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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MALCOLM I. LEWIN
JOAQUIN EZCURRA
MORRISON COHEN LLP
909 Third Avenue
New York, New York 10022
(212) 735-8600

RODNEY A. SMOLLA
Counsel of Record
4601 Concord Pike
Wilmington, Delaware 19803
(302) 477-2707
rodsmolla@gmail.com

WILLIAM T. O'BRIEN
LISA NORRETT HIMES
JOHN W. LOMAS, JR.
DENTONS US LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7500

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF

ICG's Opposition barely disputes that, in practice, lower courts have taken radically different approaches to determining who is a limited-purpose public figure; that as a result, courts reach irreconcilable results on analogous facts; and that this divergence has serious consequences. ICG thinks none of this is a problem because the courts on both sides of this conflict often cite the same 37-year-old case (albeit en route to irreconcilable results). That is wrong.

As this Court has frequently said, what matters for certiorari are "judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (citation and internal quotation marks omitted). And lower-court judgments on this issue are all over the map. Several circuits have effectively dispensed with the requirement that, for a private person to be considered a limited-purpose public figure, the defamatory statement be germane to his or her involvement in a public controversy. Other Courts of Appeals and state supreme courts enforce it rigorously. Only this Court can restore national uniformity to this important area of the law.

ARGUMENT

I. The Conflict Among The Lower Courts Is Genuine And Outcome Determinative

ICG argues that no split exists because lower courts often cite the malleable, multi-factor standard adopted by the D.C. Circuit in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980). That confuses the map (the multi-factor formula) for the territory (whether the circuits are actually applying the law in a consistent way).

Waldbaum provides no assurance that the Courts of Appeals will reach similar results in similar cases. In practice, they have not.

Three Courts of Appeals—the D.C., First, and Seventh Circuits, have virtually discarded the requirement that the defamation relate to the "particular controversy" in which the plaintiff voluntarily engaged. Pet. 10; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974). Without that critical limitation, *any* involvement in public life transforms a private person into a public figure, contrary to this Court's instructions in *Gertz*: "We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes." 418 U.S. at 352. ICG's efforts to erase these courts' departure from *Gertz* are unavailing.

A. The D.C. Circuit's Misapplication of *Gertz* is Consistent and Undeniable

Most relevant here is the D.C. Circuit's holding that a private person with some role in a public controversy retains the protection of defamation law only for falsehoods "wholly unrelated to the controversy." Pet. App. 21a. Contrary to ICG's claim, Zepter has not wrenched this phrase from its context, either as originally used in *Waldbaum*, 627 F.2d at 1298 ("Misstatements wholly unrelated to the controversy, however, do not receive the *New York Times* protection."); in *Tavoulareas v. Piro*, 817 F.2d 762, 774 (D.C. Cir. 1987) (en banc) ("The alleged nepotism by Tavoulareas was not 'wholly unrelated' to a public controversy. . . ."); or in the opinion below ("'Misstatements wholly unrelated to the controversy' are not protected, but statements, including those highlighting a plaintiff's 'talents, education,

experience, and motives,' can be germane."). Pet. App. 21a. ICG cannot escape the conclusion that this is how the D.C. Circuit applies *Gertz*.

ICG terms the D.C. Circuit's deviation from *Gertz* a "slight difference[] in phrasing." Opp. 19. But the "not wholly unrelated" standard has consequences. In *every* relevant case since 1980, the D.C. Circuit has deemed the plaintiff a public figure. *See* Pet. 19-20. That contrasts with this Court's decisions, which have emphasized the limited-purpose category's role as a bulwark *against* subjecting private figures to defamation unrelated to their public activities. *See id*. 20. Most glaringly, it is impossible to square with *Gertz*, which found the defendant to be a private figure on analogous facts. *See id*. at 16-18.

B. The Issue is Not Whether Other Circuits Purport to Require "Germaneness," but Whether that Requirement is Meaningful

ICG seeks to dismiss lower courts' chaotic application of *Gertz* as merely a quibble with the application of settled law. *See* Opp. 21. Namely, it argues that every circuit claims to require some element of "germaneness" as part of its limited-purpose-public-figure test. To be sure, the D.C., First, and Seventh Circuits often pay *lip service* to the notion that the defamation must be germane to the plaintiff's involvement in a public controversy. But lip service is all it is. In practice, as the D.C. Circuit's "not wholly unrelated" test illustrates, it has no bite.

Oddly, ICG devotes several pages to explaining why cases from the First and Seventh Circuits, *Pendleton v. City of Haverhill*, 156 F.3d 57 (1st Cir. 1998), and *Harris v. Quadracci*, 48 F.3d 247 (7th Cir.

1995), are *consistent* with D.C. Circuit jurisprudence. *See* Opp. 22-24. This is hardly surprising; after all, these courts are on the same side of the circuit split. *See* Pet. 10.

What these cases show is that the First and Seventh Circuits have joined the D.C. Circuit on its detour away from *Gertz*. In *Pendleton*, the plaintiff's only public activity was participating in a newspaper profile documenting his struggle as an African-American to become a full-time schoolteacher in a predominantly white district. 156 F.3d at 60-61. A year later, he was arrested for possessing cocaine, but a judge quickly dismissed the charges. *See id.* at 61. The defendant, a police officer, later told the local newspaper that Pendleton "had coke all over his face" and "should be in rehab." *Id.*

The First Circuit held that these statements "relate[d] directly" to Pendleton's qualifications for a teaching position, the subject of the article a year before. *Id.* at 70. ICG makes much of the fact that the First Circuit used the words "relate directly," *see* Opp. 22, as if this demonstrates that the First Circuit is enforcing the germaneness requirement. But the fact that the First Circuit deemed defamatory statements about a cocaine arrest germane to a private citizen's earlier public engagement on an unrelated issue is precisely the problem. By contrast, this Court held that Elmer Gertz's earlier activism was *not* enough to make him a public figure for purposes of unrelated slurs against his character. Pet. 16-18. The First Circuit may pay lip

service to germaneness, but *Pendleton* shows that it has abandoned it in practice.[1]

ICG similarly misapprehends the Seventh Circuit's decision in *Harris*. Its description of Lynette Harris's fifteen minutes of fame is irrelevant. *See* Opp. 24. The court held that Harris was not a general-purpose public figure. *Harris*, 48 F.3d at 252. The relevant question was thus not whether she had some public profile—she did—but whether the defamatory statement was germane to it. The defamatory statements related to Harris's *private intimate relationship* with her biographer; the public controversy concerned her years-earlier nonpayment of federal taxes on certain earnings. *Id.* at 248-49. This should have been an easy case. The defamatory statements were not about that public income-tax controversy, but about a private relationship. That the Seventh Circuit deemed one "germane" to the other illustrates how far it, like the D.C. Circuit, has departed from *Gertz*.

C. ICG Fails to Address the Other Side of the Split

ICG's Opposition does not even engage with the other side of the conflict—those circuits that require a tight connection between defamatory statements and the plaintiff's public involvement. *See* Pet. 11-

---

[1] ICG cites the First Circuit's decision in *Lluberes v. Uncommon Productions, LLC*, 663 F.3d 6, 17 (1st Cir. 2011), which held that executives who "enjoyed access to the press and exploited it by orchestrating a PR blitz" about a public controversy were limited-purpose public figures for that controversy. *See* Opp. 23 n.8. It is unclear why ICG finds this informative here. What matters is that in closer cases, the First Circuit's lax approach leads it to find limited-purpose-public-figure status where it should not, and where other circuits would not.

14. ICG's treatment of these cases comprises one footnote observing that these courts often cite *Waldbaum*. *See* Opp. 20 n.7. Petitioner agrees that lower courts often cite the malleable *Waldbaum* standard, but that means little if they are reaching irreconcilable results. Yet again, ICG's focus on lip service to *Waldbaum* leads it to overlook what courts are actually doing in these cases. And as the Petition documented at length, the Fourth, Sixth, Ninth, and Eleventh Circuits maintain a strict germaneness requirement, producing results that simply would not occur in the D.C. Circuit and its compatriots. Pet. 11-14.

ICG engages in earnest with only one case on this side of the split—*Hatfill v. The New York Times Co.*, 532 F.3d 312 (4th Cir. 2008). *See* Opp. 21 n.7. *Hatfill* offers ICG no support; at a minimum, it is consistent with Petitioner's argument that the Fourth Circuit defines germaneness strictly. Mark Hatfill was a prominent expert on bioterrorism who became a suspect in the 2001 anthrax attacks. The court held that coverage of evidence linking Hatfill to the attacks was germane to his public activities because, *inter alia*, "Dr. Hatfill himself used the [2001 anthrax] attacks as a platform from which to intensify his message about national unpreparedness." 532 F.3d at 324. That is the type of tight connection between public controversy and defamation that *Gertz* demands, but that the D.C. Circuit has abandoned.

ICG similarly refuses to confront in any meaningful way the three state supreme courts that maintain a rigorous germaneness requirement. *See* Opp. 25 n.9. The Alabama Supreme Court's nuanced analysis in *Cottrell v. NCAA*, 975 So. 2d 306 (Ala. 2007), carefully went statement by statement,

separating those that were germane to the public controversy from those that were not. *See* Pet. 15. Indeed, it rejected the argument that a public controversy about NCAA recruiting violations "implicitly involved Cottrell's character or his fitness to coach." *Cottrell*, 975 So. 2d at 343. Yet that is precisely the rationale that the First Circuit accepted in *Pendleton*, where it held that a drug arrest, as evidence of character, was relevant to a controversy over teacher hiring. 156 F.3d at 69. Similarly, had *Cottrell* been decided in the D.C. Circuit, that court would almost certainly have found statements about Cottrell's character germane, because they were "not wholly unrelated," to the recruiting scandal during his tenure.

ICG's reactions to *Wayment v. Clear Channel Broadcasting, Inc.*, 116 P.3d 271 (Utah 2005), and *Healey v. New England Newspapers, Inc.*, 555 A.2d 321 (R.I. 1989), *see* Opp. 25 n.9, are similarly misdirected. In *Wayment*, a TV station manager fired a reporter involved in widely publicized charity work and later made "false accusations that [she] was terminated because she was taking money from" a private institute "and had used her reporting contacts to try to set up a foundation for her benefit." 116 P.3d at 277. The court held that she was a private figure for purposes of the defamation. Given the plaintiff's extensive public activities on issues related to the defamation, there is little doubt that this case would have come out differently under the D.C. Circuit's "not wholly unrelated" test.

ICG dismisses *Healey* on the ground that "there was simply no pre-existing controversy," *see* Opp. 26 n.9, words that do not appear in the opinion. In fact, Healey was involved in public life in various ways that were relevant to the dispute—most notably, as

President of the YMCA Board whose actions triggered the controversy. *Healey*, 555 A.2d at 322. Nonetheless, the Rhode Island Supreme Court drew a fine distinction between his "public life" as Board President and his "private" reaction to a protester's death at a Board meeting he chaired. *Id.* at 325. This case would not have come out the same way under the D.C. Circuit's expansive approach.

These cases illustrate how divergent approaches to the limited-purpose-public-figure category are producing divergent results. That some of these courts cited *Waldbaum* is uninformative; in practice, their analysis bears no resemblance to the D.C. Circuit's. Only this Court can restore national uniformity.

II. The D.C. Circuit's Approach Eviscerates *Gertz*'s Distinction Between Limited-Purpose And General-Purpose Public Figures

ICG barely addresses Zepter's discussion of the consequences of loosening the requirements for a private person being deemed a limited-purpose public figure. *See* Pet. 16-23; *see* Opp. 28-31. Instead, it spends four pages straining unsuccessfully to reconcile D.C. Circuit precedent with the facts of *Gertz* and this Court's other limited-purpose-public-figure decisions. *See* Opp. 28-31.

What the Opposition does not contest is that in the D.C. Circuit and the courts that have followed it, plaintiffs will virtually always be found to be public figures if they have had any public involvement. Tellingly, the D.C. Circuit has an unbroken string of finding plaintiffs to be limited-purpose public figures. *See* Pet. 20 (listing cases). By contrast, every limited-purpose-public-figure decision in this Court has held that the plaintiff was a private figure. *See id.* There

is a simple reason for this discrepancy. While this Court intended the limited-purpose-public-figure category to protect private figures from being involuntarily dragged into celebrity, *see id.*, the D.C. Circuit's "not wholly unrelated" approach uses the category to expand a private person's limited public exposure to cover issues that are at most only tangentially related.

Even on the facts, however, ICG misunderstands the contrast between the D.C. Circuit's decision here and *Gertz*. *See* Opp. 28-29. Gertz had "long been active in community and professional affairs," but the defamatory statements related to an event—a murder committed by a Chicago police officer—in which Gertz had played only a private role. *See Gertz*, 418 U.S. at 351-52. Accordingly, this Court held that Gertz was a private figure for purposes of that issue. Here, Zepter had some involvement in political life supporting Djindjic, but the defamation related to a different period, when Milosevic was in power and Zepter was not involved in politics. *See* Pet. 17. Yet the D.C. Circuit deemed him a public figure not merely for purposes of supporting Djindjic, but for any statements "not wholly unrelated" to it. Pet. App. 21a-22a**.** In the D.C. Circuit's hands, the limited-purpose-public-figure category has become far more capacious than *Gertz* intended.

ICG's attempt to reconcile this case with *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), inadvertently illustrates the flaws of the decision below. *See* Opp. 30. In *Hutchinson*, this Court held that defamatory statements cannot transform a private person into the object of a public controversy. "[T]hose charged with defamation," the Court explained, "cannot, by their own conduct, create their own defense by making the claimant a

public figure." *Hutchinson*, 443 U.S. at 135. Here, however, the D.C. Circuit treated the false claim that Zepter was a Milosevic "crony"[2] as a sufficient connection between Zepter and the Milosevic era—even though it acknowledged that Zepter was "an outspoken supporter, financial backer, and advisor of Prime Minister Djindjic," Pet. App. 17a, not the earlier Milosevic dictatorship. *See* Pet. App. 22a ("the germaneness . . . inquiry is not the place to debate whether the statement is true or even well supported. Those questions are relevant to the actual malice inquiry."). That cannot be squared with *Hutchinson*'s holding that defamatory statements cannot impose public-figure status on their target. Indeed, it is particularly inappropriate given that *Gertz* explicitly repudiated *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (plurality opinion), under which the public *subject matter* of the defamation, rather than the public involvement of *the plaintiff*, controlled. *See Gertz*, 418 U.S. at 346.

Gertz predated the Internet and social media. Even then, however, this Court recognized the need to balance vibrant public discourse with the reputations of private individuals. That balance is even more urgent in the digital age. As defamatory posts, comments, and tweets race through cyberspace, the potential damage to private reputation has expanded exponentially. *See generally* Br. of Amici Curiae Professors. The limited-purpose-public-figure category strikes a reasonable balance,

---

[2] The D.C. Circuit held that ICG had "falsely stated" the sole basis for its charge that Zepter supported Milosevic—a U.S. frozen-assets list, published during NATO's conflict with Serbia in 1998, on which *every* Serbian-based bank appeared. *See* Pet. App. 129a-132a.

protecting private citizens while allowing robust discussion of public controversies.

This Court should intervene to restore uniformity among the lower courts and preserve the central tenet of *Gertz*—entry into one area of public life does not open a private person to defamation for all purposes.

III. The D.C. Circuit Erroneously Required Zepter To Prove Actual Malice At Summary Judgment

The D.C. Circuit required Zepter, to survive summary judgment, to "show by clear and convincing evidence that ICG acted with actual malice." Pet. App. 7a. That was error. The only question for the court at that stage was "whether the evidence in the record could support a *reasonable jury* finding" of actual malice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (emphasis added). Deciding whether Zepter had carried the burden of persuasion was for the jury, not the court.

In response, ICG notes that the court, in two places, recited the correct standard, *see* Opp. 32, which the Petition acknowledged. *See* Pet. 27 n.6. The problem is that while the court at times *recited* the right standard, it *applied* the wrong standard. Crucially, when it assessed the theories that Zepter believed should be presented to the jury, it dismissed them on this erroneous ground—"[E]ach of Zepter's factual theories fails to show clear and convincing evidence of actual malice." Pet. App. 40a. Between the court's parallel correct and incorrect statements of the legal standard, it is the incorrect statements that had bite when it counted.

ICG also points to the court's "painstaking[]" review of the record evidence, as if this cures the D.C. Circuit's legal error. Opp. 33. It does not; if anything, it illustrates that the court took on the role of the jury in weighing the evidence. Had the court limited itself to the correct summary judgment analysis, such an exhaustive factual exploration would not have been necessary.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

MALCOLM I. LEWIN
JOAQUIN EZCURRA
MORRISON COHEN LLP
909 Third Avenue
New York, NY 10022
(212) 735-8600

RODNEY A. SMOLLA
Counsel of Record
4601 Concord Pike
Wilmington, DE 19803
(302) 477-2707
rodsmolla@gmail.com

WILLIAM T. O'BRIEN
LISA NORRETT HIMES
JOHN W. LOMAS, JR.
DENTONS US LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7500

Attorneys for Petitioner