No. 16-35

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment permits a supervisory federal law enforcement officer to recover damages for intentional interference with contractual relations based on non-defamatory speech that concerned the officer's on-the-job conduct and was made to another prospective federal employer.

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INTRODUCTION

Petitioner Armstrong claims that this case raises an important and recurring constitutional question about "whether and when a law enforcement officer may recover for *defamation*." Pet. 29 (capitalization altered and emphasis added). But this case does not involve any defamatory speech. Both the trial court and the court of appeals determined that Thompson's speech was *not* defamatory because her statements were substantially true or non-actionable opinion. In fact, neither lower court relied on the First Amendment in ruling on the defamation claim, and Armstrong does not describe, let alone challenge, the lower courts' grounds for rejecting that claim.

Armstrong also claims that this non-defamatory speech constituted intentional interference with contractual relations. But Thompson's speech was not false and addressed a matter of public concern—to wit, Armstrong's unauthorized accessing of sensitive information in government databases and his fitness for duty as a law enforcement official with a federal agency. Armstrong cites no case in which a court has upheld tort liability for non-defamatory speech about a matter of public concern. This is hardly surprising. This Court's First Amendment decisions effectively foreclose liability for such speech, as does the Restatement (Second) of Torts for claims of intentional interference with contractual relations. Armstrong has thus failed to show that the *judgment* in this case (*i.e.*, that the First Amendment precludes tort liability for non-defamatory speech about a matter of public import) conflicts with the judgment of any other court. Nor has he shown why that judgment should be reversed even if, as he asserts, he is not a public official.

In addition to being unnecessary to the outcome below, Armstrong's claims about a "split" among the lower courts over when a law enforcement officer can be a "public official" rest on a distortion of the D.C. Court of Appeals' holding. Armstrong asks the Court to reverse the "overwhelming consensus" among lower courts that all or nearly all law enforcement officers are public officials. But the D.C. Court of Appeals *declined* to adopt any such categorical approach. Instead, it reviewed Armstrong's particular duties and concluded that his authority was substantial enough to make him a public official. The mere fact that a handful of other courts, employing a non-categorical standard decades ago, reached different conclusions with respect to different law enforcement officers with different duties and responsibilities is not evidence of a "split." The D.C. Court of Appeals' fact-bound determination that Armstrong was a public official does not implicate any split in authority, was correct, and thus does not warrant review.

Ultimately, Armstrong asks this Court to jettison settled law and to recalibrate the constitutional balance for defamation cases involving law enforcement officers based on three-year-old dicta in a single, divided federal decision and a series of law review articles dating back to the 1980s. Such musings cannot justify the extraordinary step he asks this Court to take. In all events, however, the Court should not consider altering the rules governing defamation cases in a case that does not involve defamation.

This Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

A. Factual Background.

In 2006, Armstrong was Thompson's supervisor at the Tax Inspector General for Tax Administration (TIGTA), a federal law enforcement agency. As an Assistant Special Agent in Charge, he supervised five to seven employees, managed a group of special agents investigating criminal fraud involving Internal Review Service procurements, presented results of investigations to an "adjudicator" or the United States Attorney's Office if possible criminal prosecution was warranted, carried a firearm and federal law enforcement credentials, and had access to sensitive databases and information. Pet. App. 14a–15a. TIGTA described his position as one of "heightened public trust and responsibility," requiring a "higher standard of conduct than non-supervisory employees." *Id.* at 15a.

In October 2006, Armstrong was placed under investigation and suspended from his regular duties on suspicion of having improperly accessed government databases. Armstrong later admitted that he had accessed the databases for personal use. *Armstrong* v. *Thompson*, 80 A.3d 177, 181 (D.C. 2013). Although the United States declined to prosecute him, the Department of Treasury investigating team concluded in April 2007 that Armstrong "had gained unauthorized access to two databases in violation of criminal law." *Id.* On December 4, 2007, TIGTA decided to remove Armstrong effective December 11, 2007. 6/10/2014 Trial Tr. at 524:16–18. After Armstrong filed an appeal before the Merit Systems Protection Board, the parties reached a settlement whereby Armstrong would resign without acknowledging liability, fault, or error. 80 A.3d at 181.

While the investigation was ongoing, Armstrong interviewed for a new position as a criminal investigator in the United States Department of Agriculture (USDA). *Id.* USDA extended him a tentative offer of employment in August 2007. *Id.* at 181–82. After Armstrong accepted that tentative offer, USDA received several letters written and sent by Thompson. Those letters disclosed that Armstrong was under investigation by TIGTA for possible criminal and administrative violations and that Armstrong had chosen to leave TIGTA "with the threat of termination hanging over his head." *Id.* at 182. Among other things, the letters warned USDA that hiring Armstrong would be a "grave error," and that his conduct could create "Giglio/Henthorn issues in the future should [Armstrong] ever be called to testify on behalf of your agency in a criminal or civil proceeding." *Id.* at 182, 188.[1]

B. Procedural History.

Armstrong filed suit against Thompson and another defendant in the Superior Court for the District of Columbia asserting claims for defamation, intentional infliction of emotional distress, false light, publication of private facts, and intentional interference with prospective contractual relations. *Id.* at 182–83. Armstrong's suit was based on the letters Thompson had sent to USDA.

The Superior Court granted summary judgment to Thompson on all claims. The court found, among other things, that the defamation claim failed because

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[1] The latter assertion refers to the government's obligation, pursuant to *Giglio* v. *United States,* 405 U.S. 150 (1972), and *United States* v. *Henthorn,* 931 F.2d 29 (9th Cir. 1991), to disclose information from a testifying agent's personnel files that a defendant may use to impeach the agent's credibility.

the factual statements in the letters were substantially true, and Thompson's statements of opinion were not provably false. Pet. App. 33a, 35a–40a. Accordingly, the Superior Court did not reach Thompson's First Amendment arguments with respect to this claim, including the question whether Armstrong was a public official. Similarly, the court restricted its analysis of Armstrong's intentional interference with contractual relations to common-law issues, and did not consider Thompson's argument that the First Amendment barred liability for substantially true or not provably false statements under that tort as well.

The D.C. Court of Appeals affirmed as to all claims except for intentional interference with contractual relations. As to the defamation claim, the court agreed that "no reasonable juror could deny the substantial truth of each of the statements to which [Armstrong] objects." 80 A.3d at 185. The court also agreed that Thompson's opinions were not provably false and therefore not actionable. *Id.* at 188. The court thus did not address Thompson's First Amendment defense to that claim. *Id.*

On the intentional interference with contractual relations claim, the D.C. Court of Appeals held that "reasonable minds could differ" on whether Thompson's statements were "improper or legally justified" under a common-law balancing test. *Id.* at 191; see Restatement (Second) of Torts § 767 (1979). In a footnote, the D.C. Court of Appeals determined that Thompson had not raised the separate common-law defense, under § 772(a) of the Restatement, that truth is an absolute defense to intentional interference with contractual relations. 80 A.3d at 191 n.8. The court did not discuss whether the First Amendment barred liability.

On remand, the Superior Court held that the D.C. Court of Appeals' opinion foreclosed consideration of Thompson's claims that truth was an absolute defense to a claim of intentional interference with contractual relations under both § 772 of the Restatement and the First Amendment. After a trial on the merits, a jury found for Armstrong and awarded him over half a million dollars. Thompson appealed.

The D.C. Court of Appeals concluded that, under law-of-the-case doctrine, Thompson had waived her truth-based affirmative defense under § 772 of the Restatement. It concluded, however, that the Superior Court had erred in refusing to consider whether the First Amendment barred liability on Armstrong's tortious interference claim. Relying on this Court's decision in *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988), and several federal courts of appeals' decisions, the D.C. Court of Appeals held that First Amendment restrictions apply to the tort of intentional interference just as they apply to the tort of defamation. "The issue before us," it then stated, "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*." Pet. App. 13a (emphasis added). The court then set forth its reasoning in support of this judgment.

It began by analyzing whether Armstrong was required to show "actual malice" under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny. The court concluded that such a showing was required because Armstrong was a public official, and Thompson's speech was about his official conduct and addressed a matter of public concern.

First, the court noted that the designation "public official" applies at least to government employees "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Pet. App. 15a (quoting *Rosenblatt* v. *Baer*, 383 U.S. 75, 85 (1966)). Noting that many courts have "held that … an officer 'of law enforcement, from ordinary patrolman to Chief of Police, is a 'public official,'" the court *expressly declined* to adopt such a categorical rule. *Id.* at 16a–17a. Instead, it held that "[h]ere it is enough for us to conclude that" Armstrong was a public official because he was "a supervisory special agent in TIGTA investigating potential criminal fraud, with access to confidential databases and occupying what TIGTA itself considered 'a position of heighted public trust and responsibility.'" *Id.* at 17a; see also *id.* at 15a (noting that Armstrong did "not question" TIGTA's description that he occupied "a position of heightened public trust").

Second, the court of appeals held that Thompson's speech addressed a matter of public concern. Indeed, "[Thompson's] letters … sought to inform USDA of 'actual or potential wrongdoing or breach of public trust' by a supervisory official, … a disclosure 'touching upon a matter of public concern.'" Pet. App. 20a (quoting *Connick* v. *Myers*, 461 U.S. 138, 147–48 (1983)); see also *id.* at 19a (observing that society has an "interest 'in encouraging disclosure of' 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'" (quoting Superior Court Opinion at Pet. App. 47a–48a)).

With respect to the statements at issue, the court of appeals held, first, that factual statements could be

made with "actual malice" only if they were false, and Thompson's factual assertions "were substantially true as a matter of law." Pet. App. 20a–21a (citing *Air Wis. Airlines* v. *Hoeper*, 134 S. Ct. 852, 861 (2014)). In addition, the court explained, Ms. Thompson's other assertions were expressions of opinion, and "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 21a (quoting *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20 (1990)). "In sum," the court held, "*as a matter of law under the First Amendment*, none of the statements in Ms. Thompson's letters provided a basis for liability." *Id.* (emphasis added).

REASONS FOR DENYING THE PETITION

Armstrong asks this Court to wade into an alleged debate over which law enforcement officers are "public officials" who can recover for "defamatory falsehoods" only upon a showing of "actual malice." But this case involves *non-defamatory* statements about a matter of public concern. Thus, this case presents no occasion to reconsider First Amendment limits on defamation claims. Moreover, the "split" Armstrong describes is contrived and based on a mischaracterization of the D.C. Court of Appeals' actual holding. And the lower court's conclusion that Armstrong was a public official is an unexceptional fact-bound ruling that was in all events correct. The petition should be denied.

I. PETITIONER HAS FAILED TO SHOW THAT RESOLUTION OF THE ALLEGED "SPLIT" WILL ALTER THE JUDGMENT IN THIS CASE.

Armstrong urges this Court to resolve an alleged divide among courts concerning which law enforce-

ment officers are "public officials." There is no basis for doing so here. The issue the D.C. Court of Appeals framed and resolved below is whether the First Amendment prohibits tort liability for non-defamatory statements about a matter of public concern. Because petitioner has not shown that this *judgment* would have to be reversed if this Court were to overturn the lower court's "public official" determination, there is no reason to grant review. Moreover, the D.C. Court of Appeals adopted Armstrong's side in the supposed split of authority, declining to adopt a categorical rule that law enforcement officers are public officials.

A. This Case Is About Non-Defamatory Speech On A Matter Of Public Concern.

In an earlier stage of this litigation, the D.C. Court of Appeals affirmed the Superior Court's ruling that Thompson's statements were not defamatory because they were substantially true or did not involve provably false opinion. *Armstrong* v. *Thompson*, 80 A.3d 177, 181 (D.C. 2013). Armstrong does not contest that ruling here. Indeed, he does not describe it, and did not even include the court of appeals' prior decision in the appendix to the petition.

In its latest opinion, the D.C. Court of Appeals held that this non-defamatory speech addressed a matter of public concern: Armstrong's official conduct and his fitness for duty as a law enforcement officer. Pet. App. 17a–20a. It also held that the First Amendment limits liability for intentional interference with contractual relations just as it limits liability for defamation, which ensures that "'a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim.'" *Id.* at 11a–13a. Armstrong does not challenge these holdings either. In-

stead, he seeks review of only the lower court's conclusion that he was a public official.

But for two reasons, the resolution of this question is unnecessary here. First, whether or not Armstrong was a public official, he has not shown that the First Amendment permits liability for non-defamatory speech that addresses a matter of public concern. Nor would this Court's precedents support such a position. See, *e.g.*, *Snyder* v. *Phelps*, 562 U.S. 443, 451–52 (2011) (rejecting tort liability for opinion statements addressed to a matter of public concern without considering public figure status); *Bartnicki* v. *Vopper*, 532 U.S. 514, 533–34 (2001) (describing the "core purposes" of the First Amendment as protecting "the publication of truthful information of public concern" and holding that "privacy concerns give way" in that context); *Butterworth* v. *Smith*, 494 U.S. 624 (1990) (holding that state's interest in grand jury secrecy and private parties' interest in reputation were insufficient to prohibit truthful speech about a matter of public concern); *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20 (1990) ("[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection"); *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 777 (1986) ("a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant"); *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979) ("[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards"); see also Pet. App. 20 ("Thompson's letters … sought to inform USDA of 'actual or potential wrongdoing or breach of public trust' by a supervisory official, … a disclosure

'touching upon a matter of public concern.'" (citing *Connick* v. *Myers*, 461 U.S. 138, 147–48 (1983)).

Applying these principles, moreover, this Court has held that "absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech." *Butterworth*, 494 U.S. at 634. Armstrong points out that there is a "'legitimate state interest' in 'compensat[ing] individuals for the harm inflicted on them by *defamatory falsehood*.'" Pet. 23 (emphasis added) (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)). But since there was no "defamatory falsehood" in this case, that interest is irrelevant. Regardless of whether Armstrong was a public official, he has failed to show that Thompson's non-defamatory speech about his official conduct and fitness for duty as a law enforcement officer was not quintessentially protected speech. Nor has he challenged the court of appeals' contrary conclusion. Pet. App. 17a–21a.

Second, Armstrong points to no split on this point, nor does he cite any authority for the proposition that the First Amendment tolerates liability—either in defamation or intentional interference with contract—for truthful statements or opinions. Indeed, even if Armstrong were not a public official, the First Amendment prohibits liability absent "fault," *Gertz*, 418 U.S. at 347, and falsity is a component of "fault," just as it is a component of "actual malice." See, *e.g.*, *Time, Inc.* v. *Firestone*, 424 U.S. 448, 458 (1976) ("demonstration that an article was true would seem to preclude finding the publisher at fault"); *Wilson* v. *Scripps-Howard Broad. Co.*, 642 F.2d 371, 376 (6th Cir. 1981) ("[f]alsity is an element of fault under the First Amendment"); Restatement (Second) of Torts § 580B, cmts. b, d & e (1977) (explaining that "fault" refers to fault "with regard to … falsity" or "as to fal-

sity"); *Moss* v. *Stockard*, 580 A.2d 1011, 1022 n.23 (D.C. 1990) ("falsity logically is a component" of *Gertz*'s constitutional requirements on fault even for private figures); cf. *Hoeper*, 134 S. Ct. at 863 (holding that actual malice "requires material falsity").

Thus, even if the lower court's "public official" determination were mistaken—and it is not, see *infra*—reversal of that *ground* for the decision would not justify reversal of the lower court's *judgment* that the First Amendment precludes tort liability for non-defamatory speech about a matter of public import. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (Court "reviews judgments, not statements in opinions"); *M'Clung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821) (relevant question is: "was the *judgment* correct, not the *ground* on which the judgment professes to proceed"); see also *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 & n.8 (1984) (collecting cases). This Court should not review the lower court's fact-bound determination concerning Armstrong's status as a public official, when its resolution of that issue would not require a change in the outcome of the case. Accordingly, the petition should be denied.

B. There Is No Relevant Split Of Authority.

Armstrong concedes that the "'overwhelming and entirely one-sided' consensus" among federal courts of appeals is that law enforcement officers are public figures. Pet. 12 (quoting *Young* v. *Gannett Satellite Info. Network, Inc.*, 734 F.3d 544, 553–54 (6th Cir. 2013) (Moore, J., dissenting)). Indeed, several federal courts of appeal have said as much. See, *e.g.*, *Couglin* v. *Westinghouse Broad. & Cable Inc.*, 780 F.2d 340, 346 n.6 (3d Cir. 1985) (per curiam) ("A long line of cases demonstrates that police officers are public figures."); *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"). Relying mainly on Sixth Circuit dicta, Armstrong purports to identify a split between courts that regard all or nearly all law enforcement officers as public officials and those that do not. Pet. 10–11. He asks this Court to resolve that "split" and reject the prevailing "blanket rule."

Resolution of this "split," however, is also irrelevant to this case. Regardless of whether many or most courts have adopted a categorical rule that police officers are public officials, the D.C. Court of Appeals did not do so in this case. Instead, the court considered Armstrong's specific role, responsibilities, and duties and, based *on those specific facts*, concluded that he was a public official. Pet. App. 15a–16a.[2] Indeed, the D.C. Court of Appeals expressly *declined* to hold that all law enforcement officers are public officials:

> 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). Here it is enough for us to conclude that Mr. Armstrong, a supervisory special agent in TIGTA investigating

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[2] Contrary to petitioner's suggestion, this Court has not held that "the category [of public official] *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.'" Pet. 11 (emphasis added) (quoting *Rosenblatt* v. *Baer*, 383 U.S. 75, 85 (1966)). *Rosenblatt* held only that "public officials" include "at the very least" such persons. *Rosenblatt*, 383 U.S. at 85.

> 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.

Id. at 16a–17a (footnote omitted).

The petition mischaracterizes this holding. After stating that 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 petition asserts that the D.C. Court of Appeals "*appl[ied] just such a rule*" here. Pet. 5 (emphasis added). Armstrong even quotes the language from *Roche* that the court of appeals *declined* to adopt and characterizes it as the justification for the court of appeals' holding. *Id.* at 21–22.[3]

But as the passage quoted above demonstrates, the lower court did not adopt or apply any blanket rule. Thus, it is clear that any split between a "categorical" and "non-categorical" approach to determining when law enforcement officers are "public officials" is irrelevant here. This case does not present the question "[w]hether all (or nearly all) law enforcement officers are 'public officials,'" Pet. (i), because the lower court did not adopt such a rule. Accordingly, if the Court were to grant review and reject such a rule, that would not mandate reversal, because the lower court evaluated Armstrong's specific role, responsibilities, and duties to determine that he was a public official. Pet. App. 14a–15a.

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[3] Amicus curiae bases its argument on the same mischaracterizations, and even engages in an extended five-page critique of *Roche*, as if the D.C. Court of Appeals had followed it. MLEO Br. 14–19.

Tacitly recognizing this, Armstrong attempts to hedge his bets, claiming elsewhere that the lower court ruled "that law enforcement officers vested *with some unspecified level of supervisory authority* are 'public officials,'" and that there is a split among some courts over "*how much* supervisory authority is necessary." Pet. 15 (first emphasis added); see also *id.* at 9 ("the court of appeals concluded that Mr. Armstrong was a 'public official' because he had some minimal supervisory authority"). This alternative claim also misstates the reasoning below.

The lower court did not rely on the mere existence of supervisory authority in Armstrong's position. Among other things, it considered the *degree* of that authority. See Pet. App. 14a–15a (noting that Armstrong supervised "five to seven employees" and "was responsible for managing a group of Special Agents investigating mainly fraud against the [IRS]"). It also considered that Armstrong had been afforded "access to sensitive databases and information" and that he "occupied 'a position of *heightened public trust and responsibility*,'" *id.* at 15a (emphasis added)—a characterization Armstrong did "not question" below, see *id.*

Armstrong's attempt to identify a split among courts applying a "some supervisory authority test," Pet. 15–17, fares no better. In fact, Armstrong cites no case in which a supervisory law enforcement official was held not to be a public official. In both *Sculimbrene* v. *Reno*, 158 F. Supp. 2d 8 (D.D.C. 2001), and *Clawson* v. *Longview Publishing Co.*, 589 P.2d 1223 (Wash. 1979), the supervisory officers *were* held to be public officials or public figures, whereas in *Himango* v. *Prime Time Broadcasting, Inc.*, 680 P.2d 432 (Wash. Ct. App. 1984) (line officer), *Tucker* v. *Kilgore*, 388 S.W.2d 112 (Ky. 1964) (patrolman), and

Nash v. *Keene Publishing Corp.*, 498 A.2d 348 (N.H. 1985) (police officer), there was no indication of supervisory authority.[4]

Even more to the point, the different outcomes Armstrong cites reflect nothing more than different facts. In *Kiesau* v. *Bantz,* 686 N.W.2d 164 (Iowa 2004), a deputy sheriff who served as "dog handler" was found not to be a public official. *Id.* at 169. In *McCusker* v. *Valley News*, 428 A.2d 493 (N.H. 1981), the court reached the same conclusion with respect to a deputy sheriff whose duties consisted of "serving process, interviewing complainants, doing investigative work, and acting as bailiff for the superior court." *Id.* at 495. And in *Tucker* v. *Kilgore*, the court did not rule on whether a law enforcement officer was a public official, but held only that the speech at issue "was directed not at Kilgore's official conduct as a policeman, but at his fitness and character as a man." 388 S.W.2d at 116.

None of these cases deals with law enforcement officers in positions comparable to Armstrong's. That these cases found that certain law enforcement officers were not public figures reflects only the different facts in those cases, not a split of authority on the meaning of "public official." Indeed, by pointing to the "*idiosyncratic, fact-based* inquiries" of some courts as evidence of a split, Pet. 16 (emphasis added), Armstrong effectively concedes that there is no *doctrinal* division justifying review of the fact-bound determination that the lower court made in this case.

In short, any split between courts that categorically regard law enforcement officers as public figures and those that do not is irrelevant because the D.C. Court

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[4] *Penland* v. *Long*, 922 F. Supp. 1085 (W.D.N.C. 1996), was, as Armstrong notes (Pet. 17), reversed.

of Appeals declined to apply a categorical rule. Nor is there a split among courts that apply a non-categorical rule: different outcomes simply reflect different facts. The petition should be denied for this reason as well.

II. THIS CASE WAS CORRECTLY DECIDED AND IS AN ENTIRELY IMPROPER VEHICLE FOR RADICALLY OVERHAULING THE "PUBLIC OFFICIAL" DOCTRINE IN DEFAMATION CASES.

Armstrong has identified no error in the lower court's holding that he was a public figure. The court's decision follows the case-by-case approach that this Court has applied in *Rosenblatt* and other cases, and it is consistent with the consensus approach of the lower courts. Indeed, the D.C. Court of Appeals' analysis on this issue is more nuanced—and more protective of law enforcement officers—than the categorical approach that, according to Armstrong, holds sway in most jurisdictions.

Armstrong asks this Court to undertake a radical overhaul of the public official doctrine in defamation cases based on Sixth Circuit dicta and a handful of law review articles. But this case—which involves *non-defamatory* speech—is a completely inappropriate vehicle for doing so.

A. The D.C. Court Of Appeals Correctly Applied First Amendment Principles.

1. In *Rosenblatt*, this Court declined to draw "precise lines" to determine what government employees are public officials. *Rosenblatt*, 383 U.S. at 85. Instead, as noted above, it held only that "the 'public official' designation applies *at the very least* to those among the hierarchy of government employees who have, or appear to the public to have, substantial re-

sponsibility for or control over the conduct of governmental affairs." *Id.* (emphasis added). The Court has not deviated from this case-by-case approach.

Following this Court's teachings, for several decades, the lower courts have concluded that those officers whose misuse of authority "can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss" can be public officials. *Gray*, 656 F.2d at 591. These courts have reasoned that there is a "strong public interest in ensuring open discussion and criticism" of such law enforcement officers' "qualifications and job performance." *Id.*; see also *Meiners* v. *Moriarity*, 563 F.2d 343, 352 (7th Cir. 1977) ("The public is certainly interested in an important and special way in the qualifications and performance of federal agents, such as the defendants here, whose decisions to search and to arrest directly and personally affect individual freedoms."); *Buendorf* v. *Nat'l Pub. Radio, Inc.*, 822 F. Supp. 6, 11 (D.D.C. 1993) ("Mr. Buedorf's qualifications and performance are of interest to the public in an important and special way—because his assigned duties could affect an individual's personal freedom."). Indeed, it was the strong public interest in criticizing the conduct of such law enforcement that undergirded this Court's decision in *Sullivan*. See 376 U.S. at 266.

The D.C. Court of Appeals' conclusion that Armstrong's duties rendered him a public official falls comfortably within this mainstream view. As noted, Armstrong was a special agent charged with supervising investigations into criminal fraud in federal procurement cases and presenting the results of those investigations to the prosecutors who decide whether to bring criminal charges. He had access to confidential databases containing sensitive information and

his own agency described his position as one of "heighted public trust." Pet. App. 17a; see also *id.* at 15a. Courts have routinely found law enforcement officers with comparable or even less substantial responsibilities to be public officials. See, e.g., *Dixon* v. *Int'l Bhd. of Police Officers*, 504 F.3d 73, 78 (1st Cir. 2007) (resource officer at a middle school responsible for, among other things, conducting peer mediation and teaching gang resistance was a public official); *Meiners*, 563 F.2d at 352 (federal narcotics agent was a public figure); *Piccone* v. *Bartels*, 40 F. Supp. 3d 198, 218–19 (D. Mass. 2014) (supervisory federal agent who conducted internal agency investigations was a public official); *Buendorf*, 822 F. Supp. at 11 (supervisory secret service agent was a public official); *Ryan* v. *Dionne*, 248 A.2d 583, 585 (Conn. Super. Ct. 1968) (tax collector was a public official).

2. Unable to show that the lower court's decision is erroneous under current "public official" doctrine, Armstrong asks the Court to overhaul the doctrine. In doing so, he relies heavily on dicta in the Sixth Circuit's *Young* divided decision from three years ago,[5] and on several law review articles, including four published 30 or more years ago and two from the same author. This material provides no basis for overhauling what even Armstrong describes as an "'overwhelming and entirely one-sided' consensus" among the lower courts. Pet. 12.

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[5] In fact, the Sixth Circuit's dicta in *Young* "left open the door" on whether "rank-and-file" law enforcement officers are public officials. *Hildebrant* v. *Meredith Corp.*, 63 F. Supp. 3d 732, 743 (E.D. Mich. 2014).

B. This Case Is Not An Appropriate Vehicle, And Now Is Not The Time, For Revisiting The Scope Of The "Public Official" Doctrine In Defamation Law.

Even if non-authoritative musings could provide a basis for revisiting a settled area of law, it is difficult to envision a less suitable vehicle for doing so than this case.

1. Armstrong's policy pitch is an asserted need for this Court to recalibrate the constitutional balance between two competing societal interests—(1) the fundamental right of citizens in a democracy to criticize the conduct of those who exercise governmental power and (2) the "'legitimate state interest' in 'compensat[ing] individuals for the harm inflicted on them by *defamatory falsehood*.'" Pet. 23 (alteration in original) (emphasis added); see also MLEO Br. 4–5. Indeed, the petition and its amicus curiae each refers to "defamation," "defamatory falsehoods," and "libel" more than 20 times, and the petition claims that this case "presents a classic example of the impact that applying *Sullivan* to all law enforcement is having on *meritorious cases* across the country." Pet 29 (emphasis added).

But as explained above, Armstrong's *defamation claim* was *not* meritorious: it failed because Thompson's speech was substantially true or non-actionable opinion, not because Armstrong failed to satisfy *Sullivan*'s actual malice requirement. The Court cannot determine the proper balance between First Amendment rights and society's interest in protecting against injurious *falsehood* in a case where the underlying speech was not false. The fundamental question that Armstrong is asking the Court to resolve is a purely hypothetical one in this case.

The real question posed by the facts and uncontested rulings below is whether the tort of intentional interference with prospective contractual relations should afford compensation to a law enforcement official who claims to have been injured by non-defamatory speech made to a prospective public employer about his official conduct (including the fact that he accessed sensitive government databases for personal reasons) and his fitness for office. Armstrong does not explain why society has *any* interest in providing compensation to a law enforcement official in such circumstances, much less why such a societal interest should turn on whether the official "implement[s] police policy" rather than "set[s] police policy," Pet. 19, or "has access to the media and thus 'the ability to engage in self-help,'" *id.* at 25.

In fact, as discussed above, this Court's cases already make clear that, in the case of non-defamatory speech, the First Amendment strikes the societal balance in favor of speakers. See *supra* 8–12. Moreover, wholly apart from the Constitution, the Restatement provides that a person "does not interfere improperly with [another's] contractual relation[] by giving [a] third person … truthful information." Restatement (Second) of Torts § 772(a). A large and growing number of states have adopted this position.[6] And the

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[6] *See, e.g.*, *Walnut St. Assocs.* v. *Brokerage Concepts, Inc.*, 20 A.3d 468, 478 (Pa. 2011) ("[W]e hold that … Section 772(a) should apply"); *Recio* v. *Evers*, 771 N.W.2d 121, 133 (Neb. 2009) ("[A]s stated in § 772(a), a person does not incur liability for interfering with a business relationship by giving truthful information to another."); *Commonwealth Constr. Co.* v. *Endecon, Inc.*, No. 08C-01-266 RRC, 2009 WL 609426, at *6 n.34 (Del. Super. Ct. Mar. 9, 2009) (expressly adopting § 772(a)); *Thompson* v. *Paul*, 402 F. Supp. 2d 1110, 1117 (D. Ariz. 2005) ("This was a true statement, and therefore, '[t]here is of course no liability for interference with a contract … on the part of one who merely

D.C. Court of Appeals may well add to the trend in a future case. See Pet. App. 7a, 9a–10a (noting that the first appellate decision left the question open and declining to address it in the second appeal on the ground that it had been waived). There is thus no need for this Court to weigh in on the proper balance of societal interests at stake in this case.

2. As Armstrong observes, *Sullivan* was decided at a time when the conduct of police "was 'one of the major public issues of our time.'" Pet. 3. That remains the case today, and the Court should not use a case that does not involve defamatory speech to alter the limits on the protection afforded to those who speak about law enforcement conduct.

One need not look hard to see that law enforcement conduct—including conduct involving privacy and access to sensitive information—is a major issue of current public concern and debate. This debate extends to the conduct of law enforcement officials who primarily implement policy, rather than setting it.[7] And,

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gives truthful information to another.'") *rev'd in part on other grounds*, 547 F.3d 1055 (9th Cir. 2008); *Tiernan* v. *Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 593 (W. Va. 1998) ("[W]e now adopt § 772 of the Restatement in its entirety."); *Kutcher* v. *Zimmerman*, 957 P.2d 1076, 1091 (Haw. Ct. App. 1998) (adopting "the privilege of communicating truthful information, as set forth in section 772(a)"); *Francis* v. *Dun & Bradstreet, Inc.* 4 Cal. Rptr. 2d 361, 364 & n.4 (Cal. Ct. App. 1992) (expressly adopting § 772(a) and observing that a "the admitted truth of [the defendant's statements] eviscerates [the plaintiff's claim for interference with prospective economic advantage]"); *Four Nines Gold, Inc.* v. *71 Constr., Inc.*, 809 P.2d 236, 238 (Wyo. 1991) ("[T]ruthful statements, whether solicited or volunteered, are not actionable as intentional interference with prospective contractual relations.").

[7] *See, e.g.*, Monica Davey & Frances Robles, *Darren Wilson Was Low-Profile Officer With Unsettled Early Days*, N.Y. Times,

in an era of heightened concerns over the government's ability to collect and use unprecedented amounts of data about citizens, see *United States* v. *Jones*, 132 S. Ct. 945 (2012); *Riley* v. *California*, 134 S. Ct. 2473 (2014), the debate surely extends to officers who improperly access sensitive information in government databases.[8]

The rule Armstrong seeks would chill speech on important topics. This Court should not take such an extraordinary step in the absence of any robust debate among the lower courts, and in a case that does not involve defamatory speech.

Aug. 24, 2014, http://www.nytimes.com/2014/08/25/us/darren-wilsons-unremarkable-past-offers-few-clues-into-ferguson-shooting.html?_r=0; Margaret Hartmann, *Officer Who Put Eric Garner in Fatal Chock Hold Would Like His Old Job Back*, N.Y. Magazine, July 13, 2015, http://nymag.com/daily/intelligencer/2015/07/officer-in-eric-garner-case-wants-old-job-back.html.

[8] Christine Hauser, *Denver Police Caught Misusing Databases Got Light Punishments, Report Says*, N.Y. Times, Mar. 17, 2016, http://www.nytimes.com/2016/03/18/us/denver-police-criminal-databases-personal-use.html.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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