No.

IN THE

Supreme Court of the United States

WILLIAM H. ARMSTRONG,

Petitioner,

v.

KAREN THOMPSON,

Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether all (or nearly all) law enforcement officers are "public officials" under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (App. 3a-21a) is reported at 134 A.3d 305. The opinion of the District of Columbia Superior Court (App. 22a-50a) is unreported. It incorporates by reference an earlier opinion of the District of Columbia Superior Court (App. 51a-65a), which is also unreported.

JURISDICTION

The District of Columbia Court of Appeals entered judgment on April 7, 2016. App. 1a-2a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

This case presents a recurring First Amendment question: whether a garden-variety law enforcement officer, with little or no role in setting public policy, must establish "actual malice" to recover for harm caused by tortious statements. A number of Circuits and state courts of last resort—where many issues relating to the First Amendment and defamation are decided—have held that every law enforcement officer is a "public official" under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Accordingly, those courts, including the court below, require each and

every law enforcement officer to show "actual malice" before recovering for any tort carried out through speech. In this case, despite an otherwise-error-free trial resulting in a jury verdict establishing that respondent had committed an established common-law tort, the court of appeals joined those courts and reversed on federal constitutional grounds after determining that Armstrong was a public official and that he had failed to prove "actual malice." App. 14a-21a.

This Court should grant review. The rule applied below conflicts with decisions in other lower courts; "distort[s] the plain meaning of the 'public official' category beyond all recognition," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); and deprives hundreds of thousands of individuals of the ability to obtain redress for needless, vendetta-driven attacks on their reputations and interference with their livelihoods.

A. *Sullivan* and Its Progeny

The modern understanding of how the First Amendment interacts with the common law of torts traces its origin to March 29, 1960. On that day, during the height of the Civil Rights Movement, the *New York Times* published a full-page editorial advertisement criticizing the elected Commissioners of Montgomery, Alabama, for an extreme response to a peaceful protest on the steps of the State Capitol. *Sullivan*, 376 U.S. at 256-57. One of those Commissioners sued for defamation. This Court "consider[ed] th[e] case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

open." *Id.* at 270. It recognized the public's interest in Mr. Sullivan's fitness for office because City Commissioners supervised the Police Department, and the conduct of the police in the segregated South was "one of the major public issues of our time." *Id.* at 271. In light of that interest, the Court held that the First Amendment protected even "vehement, caustic, and sometimes unpleasantly sharp attacks" against Sullivan's official behavior *unless* he could "prove[] that [a] statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 270, 279-80.

In *Sullivan*, this Court announced that its new "actual malice" requirement would apply to all "public officials." But the Court declined to "determine how far down into the lower ranks of government employees the 'public official' designation would extend * * * or otherwise to specify categories of persons who would or would not be included." 376 U.S. at 283 n.23.

The standard created by *Sullivan* represented a radical change to the common law in that it "extended a measure of strategic protection to defamatory falsehood." *Gertz*, 418 U.S. at 342. It also "exacts a * * * high price from the victims of defamatory falsehood," *ibid.*, because it requires any public official to establish with "convincing clarity" that any attack on his or her reputation was made with deliberate disregard to whether it was based on true information, *Sullivan*, 376 U.S. at 285-86. This Court considered that price justified in cases brought by public officials, to "assure to the freedoms of speech

and press that 'breathing space' essential to their fruitful exercise." *Gertz*, 418 U.S. at 342. By contrast, this Court recognized, that price is too high where the only interest at stake would be the right to make tortious statements about a private individual with no significant role in matters of public policy. *Id.* at 340 ("[T]here is no constitutional value to false statements of fact.").

This Court has still never determined how far down the government ranks the "actual malice" standard applies. It has, however, unequivocally stated that not every public employee is a "public official." *Hutchinson* v. *Proxmire*, 443 U.S. 111, 119 n.8 (1979). And it has made clear that the category ought to be limited to "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt* v. *Baer*, 383 U.S. 75, 86 (1966); *accord Gertz*, 418 U.S. at 345 (equating "public official" with someone who has "accepted public office").

In the absence of more concrete guidance, lower courts have struggled with the definition of who should be considered a "public official." In most contexts, courts consider various factors, including "(i) the extent to which the inherent attributes of a position define it as one of influence over issues of public importance; (ii) the position's special access to the media as a means of self-help; and (iii) the risk of diminished privacy assumed upon taking the position." *E.g.*, *Mandel* v. *Boston Phoenix, Inc.*, 456 F.3d 198, 204 (1st Cir. 2006).

But many courts treat law enforcement differently: Most courts apply a blanket rule deeming all (or virtually all) law enforcement officers "public officials" regardless of their rank, role, or job description. The court below, applying just such a rule, upset a jury finding of liability for intentional interference with a prospective contractual relation. In other words, the intentional and tortious statements respondent made to deprive petitioner of a job he wanted were excused because of a blanket rule treating every law enforcement officer the same as an elected official.

B. The Attack Against Mr. Armstrong

Until October 2006, Petitioner Harry Armstrong was a career public servant laboring largely in obscurity. At that time, he was a GS-14 criminal investigator working in an administrative capacity at the Office of the Treasury Inspector General for Tax Administration ("TIGTA"). *Armstrong* v. *Dep't of Treasury*, 591 F.3d 1358, 1359 (Fed. Cir. 2010) (*Armstrong II*). He had some supervisory authority over approximately six people, but his primary duties were to gather facts and write reports. App. 15a. As a result, his job did not involve making arrests. *Ibid.* He had no direct contact with the public or access to the media.

On October 31, Mr. Armstrong was informed that he was subject to investigation following TIGTA's receipt of an anonymous complaint. App. 40a-41a. He was immediately relieved of his duties and, shortly thereafter, reassigned to the Technical Services and Firearms Division, which is responsible for repairing

radios and maintaining weapons for other agents. *Ibid.*

In February 2007, Mr. Armstrong learned that the anonymous complaint that had led to his transfer had accused him of improperly accessing a government database. *Armstrong* v. *Thompson*, 80 A.3d 177, 181 (D.C. 2013) (*Armstrong IV*). The matter was referred to the U.S. Attorney for the District of Columbia, who took no action, allowing the accusations instead to be handled administratively. *Ibid.*

In March 2007, Mr. Armstrong decided to seek alternative employment at the United States Department of Agriculture ("USDA"). App. 43a-44a. During the interview process, Mr. Armstrong informed USDA that he was under investigation. *Armstrong* v. *Dep't of Treasury*, 110 M.S.P.R. 533, 541-42 (MSPB 2009). After some initial hesitation, USDA offered him a position, comparable to the position he held at TIGTA. *Armstrong II*, 591 F.3d at 1359.

In August 2007, after Mr. Armstrong announced his departure from TIGTA, USDA received six anonymous letters attacking Mr. Armstrong's integrity. *Armstrong* v. *Thompson*, 759 F. Supp. 2d 89, 91 (D.D.C. 2011) (*Armstrong III*). The anonymous letters stated (among other things) that USDA "was making a grave error in hiring" Mr. Armstrong because he was then under investigation for "gross misconduct and integrity violations (some of them criminal)." Three of the anonymous letters further stated that, at the time USDA made Mr. Armstrong an offer of employment, he had the "threat of termination hanging over his head," but that as a result of the

USDA offer, he would be allowed to leave TIGTA with an untarnished personnel record. *Armstrong IV*, 80 A.3d at 182, 185, 186.

TIGTA investigated the source of these letters, but the damage was done. USDA rescinded Mr. Armstrong's offer of employment. *Id.* at 182.

C. Prior Litigation

Blacklisted from pursuing his career as a federal law enforcement officer, Mr. Armstrong began a ten-year legal odyssey through the state and federal courts in the District of Columbia.

Initially, Mr. Armstrong sued Treasury for violations of the Privacy Act—specifically for apparent leaks in what was supposed to be a confidential investigation at TIGTA. That litigation was ultimately unsuccessful because Mr. Armstrong could not satisfy the technical requirements of the Privacy Act. *See generally Armstrong* v. *Geithner*, 610 F. Supp. 2d 66 (D.D.C. 2009) (*Armstrong I*).

During those proceedings, Mr. Armstrong finally learned the identity of the author of the anonymous letters: respondent Karen Thompson, the same person who lodged the "whistleblower" complaint in the first place. *Armstrong III*, 759 F. Supp. 2d at 91. In October 2006, respondent was a low-ranking agent who investigated procurement fraud at TIGTA. She was not assigned to investigate Mr. Armstrong's case or to TIGTA's internal affairs group. *Id.* at 91. As Judge Walton noted in an earlier stage of this litigation, the record supports a conclusion that she was "acting, as far as anybody can tell, as a rogue person

on her own behalf acting out of some sort of vendetta." *Id.* at 95.[1]

After learning that respondent had written the letters, Mr. Armstrong brought suit in the D.C. Superior Court, alleging common-law claims for defamation, intentional infliction of emotional distress, false light, publication of private facts, and intentional interference with prospective contractual relations. App. 39a. Mr. Armstrong—who had lost not only his immediate job but also any benefits he would have accrued had he remained employed by the federal government until retirement—sought compensatory and punitive damages for respondent's apparently vindictive behavior. *Ibid.* Years of litigation followed.

The superior court initially granted summary judgment to respondent, and the court of appeals affirmed in large part. However, the court of appeals reversed as to Mr. Armstrong's claim for intentional interference with prospective contractual relations, and it remanded for trial on that claim. 80 A.3d at 190-91.

Back in the superior court, respondent argued that the First Amendment precluded recovery on Mr. Armstrong's claim for intentional interference

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[1] Respondent and her husband—a fellow TIGTA agent, who was named as a defendant in the initial complaint but has since been dismissed—sought to claim official immunity under the Westfall Act, 28 U.S.C. § 2679. The designee of the Attorney General, however, refused to certify that the defendants' behavior fell within the scope of their duties. *Armstrong III*, 759 F. Supp. 2d at 91-92.

with prospective contractual relations. The court rejected that argument based on the law-of-the-case doctrine without making any specific factual findings regarding the extent to which Mr. Armstrong's position allowed him to influence public policy, gave him access to the media, or involved a decreased expectation of privacy. App. 25a-30a. The jury found in favor of Mr. Armstrong and awarded $514,000 damagdamages. Respondent again appealed.

D. The Court of Appeals' Decision

On appeal, the D.C. Court of Appeals overturned the jury's verdict. It stated that, notwithstanding its prior ruling, respondent could raise the First Amendment as a complete defense to the intentional-interference tort. The court decided it was unnecessary to remand even though the superior court never considered whether Mr. Armstrong "'ha[s], or appear[s] to the public to have, substantial responsibility for or control over the conduct of government affairs.'" App. 15a (quoting *Rosenblatt*, 383 U.S. at 85). Instead, the court of appeals concluded that Mr. Armstrong was a "public official" because he had some minimal supervisory authority and because all "law enforcement officers, particularly those with supervisory authority," are public officials as a matter of law. App. 15a. On the basis of that holding, it vacated the judgment based on the jury's verdict and remanded with instructions to enter judgment for respondent.

REASONS FOR GRANTING THE PETITION

Defamatory and other tortious statements "impose real damage on individuals and institutions, and they

often resist correction. They can threaten careers, policies, public officials, and sometimes even democracy itself." CASS R. SUNSTEIN, ON RUMORS 1 (2009). As this Court has recognized, applying the "actual malice" standard causes real damage to any public employee's effort to seek redress for the harm caused by tortious statements. *Gertz*, 418 U.S. at 342.

The Court has limited the extent to which that damage would be tolerated by applying the "actual malice" standard only where the First Amendment interest in free and robust debate is particularly strong. *Gertz*, 418 U.S. at 342. A number of lower courts have ignored those limits and applied the standard so broadly that most garden-variety law enforcement officers do not even challenge whether they are "public officials" within the meaning of *Sullivan*. *E.g.*, *Dunlap* v. *Philadelphia Newspapers, Inc.*, 448 A.2d 6, 8 n.1 (Pa. Super. Ct. 1982) (parties "agree, as they must," that plaintiff-sergeant was a public official); *Young* v. *Gannett Satellite Information Network, Inc.*, 734 F.3d 544, 553-54 (6th Cir. 2013) (Moore, J. dissenting) (police officer) (collecting cases).

This Court should grant review to resolve confusion among the federal courts of appeals and state courts of last resort regarding whether a garden-variety law enforcement officer is a "public official" for the purposes of the First Amendment. *Compare*, *e.g.*, *Gray* v. *Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981) (stating that "[s]treet level policemen" were "public officials") *with Young*, 734 F.3d at 549 (stating that cases such as *Gray* "may have misinterpreted federal law"); *Nash* v. *Keene Pub. Corp.*, 498 A.2d 348, 353 (N.H. 1985) ("[W]e are satisfied that a patrolman should not be considered a public official as a

matter of law, under the *New York Times* rule."). It should reject a blanket rule that garden-variety law enforcement officers are "public officials." Any such rule is inconsistent with society's "pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt*, 383 U.S. at 86.

Now is an appropriate time, and this is an appropriate case, for this Court to review the issue. Many jurisdictions have weighed in and have collectively created a rule that deprives hundreds of thousands of people of virtually any ability to seek redress for harm to reputation and employment prospects. And the judgment entered on a jury's verdict in favor of petitioner, a law enforcement officer who neither set policy nor interacted with the public, was overturned with instructions to enter judgment for respondent, solely on the basis of the misguided constitutional rule at issue.

I. Lower Courts Are Divided Over Whether All Law Enforcement Officers Are "Public Officials" Under *Sullivan*

Although this Court has "not provided precise boundaries for the category of 'public official,'" it has stated that the category "*cannot* be thought to include all public employees." *Hutchinson*, 443 U.S. at 119 n.8 (emphasis added). Instead, the category must be limited to "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt*, 383 U.S. at 85. The Court has given a "night watchman" as the prototypical example of a public employee who is *not* a "public official." *Id.* at 86 n.13.

A number of state courts have taken heed and held that low-ranking law enforcement officers are *not* public officials for purposes of the First Amendment. *Kiesau* v. *Bantz*, 686 N.W.2d 164, 178 (Iowa 2004); *McCusker* v. *Valley News*, 428 A.2d 493, 495 (N.H. 1981); *Tucker* v. *Kilgore*, 388 S.W.2d 112, 116 (Ky. 1964). Nevertheless, until 2013, there was an "overwhelming and entirely one-sided" consensus among federal courts of appeals (as well as a number of other state courts) that "police officers are public officials for defamation purposes"—regardless of rank or role—because "there is a strong societal interest in protecting expression that criticizes law enforcement officers." *Young*, 734 F.3d at 553-54 (Moore, J. dissenting). In 2013, the Sixth Circuit stated (albeit in dicta) that courts holding the "consensus" view "have misinterpreted federal law on the issue." *Id.* at 549 (opinion of the court).

A closer examination of the cases reveals considerable confusion among state and federal courts regarding whether, when, and why law enforcement officers should be deemed "public officials" for the purpose of the First Amendment. Many jurisdictions have weighed in, and the issue is ripe for this Court's review. DAVID ELDER, DEFAMATION: A LAWYER'S GUIDE § 5:1 (2015) (collecting cases and observing that the Sixth Circuit's *Young* opinion "raises an issue that the Supreme Court needs to definitively resolve").

A. In 2013, the Sixth Circuit faced a case where the police officer, like many plaintiffs, never challenged whether the "actual malice" standard applied to his case. *Young*, 734 F.3d at 549. *Unlike* most

plaintiffs, however, the officer was able to meet the high burden of showing actual malice: A jury found that a newspaper had acted with actual malice when, despite ample reason for doubt, it published a story that the officer had sex on the job. *Id.* at 547-48. The newspaper appealed, and the Sixth Circuit affirmed because that there was sufficient evidence to support the "actual malice" finding. *Id.* at 547-49.

The majority nonetheless opined that, had the issue not been conceded, the "actual malice" standard might not have been "the proper standard to apply." 734 F.3d at 549. The majority interpreted this Court's precedents as applying the "actual malice" rule to police officers' claims only where the officers hold "key public leadership positions" and observed that the courts applying the same rule to "rank-and-file" officers "may have misinterpreted federal law." *Id.* at 549-50.

Judge Moore dissented, citing the "uniform conclusions of our sister circuits," and relying on what she viewed as "strong policy rationales." 734 F.3d at 554. She then catalogued rulings by other Circuits deeming the following individuals to be "public officials" unable to redress injurious falsehoods without proving actual malice:

- "a police officer serving as a resource officer at a middle school" (see *Dixon* v. *Int'l Bhd. of Police Officers*, 504 F.3d 73, 88 (1st Cir. 2007));

- "a rookie patrol officer" (see *Coughlin* v. *Westinghouse Broad. & Cable, Inc.*, 780 F.2d 340, 342 (3d Cir. 1985));

- "a patrol officer" (see *McKinley* v. *Baden*, 777 F.2d 1017, 1021 (5th Cir. 1985));

- "federal law-enforcement agents" (see *Meiners* v. *Moriarity*, 563 F.2d 343, 352 (7th Cir. 1977));

- "a police officer patrolling a demonstration" (see *Speer* v. *Ottaway Newspapers*, 828 F.2d 475, 476 (8th Cir. 1987)); and

- a city "police officer" (see *Rattray* v. *City of Nat'l City*, 51 F.3d 793 (9th Cir. 1994)).

734 F.3d at 553-54. Based on those decisions, Judge Moore concluded that there is "no doubt that police officers are public officials for defamation purposes." *Ibid.*

B. Although the court below, Judge Moore in her *Young* dissent, and a number of other courts have painted with a broad brush in this area, there is significant confusion among federal courts of appeals and state courts of last resort. Courts have embraced a bevy of inconsistent tests and rationales. ELDER, DEFAMATION, *supra*, § 5:1.

A number of courts have held that, as a matter of law, *all* law enforcement officers are public figures. ELDER, DEFAMATION, *supra*, § 5:1. Some have done so because law enforcement officers can make arrests and thereby directly curtail individual liberty.[2] Oth-

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[2] *E.g.*, *Dixon*, 504 F.3d at 88; *Rotkiewicz* v. *Sadowsky*, 730 N.E.2d 282, 287-88 (Mass. 2000); *Coughlin* v. *Westinghouse Broad. & Cable, Inc.*, 603 F. Supp. 377 (E.D. Pa. 1985), *aff'd*,

ers have reasoned that such a rule is appropriate because the job of law enforcement is "uniquely governmental."[3] Others have applied the "actual malice" standard to low-ranking law enforcement officers without providing any reason why at all[4]—or at least no reason other than the jurisprudential equivalent of the schoolyard mantra that "everyone else is doing it." *E.g.*, *McKinley*, 777 F.2d at 1021.

A second group of courts adopt some variant of the rule formally adopted in Mr. Armstrong's case—that is, that law enforcement officers vested with some unspecified level of supervisory authority are "public officials." These courts diverge, however, on *how much* supervisory authority is necessary. The D.C. Court of Appeals held that a law enforcement officer with *any* supervisory authority is a "public official." App. 15a (endorsing view that *all* law enforcement officers might constitute "public officials"). By contrast, in a case subsequently endorsed by the D.C.

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780 F.2d 340 (3d Cir. 1986); *Smith* v. *Russell*, 456 So. 2d 462 (Fla. 1984); *Gray*, 656 F.2d at 591; *Meiners*, 563 F.2d at 352.

[3] *E.g.*, *Roche* v. *Egan*, 433 A.2d 757, 762 (Me. 1981); *Pierce* v. *Pacific & S. Co.*, 303 S.E.2d 316, 318-19 (Ga. Ct. App. 1983); *Colombo* v. *Times-Argus Ass'n*, 380 A.2d 80, 83 (Vt. 1977); *Coursey* v. *Greater Niles Township Pub. Corp.*, 239 N.E.2d 837, 841 (Ill. 1968); *Scelfo* v. *Rutgers Univ.*, 282 A.2d 445, 449-50 (N.J. Super. Ct. Law. Div. 1971) (holding law enforcement officials to be public officials because their powers are "constitutionally and statutorily derived"); *Starr* v. *Beckley Newspapers Corp.*, 201 S.E.2d 911, 913 (W. Va. 1974).

[4] *See generally Sweeney* v. *Prisoners' Legal Servs. of New York, Inc.*, 647 N.E.2d 101 (N.Y. 1995); *Rattray*, 51 F.3d at 793; *Speer*, 828 F.2d at 475; *Jackson* v. *Filliben*, 281 A.2d 604 (Del. 1971).

Circuit,[5] Judge Kollar-Kotelly required much more, and conducted a detailed analysis regarding an FBI agent's duties before holding that the agent was a "public official." *Sculimbrene* v. *Reno*, 158 F. Supp. 2d 8, 20 (D.D.C. 2001) (rejecting view that courts may draw "a certain and quick conclusion" from the fact that a plaintiff is "sworn to uphold and enforce the law"). The court cited, as factors cutting against a finding that Sculimbrene was a "public official," that his "duties were largely administrative" and that he lacked the authority to make arrests. *Id.* at 20-21. Nevertheless, he was ultimately held to be a "public official" because he was "the senior FBI agent detailed to the White House" and a person with "significant gatekeeping authority over access to the White House." *Id.* at 21.

Certain state courts have developed their own idiosyncratic, fact-based inquiries into whether police officers are public officials. The Supreme Court of Washington has adopted a sort of sliding scale: Officials "wielding general power and exercising broad discretion" are public officials for all purposes, *Clawson* v. *Longview Pub. Co.*, 589 P.2d 1223, 1228 (Wash. 1979); but for a law enforcement officer who "is less powerful," the "'public official' standard fails to sweep so broadly," and is instead "limited to matters more closely connected to actual job performance." *Himango* v. *Prime Time Broad., Inc.*, 680 P.2d 432, 436 (Wash. Ct. App. 1984) (quotation marks omitted). *Accord Tucker*, 388 S.W.2d at 116 (Supreme Court of Kentucky rejects argument that police officer should be treated as public official because his status as a

[5] *Barr* v. *Clinton*, 370 F.3d 1196, 1203 (D.C. Cir. 2004).

policeman "was no more than a coincidental circumstance in the attack made upon him"). The Supreme Court of New Hampshire has chosen to leave the entire question to the jury. *Nash*, 498 A.2d at 353-54.

Finally, there are courts that have (correctly) determined that there is nothing talismanic about the designation of "law enforcement." These courts have applied to "law enforcement" employees the same rule that they would to any other government employee. For example, the Supreme Court of Iowa has stated that "a low ranking firefighter who does not have substantial responsibility over the conduct of governmental affairs is not a public official," and "[t]he same rule applies to a low ranking deputy sheriff." *Kiesau*, 686 N.W.2d at 178; *accord Jenoff* v. *Hearst Corp.*, 644 F.2d 1004, 1006 (4th Cir. 1981) (holding that paid police informant was not public official notwithstanding that he "may abuse his position and work great mischief" because he did not have "substantial responsibility for or control over the conduct of governmental affairs") (quotation marks omitted); *Penland* v. *Long*, 922 F. Supp. 1085, 1091 (W.D.N.C. 1996) (concluding deputy sheriff was not public official), *rev'd on other grounds sub nom. Jackson* v. *Long*, 102 F.3d 722 (4th Cir. 1996).[6]

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[6] That is not to say that even the "normal" rules are consistently applied outside the context of law enforcement officers. As one commentator has noted, this Court's jurisprudence has left lower courts without a "workable standard for differentiating the President from the White House kitchen worker," and lower courts in turn have been unable "to resist the temptation to hold lower-level government employees like that White House kitchen worker to the exacting actual malice standard." David Finkelson, *The Status/Conduct*

Thus, although Judge Moore is correct that as a practical matter most courts treat the majority of police officers as public officials, their own approaches *contribute* to the confusion about how to apply *Sullivan* and *Rosenblatt* to low-level employees of law enforcement agencies. This Court's review is necessary not only to resolve a split of authority as to whether law enforcement officers are "public officials," but also to correct significant confusion among even those courts that hold—incorrectly—that all or almost all of them are. Review by this Court is particularly appropriate and timely because a number of the early decisions entrenching law enforcement as "public officials" were issued before this Court decided *Hutchinson* 37 years ago—the most recent time that this Court spoke about who should be considered a "public official." The precedent from lower courts classifying law enforcement officers as public officials has been accurately described as a "knee-jerk per se rule." ELDER, DEFAMATION, *supra*, § 5:1. It deserves this Court's review.

Continuum: Injecting Rhyme and Reason into Contemporary Public Official Defamation Doctrine, 84 VA. L. REV. 871, 872 (1998). See also, *e.g.*, *Johnston* v. *Corinthian Television Corp.*, 583 P.2d 1101, 1103 (Okla. 1978) (grade-school wrestling coach was "public official"); *Green* v. *Northern Pub. Co.*, 655 P.2d 736, 741 (Alaska 1982) (independent contractor-physician supplying medical care to inmates at county jails was public official). The broader inconsistency in the lower courts in determining "public official" status is still more reason why now is the appropriate time for this Court to revisit and clarify the issue.

II. This Court Should Establish A Clear Rule That Low-Level Law Officers Are *Not* "Public Officials"

Any rule holding that all or nearly all law enforcement officers are "public officials" is wrong: As the Sixth Circuit pointed out, the decisions applying the "actual malice" standard to all or nearly all law enforcement officers rest on a "misinterpret[ation of] federal law." *Young*, 734 F.3d at 549. Further, those cases "virtually disregard society's interest in protecting reputation" for a vast swath of public employees with little or no role in setting the course of public policy. *Rosenblatt*, 383 U.S. at 386 n.13. The Court should grant review because such a rule cannot be squared with this Court's holdings regarding the First Amendment status of law enforcement officers, the fundamental precepts of this Court's First Amendment jurisprudence more generally, or sound public policy.

A. The First Amendment provides special protections to criticism of individuals who *set* police policy. *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Henry* v. *Collins*, 380 U.S. 356 (1965). Lower courts have, erred, however, when they have expanded "public official" status to cover all individuals who *implement* police policy.

Gray v. *Udevitz*, 656 F.2d 588 (10th Cir. 1981), has become a very widely cited opinion holding that *all* law enforcement officers are "public officials." In that case, a newspaper reporting widespread police corruption in Rock Springs, Wyoming, decided not only to criticize the mayor, chief of police, and sheriff, but also to accuse a police investigator named Delbert

Gray of selling heroin before he was hired by the Department. *Id.* at 589. The Tenth Circuit read this Court's case law to mean that "[s]treet level policemen" should be treated equivalently to "high ranking officers" because "[t]he cop on the beat is the member of the department who is most visible to the public," and there is a "strong public interest in ensuring open discussion and criticism of his qualifications and job performance." *Id.* at 591.

As the Sixth Circuit recognized in *Young*, however, *Henry*, *Pape*, and *St. Amant* involved plaintiffs with substantial responsibility for or control over police policy. *Henry* and *Pape* both involved highly ranked officers: the Chief of Police of a town in Mississippi and the Deputy Chief of Detectives in Chicago. *Henry*, 380 U.S. at 356; *Pape*, 401 U.S. at 280-81. *St. Amant* involved a deputy sheriff who, under state law, had "substantial responsibility for or control over the conduct of governmental affairs." 390 U.S. at 730 n.2 (quotation marks omitted). These cases do *not* hold that all law enforcement officers are public officials *regardless* of whether they had any substantial role in setting public policy.

Though they announce different rules and rationales, lower court decisions applying *Henry*, *Pape* and *St. Amant* to garden-variety law enforcement officers share a number of common failings. As an initial matter, "the cases have rarely endeavored to confront and distinguish the 'night watchman' discussion of *Rosenblatt*." David Elder, *Defamation, Public Officialdom and the* Rosenblatt *v.* Baer *Criteria—A Proposal for Revivication: Two Decades After* New York Times Co. v. Sullivan, 33 BUFF. L. REV. 579, 678

(1984) [hereinafter "*Public Officialdom*"]. They have also "failed to discern the quantum difference of functions, authority, and responsibility[y]" across the spectrum of people who fit within the current understanding of "law enforcement." *Id.* at 677.

Some courts holding that all or virtually all law enforcement officers are public officials *admit* that their rule is not justified by the person's "place on the totem pole"—that is, the person's ability to affect public policy—but instead only by "the public interest in a government employee's activity in a particular context." *McClain* v. *Arnold*, 270 S.E.2d 124, 125 (S.C. 1980); *see also Brady* v. *Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 240 n.5 (N.Y. App. Div. 1981) ("[T]he average police officer does not have 'substantial responsibility for or control over the conduct of governmental affairs.'") (quoting *Rosenblatt*, 383 U.S. at 85). This Court has specifically stated, however, that *Sullivan* does not apply "merely because a statement defamatory of some person in government employ catches the public's interest." *Rosenblatt*, 383 U.S. at 86 n.13; *cf. Wolston* v. *Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979) ("A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.").

The D.C. Court of Appeals aligned itself with the courts adopting an indefensibly broad rule when it upset a substantial jury verdict and ruled against Mr. Armstrong. The court justified its ruling by stating that, "because 'law enforcement is a uniquely governmental affair,' an officer 'of law enforcement from ordinary patrolman to Chief of Police is'"—as a mat-

ter of law—"'a public official within the meaning of federal constitutional law.'" App. 16a (quoting *Roche*, 433 A.2d at 762).

B. A blanket rule that garden-variety law enforcement officers are "public officials" is inconsistent with fundamental First Amendment precepts. As this Court has repeatedly recognized, the "relationship between libel law and the freedom of speech" requires balancing two interests: fostering free discussion of public issues and protection of reputation. *E.g.*, *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 135 (1967). "The common law of defamation defined the balance between free speech and reputation decisively in favor of reputation * * * * lest 'good men fall prey to foul rumor.'" Russell L. Weaver & David F. Partlett, *Defamation, Free Speech, and Democratic Governance*, 50 N.Y.L. SCH. L. REV. 57, 57 (2006) (quoting NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 17 (1986)). In other words, there was long an understanding that society must provide redress for harm to reputation or people of integrity will not seek public office. *Ibid.*

During a period of great national stress and social upheaval, *Sullivan* swung the balance between promoting unfettered debate and redressing harm to private reputation considerably in favor of protecting even harmful speech. The impact of this shift has been dramatic: One study concluded that 75% of summary judgment motions in defamation cases involving the actual malice standard were granted, causing "some courts [to] remark[] that summary judgment had become the 'rule' rather than the 'ex-

ception' in these cases." Martin B. Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 711 & n.26 (1984).

The lower courts have allowed that pendulum to swing too far. Society of course has an interest in a free and open debate regarding matters of public import. If that were the end of the analysis, however, this Court "would have embraced long ago the view"—espoused by a number of Justices[7]—that the First Amendment provides "an unconditional and indefeasible immunity from liability for defamation." *Gertz*, 418 U.S. at 341. It has not done so.[8]

This Court has repeatedly recognized that the law of libel is predicated on a "legitimate state interest" in "compensat[ing] individuals for the harm inflicted on them by defamatory falsehood." *Gertz*, 418 U.S. at 341; *see also Butts*, 388 U.S. at 135 (recognizing that

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[7] *E.g.*, *Sullivan*, 376 U.S. at 297 (Black, J. concurring) ("An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."); *see also* John C.P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence*, 74 U. COLO. L. REV. 1471, 1480-84 (2003) (reviewing "ongoing argument" over whether to "grant absolute immunity for any statements about officials in their official capacity").

[8] For a brief period, a plurality applied the "actual malice" standard to "defamatory falsehoods relating to private persons if the statements involved matters of public or general concern." *Wolston*, 443 U.S. at 167 (discussing *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971)). The Court "repudiated this proposition in *Gertz* and in [*Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976)]," and in *Wolston* itself. *Ibid.*

"equally unfortunate" to the prospect of self-censorship would be "to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation").

Maintaining legal protection for the reputational and livelihood interests of those who do not set public policy is crucial because society's interest in protecting reputation "reflects * * * 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*, 383 U.S. at 92 (Stewart, J., concurring); *see also Herbert* v. *Lando*, 441 U.S. 153, 169 (1979) ("reiterat[ing the Court's] conviction * * * that the individual's interest in his reputation is also a basic concern"). It also recognizes that "falsehoods can hurt or even ruin individual lives." SUNSTEIN, *supra*, at 9. In Mr. Armstrong's case, the failure to protect those interests resulted not only in the mental distress inherent in watching a reputation built over a lifetime trashed, but also loss in pay and retirement benefits associated with the premature end of his career in public service. In other cases, defamation has resulted in lost customers and business opportunities, damage to the victim's credit history, or even a lawsuit for securities fraud. ELDER, DEFAMATION, *supra*, § 9:3.

"Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury." *Gertz*, 418 U.S. at 342. "[T]o define the proper accommodation between these competing concerns," the Court has explicitly declined to create broad swaths of "public individuals" who could be attacked at will. *Ibid.*

Instead, it has recognized three types of individuals who have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them": (1) individuals who have "accepted public office," *id.* at 345-46; (2) general-purpose public figures who are "pervasive[ly] involve[d] in the affairs of society"; and (3) limited-purpose public figures who have voluntarily involved themselves in a particular issue and are deemed public figures "in the particular controversy giving rise to the defamation." *Id.* at 352. The Court has, however, emphasized that these categories—particularly the categories of "public official" and "general purpose public figure"—are limited. *E.g.*, *Hutchinson*, 443 U.S. at 119 n.8 (public official); *Gertz*, 418 U.S. at 345 (general-purpose public figure).

When it comes to defining who is a "public official," lower courts have generally sought to be attentive to the tradeoffs attendant to any application of the "actual malice" requirement. More specifically, to make sure that applying the *Sullivan* to a particular public employee is justified, courts generally look at whether (1) the "inherent attributes of the position" include a likelihood that the individual will affect government policy, (2) whether the person has access to the media and thus "the ability to engage in self-help," and (3) whether the person has "actively [sought a] position[] of influence in public life . . . with the knowledge that, if successful in attaining their goals, diminished privacy will result." *E.g.*, *Kassel* v. *Gannett Co.*, 875 F.2d 935, 939-40 (1st Cir.

1989) (describing "[t]hree-[l]egged [s]tool" created by *Sullivan*, *Rosenblatt*, *Gertz*, and *Collins*).[9]

It is only when it comes to "law enforcement" that courts have ignored this Court's "counsel[] against blind application of New York Times Co. v. Sullivan" and failed to "consider[] the factors which arise in the particular context.'" *Butts*, 388 U.S. at 148 (internal quotation marks omitted). Applying the three factors stated in *Kassel* to this case demonstrates just how anomalous a blanket rule for law enforcement officers is: petitioner—like the vast majority of law enforcement officers—had *no* role in developing public policy. He had no special access to self-help either in the form of media access or in the form of a direct response to the (confidential) allegations made anonymously against him. And there was no reason for him to have assumed that, by taking a mid-level position reviewing reports on procurement fraud, he was compromising his privacy. Thus, under the rules regularly applied outside the law-enforcement context, petitioner would *not* have been deemed a public official.[10]

The public visibility of cops on the beat does not justify creating a separate rule for "law enforcement

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[9] See also, *e.g.*, *Sparagon* v. *Native Am. Publishers*, 542 N.W.2d 125 (S.D. 1996); *Ellerbee* v. *Mills*, 422 S.E.2d 539 (Ga. 1992).

[10] A similar outcome would have resulted if the Sixth Circuit's rule had been applied. *See Young*, 734 F.3d at 549. In *Young*, that court stated that the inquiry should turn on whether the officer in question has a "key public leadership position[]"—which Mr. Armstrong did not. *Id.* at 550.

officers," as the Tenth Circuit asserted 35 years ago. See *Gray*, 656 F.2d at 591. As an initial matter, courts have not limited this rule to patrol officers, but instead have concluded that "public officials" include probationary police officers, *Mercer* v. *City of Cedar Rapids*, 308 F.3d 840 (8th Cir. 2002); a probation officer, *Britton* v. *Koep*, 470 N.W.2d 518 (Minn. 1991); prison correction officers, *Sweeney*, 647 N.E.2d at 101; and even a city taxicab inspector, *Dellinger* v. *Belk*, 238 S.E.2d 788 (N.C. Ct. App. 1977). More fundamentally, under that logic, it is precisely those employees who are lowest ranking who are most likely to be deemed "public officials," a result that turns *Rosenblatt* and *Hutchinson* on their heads.

Nor can any limiting principle be drawn from the "uniquely governmental" status of law enforcement. Minting money, military service, directing air traffic, and serving as a judicial law clerk are all tasks that are, in our society, uniquely governmental. If that were the decisive criterion in determining "public official" status, an Army sergeant (or even a private soldier) would be considered a "public official" equivalent to Deputy Secretary of Defense. "It is extremely doubtful that such [individuals] come within the 'motivating force' of *Rosenblatt*, *i.e.*, 'a strong interest in debate about those persons who are in a position significantly to influence the resolution of public issues." Elder, *Public Officialdom*, 33 BUFF. L. REV. at 678 (quoting *Rosenblatt*, 383 U.S. at 85).

C. A blanket rule that all law enforcement officers are "public officials" also cannot be squared with sound public policy. "Defamatory speech is speech that, by its nature, has a tendency to cause substan-

tial harm to another"—including "reputational damage, emotional distress, or economic loss." Goldberg, *supra*, 74 U. COLO. L. REV. at 1488 & n.74. *Sullivan* does not disregard that possibility or give free license to lie. Instead, it "recognize[s] a *privilege*, grounded in the First Amendment, that publishers could invoke to *justify* their otherwise tortious (and ordinarily regulatable) conduct." *Id.* at 1489. Like any other privilege, the *Sullivan* rule involves balancing two distinct social values: promoting robust debate regarding issues of public concern and remedying needless attacks on reputation and individual livelihood.

Taking into account the realities of a plaintiff's circumstances is desirable because it confines *Sullivan* to cases where the societal benefit from a free and open debate more closely balances the harm to an individual's ability to recover for lost reputation. That is, at the very least, a more fine-tuned approach ameliorates what Professor Epstein has described as "the classical economic externality (I lie and you suffer)." Richard A. Epstein, *Was* New York Times *v.* Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 798 (1986). The potential impact of that "externality" has been exponentially magnified since Professor Epstein first made his observations 30 years ago. The development of the Internet and social media both expands the avenues for tortious speech to occur and dilutes the ability of any victim—whether a public official or a private individual—to engage in effective self-help. *See* Benjamin Barron, *A Proposal to Rescue* New York Times *v.* Sullivan *By Promoting A Responsible Press*, 57 AM. U. L. REV. 73, 89-90 (2007). In short, not only has a broad rule classifying law enforcement officers almost automatically as "public officials" been unjus-

tified from the start, but also such a rule can do more harm now than ever before. The issue deserves this Court's attention.

III. Whether And When A Law Enforcement Officer May Recover for Defamation Is A Recurring Issue Of Great National Importance

Mr. Armstrong's case presents a classic example of the impact that applying *Sullivan* to all law enforcement is having on meritorious cases across the country. Respondent's accusations in this case effectively ended Mr. Armstrong's career in public service. He has been seeking redress for that harm for nearly a decade. Over the course of that litigation, a federal judge concluded that respondent was "evasive, dissembling, and not credible." *Armstrong I*, 610 F. Supp. 2d at 69. A second federal judge stated that she was "acting, as far as anybody can tell, as a rogue person on her own behalf acting out of some sort of vendetta." *Armstrong III*, 759 F. Supp. 2d at 95. A jury found that respondent committed a tort and awarded Mr. Armstrong more than $500,000 in compensatory damages. The D.C. Court of Appeals nonetheless reversed that finding and ordered judgment for respondent because as a matter of law Mr. Armstrong (1) is a public official, and (2) cannot satisfy the "actual malice" standard of *Sullivan*. App. 21a. On its own, this is a serious miscarriage of justice. But it is also a prototypical example of how applying *Sullivan* to garden-variety law enforcement officers deprives hundreds of thousands of hard-working public servants of the ability to obtain redress for reputational harm.

Whether the *Sullivan* rule applies will largely determine whether a government employee may recover for any harm caused by allegedly tortious statements. Lower courts have long noted that, once *Sullivan* has been invoked, the First Amendment creates a "virtually impermeable envelope of protection" against a tort claim. *Gulf Pub. Co.* v. *Lee*, 434 So. 2d 687, 695 (Miss. 1983). That anecdotal understanding has been borne out by statistics. One study concluded that 75% of summary judgment motions in defamation cases involving the actual malice standard were granted. Louis, *supra*, 57 S. CAL. L. REV. at 711 & n.26. Another "indicated that many libel plaintiffs might not have sued at all" because even when they "do sue, they ultimately prevail in only five percent of all libel actions brought against the mass media"—and then only after years of expensive litigation. Diane L. Borden, *Invisible Plaintiffs: A Feminist Critique of the Rights of Private Individuals in The Wake of* Hustler Magazine *v.* Falwell, 35 GONZ. L. REV. 291, 294 (1999).

Applying *Sullivan* to all (or virtually all) law enforcement officers affects a huge number of people. According to statistics published by the Department of Justice, there were at least "750,340 sworn law enforcement officers employed by the state and local agencies * * * in 2012." U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA (April 2016), *available at* http://www.bjs.gov/content/pub/pdf/nsleed.pdf. That translates to roughly 2.5 "public officials" for every 1,000 U.S. residents—without even counting *federal* law enforcement or real public officials such as the President, political appointees, state

governors, mayors, Congress, various state legislators, members of city and town councils, and judges. See, *e.g.*, Finkelson, *supra*, 84 VA. L. REV. at 887 ("Professor Laurence Tribe's 1978 assessment of lower court decisions, which concluded that public official status now embraces virtually all persons affiliated with the government, such as most ordinary civil servants, is equally germane today.") (internal quotation marks omitted).

The garden-variety law enforcement officer directs traffic, writes parking tickets, or (as in the case of Mr. Armstrong) drafts reports for superiors. These are noble and necessary tasks that allow our society to run smoothly, but the people who perform them are private individuals who have decided to devote their lives to the public service. Unlike politicians or judges, their "jobs seemingly imply no special prospect of life in a fishbowl." *Kassell*, 875 F.2d at 940. When they are subjected to tortious speech, they should not be held to the same standard as individuals who voluntarily accepted "an influential role in ordering society." *Butts*, 388 U.S. at 164 (Warren, C.J., concurring in result). Because hundreds of thousands of individuals are affected, and the issue has received extensive (though often misguided) attention in the lower courts, review by this Court is timely and appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2016

APPENDIX A

District of Columbia
Court of Appeals

No. 14-CV-792

KAREN
THOMPSON,
Appellant,

v. **CAB-4137-09**

WILLIAM H.
ARMSTRONG,
Appellee.

On Appeal from the Superior Court of the
District of Columbia
Civil Division

BEFORE: BLACKBURNE-RIGSBY and BECKWITH, Associate Judges; and FARRELL, Senior Judge.

J U D G M E N T

This case came to be heard on the transcript of record and the briefs filed, and was argued by counsel. On consideration whereof, and as set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED that the judgment for the appellee is reversed, and the matter is remanded with instructions for the trial court to enter judgment in favor of the appellant.

For the Court:

/s/ Julio A. Castillo
JULIO A. CASTILLO
Clerk of the Court

Dated: April 7, 2016.

Opinion by Senior Judge Michael W. Farrell.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 14-CV-792

KAREN THOMPSON, APPELLANT,

v.

WILLIAM H. ARMSTRONG, APPELLEE.

Appeal from the Superior Court of the District of Columbia
(CAB-4137-09)

(Hon. Stuart G. Nash, Trial Judge)

(Argued February 29, 2016 Decided April 7, 2016)

Joshua J. Fougere, with whom *Joseph R. Guerra*, *Noah T. Katzen*, and *Arthur B. Spitzer* were on the brief, for appellant.

Kevin Byrnes for appellee.

Before BLACKBURNE-RIGSBY and BECKWITH, *Associate Judges*, and FARRELL, *Senior Judge*.

FARRELL, *Senior Judge*: A jury awarded William H. Armstrong sizable damages in his suit alleging intentional interference with a prospective contractual relationship by Karen Thompson. Before us is Ms. Thompson's appeal contending, mainly, that she was erroneously denied judgment as a matter of law because the suit, premised on true or non-provably false statements she had made to a government agency about Mr. Armstrong's fitness for a law enforcement position, was precluded by the First Amendment. In light of what we conclude was Mr. Armstrong's status as a public official at the time, we agree with Ms. Thompson and reverse the judgment in Mr. Armstrong's favor.[1]

[1] We accordingly have no occasion to reach Ms. Thompson's alternative claims of trial error.

I. Background

A.

The facts underlying Mr. Armstrong's multi-count suit against Ms. Thompson are described in our earlier opinion, *Armstrong v. Thompson*, 80 A.3d 177 (D.C. 2013) (*Armstrong I*), as follows:

> [Mr.] Armstrong, a former special agent with the Treasury Inspector General for Tax Administration (TIGTA), was on the verge of leaving TIGTA to take a job at the United States Department of Agriculture (USDA) when the USDA abruptly rescinded its offer of employment after one of Mr. Armstrong's TIGTA coworkers sent six then-anonymous letters to the USDA avowing that the agency was making a "grave error" in offering Mr. Armstrong a job because he was under internal investigation for serious integrity violations and other misconduct and would be a liability to the USDA.

Id. at 180 (footnote omitted.).[2] On the basis of

[2] TIGTA is a division of the United States Department of Treasury.

these letters, Mr. Armstrong brought five tort claims against the letter writer, Ms. Thompson: defamation, invasion of privacy (false light), invasion of privacy (publication of private facts), intentional infliction of emotional distress, and intentional interference with contractual relations. Following discovery, the trial court (Judge Epstein) granted summary judgment to Ms. Thompson on each claim after applying the common- law elements of each tort. On Mr. Armstrong's appeal, this court affirmed that decision as to the first four claims. With particular focus on the defamation claim, the court analyzed in detail Ms. Thompson's letters to the USDA and concluded that "no reasonable juror could deny the substantial truth of each of the statements [of fact] to which Mr. Armstrong objects," and that the rest of the statements "were assertions of opinion that were unverifiable and therefore not actionable as defamation." *Id.* at 185, 187.[3]

This court reversed, however, as to Mr.

[3] The court's affirmance on the twin invasion of privacy counts rested on the substantial overlap of the elements of those torts with the elements of defamation, *Armstrong I*, 80 A.3d at 188-89, and on the principle that "a plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." *Id.* at 188 (citations and internal quotation marks omitted). Regarding the emotional distress claim, we concluded that "no reasonable juror could find that [Mr. Armstrong's] distress was so severe as to satisfy the third [element] of the tort of intentional infliction." *Id.* at 189.

Armstrong's claim of intentional interference with contractual relations. As a defense to that tort, we recognized, the defendant may seek "to prove that her interference was not wrongful," *id.* at 190, and in determining whether that burden has been met courts, "following settled law in the District of Columbia," must weigh seven factors as spelled out in the RESTATEMENT (SECOND) TORTS § 767 (1977). *Id.* at 191. Unlike the trial judge, we concluded that on the evidence proffered by Mr. Armstrong, "reasonable minds could differ on the outcome of this balancing test and on . . . whether Ms. Thompson was legally justified in intentionally interfering with Mr. Armstrong's prospective employment." *Id.*

At the same time, we took note of the fact that in a post-argument submission to this court Ms. Thompson had "argued for the first time that the truthfulness of her allegations to the USDA should preclude liability for intentional interference under § 772 (a) of the RESTATEMENT." *Id.* at 191 n.28.[4] But we observed, "this court has never explicitly adopted § 772," and we declined to consider the issue — "not an uncomplicated one" — because Ms. Thompson had not argued "in her appellate brief . . . or in the trial court that truth-

[4] RESTATEMENT § 772 (a) states that "[o]ne who intentionally causes a third person . . . not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person . . . truthful information."

fulness was a complete defense under RESTATEMENT § 772," *id.*, citing "*Dyer v. William Bergman & Assocs.*, 657 A.2d 1132, 1137 n.5 (D.C. 1995) (defendant waived his contention that the court should adopt the 'truthful statement' defense to an intentional interference claim by failing to raise the issue before the trial court and in his first appeal)." In *Armstrong I*, therefore, we "remanded [the case] for further proceedings" limited to the intentional interference claim. *Id*. at 192.

B.

In moving originally for summary judgment, Ms. Thompson had argued that, besides common law defenses entitling her to judgment as a matter of law, the First Amendment shielded her completely from liability for truthful or not provably false statements made to the USDA about Mr. Armstrong, a public official, citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), and *Cohen v. Cowells Media Co.*, 501 U.S. 663 (1991). Judge Epstein did not reach the First Amendment argument because of his resolution of each tort-claim on common law grounds. After this court's partial reversal, Ms. Thompson renewed before the trial court (now Judge Nash) the defense that her non-defamatory statements of fact and opinion about a "public official" were fully protected by the First Amendment. Judge Nash declined to consider the argument, however, because he deemed this court to have held that both the common law (RESTATEMENT § 772) and First Amendment de-

fenses were waived. See JA 84-85 (finding no "possibility that this court could, consistent with the Court of Appeals decision, grant summary judgment to [Ms. Thompson] on the ground that the communications contained exclusively truthful information"). At a later point, the judge reiterated that the First Amendment defense "is one of the arguments that I've found to have been waived." The case therefore proceeded to trial and verdict.

II. Discussion

A.

Ms. Thompson argues that both First Amendment and common law principles, specifically the RESTATEMENT (SECOND) TORTS § 772 (a), barred her liability as a matter of law for statements this court held were either substantially true factually or, as expressions of opinion, not provably false. Mr. Armstrong counters at the outset that both arguments are foreclosed by *Armstrong I* (Br. for Appellee at 6). He is only partly right. In that appeal, this court rejected Ms. Thompson's invitation for us to adopt § 772 (a) because neither in the trial court nor on appeal had she argued, contrary to settled law in this jurisdiction, "that truthfulness was a complete defense under Restatement § 772." *Id.* at 191 n.28. That ruling did not, as Ms. Thompson implies, merely postpone consideration of the issue to the trial court on remand; instead, we cited *Dyer v. William S. Bergman & Assocs., supra*, and its holding

that the defendant there "waived" the § 772 argument "by failing to raise the issue before the trial court and in his first appeal." *Id.* Consequently, this holding of waiver by *Armstrong I* became the law of the case, *see, e.g.*, *Lynn v. Lynn*, 617 A.2d 963, 969 (D.C. 1992) (law of the case "precludes reopening questions resolved by an earlier appeal in the same case"), and Judge Nash correctly refused to consider the § 772 argument on remand.

Mr. Armstrong is mistaken, on the other hand, in arguing that *Armstrong I* rejected Ms. Thompson's First Amendment defense. The court there said nothing about potential First Amendment limits on Mr. Armstrong's ability to sue for intentional interference, for the obvious reason that Ms. Thompson had not raised it as an alternative ground for upholding the summary judgment granted by Judge Epstein (who in turn had not reached the First Amendment defense). On appeal, Mr. Armstrong takes no serious issue with Ms. Thompson's point that she was not obliged to raise the alternative ground for affirmance. *See, e.g.*, *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740-41 (D.C. Cir. 1995) ("forcing appellees to put forth every conceivable alternative ground for affirmance might increase the complexity and scope of appeals more than it would streamline the progress of the litigation"). Instead, Mr. Armstrong points to a statement later by a motions division of this court, in denying Ms. Thompson's motion for stay of judgment after the jury's verdict, which Mr. Armstrong sees as tantamount to rejecting the First

Amendment defense on the merits.[5] But in denying the stay request, the motions division well knew that it was not deciding the merits of Ms. Thompson's appeal but only, among other things, the likelihood of her succeeding on the merits. Its ruling was thus consistent with the doctrine that a merits division of the court may "depart[ ] from a motion division's ruling in the same case," *Kleinbart v. United States*, 604 A.2d 861, 867 (D.C. 1992), and that "law of the case is not established" by "denial of a stay." 18 B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, *et al.*, FEDERAL PRACTICE & PROCEDURE § 4478.5 (2d ed. 2015).

Judge Nash therefore erred in concluding that *Armstrong I* foreclosed consideration of Ms. Thompson's First Amendment defense. But because, as will be apparent, no further development of the record is necessary to resolve the First Amendment issues, a remand to the trial court for that purpose is unnecessary and we proceed to consideration of them.

B.

It is axiomatic that "[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits . . . ." *Snyder v. Phelps*,

[5] The motions division observed that Ms. Thompson had not cited "any case binding in our jurisdiction that holds that the First Amendment precludes liability for truthful statements involving private figures on matters of private concern."

562 U.S. 443, 451 (2011). Although the protections which the First Amendment affords speech have been applied most prominently in suits for defamation, *see, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), their applicability to other torts has repeatedly been recognized. *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (protections applied to intentional infliction of emotional distress); *Blodgett v Univ. Club*, 930 A.2d 210, 222-23 (D.C. 2007) ("a plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion"). Unsurprisingly, therefore, courts have regularly held that First Amendment restrictions apply to suits for intentional interference with contractual relations. *See Farah v. Esquire Magazine*, 736 F.3d 528, 540 (D.C. Cir. 2013); *Jefferson City Sch. Dist. No. R-1 v. Moody's Investor Servs., Inc.*, 175 F.3d 848, 856-58 (10th Cir. 1999); *Beverly Hills Foodland Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196-97 (8th Cir. 1994); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990); *cf. Delloma v. Consol. Coal Co.*, 996 F.2d 168, 172 (7th Cir. 1993) (noting the "significant First Amendment problems" that would be raised by "permitting recovery for tortious interference based on truthful statements"). Mr. Armstrong's argument that defamation and intentional interference protect very different interests can be made regarding invasion of privacy or any of the other actions that courts have refused to distinguish for First Amendment purposes. The point, and the reason we align ourselves with the deci-

sions just cited, is that "a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim." *Moldea v. New York Times Co.*, 22 F.3d 310, 319-20 (D.C. Cir. 1994).

C.

The issue before us, then, is whether the First Amendment provides full protection from liability to Ms. Thompson for her statements about Mr. Armstrong to USDA that this court determined were either substantially true or not provably false. We conclude that it does.

The First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'" *New York Times*, 376 U.S. at 279-80. The reason is that, "where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." *Garrison v. Louisiana*, 379 U.S. 64, 72-73 (1964). To prove "actual malice" in these circumstances, the public official must show by clear and convincing evidence "that the statement was made . . . with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80. And "actual malice" must be shown regardless of the speaker's motives. *See*

Garrison, 379 U.S. at 74 (rejecting, under *New York Times Co.*, a Louisiana rule "permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood").

To decide whether Mr. Armstrong was required to prove actual malice on Ms. Thompson's part, therefore, we must ask whether Mr. Armstrong, a government employee, was a "public official" and, if so, whether Ms. Thompson's statements to USDA "relat[ed] to his official conduct." *New York Times, supra*. Together these questions implicate the third and broader one of whether Ms. Thompson's statements involved issues of public concern, because "[i]t is speech on matters of public concern that is at the heart of the First Amendment's protection." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (plurality opinion) (citations and internal quotation marks omitted); *see Snyder*, 562 U.S. at 451-52.

1.

Undisputed facts of record and relevant case authority, including a decision of our own, teach us that Mr. Armstrong was a public official at the time in question. He was an Assistant Special Agent in Charge (ASAC) at TIGTA, supervising five to seven employees. As an ASAC, he was responsible for managing a group of Special Agents investigating mainly fraud involving Internal Revenue Service

procurements. His unit presented the results of its investigations either to an "adjudicator" or to the United States Attorney's Office if possible criminal prosecution was warranted. His duties required him to carry a firearm and federal law enforcement credentials, and gave him access to sensitive databases and information. In TIGTA's own description, which Mr. Armstrong does not question, he occupied "a position of heightened public trust and responsibility" as a "[f]ederal law enforcement officer," and "[a]s an ASAC [was] held to a higher standard of conduct than non-supervisory employees . . . ."

Whether Mr. Armstrong was a public official "is a question of law to be resolved by the court." *Moss v. Stockard*, 580 A.2d 1011, 1029 (D.C. 1990). Although the term "'public official' cannot 'be thought to include all public employees,'" *id.* (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979)), the designation "applies *at the very least* to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (emphasis added). Lower courts have consistently held that this standard fits the responsibility of law enforcement officers, particularly those with supervisory authority. This court is among them. In *Beeton v. District of Columbia*, 779 A.2d 918 (2001), we considered whether the plaintiff/appellant, a correctional officer at the District's then-prison facility in Lorton,

Virginia, was a public official "at the time the [alleged] defamatory article [about her] appeared." *Id.* at 920. In holding that she was, we pointed out that Ms. Beeton was commonly addressed as "Corporal" and had recently been "named the Officer in Charge . . . of the Facility's Control Center," *id.*, and we relied on "several cases from other jurisdictions holding that law enforcement officers are public officials." *Id.* at 924. We found particularly instructive *St. Amant v. Thompson*, 390 U.S. 727 (1968), in which, we said, "the Supreme Court [had] concluded that a deputy sheriff was a public official and had the burden of proving that the statements about his official conduct were made with actual malice." *Id.* Although Mr. Armstrong points out that in *St. Amant* the Supreme Court actually accepted, "[f]or purposes of this case" and without further discussion, the state court's finding that the plaintiff was a public official, *see* 390 U.S. at 730, that discrepancy is of no moment: *Beeton*'s holding that a law enforcement officer, at least one clothed with supervisory authority as Ms. Beeton was, is a public official is unmistakable.

Many courts have gone further and held that, because "[l]aw enforcement is a uniquely governmental affair," an officer "of law enforcement, from ordinary patrolman to Chief of Police, is a 'public official' within the meaning of federal constitutional law." *Roche v. Egan*, 433 A.2d 757, 762

(Me. 1981) (collecting cases).[6] Here it is enough for us to conclude that Mr. Armstrong, a supervisory special agent in TIGTA investigating potential criminal fraud, with access to confidential databases and occupying what TIGTA itself considered "a position of heightened public trust and responsibility," was a public figure within the First Amendment when Ms. Thompson made her statements.

2.

Ms. Thompson's statements to USDA about Mr. Armstrong also "relate[d] to his official conduct." *New York Times*, 376 U.S. at 279-80. "[T]hat limitation," one Circuit Court has stated, "has been broadly construed to reach 'anything which might touch on . . . [the] official's fitness for office.'" *Dixon*

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[6] *See also Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1429-31 (8th Cir. 1989) (FBI Special Agent a public official); *Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981) (law enforcement officials "have uniformly been treated as public officials within the meaning of *New York Times*"); *Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73, 88 (1st Cir. 2002) (police officers are public officials); *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 288-89 & n.5 (collecting cases) (Mass. 2000) (police officers are public officials for purposes of defamation suit); *Rattray City of Nat'l City*, 51 F.3d 793, 800 (9th Cir. 1994) (citing cases); *Hildebrant v. Meredith Corp.*, No. 13-CV-13972, 2014 WL 5420787, at *10 (E.D. Mich. Oct. 23, 2014) (law enforcement officers are public officials for purposes of defamation, regardless of whether they set department policy); *Young v. Gannett Satellite Info. Network, Inc.*, 837 F. Supp. 2d 758, 763 (S.D. Ohio 2011) ("[A]s a police officer, Young is a public figure for purposes of his defamation claim.").

v. Int'l Bhd. of Police Officers, 504 F.3d 73, 88 (1st Cir. 2007) (quoting *Garrison*, 379 U.S. at 77). And, as the Supreme Court stated in *Garrison*, "[f]ew personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." 379 U.S. at 76. Ms. Thompson's letters to USDA, as we explained in *Armstrong I*, 80 A.3d at 185-88, concerned a TIGTA investigation of Mr. Armstrong for allegedly gaining unauthorized access to and improperly using information from TIGTA databases. For instance, what Mr. Armstrong "contends . . . [was] the most damning claim in Ms. Thompson's letters" was that USDA was offering Mr. Armstrong employment at roughly the same time he "was under internal investigation by his own agency for suspected violations of both a criminal and investigative nature." *Id.* at 185. These statements undeniably related to Mr. Armstrong's fitness to hold another law enforcement position similar to that he occupied at TIGTA.

It is also apparent to us that Ms. Thompson's statements to USDA involved not just Mr. Armstrong as an individual, but matters of "public concern." *Dun & Bradstreet*, 472 U.S. at 758-59. At least as applied to a supervisory law enforcement official, we agree that "the ethics of a government employee and thus his fitness for office" are "quintessentially [a matter] of public concern." *Lewis v. Elliott*, 628 F. Supp. 512, 521 (D.D.C. 1986); *see Ayala v. Washington*, 679 A.2d 1057, 1067 (D.C.

1996) ("speech [that] concerns the conduct of government . . . [is] properly treated as of 'public concern'"). Mr. Armstrong counters that Ms. Thompson's letters were essentially the act of a disgruntled employee masquerading as good-citizen whistleblowing; he cites for this the remarks of judges in earlier related federal litigation that she was acting out of "personal motives" or, "as far as anybody can tell, out of some sort of vendetta."[7] But because no question of the First Amendment was before these judges, they had no reason to be mindful of the "breathing space" it affords speech about the fitness of public officials, even if motivated by "ill-will." *Garrison*, 379 U.S. at 73-74. The parties dispute Ms. Thompson's motives for reporting Mr. Armstrong's embroilment to USDA, but ultimately they are beside the point.[8] Judge Epstein, while also not deciding First Amendment issues, correctly saw the matter of public concern reflected in society's interest "in encouraging disclosure of" substantially true information "to a federal agency regarding a prospective employee's prior misconduct that is directly related to his fitness for the potential position."

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[7] *See Armstrong v. Thompson*, 759 F. Supp. 2d 89, 95 (D.D.C. 2011).

[8] Also beside the point is whether, as Mr. Armstrong contended at oral argument, USDA was already aware of the information concerning the TIGTA investigation through Mr. Armstrong and TIGTA"s own disclosures. This has no effect on whether Ms. Thompson's disclosures are protected by the First Amendment.

It remains for us to reject Mr. Armstrong's reliance on *Connick v. Myers*, 461 U.S. 138 (1983). There the speech at issue was an internal office questionnaire that sought answers from co-employees about things like "office morale" and "the level of confidence in supervisors." *Id.* at 141. "[I]f released to the public," the Supreme Court held, the questionnaire and answers "would convey no information . . . other than the fact that a single employee [who circulated it] is upset with the status quo." *Id. a*t 148. By contrast, Ms. Thompson's letters — in *Connick*'s distinguishing words — sought to inform USDA of "actual or potential wrongdoing or breach of public trust" by a supervisory official, *id.*, a disclosure "touching upon a matter of public concern." *Id.* at 147.

3.

For these reasons, to avoid summary judgment Mr. Armstrong had to show that triable issues of fact existed as to Ms. Thompson's actual malice in sending the letters. *See Nader v. de Toledano*, 408 A.2d 31, 50 (D.C. 1979) ("The question to be resolved at summary judgment is whether plaintiff's proof is sufficient such that a reasonable juror could find malice with convincing clarity . . . ."). In light of our decision in *Armstrong I, supra*, he could not do so. The assertions of fact in Ms. Thompson's letters, we held, were substantially true as a matter of law, 80 A.3d at 185, and the Supreme Court has "long held . . . that actual mal-

ice entails falsity." *Air Wisconsin Airlines v. Hoeper*, 134 S. Ct. 852, 861 (2014). For the rest, the letters consisted of expressions of opinion that we concluded "were unverifiable and therefore not actionable in defamation." *Id.* at 187. The Supreme Court similarly held in *Milkovich v Lorain Journal Co.*, 479 U.S. 1 (1990), that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Id.* at 20. In sum, as a matter of law under the First Amendment, none of the statements in Ms. Thompson's letters provided a basis for liability.

D.

Accordingly, we must reverse the judgment entered for Mr. Armstrong and remand with directions for the trial court to enter judgment in favor of Ms. Thompson.

So ordered.

APPENDIX B

Filed
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06/20/2012 10:27AM
Clerk of the Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

WILLIAM ARMSTRONG	:	
v.	:	Case No. 2009 CA 004137 B
KAREN THOMPSON, *et. al.*	:	

ORDER

For the reasons discussed below, the Court grants the motions of defendants Karen Thompson and David Sutkus for summary judgment under Super Ct. Civ. R. 56(c).

I. PROCEDURAL BACKGROUND

In 2008, Mr. Armstrong filed a lawsuit in the United States District Court for the District of Columbia against the U.S. Department of the Treasury, his former supervisor Rodney Davis, and

other unnamed employees of the Treasury Inspector General for Tax Administration ("TIGTA"), alleging violations of the Privacy Act and various common law torts based on anonymous letter sent to Treasury and the U.S. Department of Agriculture ("USDA") about an investigation of Mr. Armstrong as a TIGTA special agent. USDA withdrew a job offer to Mr. Armstrong after it received these letters. On the eve of the trial, Ms. Thompson admitted that she was the author of the anonymous letters. *Armstrong v. Geithner,* 610 F. Supp. 2d 66, 69 (D.D.C. 2009), *aff',* 608 F.3d 854 (D.C. Cir. 2010). The district court ultimately entered judgment in favor of the defendants, finding that Mr. Armstrong failed to prove that any TIGTA employee unlawfully accessed any system of records (the necessary predicate of a Privacy Act claim) and that none of his tort claims was cognizable under the Federal Tort Claims Act. The judgment was affirmed on appeal.

On June 5, 2009, Mr. Armstrong filed suit in this Court, asserting various state tort claims against Ms. Thompson and Mr. Sutkus arising out of the letters that Ms. Thompson sent to USDA. Both defendants requested certification from the U.S. Attorney's Office that they were acting within the scope of their employment at all times relevant to the plaintiff's claims. The U.S. Attorney's Office refused to provide the certification, and then removed the case from Superior Court to the United States District Court for the District of

Columbia for review of the denial of certification. The federal court found that neither of the defendants were acting within the scope of their federal employment in connection with the writing and mailing of the anonymous letters, although the discussion focused on Ms. Thompson's rather than Mr. Sutkus' actions. *Armstrong v. Thompson,* 759 F. Supp. 2d 89, 97 (D.D.C. 2011). The federal court then remanded the case back to this Court.

Mr. Armstrong alleges that the anonymous letters to USDA contained "false, malicious and misleading information and disclosed private facts" about Armstrong that "permanently ended Mr. Armstrong's career as a federal law enforcement agent." Compl. ¶¶ 2-3. After the Court dismissed two claims on October 6 and November 22, 2011, Mr. Armstrong's remaining causes of action are for defamation, intentional infliction of emotional distress, false light, publication of private facts, and intentional interference with prospective employment.

Both Ms. Thompson and Mr. Sutkus moved for summary judgment on these claims. Mr. Armstrong opposes the motions.

II. UNDISPUTED MATERIAL FACTS

The following statement of facts as to which there is no genuine dispute is based on decisions in prior litigation by Mr. Armstrong involving

related matters, and an affidavit that Mr. Armstrong filed in *Armstrong v. Department of the Treasury* (Thompson Ex. 4) ("Armstrong Aff."). *See Armstrong v. Department of the Treasury,* 591 F.3d 1358 (Fed. Cir. 2010); *Armstrong v. Thompson,* 759 F. Supp. 2d 89 (D.D.C. 2011).

1. Plaintiff William Armstrong is a former special agent for TIGTA. *Armstrong,* F. Supp. 2d at 90.

2. Defendants Karen Thompson and David Sutkus are TIGTA special agents, former co-workers of Mr. Armstrong, and husband and wife. *Id.*

3. In October, 2006, while Mr. Armstrong was still employed at TIGTA, Ms. Thompson anonymously sent a "hotline" letter to the Inspector General's Office accusing Mr. Armstrong of unlawfully accessing various records and databases. *Id.* at 91

4. That accusation triggered an internal investigation. *Id.*

5. On or about October 31, 2006, Mr. Armstrong received a letter indicating that he was under investigation and was being placed on administrative leave. Armstrong Aff. ¶ 24.

6. On that day, Mr. Armstrong was relieved of all law enforcement powers. Armstrong Aff. ¶ 24.[1]

7. On that day, his badge and credentials were removed as well as use of the government owned vehicle. Armstrong Aff. ¶ 24.

8. On that day, he was escorted out of the building and driven home. Armstrong Deposition 12:19-13:9 (Thompson Exhibit 10); *Armstrong,* 608 F.3d at 856.

9. On that day, his supervisory authority suspended. Armstrong Aff. ¶ 24.

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[1] Paragraph 2 of the May 22, 2012 affidavit that Mr. Armstrong recently submitted in opposing Ms. Thompson's summary judgment motion states: "My law enforcement status remained intact and was not revoked." It is not clear that this ambiguous statement directly contradicts his statement in his 2009affidavit that he was relieved of all law enforcement powers. To the extent the latest affidavit contradicts the earlier one, it does not create a genuine issue about whether he was relieved of all law enforcement powers. "Where a party emphatically and wittingly swears to a fact, it bears a heavy burden - even in the summary judgment context - when it seeks to jettison its sworn statement." *Hancock v. Bureau of National Affairs,* 645 A.2d 588, 591 (D.C. 1994) (quoting *Pyramid Securities Ltd. v. IB Resolution, Inc.,* 924 F.2d 1 114, 1123 (D.C. Cir. 1991)). Because Mr. Armstrong provides "[n]o explanation of the contradiction" between his earlier and current affidavits, the Court relies on the earlier affidavit. *See Hancock,* 645 A.2d at 591.

10. On that day, his government computer was taken away. Armstrong Aff. ¶ 24.

11. On that day, he was denied all access to the networks and network servers. Armstrong Aff. ¶ 24.

12. Mr. Armstrong was then assigned to the Technical Services and Firearms Division ("TSFD") performing "other duties as assigned." Armstrong Aff. ¶ 24.

13. The conduct by Mr. Armstrong that TIGTA investigated involved possible violations of criminal law. Treasury Department Report of Investigation dated April 2, 2007 ("ROI") at 1-2 (Thompson Ex. 2).

14. The matter was referred to the United States Attorney's Office as a criminal matter. ROI at 2-3 (referred for violations under 18 U.S.C. § 1030, fraud and related activity in connection with computers).

15. In February 2007, the U.S. Attorney's Office declined to prosecute Mr. Armstrong. ROI at 3.

16. On February 13, 2007, Mr. Armstrong was told that he was under administrative investigation for unauthorized access to TIGTA's PARIS and Choicepoint AutoTrack databases and disclosure of that information. Armstrong Aff. ¶ 32.

17. Mr. Armstrong told the investigating agents that he accessed PARIS to try to protect himself from another employee who he believed was treating him in a disparate and discriminatory fashion, and his accesses were designed to see how other similarly situated agents were being treated. Armstrong Aff. ¶ 32.

18. Mr. Armstrong made personal use of government databases. Armstrong Aff. ¶ 32.

19. In March 2007, Mr. Armstrong began looking for another job. Armstrong Aff. 33.

20. In April 2007, the Special Inquiries and Intelligence Division ("SIID") of TIGTA completed its investigation. SIID concluded that Mr. Armstrong had made unauthorized accesses to two databases in violation of criminal law, accessed a report without official need to know, and made accesses to a database for personal reasons. ROI at 2-3. The allegations that he made unauthorized disclosures of information was not substantiated. ROI at 2.

21. SIID forwarded its report for appropriate action and response within Treasury. Referral Memorandum dated April 2, 2007 (Thompson Ex. 2).

22. In August 2007, Mr. Armstrong was offered employment by the USDA, scheduled to begin in September. Armstrong Aff. ¶¶ 40, 41.

23. In August 2007, Ms. Thompson anonymously sent six letters to multiple recipients at the USDA, disclosing information about TIGTA's investigation of Mr. Armstrong, which resulted in USDA effectively terminating its employment offer to Mr. Armstrong. Complaint Ex. 1-6; *Armstrong,* 459 F. Supp. 2d at 91.

24. In September 2007, Mr. Armstrong agreed with TIGTA to a 30-day suspension. Armstrong Aff. ¶ 49; *Armstrong,* 610 F. Supp. 2d at 69.

25. In a settlement agreement dated February 7, 2008, Mr. Armstrong agreed that TIGTA "will impose a thirty (30) calendar day suspension for the conduct as sustained by the Agency in the December 4, 2007 memorandum," that he would resign within 90 days after execution of the agreement, and that the official record "will state that the reason for the suspension was misuse of a government computer and unauthorized access to agency files for personal use." Thompson Ex. 4 ¶¶ 2 & 3.

26. Consistent with the Feb.7, 2008 settlement agreement, Mr. Armstrong resigned from the TIGTA. Armstrong Aff. ¶ 49; *Armstrong ,* 610 F. Supp. 2d at 69.

III. DISCUSSION

The Court grants Ms. Thompson's and Mr. Sutkus' motions for summary judgment on all claims. With respect to several of Mr. Armstrong's claims, both parties argue at length about whether Mr. Armstrong is a public figure. Because Ms. Thompson's factual statements about Mr. Armstrong are substantially true, the Court need not decide this issue, as well as related issues of the "actual malice" standard applied to public figures.

A. Standard for summary judgment

Under Rule 56(c), summary judgment shall be granted forthwith if the record shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *See Osbourne v. Capital City Mortgage Corp.,* 667 A.2d 1321, 1324 (D.C. 1995); *Smith v. Washington Metropolitan Area Transit Authority,* 631 A.2d 387, 390 (D.C. 1993). Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [Superior Court rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Mixon v. Washington Metropolitan Area Transit Authority,* 959 A.2d *55,* 58 (D.C. 2008) (internal quotations omitted). The purpose of summary judgment "is to weed out those cases insufficiently meritorious to warrant

the expense of a jury trial." *Greene v. Dalton,* 164 F.3d 671, 675 (D.C. Cir. 1999).

"A genuine issue of material fact exists if the record contains 'some significant probative evidence ... so that a reasonable fact-finder would return a verdict for the non-moving party.'" *Brown v. 1301 K Street Limited Partnership,* 31 A.3d 902, 908 (D.C. 201 1) (citing *1836 S Street Tenants Ass 'n v. Estate of Battle,* 965 A.2d 832, 836 (D.C. 2009) (footnote omitted)). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

The Court must consider the evidence in the light most favorable to the opposing party and grant summary judgment only if no reasonable juror could find for the opposing party as a matter of law. *Biratu v. BT Vermont Avenue, LLC,* 962 A.2d 26 1, 263 (D.C. 2008); *Tucci v. District of Columbia,* 956 A.2d 684, 690 (D.C. 2008). The Court is required to "conduct an independent review of the record to determine whether any relevant factual issues exist by examining and taking into account the pleadings, depositions, and admissions along with any affidavits on file, construing such material in the light most favorable to the party opposing the motion." *District of Columbia v. Verizon Washington, DC Inc.,* 963 A.2d 1144, 1155 (D.C. 2009). The Court cannot "resolve issues of fact or weigh evidence at the summary judgment stage." *Barrett v. Covington & Burling, LLP,* 979 A.2d 1239, 1244

(D.C. 2009). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts, are jury functions, not those of a judge" deciding a motion for summary judgment. *Anderson,* 477 U.S. at255.

The moving party has the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Osborne,* 667 A.2d at 1324. If the moving party carries this burden, the burden shifts to the non-moving party to show the existence of an issue of material fact. *Bruno v. Western Union Financial Services, Inc.,* 973 A.2d 713, 716 (O.C. 2009) (quotations and citations omitted); *Osbourne,* 667 A.2d at 1324. The non-moving party may not carry this burden merely with conclusory allegations, *Greene,* 164 F.3d at 675; rather he or she "must produce at least enough evidence to make out a prima facie case in support of his [or her] position." *Bruno,* 973 A.2d at 717. Furthermore, "[i]n the summary judgment context, the court is permitted to consider the facts asserted by [the movant in an affidavit] as 'admitted,' except to the extent that such facts are 'actually controverted' in [the] opposition." *Magwood v. Giddings,* 672 A.2d 1083, 1087 (D.C. 1996) (citing Super. Ct. Civ. R. 12-I(k)).

B. Defamation

The Court grants summary judgment as to Mr. Armstrong's claim of defamation. Mr.

Armstrong alleges that the anonymous letters to USDA contained false, malicious and misleading information that permanently ended his career as a federal law enforcement agent. Mr. Armstrong has not offered evidence that raises a genuine issue that the statements made about him in Ms. Thompson's letters are false. The record - primarily Mr. Armstrong's own affidavit - establishes that the letters' factual assertions are substantially true. The other statements in Ms. Thompson's letters to which Mr. Armstrong objects are statements of opinion that are not actionable.

1. Legal Standard

A statement is defamatory if it tends to injure the plaintiff in his trade, profession, or community standing. *Williams v. District of Columbia,* 9 A.3d 484, 491 (D.C. 2010) (citing *Guilford Transort Industries, Inc. v. Wilner,* 760 A.2d 580, 594 (D.C. 2000)). To state a claim for defamation, a plaintiff must show that: (1) the defendant made a false and defamatory statement concerning the plaintiff; (2) the defendant published the statement without privilege to a third party; (3) the defendant's fault in publishing the statement amounted to at least negligence; and (4) the statement was either actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm. *Williams,* 9 A.3d at 491 (citing *Beeton v. District of Columbia,* 779 A.2d 918, 923 (D.C. 2001)).

A claim of defamation fails if the statements alleged to be defamatory are substantially true. *See White v. Fraternal Order of Police,* 909 F.2d 512, 525 (D.C. Cir. 1990) (no liability for defamation if a factual allegation is "substantially true"); *Shipkovitz, v. Washington Post Co.,* 408 Fed. Appx. 376 at *3 (D.C. Cir. 2010) (citing *Moldea v. N.Y Times Co.,* 15 F.3d 1137, 1150 (D.C. Cir. 1994)). To be actionable, a false statement must contain more than minor inaccuracies. *Shipkovitz,* 408 Fed. Appx. 376 at *2-3 (quoting *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 517 (1991)).

"As a general rule, … whereas a statement of fact may be the basis for a defamation claim, a statement of pure opinion cannot." *Rosen v. American Israel Public Affairs Committee,* 2012 D.C. App. LEXIS 152 at *15 (D.C. April 26, 2012) (internal quotation and citations omitted). "[S]tatements of opinion can be actionable if they imply a provably false fact, or rely upon stated facts that are provably false," so "a statement of opinion is actionable if -but only if– it has an explicit or implicit factual foundation and is therefore objectively verifiable." *Id.* (internal quotations and citations). "[E]xpressing a subjective view [or] interpretation"is not actionable. *Id.*

Here, there is no genuine issue that the factual statements in Ms. Thompson's letters are substantially true, and her statements of opinion are not actionable. Both parties argue at length

about Ms. Thompson's motivations in sending the letters. The Court assumes for purposes of this analysis that, as the District Court found, Ms. Thompson sent the letters in a personal, non-official capacity and that admissible evidence supports a reasonable inference that her motives for sending the letters included personal animus toward Mr. Armstrong. *See Armstrong,* 759 F. Supp. 2d at 95-96. However, a substantially true letter does not become actionable solely because the writer had malicious intent, and any malicious motive of Ms. Thompson does not relieve Mr. Armstrong of his burden to prove that the letters were not substantially true. In his opposition, Mr. Armstrong does not dispute this principle.

2. The Letters' Contents

Although Ms. Thompson sent six letters to USDA, the body of three of them is the same except for minor differences in phrasing, and so is the body of the other three. The only significant differences involve the addressees at USDA. The Court cites to the versions of the letters attached to Mr. Armstrong's complaint.

A sentence-by-sentence review of the letters demonstrates each assertion is either a substantially true statement of fact or a non-actionable statement of opinion.

a. Statements of fact

The accuracy of Ms. Thompson's factual assertions is established by Mr. Armstrong's own affidavit and by the judicial findings of Mr. Armstrong's previous lawsuits.

> "On October 31, 2006, Mr. Armstrong was stripped of his law enforcement credentials, government computer and duty weapon and placed in an administrative status." (Complaint Ex. 3 ¶ 2.)

There is no genuine issue that these factual statements are true. *See* Undisputed Material Facts ¶¶ 5, 7, 10.

> "[Mr. Armstrong] was removed from his position as an Assistant Special Agent in Charge and 'detailed' to another office where he no long had access to agency records, agency computer systems, case information, or law enforcement databases." (Complaint Ex. 3¶ 2.)

There is no genuine dispute that on October 31, 2006, all access by Mr. Armstrong to the networks and network servers was denied, that he was then assigned to the TSFD performing "other duties as assigned," that he was relieved of all law enforcement powers, and that his supervisory authority was suspended. Undisputed Material Facts ¶ ¶ 6, 8, 11, 12. It is also true that Mr. Armstrong was removed from his position as an Assistant Special Agent in Charge ("ASAC").

Although Mr. Armstrong states in his May 22, 2012 affidavit (at ¶ 2) that he "remained an Assistant Special Agent in Charge," the other facts to which he admits demonstrates that he retained only the title and was removed from the position. *See* Undisputed Material Facts ¶¶ 6, 7, 9, 12 & n.1. Also substantially true is the statement that on October 1, 2006, Mr. Armstrong "was escorted from the building." *See* Undisputed Material Facts ¶ 8.

> "Mr. Armstrong was under internal investigation by his own agency for suspected violations of both a criminal and administrative nature." (Complaint Ex. 32.)

There is no genuine issue that these factual statements are true. *See* Undisputed Material Facts ¶¶ 4, 13, 14, and 16.

> When Mr. Armstrong applied for the USDA position, he had "the threat of termination hanging over his head." (Complaint Ex. 35.)

The statement was true. Mr. Armstrong ended up agreeing to resign as part of the settlement. Undisputed Material Facts ¶ 25.

> Mr. Armstrong "admitted to looking up information on his subordinates, co-workers, etc." (Complaint Ex. ¶ 2.)

The statement was true. In February 2007, Mr. Armstrong admitted to TIGTA investigators that he had accessed databases for personal use, and in April of that year, TIGTA took the position that Mr. Armstrong's access was unauthorized. *See* Undisputed Material Facts ¶¶ 17, 20; *see also* ROI at 2-3. It is therefore also true that Mr. Armstrong "had no official need to know any of this information." Complaint Ex. 1 ¶ 2.

> "At the time USDA offered [Mr. Armstrong] a job, the investigation on him had been completed and the allegations ... were proven to be true." *(id.* ¶ 2.)

The statement was true. SIID had completed its investigation and concluded that the core allegations against Mr. Armstrong were true. Undisputed Material Facts ¶ 20. As the letter stated, Treasury had not yet made a final decision about what to do based on the report of the completed investigation: "At the time, the Treasury Inspector General for Tax Administration was deciding what disciplinary action (I believe termination was being considered) to take against him." Complaint Ex. 1 ¶ 2.

b. Statements of opinion

Ms. Thompson uses various terms to describe the focus of TIGTA's investigation: "suspected violations of both a criminal and administrative nature" (Complaint Ex. 3 ¶ 2); "serious integrity

violations which were proven to be true" (Complaint Ex. 3 ¶ 3); "serious misconduct and other violations" (Complaint Ex. 3 ¶ 5); "misconduct" (Complaint Ex. 3 ¶ 6); "gross misconduct and integrity violations" (Complaint 1¶ 1); "serious issues of misconduct, integrity violations and unethical behavior" (Complaint 1 ¶ 3). All these characterizations are opinions, and each is consistent with the undisputed fact that Mr. Armstrong was under investigation for unauthorized access to agency databases that would constitute violations of criminal law. *See* Undisputed Material Facts ¶¶ 4, 13, 14, 16.

Additional statements of opinion that cannot provide the basis for a defamation claim include the statements that (1) USDA made a grave error in hiring Mr. Armstrong (Complaint Ex. 1 ¶ 1); Mr. Armstrong is a problem and a liability to the USDA *(id.* ¶ 3); hiring Mr. Armstrong exposed the USDA to potential future Giglio/Henthorn issues *(id.* ¶ 3, Complaint Ex. 3 ¶ 4). These comments are expressions of a subjective point of view. To the extent that they imply or rely on facts, those facts are substantially true, for the reasons explained above.

Ms. Thompson also stated an opinion when she opined, "Had your agency known of the circumstances surrounding his departure, your agency would not have made an offer of employment to him" (Complaint Ex. 3 ¶ 5) - an opinion that subsequent events confirmed.

For these reasons, the Court grants summary judgment on Mr. Armstrong's defamation claim.

C. Intentional Infliction of Emotional Distress

Mr. Armstrong's claim of intentional infliction of emotional distress fails because the undisputed facts do not reasonably support a conclusion that it was outrageous or extreme, much less atrocious and utterly intolerable, for Ms. Thompson to send letters to a government agency providing substantially accurate information directly relevant to the agency's decision to hire a person for a responsible law enforcement position.

To succeed on a claim of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct by the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress. *Minch v. District of Columbia,* 952 A.2d 929, 940 (D.C. 2008) (quoting *District of Columbia v. Thompson,* 570 A.2d 277, 289-90 (D.C. 1990)); *see also Carter v. Hahn,* 821 A.2d 890, 892-93 (D.C. 2003). "The concept of 'outrageousness' is central to the tort," and "the requirement of outrageousness is not an easy one to meet." *Homan v. Goyal,* 711 A.2d 812, 818 (D.C. 1998) (quoting *Drejza v. Vaccaro,* 650 A.2d 1308, 1312 (D.C. 1994)), *amended on other grounds,* 720 A .2d 1152 (D.C. 1998). Liability is imposed where the

conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Larijani v. Georgetown University,* 791 A.2d 41, 44 (D.C. 2002) (quoting and citing *Homan* and *Drejza).*

No reasonable juror could find that it was extreme or outrageous to provide to a potential government employer, and only to the potential employer, information that is substantially true and gives the employer legitimate cause to reconsider to its employment offer. Indeed, providing such information serves a public purpose. For the same reasons such communications are not actionable as defamation, they are not actionable as intentional infliction of emotional distress. The Court therefore grants summary judgment against Mr. Armstrong on this claim.

D. Invasion of Privacy Claims

Mr. Armstrong asserts that Ms. Thompson invaded his privacy in two ways - by putting him in a false light and by disclosing private facts about him. The undisputed facts establish as a matter of law that Ms. Thompson is entitled to judgment on this claim.

1. Legal standard

To prevail on a claim of false light-invasion of privacy, a plaintiff must establish (1) publicity (2) about a false statement, representation or imputation (3) understood to be of and concerning the plaintiff, and (4) which places the plaintiff in a false light that would be highly offensive to a reasonable person. *Klayman v. Segal,* 783 A.2d 607, 613-14 (D.C. 2001) (quoting *Kitt v. Capital Concerts, Inc.,* 742 A.2d 856, 859 (D.C. 1999) (referencing Restatement § 652E (1977)); *Vassiliades v. Garfinckel's, Brooks Brothers, Miller & Rhoades, Inc.,* 492 A.2d 580, 587 (D.C. 1985). It is essential to a claim of false light that the matter published concerning the plaintiff is not true. *Moldea,* 15 F.3d at 1151.

Causes of action for defamation and false light overlap substantially. *Moldea,* 15 F.3d at 1151. Where the plaintiff rests both his defamation and false light claims on the same allegations, the claims are analyzed in the same manner. *Blodgett v. University Club,* 930 A.2d 210, 223 (D.C. 2007). "[A] plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." *Id.* (citing *Cohen v. Cowles Media Co.,* 501 U.S. 663, 670 (1991), and *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 56 (1988)).

To recover on an invasion of privacy claim based on publication of private facts, a plaintiff must show that the defendant (1) published private facts (2) in which the public has no

legitimate concern and (3) which publication would cause suffering, shame, or humiliation to a person of ordinary sensibilities. *White,* 909 F.2d at 517 (citing *Dresbach v. Doubleday & Co.,* 518 F. Supp. 1285, 1287 (D.D.C. 1981)).

The District of Columbia has generally adopted the approach in the Second Restatement of Torts ("Restatement") on invasion of privacy. *Vassiliades,* 492 A.2d at 587. According to the Restatement, both forms of invasion of privacy alleged by Mr. Armstrong - false light and disclosure of private facts - require a plaintiff to demonstrate that the defendant has "given publicity" to the matter in question. *Steinbuch v. Cutler,* 463 F. Supp. 2d 1, 3 (D.D.C. 2006) (citing Restatement §§ 652D (describing elements of public disclosure of private facts claim) & 652E (describing elements of false light claim).

"Publicity" for the purposes of invasion of privacy claims differs from the term "publication" as used in connection with defamation claims. *Steinbuch,* 463 F. Supp. 2d at 3 (citing Restatement § 652D cmt. a). While "publication" for defamation claims can mean communication to a single person, "publicity" for invasion of privacy purposes means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as *"substantially certain to become one of public knowledge." Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652D

cmt. a) (emphasis added in *Steinbuch); Beyene v. Hilton Hotels Corp.,* 815 F. Supp. 2d 235, 254 (D.D.C. 2011). As a matter of law, it is not an invasion of the right of privacy to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons." *Id.*

2. False Light

Based on the same allegations as his defamation claim, Mr. Armstrong claims that Ms. Thompson's letters to USDA presented Armstrong in a false light, depicting him as a mentally unstable person who lacked integrity and who was not qualified to perform the essential functions of his employment. Complaint ¶¶ 41-42. The Court grants summary judgment on Mr. Armstrong's false light claim because the undisputed evidence demonstrates that (1) the factual assertions in Thompson's letters are substantially true, and (2) Ms. Thompson sent her anonymous letters only to a small number of recipients at USDA. First, as in *Blodgett ,* Mr. Armstrong's false light claim is based on the same allegedly false statements as his defamation claim, and because the factual assertions in Ms. Thompson's letters to the USDA are substantially true, Mr. Armstrong fails to establish an essential element of the false light claim. Second, because Ms. Thompson did not disseminate the information about Mr. Armstrong to the public at large, but sent the letters to only a small number of people at the USDA, she cannot

be liable for invasion of privacy as a matter of law. *See Beyene*, 815 F. Supp. 2d at 254.

3. Publication of Private Facts

Mr. Armstrong alleges that Ms. Thompson's letters to USDA publicly disclosed private facts that were highly offensive to the ordinary and reasonable person. Ms. Thompson's letters did not invade Mr. Armstrong's privacy because she sent them not to the public at large, but only to a small number of people at the USDA with a legitimate interest in the information. Mr. Armstrong has not submitted any admissible evidence that would permit a reasonable jury to find that Ms. Thompson so widely broadcast the content of her letters that it would become common knowledge to the public at large.

E. Intentional Interference with Prospective Employment Relations

Mr. Armstrong alleges that Ms. Thompson's letters were designed to and did interfere with Mr. Armstrong's prospective employment with the USDA by causing USDA to withdraw its job offer. This claim fails because no reasonable jury could infer from the evidence that it was improper or unjustified for Ms. Thompson to mail the letters to USDA.

For his claim of intentional interference with business relations, Mr. Armstrong must

prove: "(1) existence of a valid contractual or other business relationship; (2) the defendant's knowledge of the relationship; (3) intentional interference with that relationship by the defendant; and (4) resulting damages." *Onyeoziri v. Spivak,* 2012 D.C. App. LEXIS 269 at *19 (D.C. 2012) (citing *NCRJC, Inc. v. Columbia Hospital for Women Medical Center,* 957 A.2d 890, 900 (D.C. 2008) (footnote omitted)). The District of Columbia has adopted the formulation in the Restatement: "One who intentionally and improperly interferes with the performance of a contract ... between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other." *See Paul v. Howard University,* 754 A.2d 297, 309 n.23 (D.C. 2000) (quoting Restatement § 766). To be actionable, the interference need not cause an actual breach of the business relationship, but instead may cause "merely a failure of performance" by one of the parties. *Casco Marina Dev., L.L.C. v. D.C. Redevelopment Land Agency,* 834 A.2d 77, 84 (D.C. 2003).

A defendant may avoid liability if he "can establish that his conduct was legally justified or privileged." *Murray v. Wells Fargo Home Mortgage,* 953 A.2d 308, 326 (D.C. 2008)
(quoting *Raskauskas v. Temple Realty Co.,* 589 A.2d 17, 27 (D.C. 1991)). The requirement that the interference be improper is "simply another way of

saying that the alleged tortfeasor's conduct must be legally justified." *Sorrells v. Garfinckel's, Brooks Bros., Miller & Rhoads, Inc.*, 565 A.2d 285, 290 (D.C. 1989). The Restatement lists seven factors to be weighed in determining whether the alleged interference is improper: "(a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties." *Onyeoziri,*20 12 D.C. App. LEXIS 269 at *33 (quoting Restatement § 767). "The issue in each case is whether the interference is improper or not *under the circumstances*; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another." Restatement § 767 cmt. b (emphasis added). The decision depends upon a judgment and choice of values in each situation. *Id.*

The Restatement factors most relevant here are (a) the nature of the actor's conduct, and (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; both of these factors weigh heavily in Ms. Thompson's favor. No reasonable jury could find it improper or unjustified for a citizen to provide substantially true information to a federal agency re-

garding a prospective employee's prior misconduct that is directly related to his fitness for the potential position. The societal interest in encouraging disclosure of such information is particularly strong when the prospective employer is a government agency and when the position is in law enforcement. The actor's motive and the interests that the actor sought to advance are also relevant under the Restatement's test, but even if the actor has malicious and vindictive motives, the communication of substantially true information to the prospective government employer still serves the same public purpose. Similarly, the public interest in the communication is the same whether the citizen uses her name or provides the information anonymously. Mr. Armstrong cannot avoid the limitations on defamation and invasion of privacy claims by recasting them as claims for intentional infliction of emotional distress.

For these reasons, the Court grants summary judgment on Armstrong's claim of intentional interference with prospective employment relations.

F. Claims Against Mr. Sutkus

Mr. Armstrong contends that Mr. Sutkus is liable for his wife's misconduct because he aided and abetted and conspired with her by assisting and encouraging her with the letters. *See* Complaint ¶¶ 9 & 18-28. If Ms. Thompson is not liable as the principal, Mr. Sutkus cannot be liable

as an aider and abettor. Because Ms. Thompson is entitled to judgment as a matter of law on all of Mr. Armstrong's claims, it follows that Mr. Sutkus is equally entitled to judgment as a matter of law.

IV. CONCLUSION

For these reasons, the Court orders that:

1. Ms. Thompson's motion for summary judgment is granted.

2. Mr. Sutkus' motion for summary judgment is granted.

3. Judgment shall be entered for both defendants and against Mr. Armstrong on all claims.

Anthony C. Epstein
Judge
Signed In Chambers

Date: June 20, 2012

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APPENDIX C

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

WILLIAM H. ARMSTRONG, Plaintiff v. KAREN THOMPSON, et al., Defendants	Docket No. 2009 CA 4137 B Civil 2 Calendar # 11 Judge Stuart G. Nash

ORDER

Before the Court is defendant Karen Thompson's Motion for Summary Judgment and defendant David Sutkus' Renewed Motion for Summary Judgment, and plaintiff's opposition to both motions. For the reason set forth below, de-

fendant Karen Thompson's Motion for Summary Judgment is denied, and defendant David Sutkus' Renewed Motion for Summary Judgment is granted.

Background

Prior to August 2007, plaintiff William Armstrong, defendant Karen Thompson, and defendant David Sutkus (Thompson's husband), were all employees of the United States Department of Treasury's Office of the Inspector General for Tax Administration ("TIGTA"). In August 2007, Armstrong received and accepted a job offer from the United States Department of Agriculture ("USDA"). Before Armstrong began his new job, however, USDA received six anonymous letters disclosing certain information about a TIGTA investigation of Mr. Armstrong for allegedly gaining unauthorized access to, and improperly disclosing information from, TIGTA databases. On the basis of this information, USDA rescinded Armstrong's job offer. Thompson has subsequently admitted being the author of those anonymous letters.

In June 2009, plaintiff filed a seven-count complaint, claiming damages on a variety of legal theories. On October 6, 2011, two counts (Fraud and Wrongful Involvement in Litigation) were dismissed by the Court (Judge Josey-Herring) for failure to state a claim. Those counts are no longer part of this litigation. On June 20, 2012, the Court

(Judge Epstein) granted summary judgment on the remaining five counts[1]. The ground upon which Judge Epstein granted summary judgment on three of the five counts (Defamation, Invasion of Privacy - False Light, and Intentional Interference with Prospective Contractual Relations) was that the information conveyed by plaintiff Thompson to USDA was substantially true[2].

Plaintiff appealed the grant of summary judgment. On November 21, 2013, the D.C. Court of Appeals issued a published opinion affirming the grant of summary judgment on all counts, with the exception of one - the Intentional Interference with Prospective Contractual Relations count, with respect to which the Court of Appeals reversed and remanded. *Armstrong v. Thompson,* 80 A.3d 177 (D.C. 2013). In its opinion, the Court of Appeals affirmed Judge Epstein's ruling that there existed no issue of material fact on the question of whether the information conveyed by defendant Thompson to USDA was substantially true. The Court of

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[1] The Court hereby incorporates the Undisputed Material Facts, set forth at pp. 2-6 of Judge Epstein's June 20, 20 12, Order.

[2] Summary judgment was granted on the remaining two counts (Invasion of Privacy - Publication of Private Facts and Intentional Infliction of Emotional Distress) on different grounds not relevant to the instant motion. Judge Epstein's grant of summary judgment on these counts was affirmed on appeal for the reasons stated in his order.

Appeals found that the fact that the information conveyed by defendant Thompson was indisputably true negated plaintiff's ability to establish essential elements of the Defamation and False Light claims.

The Intentional Interference count was remanded to this Court, and is the subject of defendants' renewed motions for summary judgment.

Defendant Thompson's Motion

Defendant Thompson has reasserted her entitlement to summary judgment on the remaining count of the complaint, arguing: (1) that the First Amendment bars an intentional interference claim premised exclusively on truthful, non-defamatory statements; and (2) under common law, truthful statements cannot be "improper" conduct required to sustain a claim for intentional interference. Because the Court is persuaded that these arguments were belatedly raised on appeal, and deemed to be waived by the Court of Appeals, this Court declines to consider them in this, the second round of summary judgment briefing.

Defendant Thompson is technically correct that "[n]othing in the Court of Appeals' decision foreclose[s] the Defendants from presenting any other arguments to this Court concerning the viability of the remanded intentional interference claim." Defendant's Motion at 4. However, given

the history of this litigation, it is impossible to view defendant Thompson's current claims about the viability of the intentional interference claim as "new" arguments. As discussed above, Judge Epstein granted summary judgment on three of plaintiff's existing counts on the ground that the information conveyed by Thompson to the USDA was substantially true. The Court of Appeals affirmed Judge Epstein on two of those three counts, holding that he correctly found that there was no issue of material fact regarding the truth of the information, and that the truth of the information negated plaintiff's ability to establish essential elements of the Defamation and False Light claims. However, the Court of Appeals explicitly declined to engage in the same reasoning with respect to the Intentional Interference claim. With respect to that count, the Court of Appeals found that the truth of the information conveyed was *not* dispositive as to whether plaintiff possessed a viable claim. Rather, in connection with that claim, the Court of Appeals stated:

> In determining whether conduct that allegedly rose to intentional interference was improper or legally justified, finders of fact must weigh seven factors, including (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to

> be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

Armstrong, 80 A.3d at 191 (citations omitted).

In applying that test to Judge Epstein's order in this case, the Court of Appeals proceeded to state:

> The trial court emphasized the social interest prong (e), concluding that the societal interest in encouraging the transmission of truthful information about a law enforcement agent to a government agency outweighed Ms. Thompson's malicious motive and the interest sought to be advanced by Ms. Thompson…. Yet reasonable minds could differ on the outcome of this balancing test and on the question whether Ms. Thompson was legally justified in intentionally interfering with Mr. Armstrong's prospective

> employment…. Because we conclude, contrary to the trial court's ruling, that a jury could have decided otherwise, we reverse the court's grant of summary judgment on Mr. Armstrong's intentional interference with prospective contractual relations claim.

Id.

As is readily apparent from the above passage, the Court of Appeals' clear expectation was that a jury would assess whether Ms. Thompson's actions were "improper or legally justified." Significantly, the Court of Appeals articulated that expectation notwithstanding its explicit understanding that the alleged intentional interference with contract consisted solely of the communication of *truthful* information. In the view of this Court, the above passage forecloses any possibility that this Court could, consistent with the Court of Appeals decision, grant summary judgment to the defendants on the ground that the communications contained exclusively truthful information.

Finally, and most importantly in connection with the pending motion, the Court of Appeals stated as follows:

> In a Rule 28(k) letter filed after oral argument… Ms. Thompson argued for the first time that the truthfulness of her allegations to the USDA should preclude liability for intentional interference…. We decline to consider this claim because Ms. Thompson did not raise it in her appellate brief…. Ms. Thompson's brief does defend the trial court's determination - after balancing the [seven] factors for evaluating the impropriety of the interference… that her conduct was legally justified because she was providing truthful information to a government agency, but she did not argue here or in the trial court that truthfulness was a complete defense.

Id. at 191 n.8.

In light of the foregoing discussion, this Court does not believe that it is appropriate to accept defendant Thompson's invitation to address the argument that the Court of Appeals explicitly found to be waived on appeal. No additional discovery has been conducted since the Court of Appeals remanded the case. Should this Court accept defendant Thompson's invitation to address truthfulness as an absolute defense to the Inten-

tional Interference count, and should the Court find summary judgment to be warranted, then that decision would, if appealed by the plaintiff, go back to the Court of Appeals on the very same record that existed previously. The Court of Appeals' finding of waiver would have been meaningless, and additional months would have slipped by as the case bounced back and forth between this Court and the Court of Appeals. This Court cannot imagine that is what the Court of Appeals had in mind when it remanded the case.

For these reasons, in this unique context, this Court finds that the Court of Appeals' finding of appellate waiver must also be construed as a waiver of the right to make the same argument in the context of a renewed motion for summary judgment before this Court. Accordingly, the argument is deemed to be waived in the context of summary judgment, and defendant Thompson's motion for summary judgment will be denied.

Defendant Sutkus's Motion

Plaintiff claims that defendant Sutkus is liable on the Intentional Interference claim as either an aider and abettor or a co-conspirator of defendant Thompson. When the case was before Judge Epstein on the motion for summary judgment, defendant Sutkus argued that there was no evidence in the record that he had acted as an aider and abettor or co-conspirator. Because Judge

Epstein granted summary judgment on behalf of defendant Thompson, the principal, he also granted summary judgment as a matter of law on the derivative claims against defendant Sutkus, based on accomplice liability, without addressing Sutkus' argument that there was no evidence that he was actually involved. Now that the one count has been reinstated against defendant Thompson, it is appropriate for this Court to address defendant Sutkus's original argument that summary judgment should be granted in his favor because of the absence of any evidence of his involvement.[3] Addressing that argument on its merits, the Court finds in favor of defendant Sutkus and grants summary judgment on his behalf.

As the Court of Appeals held on the appeal of this matter, to establish the tort of intentional interference with prospective contractual relations, the plaintiff must prove: (1) the existence of

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[3] Plaintiff contends that defendant Sutkus's arguments on this issue have been waived as a consequence of his failure to participate in the appeal of Judge Epstein's order. However, as is apparent from the discussion above, Sutkus did raise these arguments initially before Judge Epstein. Judge Epstein found it unnecessary to address these arguments, given his decision to grant summary judgment on alternative grounds. It would have been pointless for Sutkus to pursue these arguments on appeal, in light of the fact that Judge Epstein had not addressed them below. Having advanced tl1ese arguments at every meaningful opportunity during this litigation, Sutkus is entitled to resolution of his arguments on their merits.

a valid contractual or other business relationship; (2) the defendant's knowledge of the relationship; (3) intentional interference with that relationship by the defendant; and (4) resulting damages. *Id.* at 190. As defendant Sutkus points out, there is no evidence in the record that he played any role in drafting or mailing the USDA letters, that he provided defendant Thompson with any of the information contained in the letters, that he encouraged defendant Thompson to send the letters, or that he was even aware of the specific contents of the letters until after they had been sent.

Because there is no evidence in the record that defendant Sutkus personally took any action to interfere with plaintiff's prospective contractual relationship with USDA, plaintiff relies on two alternative accomplice theories of liability: either that Sutkus aided and abetted defendant Thompson in sending the letters, or that he is liable as her co-conspirator.

In order to establish Sutkus's liability as an aider and abettor, the plaintiff must prove the following elements: (1) that Thompson performed a wrongful act that caused an injury; (2) that Sutkus was generally aware of his role as part of an overall illegal or tortious activity at the time that he provided the assistance; and (3) that Sutkus knowingly and substantially assisted the principal violation. *See Halberstam v. Welch,* 705 F.2d 472, 477 (D.C. Cir. 1983).

Here, the record is devoid of any evidence that Sutkus "knowingly and substantially assisted" Thompson in communicating information to USDA. The only evidence to which plaintiff can cite in this regard is that Sutkus had contemporaneous knowledge that Thompson was sending the letters to USDA and neither restrained her from doing so nor reported her conduct to supervisors at TIGTA. Plaintiff expands on this last point, arguing that at all relevant times Sutkus was an employee of TIGTA, and was aware that TIGTA was investigating to determine who had authored the letters. Throughout the months that the investigation proceeded, Sutkus did nothing to alert the investigators that Thompson, his wife, was the author.

Plaintiff cites no authority, and the Court is aware of none, for the proposition that failing to restrain a person from committing a tort, constitutes "substantial assistance" in the commission of that tort. Similarly, no authority is cited, and none appears to exist, for the proposition that failing voluntarily to alert investigating authorities as to the identity of a tortfeasor constitutes "substantial assistance" in the commission of the tort. While plaintiff suggests that Sutkus owed "a duty to disclose his knowledge of his wife's wrongdoing," he cites no authority for the existence or scope of such duty. It simply cannot be the case that every employee of a government agency who becomes aware of a breach of the agency's policies

or code of conduct by another employee becomes complicit in that breach simply by failing to notify the agency regarding the breach. The fact that Sutkus is married to Thompson does nothing to change that calculus.

Similarly, there is no evidence in the record upon which a fact-finder could reasonably find Sutkus liable as a co-conspirator. In order to establish co-conspirator liability, plaintiff must prove: (1) an agreement between Sutkus and Thompson; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme. *Halberstam,* 705 F.2d at 477. There is no evidence in the record regarding the existence of any such agreement. The fact that Sutkus was apparently aware of Thompson's communications at the time she made them does not, standing alone, allow for an inference that he had reached an agreement with her to participate in the act. Nor does his failure to restrain her from sending the letters provide the basis for such an inference. Finally, as with the analysis of aiding and abetting liability, the fact that Sutkus did not report Thompson to the agency investigators is not evidence that he had reached any agreement

with Thompson to participate in the allegedly illegal act[4].

Because there is no evidence in the record upon which a reasonable fact-finder could find that defendant Sutkus intentionally interfered with plaintiff's prospective contract with USDA, or aided and abetted or conspired with defendant Thompson to accomplish such interference, summary judgment is appropriate with respect to defendant Sutkus.

Accordingly, for the reasons set forth above, the Court orders that:

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[4] Plaintiff asserts that Sutkus "misled" TIGTA investigators and "hid" his wife's actions. It is conceivable that such affirmative acts in aid of defendant Thompson could provide the basis of a reasonable inference that Sutkus had reached an agreement with Thompson and/or was working in concert with her. However, nothing in the record supports a finding that Sutkus provided untruthful information to the TIGTA investigators, or otherwise took any affirmative act to mislead them. The most that can be said about his interaction with the investigators is that he may not have been completely forthcoming about his wife's involvement when questioned by the investigators months after the communications were made. He was never directly asked if he knew the identity of the autl10rof tl1e USDA communications, and his claim to investigators that he first learned about plaintiff's allegedly improper access of TIGTA databases "through office scuttlebutt," appears to be literally true, even if the actual source of that "scuttlebutt" may have been his wife and co-worker, defendant Thompson.

1. Defendant Thompson's Motion for Summary Judgment is hereby **DENIED**.

2. Defendant Sutkus's Renewed Motion for Summary Judgment is hereby **GRANTED**.

Stuart G. Nash
Judge
Signed in chambers

Dated and docketed on April 10, 2014

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