No. 16-683

In The
Supreme Court of the United States

MILAN JANKOVIC, aka PHILIP ZEPTER, et al.,

Petitioners,

v.

INTERNATIONAL CRISIS GROUP, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS BLITZ & CITRON IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are two law professors with an interest in the interactions among defamation law, free speech, and developing technologies.

Marc Jonathan Blitz is the Allan Joseph Bennett Professor at the Oklahoma City University School of Law. He focuses his scholarship on free speech and privacy law, especially on how doctrines in these areas should apply to emerging technologies.

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SUMMARY OF THE ARGUMENT

Internet publication and social media has greatly increased the relevance of the limited-purpose public figure doctrine in defamation law. The current circuit division on how that doctrine is applied fails to provide

[1] In accordance with Sup. Ct. R. 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or part, and that no party or counsel made a monetary contribution intended to fund preparation or submission of this brief. *Amici curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of *amici curiae*'s intention to file this brief.

society with clear direction on the scope of free speech and defamation. This has led to the ills of forum shopping and to individuals demanding private corporations, like Google and Facebook, restrict free speech to protect reputations and silence "false news."

This Court should standardize a narrow application of the limited-purpose public figure doctrine to balance reputation and free speech. This provides individuals the protection they are otherwise demanding from private corporations – entities free to set policy based upon popularity and profit, rather than the protection of constitutional rights and public discourse.

ARGUMENT

I. This Court should grant review to resolve an inconsistency in defamation law that private corporations will otherwise effectively resolve.

A. Social media and internet publication is now the major disseminator of public speech.

We no longer live in a world of institutional publishers, limited in number and geography, restrained by accountability. The internet has made everyone an instantaneous international publisher, without financial burden, without editors, unschooled in journalistic integrity, often emboldened by perceived anonymity, and polarized in a group-think environment. *See generally* Jenny Jean B. Domino, *Unchilling Internet*

Speech: The Accidental Celebrity and the Involuntary Public Figure in Defamation Law the Christopher Lao and Amalayer Video Scandals, 89 Phil. L.J. 90, 97, 101 (2015) (providing discussion on internet use in speech).

Internet speech is legion. Facebook, the social media website, had an average of 1.18 billion *daily* active users in September 2016. Facebook, *Company Information*, Facebook Newsroom, *available at* http://newsroom.fb.com/company-info (last visited Nov. 24, 2016).

Twitter, another social media service, reported 342 million *active* users as of September 1, 2016 (with almost 700 million total registered users). Each day, users publish 158 million "tweets" (a 140-character message, instantly available worldwide) and 135,000 people sign up for new Twitter accounts. Statistic Brain Research Institute, *Twitter Statistics*, Statistic Brain, *available at* http://www.statisticbrain.com/twitter-statistics (last visited Nov. 24, 2016).

These are but two services; users also publish through blogs, websites, and video sharing sites – such as Youtube, which boasts over one billion users (nearly one-third of all people using the internet). YouTube, *Statistics*, YouTube, *available at* http://www.youtube.com/yt/press/statistics.html (last visited Nov. 24, 2016).

These private companies provided "neutral platforms" – avoiding making determinations as to what speech to allow, deferring balancing free speech and reputational rights to the law. However, the public, unable to effectively and consistently protect their privacy and reputations under current defamation law,

have demanded these providers regulate speech. *See* Deepa Seetharaman, Jack Nicas & Lukas I. Alpert, *Fake Content Puts Pressure on Facebook, Google*, The Wall Street Journal, Nov. 15, 2016, *available at* http://www.wsj.com/articles/fake-content-puts-pressure-on-facebook-google-1479257191 (last visited Nov. 25, 2016).

Now, providers like Google and Facebook are enacting policies against "inappropriate" content and the circulation of "fake news." *See id.* These policies are untethered from constitutional balances and maintenance of the Fourth Estate. Without this Court's action, the policies of these ubiquitous and rapidly expanding public-speech platforms will define the landscape of free speech and privacy – and with it, the public discourse.

B. Circuits are divided on interpreting the limited-purpose public figure doctrine as the doctrine's relevance grows.

Social media and internet publishing drastically increases, not only the number of speakers, but the number of individuals whose speech and participation give them a public presence – potentially creating numerous limited-purpose public figures. This shift is substantial as application of this doctrine to a plaintiff routinely terminates the plaintiff's case at summary judgment. The heightened, actual malice standard is effectively dispositive in most cases.

And circuits are divided on *how* the limited-purpose public figure doctrine is applied.[2] This Court has already recognized the disaster of reducing First Amendment and privacy protection to a case-by-case analysis. Such unprincipled resolutions "lead to unpredictable results and uncertain expectations, and [] could render [the Court's] duty to supervise the lower courts unmanageable." *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 343 (1974). That is, however, where we find ourselves today.

Inconsistent application of the limited-purpose public figure doctrine results in defamation claims being resolved, not on the merits or consistent legal principles, but on the plaintiff's skill at forum-shopping the most favorable circuits. This creates the "inequitable administration of the laws" maligned in the *Erie* line of cases – *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (*citing Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)) – with a modern accelerant. Internet publishing is forum-shopping's best friend – damaging reputations nationally and internationally with a matter of keystrokes, opening the door to litigation wherever one chooses. This is of particular concern as the United States often serves as a forum for international defamation disputes, as it is effectively doing here.

Forum shopping prevents consistent guidance on permitted behavior; both speaker and target are

[2] To avoid redundancy here, we refrain from reiterating the Pet. for Writ of Cert., which thoroughly discusses the circuit division.

harmed. Speech is chilled because speakers are unsure of their First Amendment protections. Individuals are discouraged from public participation for fear of opening themselves to false scrutiny of their personal lives.

II. A narrow application of the limited-purpose public figure doctrine balances free speech and reputational concerns.

A narrowly-applied limited-purpose public figure doctrine (consistent with this Court's application in *Gertz*) should be standardized across all circuits. It provides effective protection of reputation and privacy – a protection demanded by the public. Without this Court's action, private corporations will instead restrict speech – but without the constitutional and broader social considerations for free speech.

Before some circuits broadened the limited-purpose public figure doctrine to further favor publication over reputation, the narrowly-applied doctrine from *Gertz* was sufficiently protecting free speech and a robust marketplace of ideas. News outlets, both print and television, rarely considered libel as a serious threat; hesitation and further investigation was driven by journalistic integrity rather than the legal department. Russell L. Weaver, Andrew T. Kenyon, David F. Partlett & Clive P. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech*, 184-87, 196, 200 (Carolina Academic Press 2006).

Furthermore, overly-broad application of the limited-purpose public figure doctrine incentivizes irresponsible journalism: to avoid the knowledge of or reckless disregard to falsity, a publisher is encouraged to forego further investigation and to rely on limited sources – for the sake of preserving the shield of ignorance. *See id.*, p. 256-57 (*citing* William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment and Bad Journalism*, Sup. Ct. Rev. 169, 185-86 (1994)).

III. This case is well-positioned to address an important fundamental rights issue that will otherwise be effectively determined by private corporations.

This case is an excellent opportunity to resolve the circuit divide over the limited-purpose public figure doctrine. This litigation has produced three separate appeals through the D.C. Circuit. Additionally, this issue will attract numerous interested parties and *amici* to assist in fully vetting the issues.

Delay in addressing this issue will only further exacerbate the attendant problems and continue to drive society to seek regulation outside the legal system, from private entities with no obligation to constitutional free speech and reputational protections.

CONCLUSION

For the reasons above, this Court should grant the petition and apply a narrow interpretation of the limited-purpose public figure doctrine.

Respectfully submitted,

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