No. 16-683

IN THE

Supreme Court of the United States

MILAN JANKOVIC, also known as PHILIP ZEPTER,
Petitioner,

FIELDPOINT B.V.; UNITED BUSINESS ACTIVITIES HOLDING, A.G.,
Respondents,

- v. -

INTERNATIONAL CRISIS GROUP, A Non-Profit Organization; JAMES LYON, Individual; DOES 1 THROUGH 10,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF JOHN J. WALSH, AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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December 6, 2016 *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*

I have been a member of the Bar of New York since 1960 and the Bar of this Court since 1973.[1] I have been practicing as a litigator and counsel to libel plaintiffs, actual and potential, in the field of media law since 1980, when I was retained by William P. Tavoulareas, then the President and COO of Mobil Corporation, and his son Peter to advise them and ultimately prosecute a libel claim against The Washington Post and one of its sources, Philip Piro, based on a November 30, 1979 article published by The Post about both of my clients. I was the lead counsel for the Tavoulareases in a trial in the U.S. District Court for the District of Columbia which resulted in July, 1982 in a verdict against The Post and its reporter, Patrick Tyler, in favor of William Tavoulareas for a total of $2,250,00 in compensatory and punitive damages.

After the trial, in May, 1983, District Judge Oliver Gasch granted The Post's motion for judgment notwithstanding the verdict, holding that Mr. Tavoulareas was a limited purpose public figure, and had failed to prove actual malice by clear and convincing evidence. That judgment was reversed on appeal in April, 1985 by a majority of the D.C. Circuit panel (McKinnon and Scalia, JJ, Wright, J dissenting) which found, after an independent review of the

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[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, I certify that no counsel for any party authored this brief in whole or in part and that no counsel for any party or party made a monetary contribution intended for the preparation or submission of this brief.

Pursuant to Rule 37.2(a), I certify that both Petitioner and Respondents have consented in writing to the filing of this brief.

record, that it did contain clear and convincing evidence from which the jury could reasonably have concluded that the Post published the article with reckless disregard for its truth or falsity. The Post moved for rehearing *en banc*, which was granted, the panel decision vacated, and in March, 1987 the *en banc* Circuit Court (now minus Judge Scalia who had been elevated to this Court), affirmed Judge Gasch's dismissal, with Judge McKinnon dissenting. *See Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987). This Court denied our petition for certiorari which presented questions about the scope of "independent review" of constitutional issues in defamation cases by federal appeals courts and, important to my interest and reason for offering this brief to the Court in this case, the question of whether the D.C. Circuit Court of Appeals correctly held that Mr. Tavoulareas was a limited purpose public figure in the circumstances of his case.

Those five years of post-trial and appellate litigation in *Tavoulareas* provided me with an advanced education in American media and First Amendment law as applied to defamation which became foundational to my practice in those fields for the next thirty years. Throughout those years of practice , I have viewed this Court's denial of the *Tavoulareas* petition as a lost opportunity for the Court to consider and promulgate clear guidance to the lower courts for the determination of who is, and who is not, a "limited purpose public figure." The petition in *Jankovic v. International Crisis Group* presents the same opportunity to this Court in the context of what is, in my view, an erroneous ruling by the

same Circuit Court, that Mr. Jankovic too is such a libel plaintiff, citing its earlier *Tavoulareas* decision multiple times in support. I respectfully disagree with the D.C. Circuit Court's analysis in *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 589 (D.C. Cir. 2016), and wish to present the reasons why I disagree as a friend of the Court. I will do so as briefly as possible.

SUMMARY OF ARGUMENT

In *Jankovic,* as it did in *Tavoulareas,* the D.C. Circuit Court performed an analysis not required by anything said by this Court in *Gertz v. Welch*, 418 U.S. 323 (1974), or in its own post-*Gertz* decision in *Waldbaum v. Fairchild Publications*, 627 F2d 1287 (1980). By combining an expansive, generic and vague description of the "public controversy" with a temporally illogical and equally vague finding about the germaneness , *i.e.*, the relevance to that controversy, of the defamatory statement that *Jankovic* had been a "crony" of the dictator Milosevic while he was in power and benefited from it, the court of appeals burdened Mr. Jankovic, as it did Mr. Tavoulareas, with proving "actual malice" by clear and convincing" evidence. It is not surprising, then, that the court of appeals next found that petitioner had not carried that very difficult burden.

The question which the *Jankovic* "public figure" analysis raises in my mind is why petitioner, a native-born Serbian who had been for many years, including the Milosovic era, a highly successful business man throughout Europe, was considered by the D.C. Circuit to be treated as a "public" figure because he *entered*

into a public controversy "surrounding political and economic reform in Serbia and the integration of Serbia into international institutions *during the post-Milosevic* era," *i.e.*, years *after* Milosovic was out of power. I will answer that question *supra*. In *Tavoulareas*, where the Post article had alleged nepotistic actions by my client to enrich his son by misusing his position and breaching his fiduciary duty to Mobil and its shareholders, the court of appeals also found he participated in a very broadly defined public controversy: "whether the management and structure of the United States' private oil industry was in need of alteration or reform," followed by a determination of "germaneness" essentially unhinged from any legal concept of relevance: "not wholly unrelated."

I submit that in both of these cases, the D.C. Circuit Court failed to observe both the guidelines that *Gertz* laid down for determining who is a public figure for a *"limited* purpose" and what *New York Times v. Sullivan*, 376 U.S. 254 (1964), and due process require: a properly weighted balancing of both the expressive right under the First Amendment and the equally strong and constitutionally protected right of an individual in his reputation.

I believe, and respectfully submit, that in many aspects of our now-constitutionalized law of defamation, courts have too often overweighted the First Amendment-protected expressive right and underweighted, or even ignored, the social value of the equivalent reputational right when striking a balance between them. I believe this may be so because the interest in reputation is

seen as a creature of state law inherited from common law traceable to our colonial era, and not as an express command of the Constitution, and thus not on a par with free expression under the First Amendment. As a result, the reputational right has not been recognized in post-*Sullivan* defamation cases for what it is: a fundamental *liberty* interest of individuals protected by the Fifth and Fourteenth Amendments from infringement by our national and state governments.

The decision by the D.C. Circuit in *Jankovic* is a prime example of what results when this mis-weighting is a substantial factor in the analysis of whether a libel plaintiff is a "limited purpose public figure," leading to the broad and unrestrained application of the *Gertz* factors of "particular public controversy" and "germaneness" seen in the court of appeals' decision. I believe that court made the same error in its *en banc* decision in *Tavoulareas*. This time, the Court should not pass up the opportunity to clarify for the lower courts, with a greater level of precision, how to define, weigh and apply the competing elements of law in the circumstances of record in which a private person who has been defamed can be transformed into a *limited* purpose public figure.

ARGUMENT

IN DECIDING THAT PETITIONER WAS A LIMITED PURPOSE PUBLIC FIGURE AND AWARDING SUMMARY JUDGMENT TO DEFENDANTS, THE COURT OF APPEALS GAVE LITTLE OR NO WEIGHT TO PETITIONER'S RIGHT AS A PRIVATE PERSON TO PROTECT HIS REPUTATION AND OVER-WEIGHTED THE BALANCING REQUIRED BY *NEW YORK TIMES V. SULLIVAN* IN FAVOR OF DEFENDANTS' FIRST AMENDMENT RIGHTS

There seems to be no disagreement that Justice Stewart's frequently cited description of the societal value of a person's reputation in his concurring opinion in *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (Stewart, J., concurring), is the definitive explanation of that value's place in the orderly regulation of society in the American republic:

> *"It is a fallacy, however, to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not.* As the Court says, 'important social values . . . underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.' . . . The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt 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.* The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. *But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."*

383 U.S.75, 92 (emphasis supplied).

The emphasis I placed above is central to my argument; this cogent view of the protected status of reputation in our society is not a mere dictum or platitude to be acknowledged by courts as something akin to an "honorable mention" in opinions striking a balance in which First Amendment values invariably trump reputational rights. It speaks to a structural principle on which the American republic was founded: the "unalienable Rights" to "Life, *Liberty* and the pursuit of Happiness" declared by the Founding Fathers in 1776 and integrated by them into the U.S. Constitution in 1789. No decision of this Court has ever challenged Justice Stewart's delineation of this fundamental right and its authoritative quality has been vouched for repeatedly by its placement in subsequent opinions, concurrences and dissents in this Court.

In the post-*New York Times v. Sullivan* era, the lack of proper weighting of the right to reputation was the central theme of Justice Steven's dissent in *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767 (1986), writing for himself, Chief Justice Burger and Justices White and Rehnquist, protesting the majority's assignment of the burden of proof of falsity to

private libel plaintiffs in certain cases. Justice Stevens wrote: "*By attaching no weight* to the State's interest in protecting the private individual's good name, the Court has reached a pernicious result" (475 U.S. at 781, emphasis supplied), and followed that by quoting Justice Stewart's exposition of the place of the reputational right in our constitutional system set out above. Then, in a subsequent passage which can only be described as prescient in relation to the state of communications media of all kinds in America and the rest of the world today, Justice Stevens went on to write:

> "Despite the obvious blueprint for character assassination provided by the decision today, the Court's analytical approach – by *attaching little or no weight* to the strong state interest in redressing injury to private reputation – provides a wholly unwarranted protection for malicious gossip."

475 U.S. at 786 (emphasis supplied). Later, he added:

> "The Court's result is plausible, however, *only because it grossly undervalues* the strong state interest in redressing injury to private reputations. The error lies in its initial premise with its mistaken belief that doubt about the veracity of a defamatory statement *must invariably be resolved in favor of constitutional protection of the statement and against vindication of the reputation of the private individual.*"

475 U.S. at 787 (emphasis supplied).

I submit that a similar error was at work in the "public or private figure" decisions of the D.C. Circuit Court of Appeals in *Jankovic*, as it was 30 years ago in *Tavoulareas* – the facts are different but the issue in both cases is the same: whether the libel claimant who starts his case as a private person will be able to press his claim as such, or be tagged with the status of a "public" plaintiff, with vastly more difficult burdens of proof. In my view, many courts, faced with difficult decisions about whether a libel plaintiff's participation in some aspect of public life makes him a public figure, pressed by zealous defenses based on claims of superior First Amendment rights, too often resolve their doubts or indecision by defaulting to the safe territory of the First Amendment, thereby exposing that individual to the same risk of unremedied injury to his reputation as that of the highest government official. *See* Ronald H. Surkin, *The Status of the Private Figure's Right to Protect His Reputation Under the United States Constitution*, 90 Dickinson L. Rev. 667 (1985), for a well-developed discussion of the reputational right in this context.

The resolution of this unfair tendency to burden libel plaintiffs who are neither public officials nor persons of widespread fame or notoriety with the onerous burdens of proof established in *Sullivan* should be evaluated by the Court against the backdrop of the drastic transformation in the means of communication that have been developing in recent decades. I described Justice Stewarts's concern in 1986 about the protection of reputational interests from "malicious gossip" and "character

assassination" as "prescient." Those references actually seem quaint today, echoes of a bygone era of information distribution, and may actually be inadequate to encompass the number and variety of vehicles for defamation that have emerged through communication via the internet.

Today it is commonplace for the American public to be flooded each day with reports of out of control and uncontrollable online publications and new types of information distribution channels marked by "fake news," "revenge" websites, malicious, often anonymous, gossip and rumor-peddling sites, online "news" sites of dubious origin and operation streamed from around the globe, and the spectacle of traditional media print and television organizations struggling for attention and relevance by mimicking or republishing such online content in their operations, with all of it enjoying near perpetual life and availability through revenue-driven search sites and "viral" republication on social media. This is the world of communication today, in which the balancing of competing expressive and reputational rights will have to be conducted, including deciding issues such as who is or is not a public figure, without overweighting or underweighting the one or the other. The arrival of the *Jankovic* petition at this Court in this climate is timely indeed.

Unlike *Hepps*, where this Court's decision resulted in a new rule of law about how and by whom falsity must be established in almost all libel cases, the error in the D.C. Circuit's *Jankovic* decision is embedded in its analysis and

application of the guidelines laid down by this Court in *Gertz* and by the D.C. Circuit itself in *Waldbaum*. By describing the "particular controversy" in the broadest possible terms, the court of appeals employed a methodology that, whether by design or not, will almost always result in the challenged publication being "germane" to the controversy, even if the publication at issue is positioned at the most remote point of relevance, as suggested by the description "not wholly unrelated" used by the court of appeals to characterize the Post article in *Tavoulareas*. The finding there by the court of appeals that nepotistic actions, alleged to have been taken within the confines of routine and legitimate intercompany business relationships by William Tavoulareas to benefit his son, would have significant, impactful consequences, *i.e.*, material relevance, on the important, wide-ranging economic, commercial, national and international political issues in an alleged controversy over whether the U.S. international oil industry needed reform, was essentially an *ipse dixit* by the court , an unsupported bow to *Gertz* analysis by a court that had already, in my view, erroneously ruled in impermissible contradiction of a jury's finding of falsity that the Post's article was substantially true.

The obverse, "wholly unrelated, " found its way into the *Jankovic* analysis of "germaneness" only to be dismissed as inapplicable because "statements ... 'highlighting a plaintiff's' talents, education, experience and motives' can be germane" followed by another unsupported and speculative assertion that linking Jankovic to Milosovic "would be relevant to understanding

[his] role and why he wanted to be involved in the reform effort ...," while dismissing the evidence in the record of petitioner's actual reasons of why he publicly supported the new reformist regime. 822 F.3d at 589.

Thus, in 2016, the same court of appeals that I believe erroneously burdened William Tavoulareas with public figure status, has somehow found that an allegation, which it previously found to be defamatory, of a beneficial "crony" relationship with the totalitarian Milosevic regime of the 1990s, is also significantly consequential and impactful to the outcome of a *subsequently arising* international controversy involving the serious, almost boundless issues of political and economic reform in Serbia and when Serbia would be able to rejoin the international community. The temporal disconnect alone should be enough to persuade this Court to grant certiorari to review the record to examine whether this odd conclusion has any support in logic or the evidence.

Gertz boiled its teaching down to this: "It is preferable to reduce the public figure question *to a more meaningful context* by looking to the *nature and extent of an individual's participation in the particular controversy giving rise to the defamation.*" 418 U.S. at 352 (emphasis supplied). How an alleged personal relationship between petitioner Jankovic and the dead dictator in the 1990s was going to affect Serbia's subsequent efforts to reform its institutions and rejoin the family of nations must, as in *Tavoulareas,* be at the most remote point of relevance, and outside the scope of germaneness

as laid down in this formulation in *Gertz*. Even more important, that a court engages in such speculative reasoning as the final step in finding a private person to be a public figure, burdening him with proof of actual malice to protect the First Amendment rights of the defendants, suggests strongly that no weight at all was given to petitioner's right to protect his reputation.

I submit that the decision below is a another example of what Justice Stevens decried in *Hepps*: a decision arrived at, whether consciously or not, by overweighting First Amendment protection of expression, and underweighting the personal interest in reputation, leading the court into further errors in applying the principles of *Gertz*. Granting review in this case will provide, in my view, another opportunity for examining and restoring to initial parity the manner in which the balance involving competing interests of free expression and reputation is struck in the "public/private" figure determination, by affirming the necessity of including in that process the full weight of the reputational right so eloquently and forcefully described by Justice Stewart in *Rosenblatt* and reiterated by Justice Stevens in *Hepps*.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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December 6, 2016 *Amicus Curiae*