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 FOR MARYLAND LAW ENFORCEMENT OFFICERS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

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BRIEF FOR MARYLAND LAW ENFORCEMENT OFFICERS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICUS CURIAE

Maryland Law Enforcement Officers, Inc. (MLEO) is a professional non-profit organization dedicated to promoting professional law enforcement throughout the State of Maryland. Founded in 1936, MLEO has six hundred members from eighty-four criminal justice agencies in Maryland. Each member is a current or former member of a federal, state, or local law enforcement agency, a corrections agency, or a criminal justice agency (including agencies headquartered in the District of Columbia). MLEO is devoted to protecting the interests of its members, and of all law enforcement officers, so that they can focus on their important, and often dangerous, role protecting the community.[1]

The D.C. Court of Appeals' categorical treatment of law enforcement officers as public officials for purposes of the *New York Times Co. v. Sullivan* line of cases leaves law enforcement officers, including MLEO's members, uniquely exposed to and helpless to defend against defamation and invasions of their

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[1] The parties received timely notice of MLEO's intent to file this brief and consented to the filing of this brief. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

privacy. MLEO has an important interest in ensuring that this Court rejects that incorrect view.

SUMMARY OF ARGUMENT

Based on an obvious distortion of this Court's precedent, courts across the United States are categorically depriving the country's nearly nine hundred thousand law enforcement officers of their rights to protect their reputations and their personal privacy under state law. Private individuals can seek redress for defamatory falsehoods. By contrast, under the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), public officials cannot, not without clearing the additional, extraordinary bar of proving actual malice. Sullivan was an elected politician, not a police officer. Yet a number of courts insist that *New York Times* interprets the Federal Constitution to treat line-level law enforcement officers as "public officials." The D.C. Court of Appeals' decision in this case is but the latest entrant in the three-way conflict. The courts insisting on treating law enforcement officers like petitioner as public officials show no sign of correcting their course. This Court's intervention is urgently needed.

Holdings like the one below leave law enforcement officers without any real remedy for defamatory falsehoods. This Court has recognized that the *New York Times* rule must be limited in scope, because it truncates the state-law rights of defamed individuals: many deserving plaintiffs are unable to meet the *New York Times* standard. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). The Court has therefore held that the cost of the *New York Times* rule is justified only in "the context of defamation of a public person." *Id.* Private figures, even when de-

famed on a matter of public concern, may recover reputational damages on a lesser showing of ordinary negligence. *Id.* at 343, 347.

For this Court's tiered approach to work, it is crucially important that victims of defamation be placed in the correct category. If a private figure who has been defamed is wrongly categorized as a public official, then she will be stripped of the reputational rights that her State has validly chosen to protect under its own law. State law is displaced for no valid federal reason. Yet that is precisely the effect that the D.C. Court of Appeals' decision, and the countless similar cases across the country, has on the hundreds of thousands of law enforcement officers in the United States.

Run-of-the-mill law enforcement officers and their immediate supervisors are not "public officials" like Sullivan. They do not set public policy; they enforce and execute the policy decisions made by others. And while specific actions by particular officers may at times become topics of legitimate public attention, that attention is "occasioned by the particular charges in controversy" rather than inherent in the law enforcement officer's role, as this Court's precedent requires. *Rosenblatt v. Baer*, 383 U.S. 75, 86 n.13 (1966).

The Court should therefore grant the petition and correct the unjust deprivation of police officers' state-law rights that courts nationwide are carrying out in this Court's name.

ARGUMENT

THE COURT SHOULD GRANT THE PETITION AND CLARIFY THAT NOT ALL LAW ENFORCEMENT OFFICERS ARE PUBLIC OFFICIALS UNDER *NEW YORK TIMES*.

A. The Court's *New York Times* Precedent Reflects a Careful Balance Between Reputational Rights and Free Expression.

The D.C. Court of Appeals' decision disrupts the careful balance embodied in this Court's precedent. Defamation cases involve competing rights: individuals' right to defend their reputations; States' right to provide those individuals with redress; and everyone's right to engage in robust public debate. And that balance would be wholly disrupted if the actual malice standard of *New York Times* were required in all circumstances as a matter of federal constitutional law. While the standard is "an extremely powerful antidote" to the risk of self-censorship, it carries strong side effects: it "exacts a correspondingly high price from the victims of defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). "Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test." *Id.*

Those side effects are significant. The state laws protecting reputation that the *New York Times* rule displaces serve profound and important social interests. *Id.* at 341. "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 86

(1966). "[T]he individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" *Gertz*, 418 U.S. at 341 (quoting *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring)). In short, the interest in protecting defendants' right to debate is "not the only societal value at issue" in defamation cases. *Id.*

In pursuit of an appropriate balance in this difficult area, and in recognition of the *New York Times* standard's hazardous side-effects, the Court has carefully limited the "powerful antidote" of the *New York Times* standard to a very narrow field: defamatory falsehoods about public officials and public figures. *Id.* at 342–43. The Court has justified the application of the actual malice standard to such figures on two bases.

First, such figures have a greater-than-average ability to protect themselves from defamatory falsehoods. "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344. "Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Id.*

Second, and "[m]ore important," the Court has suggested that public officials in some sense have it coming. *Id.* "[P]ublic officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Id.* at 345. "An individual who decides to

seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." *Id.* at 344. And so, in the Court's view, the State has less of an interest in protecting such an individual from defamatory falsehoods. *Id.*

In contrast, the Constitution never requires private figures to satisfy the *New York Times* standard as a condition of redressing reputational harms—not even when they are defamed about a matter of public concern. *Id.* at 345–47. In place of the demanding "actual malice" standard from *New York Times*, the Constitution allows private figures to recover for reputational damage on a showing of, at most, ordinary negligence. *Id.* at 347. (Of course, States are free to adopt a stricter standard as a matter of state law. *Id.*)

The Court has made clear that not every public employee has assumed the risk of defamation and thereby become a public official subject to the *New York Times* standard. *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979). Rather, to be a public official, a person must hold "a position in government [with] such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Rosenblatt*, 383 U.S. at 86. And the public's "independent interest" must be inherent in the position, and not merely "occasioned by the particular charges in controversy." *Id.* at 86 n.13. Any other conclusion, the Court

has explained, would "virtually disregard society's interest in protecting reputation." *Id.*

Applying this standard, the Court has explained that "a night watchman accused of stealing state secrets" would not be a public official. *Id.* The public may be interested in the secrets, but not in the position of night watchman. Nor are ordinary lawyers in private practice deemed "public officials," even though they are "officers of the court" owing certain duties to the public. *Gertz*, 418 U.S. at 351.[2]

As for who ***is*** a public official, the Court held in *New York Times* itself that an elected city commissioner was a public official. 376 U.S. at 256. So are judges, *Garrison v. Louisiana*, 379 U.S. 64, 66–67 (1964), heads of law enforcement agencies, *Henry v. Collins*, 380 U.S. 356, 357 (1965) (per curiam) (Chief of Police); *Moity v. Louisiana*, 379 U.S. 201 (1964) (per curiam), *rev'g* 159 So. 2d 149 (La. 1963) (elected sheriff[3]); elected district attorneys, *Moity*, 379 U.S. at 201; *see also Henry*, 380 U.S. at 357 (County Attorney), and members of a local board of education, *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 573 (1968). These are, in short, high-level, influential people: elected officials, department heads, and others who set government policy, not those who merely carry it out. *See* DAVID ELDER, DEFAMATION: A LAWYERS' GUIDE § 5:1 (July 2016).

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[2] It was a close question requiring factual development whether the supervisor of a county recreation area who reported directly to elected County Commissioners was a public official. *Rosenblatt*, 383 U.S. at 77, 87.

[3] The sheriff was an elected officer whose role was directly created by the Louisiana Constitution, and was the chief law enforcement official of the parish. *See* La. Const. art. VII, § 65 (1921).

Beyond these decisions (several of them terse per curiams, and all of them from the 1960s), however, this Court has provided scant guidance concerning who qualifies as a "public official" for purposes of the *New York Times* rule. Bereft of specific guidance, lower courts have read this Court's opinions as requiring the application of the *New York Times* standard as a federal barrier to state-law claims by an ever-expanding set of defamation victims. Only by providing clear guidance on the limited scope of the *New York Times* rule can this Court return the matter to the States, which are—of course—free to regulate the showing that some or all defamation plaintiffs must make as a matter of state law. By doing so, the Court will vindicate state autonomy and "return power to the State, and to its people" to decide the proper scope of law-enforcement officers' reputational rights. *Kansas v. Carr*, 136 S. Ct. 633, 641 (2016) (emphasis omitted).

B. Contrary to Lower Courts' Decisions, the Court Has Never Held that Run-of-the-Mill Law Enforcement Officers Are Public Officials.

This Court has never addressed whether run-of-the-mill law enforcement officers and their immediate supervisors are public officials subject to the *New York Times* standard. Yet the split on the question presented has arisen because some lower courts have erroneously read this Court to have already held that they are.

The most analogous fact-pattern to come to this Court was in *St. Amant v. Thompson*, 390 U.S. 727 (1968), but the Court did not rule on the point. Rather, the Court assumed without deciding that the

Supreme Court of Louisiana had been correct to rule that a deputy sheriff was a public official. *Id.* at 730 & n.2. The Louisiana court had explained, "after considering state law, that a deputy sheriff has 'substantial responsibility for or control over the conduct of governmental affairs.'" *Id.* at 730 n.2 (quoting *Thompson v. St. Amant*, 196 So. 2d 255, 261 (La. 1967)). But this Court did not adopt or approve of that reasoning. *See id.* at 730.

Even if this Court had ratified the Louisiana court's holding, that holding was narrow and idiosyncratic; it turned on the details of Louisiana law regarding deputy sheriffs and did not purport to address law enforcement officers in general. *See Thompson*, 196 So. 2d at 261. The Louisiana court explained that as a matter of Louisiana law, "[t]he deputy acts for the sheriff, and his acts are the acts of the sheriff." *Id.* The state court then explained that because the sheriff—a constitutional officer who was the chief law enforcement officer of the parish, *see supra*, note 3—was a public official, the deputy must likewise be a public official. *Id.*

That reasoning has nothing to say about run-of-the-mill officers in large modern law enforcement agencies, who never stand in their chiefs' shoes. But that has not stopped lower courts—including the court below—from treating *St. Amant* as "particularly instructive," Pet. App. 16a, as though it were a general holding about law enforcement officers.

C. Run-of-the-Mill Law Enforcement Officers Are Not Public Officials: There Are Too Many Of Them, They Do Not Set Government Policy, and It Is Unfair to Demand that They Surrender Their Rights to Defend Their Reputations.

While the Court has not specifically answered the question presented, the *reasoning* of this Court's public-official cases shows that run-of-the-mill law enforcement officers and their immediate supervisors are ***not*** public officials. Such officers are simply not akin to the influential, policy-setting officials with ready access to the media that this Court has subjected to the *New York Times* standard.

For one thing, there are far, far more law enforcement officers than there are officials of the sort this Court has recognized as public officials. As of 2008, the most recent year for which complete data is available, there were approximately 885,000 sworn law-enforcement officers in the United States: about 765,000 employed by state and local governments, and about 120,000 employed by the federal government. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 10 tbl. 8 (Apr. 2016), http://bjs.gov/content/pub/pdf/nsleed.pdf (NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA) (source described as most accurate reflects 765,246 sworn state and local law enforcement officers in 2008); Bureau of Justice Statistics, U.S. Dep't of Justice, FEDERAL LAW ENFORCEMENT OFFICERS, 2008, at 1 (June 2012), http://bjs.gov/content/pub/pdf/fleo08.pdf (FEDERAL LAW ENFORCEMENT OFFICERS) (approximately 120,000 full-time law enforcement

officers employed by federal agencies in 2008). The federal officers range from FBI agents to ICE agents to the Federal Protective Service officers who guard federal buildings and the Amtrak police who serve on Amtrak passenger trains and at Amtrak facilities. *See* FEDERAL LAW ENFORCEMENT OFFICERS, *supra*, at App. tbl. 4. Similarly, the state and local officers include members of sworn campus and transit police forces. *See* NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA, *supra*, at 12. To expand the public-official category to include all these officers, as lower courts have done, is thus to dramatically grow the population subject to the "strong antidote" of the *New York Times* standard, with all of its attendant harmful side effects.

For another, while run-of-the-mill law enforcement and line-level supervisor jobs are enormously important and often dangerous, they do not come with any power to set policy. In *Moity*, one of the defamed individuals was a parish sheriff who, as the chief law enforcement officer for his parish, could choose his law enforcement priorities. *See State v. Moity*, 159 So. 2d 149, 150 (La. 1963), *rev'd,* 379 U.S. 201 (1964). The plaintiff in *New York Times*, a city commissioner in Birmingham, was responsible for supervising "the Police Department, Fire Department, Department of Cemetery, and Department of Scales." *New York Times*, 376 U.S. at 256. Run-of-the-mill police officers and their immediate supervisors have nothing akin to that level of policy discretion.

Rather, ordinary officers and their immediate supervisors, like other low- to mid-level government employees, are tasked with carrying out policies set

by others. Some of the officers do that on the beat, in day-to-day interactions with the public. Others, like petitioner, have a more administrative role—writing reports, managing evidence, or scheduling or dispatching other officers. Regardless, such officers have no more ability to decide for themselves what policies their departments should follow or how their departments should go about fulfilling their missions than has any other low- or mid-level government employee. And, of course, a run-of-the-mill police officer or his immediate supervisor has no ready access to the media, either. *Cf. Gertz*, 418 U.S. at 344.

As such, the trade-off *New York Times* requires of high-level officials, who give up defamation protection in exchange for a prominent position and an ability to set public policies and access the press, is vastly different for ordinary law-enforcement officers. Those who choose to become police officers do so knowing they are taking on a dangerous job. But the danger they take on is physical danger. Law enforcement officers' acceptance of often physically dangerous jobs should not initiate open season on their reputations and require them to surrender their state-law protections from defamation, too.

Nor are police officers adequately compensated for such a demand. Line-level law enforcement officers were paid a national average of $27.74 per hour in 2010. Bureau of Labor Statistics, U.S. Dep't of Labor, NATIONAL COMPENSATION SURVEY, Series NWU00999991020000333050250500 0 (extracted July 31, 2016), http://data.bls.gov/cgi-bin/srgate. Their first-line supervisors were paid an average of $37.62 per hour. Bureau of Labor Statistics, U.S. Dep't of Labor, NATIONAL COMPENSATION SURVEY, Series

NWU009999910200003310122505000 (extracted July 31, 2016), http://data.bls.gov/cgi-bin/srgate. And those figures are averages that include officers with decades of experience.

Dallas Police Chief David Brown recently pointed out that the starting pay for a Dallas police officer is just $44,659 per year. Scott McLean, *Low Pay Pushing Dallas Police Officers to Go Elsewhere*, CNN.COM (July 19, 2016), http://www.cnn.com/2016/07/19/us/low-pay-dallas-police/. As Chief Brown put it, "These officers risk their lives for $40,000 a year . . . And this is not sustainable." *Id.* Forcing officers in such a position to also surrender their state-law reputational rights as though they were elected officials is a step too far. Chief Brown is no doubt a public official under this Court's precedent. But the thousands of ordinary officers and low-level supervisors in his department are not. *See* Criminal Justice Information Servs., U.S. Dep't of Justice, *Crime in the United States 2013*, *Table 78: Texas* (listing 3,474 full-time law enforcement officers in Dallas), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-78/table-78-cuts/table_78_full_time_law_enforcement_employees_texas_by_city_2013.xls. Nothing in this Court's *New York Times* precedent suggests otherwise.

D. Lacking Specific Guidance from this Court, Lower Courts Routinely and Erroneously Hold that Ordinary Law Enforcement Officers Are Public Officials.

Despite this Court's precedent, lower courts across the country have subjected defamation claims by ordinary police officers and their immediate supervisors to the harsh *New York Times* standard—

purely because of the job title, not any policymaking authority or prominence. Courts have given various unpersuasive reasons for misapplying the standard, and in some instances they have given no reasons at all. But regardless of the reason, the result has been the same: officers have repeatedly and unjustly been deprived of their state-law rights to defend their honor and reputation. And the problem seems only to be getting worse.

The Maine Supreme Judicial Court's decision in *Roche v. Egan*, 433 A.2d 757 (Me. 1981), is representative of both the flawed reasoning on one side of the split and its consequences for law enforcement officers. The plaintiff, Detective Thomas Roche, was a police detective unanimously described as a "dedicated, capable and level-headed officer." *Id.* at 758. He had "received at least a dozen citations for outstanding police work." *Id.* at 758. And until the events giving rise to the lawsuit, Detective Roche had never been the subject of a complaint. *Id.* at 759.

But then, out of the blue, Detective Roche's department received a letter from six of Roche's neighbors complaining that Detective Roche had "harrassed (sic) neighbors with foul language, has displayed a VIOLENT temper, threatened little children, kicked pets and called the Cape Elizabeth Police Department needlessly. . . . We want it known that we are afraid for the lives of our children and our own around this most disruptive person." *Id.*

On receiving such a letter, Detective Roche's employer, sensibly enough, initiated an investigation. *Id.* And for the first two weeks of that investigation, the department insisted that Detective Roche, de-

spite his long and unblemished record, leave his service revolver at the station instead of carrying it home. *Id.*

But the investigation did not produce any evidence of misconduct by Detective Roche. *Id.* Not only was there "no substance to any of the charges made in the letter," but in fact the letter was part of an extraordinary pattern of malicious harassment of Detective Roche and his family by his neighbors. *Id.* at 759 & n.1.

Testimony at trial revealed that Detective Roche's neighbors had taunted his wife with "obscene gestures and vindictive names." *Id.* at 759 n.1. They had threatened his nine-year-old daughter that they would have her cat "gassed." *Id.* And they had shouted at Detective Roche, among other things, "(W)e can come out on the porch tonight and sit down kids because the pig is out back. The air is not polluted. The dirty rotten pig is out in his back yard." *Id.* With his wife "near a nervous breakdown," Detective Roche went so far as to ask his neighbors "why they were objects of such hostility and what he had done to deserve it." *Id.* The defamatory letter, of course, had been but the latest step in this campaign of harassment.

Detective Roche sued for defamation, prevailed at trial, and was awarded actual and punitive damages. *Id.* at 758, 764. But the Maine SJC reversed, holding that Detective Roche was a public official required to show actual malice. *Id.* at 764. So the verdict was set aside, and Detective Roche was left to try again at a new trial—this time subject to the extremely high *New York Times* hurdle. *Id.*

Why did the Maine SJC conclude that Detective Roche was a public official? The court opined that a police detective is "vested with substantial responsibility for the safety and welfare of the citizenry in areas impinging most directly and intimately on daily living: the home, the place of work and of recreation, the sidewalks and streets." *Roche*, 433 A.2d at 762. Reasoning that "[l]aw enforcement is a uniquely governmental affair," the Maine SJC explained that "[t]he nature and extent of the responsibility of a police detective is punctuated by the fact that a firearm, no less than a badge, comes with his office." *Id.*

That reasoning is far afield from this Court's reasoning in *Rosenblatt*, *Gertz*, and other cases in the *New York Times* line. Being a police detective can indeed be a dangerous job—hence the firearm the Maine SJC focused on—and it is certainly an important job. But it is vastly different in kind from the jobs this Court has held render their holders public officials: elected officials, heads of police departments and other agencies, and the like. *See supra*, at 7–9. Unlike those officials, a police detective—one of many, no doubt—is not someone the identity of whom even an unusually well-informed member of the public is likely to know or care about based solely on his position. *See Rosenblatt*, 383 U.S. at 86.

Of course, if some controversy erupts over the action taken by a particular police detective, the public will have an interest in the subject of that controversy. But that just makes the detective akin to *Rosenblatt*'s night watchman accused of stealing state secrets. *Id.* at 86 n.13. As this Court explained in *Rosenblatt*, "a conclusion that the *New York Times* mal-

ice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest." *Id.* Instead, "the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id.*

In any event, the Maine SJC's cursory examination of this Court's precedent simply failed to address this difficult issue and in particular, failed to consider whether a police detective was really a position that would "invite public scrutiny and discussion of the person holding it" even outside the context of a particular controversy. *Id.* Instead, the Maine SJC turned to three far less pertinent lines of argument.

First, the Maine SJC relied on what was already, in 1981, a long line of erroneous lower-court precedent—cases "decid[ing] that an officer of law enforcement, from ordinary patrolman to Chief of Police, is a 'public official' within the meaning of federal constitutional law." *Roche*, 433 A.2d at 762.[4]

Second, the Maine SJC reasoned that "the Supreme Court, in the course of deciding other issues emerging from *New York Times v. Sullivan*, supra, has not hesitated to accept . . . decisions by federal

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[4] Citing *Meiners v. Moriarity*, 563 F.2d 343 (7th Cir. 1977); *Thuma v. Hearst Corp.*, 340 F. Supp. 867 (D. Md. 1972); *Jackson v. Filliben*, 281 A.2d 604 (Del. 1971); *Coursey v. Greater Niles Twp. Publ'g Corp.*, 239 N.E.2d 837 (Ill. 1968); *Kidder v. Anderson*, 354 So. 2d 1306 (La. 1978); *Gilligan v. King*, 264 N.Y.S.2d 309 (Sup. Ct. 1965); *Colombo v. Times-Argus Ass'n*, 380 A.2d 80 (Vt. 1977); *Starr v. Beckley Newspapers Corp.*, 201 S.E.2d 911 (W. Va. 1974).

and state courts" treating law enforcement officers as public officials. *Id.* The Maine SJC cited *Time, Inc. v. Pape*, 401 U.S. 279 (1971), and *St. Amant v. Thompson*, 390 U.S. 727 (1968). But the defamation victim in *Pape* was "Deputy Chief of Detectives of the Chicago Police Department"—far from the ordinary detective at issue in *Roche*. *Pape*, 401 U.S. at 284. And *St. Amant*, as explained above, turned on idiosyncrasies of Louisiana law and had nothing to say about ordinary law enforcement officers like Detective Roche.

Third, the Maine SJC reasoned that "[i]n *Henry v. Collins*, 380 U.S. 356 (1965), the Supreme Court itself applied the requirements of *New York Times v. Sullivan* to a law enforcement officer." *Roche*, 433 A.2d at 762. But *Henry* involved a Chief of Police—no mere "law enforcement officer." 380 U.S. at 356.

Thus, none of the Maine SJC's reasons for adopting a categorical rule that law enforcement officers are public officials stands up to scrutiny. And ***nearly all of the lower court cases taking such a position are like*** **Roche:** they are scantly or inaccurately reasoned and dependent to a significant extent on misconstructions of this Court's precedent. But now, decades later, they are also established law in many parts of the country such that courts can say, as the D.C. Court of Appeals did, that "[l]ower courts have consistently held that [the *Rosenblatt* public-official] standard fits the responsibility of law enforcement officers." Pet. App. 15a.

Roche is particularly illustrative because it underscores that law enforcement officers are, if anything, ***more*** exposed to defamation and ***more*** in need of protection than the average citizen. The nature of

some of the abuse that Detective Roche suffered—"[t]he dirty rotten pig is out in his back yard," *Roche*, 433 A.2d at 759 n.1—strongly hints at the possibility that his law enforcement position was the impetus for the attacks. Yet Roche was a mere detective—not a police chief or someone with policy-setting authority or ready access to the press. *See id.* at 762. The idea that he had assumed the risk of such attacks on his reputation is beyond implausible and nowhere suggested by this Court's precedent.

The Tenth Circuit's decision in *Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981), provides another example of the flawed reasoning, inconsistent with this Court's precedent, that has come to dominate lower courts' treatment of this issue. In *Gray*, the Tenth Circuit emphasized that a police patrolman plaintiff "possesses both the authority and ability to exercise force," and that "[m]isuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss." *Id.*

But the Tenth Circuit failed to consider whether, ***outside the context of some particular controversy***, the public really has an "independent interest in the qualifications and performance" of each police patrolman akin to its interest in such qualities of its elected officials. *Id.*; *see Rosenblatt*, 383 U.S. at 86. Instead, and contrary to this Court's clear instructions in *Rosenblatt*, the Tenth Circuit focused entirely on the "particular controversy" that had caught the public's attention, reasoning that:

> The conduct of former Rock Springs policemen during the time they worked for the city was a matter of lively public interest at the time the

> Udevitz article was published. According to the article, a special investigator appointed by the Wyoming Supreme Court to probe allegations of corruption in Rock Springs was to report on the advisability of a grand jury investigation the same week the article was distributed.

Gray, 656 F.2d at 590 n.3. In other words, at the time the article was published, the allegations therein were a matter of considerable public interest. But under this Court's precedent, that is not enough. *See Gertz*, 418 U.S. at 346–47 (refusing to extend the *New York Times* rule to compensatory damages for defamation of private figures, even when the defamation relates to matters of public concern).

The contrast between ordinary law enforcement officers and true public officials is perhaps best illustrated by another erroneous case: *Wollman v. Graff*, 287 N.W.2d 104 (S.D. 1980). There, the Supreme Court of South Dakota applied *New York Times*, with no explanation, to a small-town, "part-time police officer . . . who worked the night shift." *Id.* at 105.

A politician running for office wrote a pamphlet claiming that the officer had been fired by three towns and one county. *Id.* That, as it happened, was completely false—the officer "was never fired from any law enforcement position in any of the towns listed in the leaflet or any other town." *Id.* at 106. But the part-time police officer was "subjected . . . to ridicule and abuse which caused him to lose the respect of the people" in the small town where he worked. *Id.* at 105. Things got so bad that he resigned and got a job in a different town. *Id.*

There was a true public official in *Wollman*, but it was not the part-time, night-shift police officer who was the defamation victim; it was the political candidate who defamed him. The idea that the part-time police officer had public prominence comparable to the candidate such that he (a) had assumed the risk of such an attack, and (b) would be able to rebut such an attack is pure fantasy. Happily, the officer was able to show actual malice, and so the direct consequences of *Wollman* were muted. *See id.* at 108. But as this Court has recognized, many deserving plaintiffs will be unable to meet that standard. *See Gertz*, 418 U.S. at 342.

The result of cases like these—and there are dozens of them—is to systematically deny law enforcement officers the reputational rights to which they are entitled under state law. And the lower courts on one side of the split have gotten to that broad and erroneous conclusion by misconstruing this Court's precedent. This Court should grant the petition and clarify that low-level law enforcement officers and their immediate supervisors are not public officials under *New York Times*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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