Courtier's should not be "automatically categorically excluded" from the process of protecting their reputations and receiving First Amendment consideration. Joseph H. King, *The Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian Knot" Syndrome*, 29 Hofstra L. Rev. 343, 359 (2000).

Should this Court determine that an individual can be a libel-proof plaintiff under defamation law solely on the basis of past criminal convictions, including felony convictions, that have gained notoriety or public attention, individuals, such as Ms. Courtier, would be excluded from First Amendment protections. Plaintiffs similar to Ms. Courtier do have good reputations to protect. *See* David L. Hudson, Jr. *Shady Character: Examining the Libel-Proof Plaintiff Doctrine*, 52 Tenn. B.J. 14, 15 (2016). These plaintiffs' reputations are not so diminished that they cannot be rebuilt. Ms. Courtier is the quintessential example of the type of plaintiff who should not be excluded by the libel-proof doctrine. Such a broad application of the libel-proof doctrine would go against the majority of courts' narrow application in very limited circumstances of notorious criminality. This Court should preserve the important right of individuals to protect their good or redeemed reputations and affirm the lower court's ruling.

II. THIS COURT SHOULD AFFIRM THE SUPREME JUDICIAL COURT OF TENLEY'S DECISION BECAUSE PETITIONER WAS NOT ENGAGING IN RHETORICAL HYPERBOLE.

To constitute defamation, "a statement on matters of public concern must be provable as false." *Milkovich*, 497 U.S. at 19. While the Court declined in *Milkovich* to create a blanket "opinion" exception, it limited claims of defamation to (1) factual assertions or (2) opinions that either imply or include embedded statements of fact. *Id.* at 18-20. The Court ruled that its jurisprudence "provides protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Id*. at 20 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1987)). The latter statements qualify as "'imaginative expression' or . . . 'rhetorical hyperbole.'" *Id.*

One test developed by lower courts to determine "whether a statement implies a factual assertion" for defamation purposes is the *Underwager* test:

> First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

Underwager v. Channel 9 Austl., 69 F.3d 361, 366 (9th Cir. 1995).

This Court should adopt the *Underwager* test for purposes of determining whether a statement qualifies as rhetorical hyperbole or is "provable as false." In accordance with the *Underwager* test, this Court should find that Petitioner's statements could reasonably be taken literally and, thus, are not "rhetorical hyperbole." However, even if this Court chooses to treat Petitioner's statements as opinion, it should still refuse the statements the protection of rhetorical hyperbole, because they imply undisclosed facts that defame Ms. Courtier.

A. Petitioner's Defamatory Statements about Ms. Courtier Could 'Reasonably' be Construed as Stating Facts about Ms. Courtier.

Under the *Underwager* test, Petitioner's defamatory comments about Ms. Courtier should be treated as statements of fact because: (1) the broad context would not indicate that the statements

should not be taken as factual assertions; (2) the specific context did not suggest he was engaging in "figurative or hyperbolic language"; and (3) the statements were "susceptible of being proved true or false."

1. The 'broad context' of Petitioner's statements do not indicate that the statements are not to be taken literally.

There is nothing in the "broad context" of Petitioner's statements that would indicate that the statement should not be read at face value. In order for the "broad context" in which allegedly defamatory statements are placed to provide protection, there must be an element that allows the reader to conclude the statements are not to be received literally. *Knievel v. ESPN, Inc.*, 223 F. Supp. 2d 1173, 1180 (D. Mont 2002). For example, in *Knievel*, the allegedly defamatory nature of a photo caption was alleviated by the character of the website on which it was found, "one of tongue-in-cheek humor and slang that was not meant to be taken seriously." *Id.* at 1180.

Similarly, other courts have held that whether hyperbole is a regular feature of the kinds of statements made in an allegedly defamatory action can be included in the analysis of a claim. For example, "sports publications" are often regarded differently than other sources because "'readers...presumably take such railings with a grain of salt.'" *Washington v. Smith*, 80 F.3d 555, 557 (D.C. Cir. 1996) (Ginsburg, J.) (quoting *Moldea v. New York Times Company*, 22 F.3d 310, 313 (D.C. Cir. 1993). *See also Biopsherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 184 (4th Cir. 1998) (affirming dismissal of defamation lawsuit where column had "a breezy rather than solemn tone," and "[t]he context and tenor of the article thus suggest that it reflects the writer's subjective and speculative supposition.")

However, unlike the caption in *Knievel*, Petitioner's statements were not published on a humorous or "joking" website. Instead, they appeared on his social media sites (J.A. at 8), where residents and voters of the town would look for official statements and for his positions on matters

of general interest. There are no indications from the record that this post was set aside as different from the others. Also, unlike sports columnists who regularly traffic in overblown commentary, a mayor like the Petitioner, would be presumed by voters to be well-informed about his criticisms of other members of the community, and to think before attacking a highly regarded citizen. As a result, the broad context of the statements made fails to remove the defamatory "sting" of Lansford's statements.

2. The specific context does not indicate that Petitioner was using figurative or hyperbolic language.

Likewise, there is nothing in the specific context of Petitioners's statements, indicating that he was engaging in "figurative or hyperbolic language." If paired with other obviously non-factual statements, a statement becomes less likely to be factual for the purposes of defamation law. *Knievel*, 223 F. Supp. 2d at 1180 ("The caption . . . appeared among a number of other photos using similar loose, figurative slang language.").

Indeed, in the current case, the context actually heightens the likelihood that the statements would be taken literally. Divorced from their context, the charges that Ms. Courtier is "a pimp for the rich" and "a whore for the poor" might not be defamation; however, the other statements in Petitioner's broadside belies the possibility that he was simply being figurative in his choice of words. In the same statement, Ms. Courtier is described as "lewd and lusty," and "a woman who walked the streets strung out on drugs." (J.A. at 4). Another statement reads, "I guess she learned something from the streets." *Id.* These repeated implications that Ms. Courtier has been involved in prostitution and is engaged in similar activity, having "learned something" about it in the past, increase the likelihood that the reader would perceive these allegations as literally true. Not only could a reasonable reader find these suggestions "between the lines" of Petitioner's publication, it is difficult to see how it could be taken any other way.

3. Petitioner's assertions that Ms. Courtier was a 'pimp,' 'leech,' 'whore,' and 'swindler' were capable of being proved true or false.

Additionally, all of the statements could be proven either true or false. Each of the terms has a widely understood and objective meaning, and this Court should apply those meanings when assessing whether the statements are defamatory. *Levinsky's, Inc., v. Wal-Mart Stores*, 127 F.3d 122, 129 (1st Cir. 1997) ("Under the aegis of the First Amendment, a particular word or phrase ordinarily cannot be defamatory unless in a given context it reasonably can be understood as having an easily ascertainable and objectively verifiable meaning. The vaguer a term, or the more meanings it reasonably can convey, the less likely it is to be actionable."). But even if this Court finds that "the words can be construed as having more than one meaning, only some of which are potentially defamatory, it is for a jury to select among those meanings." *Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113 (2d Cir. 2005).

"[C]alling someone a pimp is, in the abstract, capable of defamatory meaning . . ." *Knievel*, 223 F. Supp. 2d at 1181. The Oxford English Dictionary defines a "pimp" as "a man who takes a proportion of the earnings of a prostitute, usually in return for arranging clients, providing protection, etc." Even the broader definition provided for by O.E.D. defines a pimp as "[a] person who panders to an undesirable or immoral impulse, appetite, etc." In either case, Petitioner is accusing Ms. Courtier of trafficking in immoral activities for her wealthy clients.

The fact that earlier in his diatribe the Petitioner refers to Ms. Courtier as "pimp[ing] out these clothes to the rich and the lavish" does not effectively offset the defamatory statements because the Lansford is implying that Ms. Courtier was previously a prostitute. The phrase "lewd and lusty" is, itself, sexually charged, and the accusation that Ms. Courtier "walked the streets" is a clear reference to her having been a literal prostitute. Furthermore, Petitioner preceded his use of "pimp" and "whore" with the line suggesting that Ms. Courtier "learned something from the streets." This

discounts any possibility that the statement was not meant to be taken as an allegation—a statement of fact—that she is essentially a prostitute.

As for the use of the word "swindler," it is not a word given to multiple meanings. The Oxford English Dictionary defines a "swindler" as "[a] person who uses deception, trickery, etc., to obtain or take something, esp. money; a confidence trickster, a fraudster." Regardless of whether Petitioner was using this term to refer to Ms. Courtier's business or to her charitable efforts, it is defamatory. "Words which charge an individual or a corporation with dishonorable, unethical or unprofessional conduct in a trade, business or profession are capable of a defamatory meaning." *Fields Foundation Ltd. v. Christensen,* 103 Wis. 2d 465, 483 (Wis. App. 1981). Even more clearly, "[t]o charge an ostensibly legitimate foundation with a sham operation inevitably causes others to shun it. The charge is defamatory." *Id.* The meaning of the phrase "a leech on society" is also well-known, indicating that the individual is somehow sustained by public largesse or otherwise negatively affects the community.

B. Even if the Statements are not Clear-Cut Statements of Fact, They are Defamatory Because of Their Implications.

Alternatively, if this Court finds that the statements were not an assertion of fact it should instead regard the comments as opinion. Even under this scenario, however, Petitioner has crossed the line from opinion that is protected by the First Amendment to opinion that defames. Statements cannot be shielded from the reach of defamation law "simply [by] couching such statements in terms of an opinion." *Milkovich,* 497 U.S. 1 at 19. Instead, the assertion of such an opinion focuses the inquiry on what facts the speaker is using to back up his or her contention. *Id.* at 18-19.

This Court has held that "[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." *Id.* That is the case here. "A defamatory

communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Restatement Torts (Second), § 566 (Am. L. Inst. 1977). This idea is grounded in the fact that readers can then assess the opinion fairly. *Standing Comm. on Discipline of the United States Dist. Court v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1994) (construing defamation law concepts to ascertain First Amendment rights in a disciplinary matter). "When the facts underlying a statement of opinion are disclosed, readers will understand [that] they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts." *Id.*

Thus, the *Standing Committee* court found that it was not defamatory for a lawyer to accuse a judge of anti-Semitism because the facts for that opinion – an alleged history of disciplining Jewish attorneys – were clearly stated, and the facts themselves – in the form of the disciplinary rulings and the attorneys being Jewish – were true. *Id.* at 1438. In the most generous light, the Petitioners's decision to label Ms. Courtier "a swindler" is susceptible to multiple meanings based on its location in the text. This phrase could could be based on the facts disclosed in the commentary, but it could also be based on something not referenced at all. Furthermore, given the comma between "a swindler" and the phrase "who hoodwinks the poor into thinking she is some kind of modern-day Robinita Hood," a reasonable reader could infer that the two allegations are separate -- meaning that the facts suggesting she is a "Robinita Hood" are not the same as those suggesting that she is "a swindler."

There is a unique aspect of Ms. Courtier's relationship with the Petitioner that make these accusations particularly susceptible to the interpretation that they are based on undisclosed facts: Petitioner and Ms. Courtier were once close. (JA at 3.) As the trial court found, "Courtier's former

husband and Lansford were political contemporaries and one-time allies. They both served on the city council together." *Id.* Given this fact, a well-informed reader would not just be reasonable in drawing the conclusion that there were undisclosed facts contributing to the Petitioner's purported "opinion" of Ms. Courtier based on the statement itself. Such a reader would be reasonable in drawing the conclusion that the Petitioner *had access* to such facts. Therefore, even a reasonable reader aware of the publicly available information about Ms. Courtier's situation and her dispute with the Petitioner could draw the conclusion that Petitioner had additional knowledge that Ms. Courter was, indeed, engaged in illegal activities or exploiting the poor.

The allegations that Ms. Courtier is a "whore" and "pimp" may be problematic regardless of whether they are based on undisclosed facts. "Statements that 'could reasonably be understood as imputing specific criminal or other wrongful acts' are not entitled to constitutional protection merely because they are phrased in the form of an opinion." *Standing Committee,* 55 F.3d at 1440 (quoting *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 64 (2d. Cir. 1980)).

In any event, these statements are similarly impliedly buttressed by facts that are mistaken and defamatory. Nowhere in the record is there any sign of Ms. Courtier "walk[ing] the streets," as that term is commonly understood as a reference to prostitution. Indeed, rather than being involved in prostitution, Ms. Courtier was "sexually abused by an older man." (J.A. at 5). This misunderstanding of the facts of Ms. Courtier's life taints the opinions that are based upon it. Similarly, there is nothing in the record or in the public domain that Petitioner has brought forward to suggest that Ms. Courtier is currently a "leech on society ," and would require readers to assume that he has undisclosed facts backing up that opinion.

As such, even if the statements that Ms. Courtier has challenged are not factual statements, they are opinion built on mistaken or undisclosed facts and must be refused protection as "rhetorical hyperbole."

CONCLUSION

Reversing the Supreme Judicial Court of Tenley's opinion would expand the protections against libel-proof plaintiffs and for rhetorical hyperbole far beyond the boundaries that this Court has carefully drawn around them. This Court should reject the Petitioner's call to do so.

Labeling Ms. Courtier as a libel-proof plaintiff based on the incremental harm doctrine would make no sense in the current case, given that the comments she is challenging are no more harmful than the rest of Petitioner's statement. Furthermore, subjecting individuals like Ms. Courtier to either version of the libel-proof plaintiff doctrine would render worthless the efforts of anyone who seeks to rehabilitate their good names after youthful indiscretions.

Similarly, allowing Petitioner to hide behind rhetorical hyperbole would weaken the guidelines that this Court has put in place to ensure that defamatory statements cannot take undue advantage of that doctrine. Neither the broad context nor the specific context indicated Petitioner's statements were not to be taken literally, and labeling the plaintiff as a "pimp," "whore," "swindler," and "leech on society" could be reasonably construed as accusing her of the behaviors associated with each. Alternatively, even if this Court concludes that those comments were not assertions of facts but statements of opinion, those opinions were built on undisclosed or mistaken facts, and should not be provided the protections associated with rhetorical hyperbole.

As such, the decision of the Supreme Judicial Court of Tenley should be affirmed.