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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

Respondent scarcely disputes that there is a longstanding split of authority over the circumstances in which a garden-variety law enforcement officer is a "public official" within the meaning of the First Amendment. Opp. 12-17. She acknowledges that the issue touches on "a major issue of current public concern and debate." *Id.* at 22. Nevertheless, Respondent opposes certiorari on the asserted ground that "it is difficult to envision a less suitable vehicle" than this one for resolution of the split. *Id.* at 20.

Respondent protests too much. Her lead contention—that the lower court applied a "nuanced," "case-by-case" test that does not implicate the Question Presented (*id.* at 17)—is belied by the lower court's opinion. See *infra* Part II.A.

Respondent's next contention—that the lower court's judgment rests on two alternative holdings—is likewise mistaken. See *infra* Part II.B. As the court of appeals made clear, its judgment turned *solely* on its holding that Petitioner was a "public official." The very first paragraph of the Court's opinion concludes as follows:

> Before us is Ms. Thompson's appeal contending, mainly, that she was erroneously denied judgment as a matter of law because the suit * * * 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.

Pet. App. 4a (emphasis added).

Last, Respondent's claim (at 20-23) that this issue is *too important* for this Court to decide right now is unpersuasive. Respondent acknowledges that this split of authority has percolated for roughly thirty years. Not one of the courts to opine on it shows any sign of wavering. Without this Court's review, this 30-year-old split on "'one of the major public issues of our time'" (*id.* at 22) will only persist. See *infra* Part III.

This case presents an excellent opportunity for this Court to clarify that not all law-enforcement officers are "public officials."

I. RESPONDENT ACKNOWLEDGES THAT THE QUESTION PRESENTED IS AN ISSUE OF GREAT NATIONAL IMPORTANCE THAT HAS DIVIDED COURTS

Respondent hardly denies that, as the Petition pointed out (at 13-18), there is a deep and acknowledged split among the federal courts of appeals and state courts of last resort regarding *which* law enforcement officers are public officials. Indeed, she largely concedes (at 12-13) that the federal courts of appeals and state courts of last resort are divided into three camps: (1) those that treat *all* law enforcement officers as public officials; (2) those that treat law enforcement officers vested with some unspecified level of supervisory authority as "public officials"; and (3) those that treat "law enforcement" employees the same as they would any other gov-

ernment employee (*i.e.* by looking at the impact the officer has on public policy).[1] Moreover, as Respondent observes, the conduct of police is not merely an "important topic[]," but "'one of the major public issues of our time.'" Opp. 22-23.

II. THIS CASE IS AN IDEAL VEHICLE FOR THE RESOLUTION OF AN ACKNOWLEDGED SPLIT ON AN ISSUE OF GREAT NATIONAL IMPORTANCE

Having failed to dispute that the Question Presented is both an important federal issue and the subject of an intractable conflict, Respondent asserts that this Court should deny review because (1) the court below applied a "nuanced," "case-by-case" approach to determining whether *Sullivan* applied (Opp. 17) and (2) the judgment is supported by two alternative holdings (Opp. 9-12). Respondent is wrong on both counts.

A. The Court of Appeals Squarely Held That All (Or Nearly All) Law Enforcement Officers Are "Public Officials"

Respondent asserts that this Court should not review this case because the court below did not hold

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[1] Compare, *e.g.*, *Gray* v. *Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981) (holding that "[s]treet level policemen" were "public officials") with *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.") and *Keisau* v. *Bantz*, 686 N.W.2d 164, 178 (Iowa 2004) ("The same rule applies to a low ranking deputy sheriff" as to a "low ranking firefighter.").

that the heightened standards of *Sullivan* apply to all (or nearly all) law enforcement officers. Opp. 14. Instead, she says, the court of appeals applied a "nuanced," "case-by-case" approach. *Id.* at 17. She even goes so far as to claim that the "D.C. Court of Appeals adopted Armstrong's side of the supposed split of authority." *Id.* at 9.

But the court of appeals did no such thing. The court's holding was precisely as the Petition described it:

> Whether Mr. Armstrong was a public official "is a question of law to be resolved by the court." * * * Lower courts have consistently held that [the "public official"] standard fits the responsibility of law enforcement officers, particularly those with supervisory authority. ***This court is among them***.

Pet. App. 15a (emphasis added).

Moreover, Respondent's claim (at 17) that the D.C. Court of Appeals takes a "nuanced," "case-by-case" approach is a sharp departure from what Respondent urged and the court accepted below. In the court of appeals, Respondent argued extensively and successfully that the D.C. Court of Appeals had *already*, in 2001, followed "a long line of cases" establishing "that a police officer ***of any rank*** is a public figure." Opening Brief for Defendant-Appellant Karen Thompson at 19-20 & n.3, *Thompson* v. *Armstrong*, 134 A.3d 305 (D.C. 2016) (No. 14-CV-792), 2015 WL 10682500 (citing *Beeton* v. *District of Columbia*, 779 A.3d 918, 924 (D.C. 2001)) (emphasis added and internal quotation marks omitted). First

in *Beeton* and again in the decision below, the D.C. Court of Appeals "relied on 'several cases from other jurisdictions holding that ***law enforcement officers are public officials.***'" Pet. App. 16a (emphasis added).

The court did state that the *Beeton* rule applies with "particular[]" force to law enforcement officers "with supervisory authority." *Id.* at 15a. But, because the court *held* that "the responsibility of law enforcement officers"—that is, ***all*** law enforcement officers—makes them "public officials," its statement that this blanket rule applied with "particular[]" force to this case did not narrow its holding or eliminate the conflict of authority that deserves this Court's attention. *Ibid.*

The court also listed factors purportedly establishing Petitioner's supervisory authority. *Id.* at 14a-15a. But each of the listed factors would apply to all (or nearly all) federal law enforcement officers. The factors included that Petitioner "occupied 'a position of heightened public trust and responsibility' *as a 'federal law enforcement officer*,'" that "[h]is *unit* presented the results of its investigations either to an 'adjudicator' or to the United States Attorney's Office," and that "[h]is duties required him to carry a firearm and federal law enforcement credentials, and gave him access to sensitive data and information." *Ibid.* (emphasis added and alterations omitted).

The case-dispositive "question of law" that the court below decided is pristinely framed for this Court's review.

B. Respondent Is Incorrect That The Judgment Below Rests On Alternative Grounds

Respondent goes on to assert that this case is not an appropriate vehicle because the lower court's judgment rests—or *could have rested*—on a number of alternative grounds. That assertion is incorrect.

1. Respondent asserts that the decision below rests on an "alternative holding" that respondent's statements "touch[ed] upon a matter of public concern." Opp. 7. To the contrary, while the court of appeals did discuss the "public concern" doctrine, that discussion was neither "alternative" nor a "holding."

First, contrary to respondent's claim (at 10-11), the opinion below does not indicate that the court of appeals considered the "public concern" doctrine to provide an alternative holding. Instead, the court introduced its opinion by saying it was reversing the tort verdict "[i]n light of what we conclude was Mr. Armstrong's status as a public official at the time." Pet. App. 4a. In describing its analysis, the court wrote that it "*must* ask whether Mr. Armstrong * * * was a public official, and, if so, whether Ms. Thompson's statements to USDA relat[ed] to his official conduct." *Id.* at 14a (emphasis added) (internal quotation marks and alterations omitted). *Only* an affirmative answer to *both* of those questions would "implicate the third and broader one of whether Ms. Thompson's statements involved issues of public concern." *Ibid.*

Second, aside from the irrefutable fact that the court of appeals did not base reversal of the judgment below on a "matter of public concern" determination independent of the "public official" determination, it *could* not properly have done so. It is long-settled law that private persons do not have to satisfy *Sullivan*'s heightened standard merely because defamatory statements made against them touch on matters of public concern. See, *e.g.*, *Wolston* v. *Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167-68 (1979) ("A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*.") (recognizing that *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 44, 91 (1971), had been overruled). The cases Respondent cites are not to the contrary. One expressly left it open to States to require defendants to prove truth as an affirmative defense. *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 778-89 & n.4 (1986) (declining to "break new ground" or "consider what standards would apply if the plaintiff sues a nonmedia defendant"). Three involved government-imposed prior restraints on publication. *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001) (wiretapping statutes); *Butterworth* v. *Smith*, 494 U.S. 624 (1990) (injunction against grand juror sharing his own testimony); *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (limitations on publication regarding juvenile offenders). The remaining one involved a peaceful protest about widely applicable issues in a traditional public forum, not aimed at the particular plaintiff. *Snyder* v. *Phelps*, 562 U.S. 443 (2011).

2. As this case comes to this Court, there is no basis to dispute that, but for a First Amendment override of District of Columbia law, Respondent would be liable to Petitioner for her vendetta-driven tort of intentional interference with Petitioner's prospective contractual relationship, *i.e.*, the new job that he lost because of Respondent's anonymous communications. After the trial court granted Respondent summary judgment under District of Columbia law, the D.C. Court of Appeals *reversed* in relevant part. *Armstrong* v. *Thompson*, 80 A.3d 177, 190-91 (2013). After a jury verdict in Petitioner's favor, the *only* non-constitutional ground for reversal that Respondent raised and that the court of appeals addressed was rejected as having been waived. Pet. App. 9a-10a. Reversal of the jury verdict was based *solely* on application of this Court's First Amendment principles, developed in a defamation context, in the context of this intentional-interference case. *Id.* at 11a-13a. Furthermore, Respondent, having successfully encouraged the court below to import those principles from the defamation context to the intentional-interference context, is in no position to suggest that this case does not squarely present a question about that contours of the *Sullivan* doctrine.

Respondent nevertheless tries to reformulate the question presented so that this is a case exclusively about "non-defamatory" speech. Opp. i, 1, 5, 8, 10, 21. To the extent Respondent is suggesting that her malicious interference with Petitioner's job prospects was not tortious just because it was not "defamatory," she has already lost that non-federal issue. The court of appeals held in the first appeal, in the very

same opinion in which it rejected liability for defamation, that "reasonable minds could differ * * * on the question whether Ms. Thompson was legally justified in intentionally interfering with Mr. Armstrong's prospective employment." *Armstrong*, 80 A.3d at 191. In particular, the trial court had erred when it held 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." *Ibid.*[2] On remand, a jury ruled that Respondent's behavior was *not* justified. This Court is not the place to relitigate that factual question.

This Court *is* the place to litigate the question whether the First Amendment nevertheless shields Respondent's unjustified and tortious conduct. But the answer to that question turns on the "public official" question raised by the Petition (as well as the two derivative arguments that the court of appeals addressed seriatim, (Pet. App. 17a-21a)). To the ex-

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[2] When the lower courts deemed Respondent's speech "not provably false" (Pet. App. 9a), they did so in the context of a defamation suit *under District of Columbia law*, which requires a private-figure plaintiff to prove falsehood. *Id.* at 33a ("To state a claim for defamation [under District of Columbia law], a plaintiff must show that: (1) the defendant made a false and defamatory statement."). In contrast, the common law holds that "the defendant must bear the burden of proving truth." *Hepps*, 475 U.S. at 776. Thus, even aside from the differences between the intentional-interference and defamation torts, any characterization of Petitioner's speech as "non-defamatory" turns on allocation of the burden of proof.

tent Respondent claims that the "non-defamatory" nature of her slurs on Petitioner resolves the constitutional question, she is either assuming the correctness of the reasoning below or trying to substitute a different rationale. She is free to make those arguments on the merits, but they are no reason to avoid addressing the "public official" question squarely raised and resolved below.

III. NOW IS THE APPROPRIATE TIME TO CLARIFY THAT NOT ALL LAW ENFORCEMENT OFFICERS MUST SATISFY *SULLIVAN*

Finally, Respondent urges that now is an inappropriate time to take this case. In support of that assertion, Respondent derides the split on the Question Presented as resting on "three-year-old dicta * * * and a series of law review articles dating back to the 1980s," and argues that it would be inappropriate to opine on this issue at a time when "law enforcement conduct * * * is a major issue of current public concern and debate." Opp. 2, 22. Neither contention is persuasive.

First, Respondent's inability to decide whether this split is too old or too new is telling. As respondent acknowledges, and scholars have observed, courts have been intractably split on *which* law enforcement officers are public officials for roughly 30 years. DAVID ELDER, DEFAMATION LAW: A LAWYER'S GUIDE § 5:1 (2016) (collecting cases). They still are. *E.g.*, *Young* v. *Gannett Satellite Info. Network, Inc.*, 734 F.3d 544, 553-54 (6th Cir. 2013) (Moore, J., dissenting).

But contrary to Respondent's claim, the longevity of this disagreement militates *in favor of* hearing this case. Jurisdictions have been entrenched on this issue for years, and, in some cases, decades. ELDER, DEFAMATION, *supra*, § 5:1 (collecting cases). As a result, there is not likely to ever be more "robust debate among the lower courts." Opp. 23. Far from showing signs of subsiding. the rule that all (or nearly all) law enforcement officers are "public officials" is *so* entrenched that many officers do not even challenge it. *Young*, 734 F.3d at 553-54. As a result, this Court is the only one that can resolve this longstanding confusion.

2. Moreover, respondent's assertion (at 22) that the Petition should be denied because "law enforcement conduct * * * is a major issue of current public concern and debate" is a red herring. As respondent acknowledges, "*Sullivan* was decided at" such a time, as well. *Ibid.*

Nor is respondent correct (at 22) that recent news coverage justifies the rule that the court of appeals adopted. When a private individual takes action to insert himself in a public debate, he may become a "limited purpose public figure," subject to *Sullivan*'s burden. *E.g.*, *Pendleton* v. *City of Haverhill*, 156 F.3d 57, 71 (1st Cir. 1998) (concluding that guidance counselor "although not a public official, was a limited-purpose public figure" because he had "voluntarily stepp[ed] into the midst of an ongoing controversy"); *Lohrenz* v. *Donnelly*, 223 F.Supp.2d 25, 44 (D.D.C. 2002) (concluding that first woman to pilot F-14 Tomcat was not public official but was "limited-purpose public figure"). The limited-

purpose-public-figure doctrine exists precisely to allow robust debate on the kinds of issues currently attracting public attention. But it is a troubling and important overreaction to paint with a broad brush and deem *nearly all* law enforcement officers "public officials," for all constitutional purposes, just because *some* put themselves in positions of public controversy.

The only conduct in which *Mr. Armstrong* was said to have engaged involved accessing an administrative database to "monitor and/or stay up to date on the investigation" of a "motor vehicle accident that [he] caused while driving [a] Government Owned Vehicle." JA174-75, *Thompson* v. *Armstrong*, 134 A.3d 305 (D.C. 2016) (No. 14-CV-792). Unlike the police officers to whom respondent points (at, *e.g.*, 23 n.8)—but much like *many* garden-variety law-enforcement officers who may be the subject of tortious vendettas like Respondent's—Mr. Armstrong's conduct did not place him anywhere near the center of an important public discussion. See, *e.g.*, *Roche* v. *Egan*, 433 A.2d 757, 762 (Me. 1981) (addressing private dispute between neighbors).

CONCLUSION

For the foregoing reasons and those stated in the petition and amicus brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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