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 a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF RESPONDENT INTERNATIONAL CRISIS GROUP IN OPPOSITION


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## QUESTIONS PRESENTED

1) Whether the Court of Appeals erred when, applying this Court's well-settled precedent and the consistent body of law that has developed based on it, it held that the Petitioner is a public figure for purposes of this defamation case because, along with the other established indicia of public figure status he does not contest, the allegedly defamatory statements were germane to his involvement in the public controversy addressed by the publication at issue.

2) Whether the Court of Appeals erred in applying the standard for summary judgment, in holding that no reasonable jury could find clear and convincing evidence of "actual malice," when the decision correctly applied the law in analyzing Petitioner's inadequate evidence.

## CORPORATE DISCLOSURE STATEMENT

International Crisis Group ("ICG") is a not-for-profit corporation with no corporate parents. No publicly held corporation owns any portion of ICG. ICG is an independent, multinational organization that engages in field-based research in conflict zones worldwide and provides analysis and recommendations regarding conflict prevention and resolution to governments, international organizations, and diplomats around the world.

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The Petition should be denied because the D.C. Circuit's decision applies well-settled law to the facts presented, and neither creates a conflict in the circuits nor conflicts with any ruling of this Court. Indeed, a review of the circuit "split" alleged by the Petition reveals that the only differences are in the *outcomes* of cases in which the courts have faithfully applied the same legal standard to varying factual records.

## STATEMENT OF THE CASE

Because the Petition's theory of a circuit "split" is at bottom a factual rather than legal argument, and because the Petition misstates the record evidence in material ways, International Crisis Group ("ICG") provides a summary of the case that includes a description of the relevant, undisputed evidence.

### A. The Public Controversy

After the disintegration of the Soviet Union, Yugoslavia endured a decade of violent hostilities between various religious and ethnic factions. J.A.434-36, 386-87.[1] The most dominant of these factions was Serbia, led by Slobodan Milosevic, who had assumed near dictatorial powers following the collapse of the Soviet power structure. J.A.435. During this period, the control of virtually every Serbian institution, from the biggest factories and public sector institutions to the smallest ventures, passed into the hands of the Milosevic *garnitura*. J.A.713-14. Milosevic developed economic and political structures to reward loyalists

[1] Citations to "J.A._" refer to Volumes I-III of the Joint Appendix, filed in *Jankovic v. ICG*, No. 14-7171 (D.C. Cir. Sept. 15, 2015).

and ensure support for his government. J.A.437-38. Monopolies were granted to favored constituents and government pressure was exerted to ensure particular businesses obtained clients. J.A.713-14, 706. Privileged exchange rates were granted to favored elites to mitigate the effects of wartime inflation. J.A.446, 713. Milosevic kept particularly tight control of the financial sector, and financial institutions were closely scrutinized by his regime. J.A.714.

The record evidence in this case is undisputed that, during Milosevic's rule, Petitioner Philip Zepter operated various businesses in Serbia. J.A.409-10, 1000-02, 1021-23, 1339-40, 1500. Immensely successful, Zepter, who liked to compare himself favorably to billionaire Bill Gates, boasted that no other member of the Serbian diaspora had invested as much in the former Yugoslavia as he had. J.A.1021, 1101. Zepter opened the first private bank in Belgrade, Serbia in 1991, and received special authorization from the Serbian government to sell, use and transport foreign currency. J.A.447, 1340. This enabled Zepter to conduct international transactions, while other banks were limited to domestic transactions. J.A.986-87. Zepter asked for and received this crucial privilege from the Milosevic administration, which he described as "a big piece of cake in the bank business." J.A.987.

It would take NATO's intervention to end the worst sectarian violence Europe had seen in decades. J.A.435-36, 821-22. But Serbian nationalism remained strong and Milosevic held onto power until he was deposed in a popular uprising in 2000. J.A.436. While Milosevic was gone, however, many of the quasi-

governmental structures he created to concentrate power and finance survived. J.A.437.

Following the 2000 elections, a dispute emerged in Serbia about the process of instituting political and economic reforms. J.A.893-94. Those supporting a measured approach backed the new President, Vojislav Kostunica, while those favoring an accelerated pace of reform backed the new Prime Minister, Zoran Djindjic ("Djindjic"). J.A.705, 1368. This controversy was "a mainstay of public debate and discussion in the media, on television, in diverse social and political circles, and on the streets of Serbia." J.A.721. The controversy was of international import, with many Western governments skeptical of Djindjic but in favor of his agenda. J.A.1030-34, 864-66.

The so-called "parallel structures" Milosevic had created to finance his regime and evade international sanctions posed the chief barrier to reform. J.A.437-38, 444, 705-06. The degree of state capture—the extent to which oligarchs were able to influence the political process by financing political parties and bribing officials—was a matter of intense public concern. J.A.1032-34, 1114-21, 1267-73. While Djindjic promised reform, many in the region and throughout the international community questioned his commitment to do so. J.A.1032-34, 1109-13. Specifically, they doubted his resolve to dismantle Milosevic's power structures and put an end to endemic cronyism.

Djindjic's association with "oligarchs" and organized crime figures from the Milosevic era cast further doubt on the sincerity of his expressed devotion to reform.

J.A.1274-75, 1343. His entanglement with "businesspeople that are classed as part of organized crime, cast dark shadows over the purported shining light." J.A.1109. Djindjic justified his association with his "'friends in heaven, but also in hell,'" as his pragmatic, if ironic, calculation that it was the way to move forward with reforms. Dkt. 153-20.[2]

No oligarch was more closely associated with Djindjic than Zepter. Theirs was an intimate relationship, with Zepter serving as confidant and economic advisor to the Prime Minister. J.A.1322. Knowledgeable observers understood that Zepter was a beneficiary of patronage while Milosevic was in power, given that his administration's acquiescence was a mandatory precursor to conducting any business in Serbia in the 1990s, especially if that business was a bank with the right to conduct international transactions. J.A.714. As one Serbian scholar explained, "the general consensus view [was] that no significant economic activity, including Zepter's ownership and operation of Zepter Banka, could take place in Serbia without the consent and cooperation of the regime of Slobodan Milosevic." *Id.*

The public's skepticism that, despite his best intentions, Djindjic was beholden to oligarchs was reinforced by the exchange of benefits between him and Zepter, which was seen by many as indicative of corrosive insider dealing. J.A.1054, 1101, 1319-25. For example, there were press reports that Zepter Banka

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[2] Citations to "Dkt. _" refer to the docket numbers of exhibits filed in *Jankovic v. ICG*, No. 1:04-cv-1198-RBW (D.D.C. July 15, 2004).

received the exclusive right to administer loan credits on behalf of a state agency, which other banks criticized as favoritism. J.A.720-21, 1101. When a Zepter Banka director was made Finance Minister, some publicly questioned if the move was precipitated by a bribe. J.A.449-50, 726-27. Others questioned why Zepter was exempted from paying an "extra profits" tax meant to force tycoons to disgorge ill-gotten gains accrued during the Milosevic years. J.A.446-47, 723-24. The impression of ongoing cronyism found further support when Zepter purchased premium land at a fraction of market value and was reportedly excused from repaying a large loan funded by Serbian taxpayers. J.A.1197-99; Dkt. 153-23.

The Serbian public was well aware of many benefits that Zepter afforded Djindjic that could explain such preferential treatment. He gave Djindjic the use of his private plane. J.A.1054. He also came to Djindjic's defense in the press, including through a front page open letter to the Serbian people in several national papers. J.A.1178-82, 1191-92, 1197-99. He contributed to Djindjic's election campaign, and hired an American lobbyist, at his own expense, to enable Djindjic to advance his political agenda and "establish friendly and constructive relations [with America], to encourage investment, and to enhance Serbia's image as a forward-looking, stable, investor-friendly country." J.A.1101, 1133, 1505.

That lobbyist, who had represented other world leaders, arranged for Djindjic to visit the United States and meet with senior administration officials five times in just one year. Djindjic met President Bush, Secretary of State Powell, National Security Advisor

Rice, and congressional leaders. J.A.767, 1089-1100, 1174-76, 1512-17. He also arranged for Djindjic to meet with the New York Times, the Wall Street Journal and other national media outlets. One of Djindjic's goals was to urge U.S. officials to support Serbia on key financial issues. J.A.1173. The mission proved successful, as Djindjic secured America's promise to help Serbia write off two-thirds of its $12.2 billion foreign debt. J.A.1177. When the Serbian press reported that Zepter had bankrolled Djindjic's expedition, he was dubbed "the most important financier of the Serbian Government." J.A.1133.

Zepter does not dispute that his support of Djindjic had put a target on his back: he grimly acknowledged that he "made many enemies by helping Zoran Djindjic come to power, for being his close friend, and then, when he became the Prime Minister, his adviser for international economic business affairs." J.A.1322. He claimed he was the victim of attacks in the press and elsewhere "in a brutal and unscrupulous way, by trying to pin murders, support for terrorism, tax evasion, and weapon smuggling on me." J.A.1321.[3] These allegations of criminality and cronyism, standard fare during Djindjic's tenure, continued to plague Zepter well after the Prime Minister's assassination in 2003. J.A.1304-05.

[3] Despite such unpleasant consequences, Zepter was not dissuaded from participating in politics, both before and after Djindjic's assassination. Indeed, he publically contemplated running for President of Serbia. J.A.1199, 1341; Dkt. 154-4-Dkt. 154-7.

In sum, in Serbia there was a continuous loop of allegations of cronyism against politicians and oligarchs, beginning with those who held power and prospered in Serbia during the Milosevic years, and continuing after the 2000 elections. This was especially true of Djindjic, whose continued association with Mafiosi and old guard tycoons virtually guaranteed that such accusations would be leveled against him. In turn, Zepter's voluble support of Djindjic guaranteed that allegations of cronyism, corruption and criminality would dog Zepter long after Djindjic's demise.

**B. International Crisis Group**

ICG is the brainchild of Mort Abramowitz, a distinguished U.S. diplomat who also served as President of the Carnegie Endowment for International Peace, and Mark Malloch Brown, a former World Bank Vice President and Deputy-Secretary General of the United Nations, conceived during a flight out of war-torn Sarajevo in 1993. J.A.780-81; Dkt. 158-12. They lamented the international community's failure to respond to the human tragedy unfolding in Bosnia. They envisioned an independent organization to serve as the world's eyes and ears on the ground in areas of conflict and to advocate for international intervention. Abramowitz and Brown were joined in their early efforts by other statesmen who shared their view of the pressing need for a non-partisan organization working to prevent armed conflict.

Today, ICG monitors more than 70 conflict zones around the world, sounds the alarm about impending

crises, and seeks opportunities to prevent or resolve them. ICG's mission has won the support of many accomplished diplomats, public officials and policy makers. ICG's First Chairman was former United States Senator George J. Mitchell, who twice served as United States Special Envoy for peace in Northern Ireland and in the Middle East. Its presidents have included such distinguished public servants as Louise Arbour, a former Justice of the Supreme Court of Canada, United Nations High Commissioner for Human Rights, and Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda. From its inception, ICG's signature methodology has been extensive field research undertaken by expert analysts sent to gather data on the ground in dangerous conflict regions, sometimes with little more than a laptop and a rucksack. J.A.839, 844-45; Dkt. 158-12; Dkt. 149-5. Working on the frontlines has exposed ICG personnel to threats of arrest, even death. Dkt. 158-12.

ICG's hard-won intelligence is provided to all levels of government and international organizations, in published reports and commentary and in meetings with decision makers at the highest levels of governments throughout the world. It is a prodigious effort, with the annual publication of scores of reports and briefing papers. This dedicated approach has enabled ICG to sound early alarms in an effort to prevent violence and death, from Kosovo to Darfur. As UN Secretary General Kofi Annan once said, ICG is "a global voice of conscience, and a genuine force for peace." Dkt. 158-12.

### C. ICG's Reporting

Between 1999 and 2003, ICG published several reports focused on the painstaking process of Serbian and regional democratic reform and how the international community might better encourage that process. ICG's reports often addressed the continued existence of so-called "parallel structures," including even ostensibly private enterprises, which were "capable of exerting coercive force on citizens . . . without the scrutiny of democratically elected leaders." J.A.949-50.

For example, a 2001 ICG report examined the banking system in a small Serbian-majority enclave in Muslim-majority Bosnia. The report noted that Milosevic-era banks were either state owned or "subject to pervasive political interference," providing a "non-transparent system for controlling financial flows [that] was easy to abuse by the party . . . in power, enabling them to siphon off funds for various illegitimate purposes." J.A.659; Dkt. 148-7. The following year, ICG published a report which noted that the Serbian press had identified several prominent individuals "who either amassed wealth under Milosevic in unclear circumstances, or hold positions of political influence," among them "Filip Zepter." J.A.675. The report concluded: "All [of these individuals] appear to have close ties to either Premier Djindjic, President Kostunica and/or the military. Many have been mentioned in the Belgrade media in the context of illegal weapons sales, cigarette smuggling, and political assassinations." *Id.*

ICG continued to analyze the efficacy of the Serbian reform movement after Djindjic's assassination. A 2003 report analyzed, among other things, the political situation that led to the assassination and whether it would be the catalyst for Serbia to rid itself of "the illegal parallel state Milosevic created that often exercised more power than the legitimately elected authorities and that [the current government] has not dismantled." Dkt. 148-10. The report also noted: "Milosevic-era 'businessmen' affiliated with Serbian State Security . . . appear to control much of Republika Srpska's revenue flows . . . . Another company that allegedly provides cover for money laundering and weapons shipments is the Zepter Group, owned by Milan Jankovic (a.k.a. Filip Zepter)." *Id.*

As ICG's president explained, "[t]he whole point . . . of these series of reports was to describe the continuing influence into the new era, in which people like Mr. Djindjic were prominent and pushing arguably in other directions, of the continued prominence and relevance of the previous Milosevic business establishment and . . . that this was seriously inhibiting Serbia's capacity to manage a rapid transition in the way that the rest of the world was hoping." J.A.1693.

After months of extensive reporting, researching and editing, in July 2003, ICG published the challenged Report No. 145, *Serbian Reform Stalls Again*, which focused on the obstacles facing democratic reform, including the uninterrupted influence of wealthy businessmen on Serbia's fledgling democracy, businessmen commonly referred to as "oligarchs" or "tycoons." J.A.606-48. The passage

challenged by Zepter, which notably appears *nowhere* in his Petition, under the heading "The New Serbian Oligarchy," states:

> The unwillingness to continue the crackdown reflects the power of the Milosevic-era financial structures that—with the rigid oversight once provided by the dictator removed—have transformed themselves into a new Serbian oligarchy that finances many of the leading political parties and has tremendous influence over government decisions. Some of the companies were originally formed as fronts by State Security or Army Counterintelligence (KOS), while others operated at the direct pleasure of the ruling couple. Under Milosevic, many of these companies profited from special informal monopolies, as well as the use of privileged [currency] exchange rates. In return, many of them financed the regime and its parallel structures.
>
> Some of the individuals and companies are well known to average Serbs: Delta Holding (Milorad Miskovic), Karic (Bogoljub Karic), Pink (Zeljko Mitrovic), Zepter (Milan Jankovic, aka Filip Zepter), Kapital Banka (Djordje Nicovic), Toza Markovic (Dmitar Segrt), Progres (Mirko Marjanovic), Simpo (Dragan Tomic), Komercijalna Banka (Ljubomir Mihajlovic), Novokabel (Djordje Siradovic), Stanko Subotic, Dibek (Milan Beko), ABC (Radisav Rodic), Hemofarm (Miodrag Babic), AIK Banka Nis (Ljubisa

Jovanovic) and Dijamant (Savo Knezevic) are but some of the most prominent. Because of the support they gave to Milosevic and the parallel structures that characterized his regime, many of these individuals or companies have at one time or another been on EU visa ban lists, while others have had their assets frozen in Europe or the US. [footnote omitted]

In the popular mind, they and their companies were associated with the Milosevic regime and benefited from it directly. The DOS [political party] campaign platform in September 2000 promised that crony companies and their owners would be forced to answer for past misdeeds. Few of the Milosevic crony companies have been subjected to legal action, however. The enforcement of the "extra-profit" law is often viewed as selective and there have been only a handful of instances in which back taxes, perhaps 65 million Euros worth, have been collected. [footnote omitted] Most disturbing is the public's perception that—at a time when the economy is worsening—these companies' positions of power, influence and access to public resources seem to have changed very little.

The oligarchs have managed the transition from the old regime to the new with relative ease because of their ability to finance Serbia's political parties. While Milosevic was in power, most of the parties in the DOS

> [opposition] coalition received substantial financing from abroad . . . . After [Milosevic was deposed], this money dried up. At a time when DOS needed funding for its political activities, the Milosevic financial oligarchy was seeking new protection. These mutual needs fit together nicely. . . .[4]

J.A.627-28.

The report's primary author, Dr. James Lyon, is an American citizen who resided and worked in the Balkans for decades. After earning his Ph.D. in Balkan history, Lyon gathered information and conducted interviews on the influence of the Serbian oligarchs. J.A.445. As an ICG project director, Lyon was regularly in touch with officials in the Serbian, Bosnian and other regional governments, diplomats, and NATO intelligence services, as well as businesspersons, political activists and ordinary citizens. J.A.445-46.

A common view frequently imparted in these many interactions, and one that Lyon shared, was that it was nigh impossible, given the authoritarian nature of the Milosevic regime, for anyone to have amassed

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[4] Not only does Petitioner omit the challenged passage, he also overstates the one remaining allegedly defamatory implication which neither refers to Zepter or the benefits he allegedly received as "corrupt," nor to Milosevic as the "Butcher of the Balkans." Pet. 2, 5, 6. Rather, the D.C. Circuit found that the above-quoted passage might be read to imply that Zepter "was a 'crony' of Milosevic who supported the regime in exchange for favorable treatment" and that he "was actively in alliance with Milosevic and his regime." *Jankovic v. ICG*, 494 F.3d 1080, 1091 (D.C. Cir. 2007); *see also* Pet. App. 9a.

significant wealth during that period without the sponsorship of, or direct assistance from, his government or security services. J.A.453. In this regard, Lyon learned that Zepter had access to privileged currency rates, and that authorities aligned with the Milosevic regime had pressured local businesses and state agencies, including the military, to use Zepter's bank. J.A.446-47. Other experienced ICG observers of the Milosevic government also believed it implausible that any significant commercial entity, let alone a bank, could operate independently of such an authoritarian regime, particularly during a period of war. J.A.958-60.

Lyon also consulted with NATO intelligence and diplomatic sources who told him that Zepter and his businesses were suspected of money laundering and arms dealing. J.A.447-48. These officials, as well as sources within the Serbian government, told Lyon that Zepter had ties to Milosevic's state security apparatus and that his company had been formed with capital from a state-owned company controlled by Milosevic. *Id.*

Lyon was also aware of the Serbian media's coverage of Zepter, much of it unflattering, including allegations related to the origins of Zepter's immense wealth, his association with prime minister Djindjic, and even criminal conduct. J.A.448-50. Various Serbian publications charged that Zepter's businesses improperly benefitted from his relationship with leading politicians and raised questions concerning the apparent conflict of interest in the appointment of a Zepter Bank director as minister of finance. J.A.449.

Finally, Lyon learned that the U.S. Treasury Department, specifically its Office of Foreign Assets Control ("OFAC"), had included Zepter Bank on its list of entities in Yugoslavia whose assets should be frozen. J.A.452-53. To Lyon and his superiors at ICG, the inclusion of Zepter Bank on the OFAC list provided foundation for "the conclusion . . . that these entities were one way or another part of the larger government of Serbia regime, [the] Milosevic regime." J.A.807-08, 804, 811. They believed that, with respect to those individuals and entities singled out by the Treasury Department, "it was impossible to operate at their level of economic activity without mutual support between them and the Milosevic regime." J.A.958-60.[5]

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[5] The Petition's description of purported evidence of actual malice—a citation-free mischaracterization of the record—is inaccurate in a number of material respects. Pet. 7. For example, Zepter challenges ICG's reliance on Zepter Banka's inclusion on the OFAC list. But the government official responsible for Treasury's economic sanctions programs confirmed that entities placed on the list were included there *because* the U.S. viewed them as agencies or instrumentalities of the Milosevic regime. J.A.1782. This was what ICG believed to be the case and why it included a reference to the list in Report 145. J.A.807-808, 804, 811, 453. Next, Zepter's fanciful tale of attempted extortion, advanced for the first time nine years into the litigation, did not raise an issue as to whether Lyon believed his own reporting, particularly since Zepter's own account of the one purported meeting, which he claims happened *after* publication of Report No. 145, would provide evidence that Lyon believed his reporting was accurate. J.A.1736.

As for sources who spoke to Lyon only after securing a promise of confidentiality, a necessary practice among journalists reporting from conflict zones, J.A.448, Lyon testified about what they told him, while honoring his promise not to identify them. After Lyon invoked the reporter's privilege, Zepter never made any effort to

## REASONS FOR DENYING THE PETITION

### I. No Conflict Among The Lower Courts Is Presented By This Case

Appealing to the Court's role in resolving conflicts between appellate courts' interpretations of federal law "on the same important matter," Sup. Ct. R. 10(a), the Petition urges that there is a "live and expanding division of authority," Pet. 8, among the circuits concerning the extent to which a statement challenged as defamatory must relate to a plaintiff's participation in a public controversy—one aspect of a multi-part analysis applied by virtually every circuit to determine whether a plaintiff in a defamation action is a limited-purpose public figure.

This supposed "split" has escaped the notice of every Court of Appeals for a simple reason: It does not exist. Indeed, a review of the authorities cited in the Petition reveals no conflict at all, but simply cases in which the outcome of the public figure determination, following the application of a well settled legal standard, varied based upon different facts.

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challenge that assertion before the close of discovery. And, finally, Zepter persists in peddling the false dichotomy that Zepter could not have been a supporter of Milosevic and Djindjic in turn, and for ICG to have believed otherwise is evidence of actual malice. Ample evidence shows that many well-connected persons (including a Milosevic-turned-Djindjic-aligned security chief who was one of Zepter's own witnesses, J.A.1710-17), shifted alliances as the political climate in the former Yugoslavia changed—an entirely predictable state of affairs that numerous media, including ICG, contemporaneously reported and Zepter himself has acknowledged to be true. J.A.979, 1170-72, 1693, 1773.

### A. The *Gertz* Decision

The limited-purpose public figure concept was first articulated by this Court over four decades ago in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). That decision explained that the public figure analyses is informed by two "touchstones." First, the public figure is an individual who has pursued a course of conduct that foreseeably "invite[s] attention and comment." *Id.* at 345. Such people "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* Second, the public figure enjoys "access to the channels of effective communication" and thus has the ability to respond to falsehoods and mitigate harm. *Id.* at 344. Following *Gertz*, the lower courts have uniformly recognized that, in determining whether a defamation plaintiff is a public figure, "[a]t all times, the judge should keep in mind the voluntariness of the plaintiff's prominence and the availability of self-help through press coverage of responses[;] in other words, whether the plaintiff has assumed the risk of reputational injury and whether he has access to the media." *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1295 (D.C. Cir. 1980); *see also Tavoulareas v. Piro*, 817 F.2d 762, 773 (D.C. Cir. 1987) (en banc) (citing *Gertz*, 418 U.S. at 345).

### B. Lower Courts Devise Analytic Framework

Following the "broad rules of general application" set forth in *Gertz*, 418 U.S. at 343-44, the D.C. Circuit was the first federal circuit to establish a multi-part test to guide the public figure inquiry, in *Waldbaum v.*

*Fairchild Publications, Inc.*, 627 F.2d at 1296-98. This analytic test has been cited approvingly by this Court, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 n.3 (1986), and the other circuits have looked to it for guidance.

Although unclear from the Petition, the D.C. Circuit test for identifying limited-purpose public figures unquestionably requires a nexus between the plaintiff's role in the relevant public controversy and the alleged defamation. *Waldbaum*, 627 F.2d at 1298 ("Finally, the alleged defamation must have been germane to the plaintiff's participation in the controversy."); *see also Tavoulareas*, 817 F.2d at 773 (same).

Indeed, following the D.C. Circuit's lead in *Waldbaum*, *every* circuit now requires a nexus between the plaintiff's role in the public controversy and the allegedly defamatory statement, either stated expressly as a "germaneness" requirement like the D.C. Circuit, or by a similarly worded test.

Two circuits have adopted the *Waldbaum* test word for word, requiring that the challenged statement be "germane" to the plaintiff's participation in the controversy. *See, e.g.*, *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1494 (11th Cir. 1988) (adopting *Waldbaum* test); *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433-34 (5th Cir. 1987) (same). Other circuits use slightly different language to describe the same requirement. For example, the Second Circuit asks whether the plaintiff "voluntarily injected himself into a public controversy *related to the subject of the litigation*." *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2d Cir. 1984) (emphasis added); *see also*

*Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 266 (9th Cir. 2013) (test includes "whether the alleged defamation is related to the plaintiff's participation in the controversy"). Still other circuits incorporate the requirement by relying on the *Gertz* formulation that the relevant controversy must "giv[e] rise to the alleged defamation." *See, e.g.*, *Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 529 (6th Cir. 2014); *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 13 (1st Cir. 2011); *Hatfill v. N.Y. Times Co.*, 532 F.3d 312, 322 (4th Cir. 2008); *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1078 (3d Cir. 1988).

Zepter attempts to conjure a conflict in this uniform body of authority by latching onto slight differences in phrasing. Thus, the Petition points to *Waldbaum's* passing and wholly unobjectionable observation that "[m]isstatements wholly unrelated to the controversy . . . do not receive the New York Times protection," 627 F.2d at 1298 (cited at Pet. 8-9), wrenches it from its context in the court's opinion, and declares it an affirmative pronouncement that the germaneness requirement is satisfied so long as the alleged defamation is not "wholly unrelated" to the identified public controversy. Viewed in context, however, the quoted language in no sense purports to articulate a relaxation of the required nexus and no court, including the D.C. Circuit, has ever construed it to do so.

Minor variations in wording are not tantamount to a circuit conflict and they certainly do not support Zepter's contention that some circuits have "effectively discard[ed] the requirement that the defamation relate

to the 'particular controversy' in which the plaintiff was involved." Pet. 10. Thus, for example, far from standing at odds with the D.C. Circuit as Zepter claims, the Eleventh Circuit has adopted *verbatim* the D.C. Circuit's test. *E.g.*, *Little v. Breland*, 93 F.3d 755, 757 (11th Cir. 1996) ("[W]e adopted the three part test set forth in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), to determine if the plaintiff is a limited purpose public figure."). The Petition premises its entire argument that the Eleventh and D.C. Circuits are in conflict on the *outcomes* of two inapposite decisions, in which the Eleventh Circuit recited and applied the *Waldbaum* factors to the particular facts of the cases before it and determined that neither plaintiff was a limited-purpose public figure. Pet. 13-14 (citing *Bennett v. Hendrix*, 426 F. App'x 864 (11th Cir. 2011) (unpublished), and *Long v. Cooper*, 848 F.2d 1202 (11th Cir. 1988)).[6] Simply put, there is no conflict in the circuits with respect to either the existence or contours of the germaneness requirement.[7]

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[6] In both cases, the court actually held that the plaintiff did not sufficiently *participate* in the controversy—a separate prong of the test from germaneness. *See Long*, 848 F.2d at 1204; *Bennett*, 426 F. App'x at 866.

[7] Indeed, all of the remaining circuits claimed by the Petition to take "an approach faithful to the Court's holding in *Gertz*"—the Fourth, Sixth, and Ninth Circuits—supposedly unlike the D.C. Circuit, Pet. 10—nevertheless have repeatedly cited the D.C. Circuit's *Waldbaum* decision with approval. *See, e.g.*, *Thomas M. Cooley Law School*, 759 F.3d at 529-30 (6th Cir.) (citing *Waldbaum*); *Makaeff*, 715 F.3d at 266 (9th Cir.) (same); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 710 (4th Cir. 1991) (same); *Silvester*, 839 F.2d at 1494 (11th Cir.) (same). And, while the

Because there is no actual conflict in the legal standard adopted by the circuits, Zepter necessarily rests his argument for *certiorari* on the premise that the way the same test has been *applied* to the facts unique to individual cases "dilutes the germaneness requirement." Pet. 8-9. But a disagreement over the outcomes of selected cases applying the same legal standard to different factual records in no way represents the type of conflict in the law that warrants this Court's intervention. Sup. Ct. R. 10(a). Rather, varying outcomes in different cases are to be expected by virtue of the highly fact-specific nature of the public figure inquiry, which is, of necessity, "a difficult and sensitive exercise unsusceptible to the application of rigid or mechanical rules." *Tavoulareas*, 817 F.2d at 772. As a result, a particular public figure determination, "as in most public figure cases, is fact-bound and restricted to the specific circumstances revealed in the record." *Pendleton v. City of Haverhill*, 156 F.3d 57, 70 (1st Cir. 1998). The Petition's attempt to recast those cases and thereby create the impression of a conflict in the application of the same standard to different facts is, as we demonstrate below, unavailing.

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Petition quotes selected language from a 1989 Fourth Circuit decision, Pet. 11-12 (discussing *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681 (4th Cir. 1989)), it nowhere mentions that Circuit's most recent limited-purpose public figure analysis, which did precisely what the D.C. Circuit did in this case—evaluate a plaintiff's access to the media, identify a public controversy, consider whether the plaintiff "'thrust [himself] to the forefront'" of that controversy, and decide whether the plaintiff thrust himself into the "'particular public controversy' that gave rise to the alleged defamation." *Hatfill*, 532 F.3d at 322-23; *see also* Pet. App. 13a-22a.

**C. The Supposed "Split"**

In *Pendleton*, for example, the First Circuit found that there was a public controversy surrounding a school district's struggle to increase minority faculty representation. The plaintiff wanted a teaching position and urged his qualifications in the media. 156 F.3d at 69. Shortly thereafter, he was arrested on drug charges. After the charges were dismissed, an arresting officer was interviewed and said the arrest was justified because Pendleton was "doing cocaine and [he] got caught [p]eriod," adding that he "should be in rehab right now." *Id.* at 61-62. The officer also pushed back against the charge that he was trying to stymy Pendleton in his "well-known 'fight[] for a school department job.'" *Id.* at 70 & n.9. The plaintiff predicated his defamation action on these and related statements.

The First Circuit found that the plaintiff voluntarily injected himself into the public controversy by speaking out on the importance of faculty diversity and "airing his qualifications" for the job in the press. *Id.* at 69-70. The court then concluded that the officer's allegedly defamatory statements about his drug use and arrest "*relate[d] directly* to Pendleton's qualifications for the public position to which he aspired and *by extension* to the controversy which swirled around that position—a controversy into which Pendleton had thrust himself." *Id.* at 70 (emphasis added).

This "relate[s] directly" standard is of course the precise articulation of the law that Zepter claims is applied by those circuits on the "correct side" of the

conflict he posits, which purportedly does *not* include the First Circuit. Pet. 10-11.[8] The fact that Zepter disagrees with that court's view that statements about whether the plaintiff used drugs were sufficiently related to his participation in the controversy—the application of law to fact—is not the equivalent of the court applying the *wrong* legal standard. *Id.*

Similarly, in *Harris v. Quadracci*, the Seventh Circuit expressly applied the D.C. Circuit's *Waldbaum* test, including its "germaneness" requirement. 48 F.3d 247, 251 (7th Cir. 1995). In finding that the requirement was met in that case, the court reviewed a record far different from the "private romantic feud" portrayed in Zepter's Petition. Pet. 11. In fact, plaintiff Lynette Harris was an admittedly "'well-known'" actress and model in Milwaukee who had appeared in the media on several occasions and became a national celebrity after she was prosecuted for tax evasion relating to her failure to report as income money provided to her by a wealthy widower who "was partial to the company of young women." 48 F.3d at 248. She gave interviews about the tax case on nationally syndicated programs. *Id.* Following the reversal of her conviction, Harris agreed to be interviewed for a book, but the relationship with the author soured amid the author's claims that she demanded a percentage of

[8] Subsequent First Circuit decisions have similarly emphasized that a limited purpose public figure exposes oneself to commentary on a "'limited range of issues'" defined by "'looking to the nature and extent of an individual's participation in the particular controversy *giving rise to the defamation*.'" *Lluberes*, 663 F.3d at 13 (emphasis added) (quoting *Gertz*).

profits and Harris's reciprocal claims of sexual harassment. *Id.* at 248-49.

The challenged report—an article in *Milwaukee Magazine* titled, "Runaway Twin: Lynette Harris takes her biographer on a frightening journey"—addressed that twist in the ongoing public drama. *Id.* at 249. Although Harris conceded that her conviction for tax fraud was a public controversy in which she played a central role, she argued that there was an insufficient nexus between the alleged defamation relating to the breakdown of her relationship with the biographer to whom she told her story about the tax controversy and her role in that controversy. *Id.* at 251. Applying *Waldbaum*'s germaneness requirement, the Seventh Circuit concluded that the controversies were intertwined, noting that the article addressed her conviction at length. Thus, the court's conclusion that "the article in question was 'germane' to the tax controversy," *id.* at 252, is most certainly not, as Zepter argues, an abandonment of the germaneness component of the public figure analysis. Again, it is simply Petitioner's disagreement over the application of settled law to particular facts.

Zepter similarly seeks to recast the Seventh Circuit's decision in *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265 (7th Cir. 1996) (cited at Pet. 11 n.1). Milsap was the director of a public anti-poverty program. An audit turned up "many financial irregularities," 100 F.3d at 1269, and Milsap was fired. There were contemporaneous media accounts about those "irregularities, including failure to document or substantiate funds disbursed, and *thousands of dollars*

*in overdrafts*" during Milsap's tenure as program administrator. *Id.* (emphasis added). Milsap did not dispute that he played a part in the public controversy concerning his stewardship of the jobs training program, but did challenge the finding that the defamatory statement was germane to his role in the controversy. The challenged statement appeared in a column about the career of a reporter whose writings contributed to Milsap's downfall. The columnist noted that, during the public controversy, a question arose about the source of Milsap's funds. He then posited his answer to that question: "[n]o mystery, if my case was typical. He simply reneged on paying people." *Id.* at 1267.

Milsap argued that whether he had reneged on a debt owed to the columnist was not germane to his role in the previous public controversy. The Seventh Circuit disagreed, concluding that the challenged statement and plaintiff's role in the public controversy were both related to his "lack of fiscal responsibility" and the "financial irregularities" unearthed when he was program director. *Id.* at 1269 ("Milsap put himself into the public eye in Milwaukee at that time, and the price of his notoriety included reports of financial irresponsibility.").[9]

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[9] The Petition similarly mischaracterizes the underlying facts in the decisions of three state supreme courts. It is telling that one of three decisions Zepter cites to illustrate this illusory "split" with the D.C. Circuit is by a supreme court that expressly adopted the *Waldbaum* test, which it cited throughout its analysis. *See Cottrell v. Nat'l Collegiate Athletic Ass'n*, 975 So. 2d 306, 333-34 (Ala. 2007) (cited at Pet. 15). Not surprisingly, *Waldbaum* is also extensively cited with approval in *Wayment v. Clear Channel*

In each of these cases, the courts expressly gave due consideration to whether the challenged statement was germane to the plaintiff's role in the identified controversy. The fact that Zepter deems the application of that legal requirement to the unique facts of each of those cases wrongheaded does not evidence any "split" in authority requiring this Court's review.

**D. This Case**

Although the Petition asserts that Zepter was declared a limited purpose public figure "even though the defamation was not about" the identified public controversy, Pet. 7, the D.C. Circuit in fact considered that precise argument and determined correctly that the challenged passage *was* about Zepter's role in the controversy:

> Yet even if Zepter was an important figure in the Serbian reform effort mainly due to his relationship with Prime Minister Djindjic, his relationship to Milosevic is relevant to Zepter's role in the controversy.

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*Broadcasting, Inc.*, 116 P.3d 271 (Utah 2005) (Pet. 16). In that case, the court's analysis hinged on the absence "of any public controversy at all." 116 P.3d at 285; *id.* at 282. And in *Healey v. New England Newspapers, Inc.*, a Pawtucket, Rhode Island physician was found to be a private figure for purposes of an article about his reported inaction after hearing that a YMCA member had collapsed on a sports field outside the building where the physician was meeting with YMCA board members. 555 A.2d 321 (R.I. 1989) (Pet. 15-16). As the court explained, there was simply no pre-existing controversy related to the plaintiff's life or work as a doctor. *Id.*

Pet. App. 22a.[10] Thus, contrary to the Petition's allegations, the D.C. Circuit did not ignore its own germaneness requirement in this case. Rather, it expressly considered the relation between the existing controversy in which Zepter participated and the challenged statement:

> Linking Zepter to Milosevic would be relevant to understanding Zepter's role and why he wanted to be involved in the reform effort led by Prime Minister Djindjic. The germaneness test is met because the defamatory statement relates to the individual's role in the public controversy.

*Id*. Thus, as in his analysis of the decisions of other circuits, at bottom, Zepter disagrees only with the *conclusion* reached by the D.C. Circuit and fails to identify any conflict that warrants this Court's review.

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[10] Petitioner misstates the public controversy identified by the D.C. Circuit. It is not "the rule of Slobodan Milosevic." Pet. 19. It is "political and economic reform in Serbia and integration of Serbia into international institutions during the post-Milosevic era." Pet. App. 7a, 14a. Zepter similarly mischaracterizes the nature and extent of his participation in that public controversy. It was not merely "supporting Djindjic." Pet. 6. Rather, the D.C. Circuit found that Zepter achieved "'special prominence' in the debate," based upon much more than his intimate relationship with the Serbian Prime Minister: his funding of the international activities of the Serbian government, his proven access to the media, as evidenced by the press coverage he received, interviews he gave, "open letters" he published on the front page of newspapers, and public pronouncements of his own political ambitions. Pet. App. 17a-18a.

## II. There Is No Conflict With A Decision Of This Court

It is axiomatic that the Court may exercise its discretion to review appellate decisions that conflict with a ruling of this Court. Sup. Ct. R. 10(c). No such conflict exists between the decision in this case and *Gertz*, or subsequent decisions by this Court. Zepter cannot argue, and does not even attempt to do so, that the *Waldbaum* test itself somehow conflicts with *Gertz*. Instead, he argues that the D.C. Circuit's conclusion that he is a public figure cannot be reconciled with *Gertz*. He is wrong.

The public controversy in *Gertz* involved the successful prosecution of a Chicago police officer for the shooting death of a young man. 418 U.S. at 325. The trial and conviction of the officer were controversial and garnered significant media coverage. Gertz was an attorney retained to represent the man's family in a separate civil wrongful death suit against the officer. *Id.* A magazine published an article about the trial, in which it accused Gertz of being a "Leninist," a "Communist fronter," a member of a Marxist organization and of orchestrating the "frame-up" of the officer. *Id.* at 326. The article also implied that Gertz had a criminal record. *Id.*

The Court determined that Gertz was a private figure, noting: "He took no part in the criminal prosecution of [the officer]. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so." *Id.* at 352. In light of his "minimal role," Gertz "plainly did not thrust himself into the vortex of this public issue"

or "engage the public's attention in an attempt to influence its outcome." *Id.*

Zepter's contention that "this Court held that Gertz was a private figure *because the defamatory attacks*, which focused on his representation of a victim of alleged police brutality, *were not germane to 'the particular controversy* giving rise to the defamation'" is simply not accurate. Pet. 17 (emphasis added). The "defamatory attacks"—that Gertz was a Communist sympathizer with a criminal record who engineered the erroneous conviction of a police officer—did not, as Zepter claims, "focus[] on his representation of a victim of alleged police brutality." Rather, they "focused" on the public controversy that gave rise to the defamation, to wit, the criminal prosecution. Once the Court determined that Gertz did not play *any* role in *that* controversy, the public figure analysis came to an end. There was no consideration of the "germaneness" requirement, *i.e.*, whether, if Gertz *had* played a meaningful role in the identified controversy, there was a nexus, sufficient or otherwise, between the challenged statements and the controversy "giving rise to the defamation."

The D.C. Circuit's analysis in this case is also consistent with the law undergirding the three other public figure cases cited by Zepter. In *Time, Inc. v. Firestone*, the Court declined to find divorce proceedings of a wealthy socialite to be "the sort of 'public controversy' referred to in *Gertz*." 424 U.S. 448, 454 & n.3 (1976). In addition, even assuming that the divorce was an appropriate public controversy, the Court found that the requisite measure of voluntary

participation was absent. The plaintiff did not thrust herself into the public sphere merely by participating in mandatory judicial proceedings. *Id.* at 454. The decision says nothing about whether the alleged defamation was germane to the controversy addressed by the published article.

In *Wolston v. Reader's Digest Association, Inc.*, the Court identified the U.S. investigation of Soviet espionage as a public controversy of the sort contemplated in *Gertz*, and noted that the plaintiff's failure to respond to a grand jury subpoena, which resulted in a contempt citation, attracted media attention. 443 U.S. 157, 162-63 (1979). Nevertheless, the Court recognized that the plaintiff had been "dragged unwillingly" into the public dispute and, once enmeshed, kept his involvement to a minimum. This lack of "voluntary" involvement in the identified public controversy constituted the *sole* ground on which this Court concluded he could not properly be deemed a public figure. *Id.* at 165-68 (plaintiff "never discussed th[e] matter with the press and limited his involvement to that necessary to defend himself against the contempt charge").

In *Hutchinson v. Proxmire*, plaintiff was a research scientist whose application for a grant caught the attention of Senator William Proxmire. 443 U.S. 111, 115 (1979). The plaintiff's research earned a "Golden Fleece" award, a contrivance the senator created to highlight expenditures that wasted taxpayer money. *Id.* at 114. The Court noted that Proxmire did not identify any particular public controversy, "at most, . . . point[ing] to concern about general public

expenditures." *Id.* at 135. Even assuming this was the sort of public controversy contemplated in *Gertz*, Hutchinson "at no time assumed any role of public prominence in the broad question of concern about expenditures." *Id.* Accordingly, the Court determined that an unknown scientist who merely conducted research and applied for grants did not engage in voluntary conduct sufficient to make him a limited purpose public figure. *Id.* at 134-36. Once again, the Court did not consider whether the challenged statements were "germane" to Hutchinson's participation in a public controversy.

In each of these cases, the Court declined to confer public figure status after determining that the case did not involve a public controversy or that the plaintiff had not voluntarily participated in the public controversy identified. In each case, the conclusion that the plaintiff was not a public figure was reached without addressing the germaneness requirement. By definition, therefore, the D.C. Circuit's application of *that* requirement in this case cannot be said to conflict with this Court's precedent.[11]

## III. The D.C. Circuit Applied The Correct Summary Judgment Standard

Pointing to slight variations in wording in various places where the D.C. Circuit set forth the non-movant's burden of proof on summary judgment in a

[11] To buttress his attempt to demonstrate a significant issue worthy of this Court's attention, Zepter cites to a string of law review articles, dating from the 1970s and 1980s. *See* Pet. 21-23. It is telling indeed that he cites not a single article addressing the public figure issue in the last twenty years.

public figure libel case, Zepter argues that the court "misapplied this Court's long-settled precedent," and, in so doing "usurped for itself the judgment that [this Court] reserves for the jury." Pet. 27.

A simple review of the decision itself shows the fallacy of this contention:

> To prevail on summary judgment, and now on appeal, Zepter must show that "the evidence in the record could support a reasonable jury finding . . . that [he] has shown actual malice by clear and convincing evidence." As the non-moving party, he is entitled to the benefit of all "justifiable inferences" in his favor and "need only present evidence from which a jury might return a verdict in his favor."

Pet. App. 23a-24a (quoting *Anderson*, 477 U.S. at 254-55, 255–56, 257); *see also id.* at 40a ("Even taking [Zepter's] flawed evidentiary assertions together, no reasonable jury could find by clear and convincing evidence that ICG acted with actual malice.").[12]

To be sure, later in its opinion, the court occasionally referenced the plaintiff's burden with a summary, shorthand reference rather than repeating its every detail. *See, e.g.*, Pet. 27 ("It was Zepter's burden to 'show by clear and convincing evidence that ICG acted with actual malice.'"); *id.* ("each of Zepter's factual theories fails to show clear and convincing

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[12] *See also, e.g.*, Pet. App. 25a-26a (analyzing argument in light of what a jury could believe), 29a (same), 30a-33a (same), 36a (same), 38a-39a (same).

evidence of actual malice"). Nevertheless, a review of the D.C. Circuit's 20-page analysis leaves no doubt that the court understood its limited role in evaluating the record evidence as well as what would have been the role of the factfinder, had the evidence met the threshold to become a jury question.

Indeed, the court painstakingly reviewed the undisputed record evidence, evaluating it both standing alone and in the aggregate, Pet. App. 22a-41a, citing and applying the proper legal standard throughout. *See supra* note 12. The D.C. Circuit conducted this required "threshold inquiry," giving Zepter the benefit of all inferences but doing so with the recognition that it was not "required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party." *Anderson*, 477 U.S. at 251 (citation omitted). Instead, it recognized that, before evidence becomes a jury question, "there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Id.* (citation omitted).[13] The court correctly set forth and applied the law on summary judgment in this case.

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[13] The Petition's account of the record evidence with respect to actual malice is neither accurate nor complete. *Compare* Pet. 7, *with supra* note 5. The D.C. Circuit recognized that each purported piece of evidence failed, alone or in the aggregate, to create a *genuine* issue of material fact with respect to actual malice. Pet. App. 22a-40a.

## CONCLUSION

For the reasons discussed above, the Petition should be denied.

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Respectfully submitted,

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