Oral Argument Not Yet Scheduled

Nos. 14-7171, 14-7178

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MILAN JANKOVIC, also known as PHILIP ZEPTER,
Plaintiff-Appellant,

v.

INTERNATIONAL CRISIS GROUP, A Non-profit Organization;
JAMES LYON, Individual; DOES 1 through 10,
Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Columbia
(Hon. Reggie B. Walton, Case No. 1:04-cv-01198)

BRIEF OF THE BROOKINGS INSTITUTION, THE CATO INSTITUTE, THE CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, THE COMPETITIVE ENTERPRISE INSTITUTE, COUNCIL ON FOREIGN RELATIONS, THE HUDSON INSTITUTE, HUMAN RIGHTS FIRST, HUMAN RIGHTS WATCH, AND PEN AMERICAN CENTER AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. Except for those listed below, all parties, intervenors, and *Amici* appearing before the district court and in this Court are listed in the Brief for Appellees. This brief is submitted on behalf of the following *Amici*:

- The Brookings Institution
- The Cato Institute
- The Center for Strategic and International Studies
- The Competitive Enterprise Institute
- Council on Foreign Relations
- The Hudson Institute
- Human Rights First
- Human Rights Watch
- The PEN American Center

Amici are nonprofit public-interest organizations. None has any parent company, and no publicly-held company has a 10% or greater ownership interest in any of them.

B. Rulings Under Review. Accurate references to the rulings at issue appear in the Brief for Appellees.

C. Related Cases. Accurate references to related cases appear in the Brief for Appellees.

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GLOSSARY

ICG International Crisis Group

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF *AMICI*

Amici, an ideologically diverse group of non-profit public-interest organizations, all agree that the First Amendment protections at stake in this case provide a vital safeguard for their writing, analysis, and reporting of information that is of crucial interest to the public at large.

The Brookings Institution is a nonprofit organization devoted to high-quality, independent research. Brookings is a trusted source for nonpartisan commentary, including analysis regarding foreign policy and international issues. Brookings's scholars research and publish on international concerns such as human rights, the crisis of displaced persons and refugees, and anti-corruption.

The Cato Institute is a non-partisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government both at home and abroad. Toward those ends, Cato conducts conferences and publishes books, studies, reports, and commentary on many subjects, including international corruption.

The Center for Strategic and International Studies (CSIS) is a bipartisan, nonprofit organization dedicated to finding ways to sustain American prominence and prosperity as a force for good in the world. CSIS focuses on defense and security; regional stability; and transnational challenges ranging from energy and climate to global development and economic integration.

The Competitive Enterprise Institute (CEI) is a nonprofit organization that promotes individual liberty and limited government. CEI's policy analysis and litigation activities focus on overregulation and the rule of law in the United States and internationally. CEI has been involved in a number of cases involving freedom of speech, and is currently a defendant in a separate defamation case brought by a public figure.

Council on Foreign Relations (CFR) is an independent, nonpartisan membership organization, think tank, and publisher. It is dedicated to being a resource for its members, government officials, business executives, journalists, educators and students, civic and religious leaders, and other interested citizens in order to help them better understand the world and the foreign-policy choices facing the United States and other countries. CFR is the publisher of *Foreign Affairs*, the preeminent journal of international affairs and U.S. foreign policy, and also provides up-to-date information and analysis about world events and American foreign policy on its website, CFR.org.

The Hudson Institute is an independent, non-profit research organization promoting global security, prosperity, and freedom. Hudson's work covers defense, international relations, economics, health care, technology, culture, and law. It seeks to improve public policy and influence global leaders in government and business through publications, conferences, and policy briefings.

Human Rights First is a nonprofit, nonpartisan advocacy organization that believes American leadership is essential in the global struggle for human rights, and presses the United States government to respect human rights and the rule of law. The organization publishes reports, fact-sheets, blueprints, and policy papers concerning human rights issues in the U.S. and abroad.

Human Rights Watch is one of the world's leading independent organizations dedicated to defending and protecting human rights. Human Rights Watch investigates abuses, exposes facts widely to the public, and advocates for the respect of rights, the accountability of perpetrators, and the achievement of justice. Each year it publishes hundreds of reports, press releases, and multimedia products concerning more than 90 countries worldwide, including regularly on issues concerning free expression.

PEN American Center ("PEN") is a non-profit association of writers that includes poets, playwrights, essayists, novelists, editors, screenwriters, journalists, literary agents, and translators. PEN has approximately 4,000 members and is affiliated with PEN International, the global writers' organization with 144 centers in more than 100 countries in Europe, Asia, Africa, Australia, and the Americas. PEN advocates for writers and for literature and to protect the freedom of the written word wherever it is imperiled.

Amici received consent to file this brief from Defendants-Appellees International Crisis Group, et al., but Plaintiff-Appellant Philip Zepter has refused consent. Accordingly, this brief is accompanied by a motion for leave to file. [1]

SUMMARY OF ARGUMENT

In *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), this Court established its now-canonical test to determine when a plaintiff qualifies as a limited-purpose "public figure" who must prove "actual malice" to prevail in a defamation suit. The function of this doctrine is to give force to the First Amendment's protection for "'uninhibited, robust, and wide-open'" debate, and to encourage public scrutiny of the actions and motivations of those who "invite attention and comment" by "'assuming special prominence in the resolution of public questions.'" *Id.* at 1291 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)). In light of that function, even when a plaintiff has not attained the type of "'pervasive fame or notoriety'" that would make him a public figure for *all* purposes, he may nonetheless qualify as one for "'a particular public controversy'" if he "'injects himself or is drawn into [it].'" *Id.* at 1292 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)).

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *Amici*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. *See* Fed R. App. P. 29(c)(5).

A plaintiff is thus deemed a limited-purpose public figure when "he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants." *Id.* Due to the public stakes, plaintiffs in these circumstances must "accept the risk" that public comment and criticism may "cast them in an unfavorable light." *Id.* As long as the commentary is "germane" and not "wholly unrelated" to the plaintiff's role in public controversy, it is entitled to strong First Amendment protection. *Id.* at 1298.

Since *Waldbaum*'s inception, this Court has applied the doctrine broadly to provide robust protection for free and open debate, recognizing the great variety of ways that plaintiffs can invite scrutiny by playing a role in public events. Indeed, *Waldbaum* has become the most widely cited precedent nationwide for fleshing out the Supreme Court's "skeletal" public-figure doctrine. *Id.* at 1292. Federal courts of appeals across the country have not only adopted *Waldbaum*'s test for limited-purpose public figures, but have likewise applied it broadly to ensure that plaintiffs who are involved in public controversy cannot wield defamation suits as a weapon to silence their critics. And the principles embodied in *Waldbaum* serve as a model for free-speech protections around the world.

The plaintiff here, however, seeks to radically narrow the *Waldbaum* doctrine. A billionaire mogul and political patron, Philip Zepter is, by his own

account, one of the most powerful and influential figures in his native Serbia. His vast wealth and network of elite connections give him an almost unparalleled ability to shape the course of social and political reform in Serbia, while his easy access to the media and his active involvement in Serbian public affairs both before and after the fall of Slobodan Milosevic easily distinguish him from the average private citizen. Far from an obscure private figure who has shied away from public affairs, Zepter was at the heart of the public controversy in July 2003 that prompted James Lyon and International Crisis Group to publish the commentary that he is suing them for—namely, a report on whether the Serbian government had been, and was in danger of remaining, beholden to a small cadre of wealthy and well-connected figures such as himself. This highly consequential public question could not be debated fully and fairly without considering the past behavior and associations of Mr. Zepter in connection with the Serbian government.

Moreover, just as Zepter's power and influence made him a legitimate focus of public scrutiny, they also make him a dangerous libel plaintiff. His practically unlimited resources give him the power to try to silence his critics through the imposition of ruinous litigation costs, which he can credibly threaten against anyone who might voice allegations of undue political influence and benefits.

In these circumstances, treating Zepter as a mere private figure would seriously chill critical commentary on the role that private business leaders play in the public sphere. Thus, *Amici* urge this Court to affirm the district court's decision holding that Zepter is a limited-purpose public figure.

ARGUMENT

I. COURTS ACROSS THE COUNTRY HAVE APPLIED *WALDBAUM* BROADLY TO PROTECT PUBLIC DEBATE REGARDING THE POWER AND INFLUENCE OF WEALTHY BUSINESS LEADERS

Waldbaum established a three-part inquiry to determine whether a plaintiff should be treated as a limited-purpose public figure. *First*, the court must identify the relevant "public controversy," which "must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." 627 F.2d at 1296. If an issue is "being debated publicly and if it ha[s] foreseeable and substantial ramifications for non-participants, it [i]s a public controversy." *Id.* at 1297. *Second*, "[o]nce the court has defined the controversy, it must analyze the plaintiff's role in it." *Id.* "The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." *Id. Third*, "the alleged defamation" cannot be "wholly unrelated to the controversy," but "must [be] germane to the plaintiff's participation in [it]." *Id.* at 1298.

In *Waldbaum* and its progeny, this Court has applied these three factors broadly to ensure that the First Amendment provides strong protection against reprisal for commentary on rich and powerful individuals who are involved in public affairs. In addition, the broad scope of *Waldbaum*'s protections has been reinforced by multiple other circuits that have adopted and applied the same factors in a speech-protective manner. Indeed, given the international context of this case, it is notable that the *Waldbaum* doctrine serves as a model not only at home but also abroad, both by exemplifying international freedom of expression and by discouraging so-called libel tourism.

A. This Court Has Applied *Waldbaum* Expansively To Cover Plaintiffs With Influence Over Matters Affecting The Public Interest

Waldbaum itself illustrates the breadth of the First Amendment's protection for commentary on the past and present activities of those who may have a significant "impact" on matters that "affect[] the general public or some segment of it in an appreciable way." 627 F.2d at 1296-97. The plaintiff in that case, Eric Waldbaum, was the "president and chief executive officer of Greenbelt Consumer Services, Inc.," which was "a diversified consumer cooperative that, during Waldbaum's tenure, ranked as the second largest cooperative in the country." *Id.* at 1290. Both before and after his time at Greenbelt, Waldbaum advocated policies that "became the subject of public debate within the supermarket industry and

beyond, debate that would affect consumers and retailers in the Washington area and, perhaps, elsewhere." *Id.* at 1299. After Waldbaum was fired, a trade publication reported that the company "ha[d] been losing money the last year and retrenching" under Waldbaum's stewardship. *Id.* at 1290. Waldbaum sued for libel.

At the first step of the public-figure test, the court identified two very broad and "admittedly overlapping controversies" regarding "the viability of cooperatives as a form of commercial enterprise" and "the wisdom of various policies that Greenbelt in particular was pioneering." *Id.* at 1299. At the second step, in assessing Waldbaum's role in these broad controversies, the court found it irrelevant that his formal role as president had ended by the time the allegedly libelous article was published. What mattered was that he had been "known as a leading advocate of certain precedent-breaking policies *before* coming to Greenbelt," and he had "pursued these [controversial] policies and other consumer-oriented activities" during his time as president of the company. *Id* (emphasis added). He was not "merely a boardroom president whose vision was limited to the balance sheet," but was instead "an activist, projecting his own image and that of the cooperative far beyond the dollars and cents aspects of marketing." *Id.* at 1300. Because he "attempt[ed] to influence the policies of firms in the supermarket industry and merchandising generally," he "assumed the risk" of public commentary and criticism on "the successfulness or profitability of enterprises

under his management." Commentary on his past activity was thus germane to the public controversy over supermarket policies because it provided "strong evidence in the public debate" over what polices "firms should adopt." *Id.*

This Court reaffirmed the breadth of *Waldbaum*'s public-controversy analysis in *Tavoulareas v. Piro*, 817 F.2d 762, 773 (D.C. Cir. 1987) (en banc). The plaintiff there was the CEO of Mobil Oil, who filed a libel suit over allegations that he had improperly used his influence to help his inexperienced 24-year-old son obtain a high-paying "equity partner[ship]" in a Greek shipping venture that operated Saudi Arabian oil tankers. *See id.* at 767-68. The court held that he was a public figure for the purposes of the libel suit because he had "thrust [Mobil and himself] to the forefront of the national controversy *over the state of the oil industry*." *Id.* at 773 (emphasis added) (quotation marks omitted).

The court in *Tavoulareas* thus defined both the "public controversy" and the "germaneness" prongs of *Waldbaum* in capacious terms, finding that there was an ongoing "controversy over the state of the oil industry" because, during "the oil shortages of the 1970's, numerous public officials, pundits, and commentators [had] criticized both the performance and integrity of the major, integrated oil companies," and "[m]any reform proposals were publicly advanced and considered." *Id.* The court found that the plaintiff played a significant role in this broad controversy because he had been "outspoken in defending the oil industry's

performance, in blaming the oil crisis on government regulation and interference with the free market, and in advocating rejection of efforts to further regulate or alter the oil industry." *Id.* at 773-74 (internal citation omitted). As for "germaneness," the court found that the nepotism allegations were germane to the controversy because they sought to provide the public with "'a rare glimpse into corporate behavior at the top of one of the largest publicly held international oil companies,'" which was not "'wholly unrelated'" to the larger controversy because "the credibility and integrity of representatives of the oil industry had become an issue" in the public debate. *Id.* at 774 (quoting *Waldbaum*, 627 F.2d at 1298).

Waldbaum and *Tavoulareas* together demonstrate that the limited-public-figure test provides robust protection for speech about people's character and activities insofar as they are relevant to the person's involvement in matters of public concern that will affect the general public. When an influential figure has behaved in a certain way or demonstrated certain character traits in the past, *Tavoulareas*, 817 F.2d at 773-74, that is relevant information in the present: It not only helps to explain past events so that the public can learn the lessons of history, but also alerts the public that the same behavior and character traits may recur in the future. Accordingly, the "talents, education, experience, and motives" of the people who may impact public events can be highly salient in public debate. *Waldbaum*, 627 F.2d at 1298. In recognition of that fact, the public-figure doctrine

provides a crucial "strategic protection" that is "need[ed] to avoid chilling the dissemination of information and ideas that are constitutionally protected." *Id.* at 1293. Given that "the outcome of future litigation is never certain," the protection must be construed broadly so that speakers do not choose "choose to err on the side of suppression" for fear of lawsuits. *Id.* Even "[q]uestionable areas thus receive prophylactic protection to ensure that the press will not refrain from publishing material that has value under the first amendment due to its own content." *Id.*

This Court's other precedents confirm the broad scope of the "strategic protection" for speech regarding character and behavior of those who influence public events. A striking example is *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985), which involved an air-traffic controller who became an "*involuntary* limited-purpose public figure," *id*. at 741, because he was "the sole air traffic controller on duty at Dulles [Airport] on the day [a] TWA plane crashed into Mt. Weather in 1974," *id.* at 738. By virtue of being in that position, he "became embroiled, through no desire of his own, in the ensuing controversy over the causes of the accident." *Id.* at 742. As a result, speech about his relevant conduct and character fell within the public-figure protection because it was a vital aspect of the public debate over "the management of a program administered by the FAA, an arm of the government." *Id.* This confirms that speech about a person's character and conduct must be protected when it pertains to the person's

involvement in issues of legitimate public concern, to ensure that the threat of a defamation suit does not chill public debate.

Similarly, in *Lohrenz v. Donnelly*, 350 F.3d 1272, 1282 (D.C. Cir. 2003), this Court held that a woman who became one of the first "combat jet pilot[s]" must be treated as a limited-purpose public figure to avoid chilling speech on the public controversy over the progress of women in combat. In choosing to become a combat pilot she "assumed the risk of success whereby she would become one of the first few women combat pilots and thus necessarily attain 'special prominence' in an ongoing public controversy about such opportunities." *Id*.

Lohrenz is consistent with the earlier case of *McBride v. Merrell Dow*, 800 F.2d 1208 (D.C. Cir. 1986), which involved a doctor who sued *Science* magazine over an article that suggested his "'testimony was for sale'" due to his previous work as an expert witness in defense of Bendectin, a drug that was alleged to cause birth defects. *Id.* at 1210. The court held that because the plaintiff had "voluntarily inject[ed] himself . . . into [the] particular public controversy surrounding Bendectin's safety, [he] ha[d] become a public figure for the limited range of issues about the drug." *Id.* at 1211 (quotation marks and citation omitted). Given his prominent role in the controversy, commentary about him had to be protected under the First Amendment to avoid stifling public debate about "the perceived dangers of Bendectin." *Id.*

Perhaps most importantly of all, in addition to generally establishing broad protection for speech pertaining to public controversies, this Court has also applied *Waldbaum* specifically to protect public debate about private citizens' pre-existing personal connections with political officials. In *Clyburn v. News World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990), the plaintiff was a private citizen whose girlfriend collapsed and died of a drug overdose at a party in Washington, D.C., that was allegedly attended by "highranking [Marion] Barry administration officials." *Id.* at 31. Media reports claimed that after his girlfriend's collapse, the plaintiff delayed "'several hours'" before calling for medical help in order to avoid drawing attention to the party. *Id.* at 35. The court held that the plaintiff was a limited-purpose public figure, emphasizing the "important" fact that his "act[ion]s *before* any controversy arose put him at its center," since he "had numerous contracts with the District government," and he had formed "many social contacts with administration officials." *Id.* at 33 (emphasis added). The court noted that although "[o]ne may hob-nob with high officials without becoming a public figure," forming such connections "markedly raise[s] the chances" of "becom[ing] embroiled in a public controversy" because the nature and conduct of the connections may well become a legitimate topic of public concern. *Id.*

Finally, the proper application of *Waldbaum* to the facts of the present case is well illustrated by another case from the district court below, which involved a

public-interest organization that was sued over an article alleging corruption in the Russian political and business establishment. *See OAO Alfa Bank v. Ctr. for Public Integrity*, 387 F. Supp. 2d 20 (D.D.C. 2005). Like Judge Walton here, Judge Bates held there that the plaintiffs, a pair of wealthy Russian "oligarchs," were "limited public figures for purposes of the public controversy involving corruption in post-Soviet Russia and the future of Western aid and investment in the country," because they "were two of the leading participants in the transformation of the Russian economy" after the fall of the Soviet Union. *Id.* at 43.

First, the court identified the relevant "public controversy" by noting that "[t]he rise of the oligarchs and the decline of the Russian economy into what one observer described as a 'criminal-syndicalist state' was one of the defining foreign policy controversies of the 1990s." *Id.* Second, the plaintiffs played a role in the controversy by ascending "into an elite class of Russian businesspeople, converting them almost overnight into two of the richest and most powerful individuals in the country," giving them "unprecedented influence in the political and economic affairs of their nation." *Id.* at 44. And third, the statements at issue were "germane" to the plaintiffs' role in the controversy because the "allegations of corruption and illegal conduct," whether "true or not," were "a component of the debate over the consequences of Russia's economic reforms and the corruption that most agree has gripped the post-Soviet economy." *Id.* The parallels here are obvious.

B. Other Circuits Have Likewise Applied *Waldbaum* Expansively To Protect Free And Open Debate

As commentators have recognized, *Waldbaum* "provides the most widely followed limited public figure test" in jurisdictions across the country. *See* Christopher R. Smith, *Dragged into the Vortex*, 89 IOWA L. REV. 1419, 1438 (2004); Daniel P. Dalton, *Defining the Limited Purpose Public Figure*, 70 U. DET. MERCY L. REV. 47 (1992) (finding the *Waldbaum* test to be the best guide for limited purpose public figure determinations). The many federal circuit courts that have adopted and applied *Waldbaum* confirm both its canonical status and the broad protection it provides for commentary and criticism relating to those figures who exert influence on matters of public controversy.

For example, in *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491 (11th Cir. 1988), the Eleventh Circuit stated that "[t]he proper standards for determining whether plaintiffs are limited public figures are best set forth in *Waldbaum*." *Id.* at 1494. The court then applied *Waldbaum* to hold that plaintiffs, who were prominent members of the jai-alai industry, were public figures in a defamation suit they filed over allegations of corruption. The court identified a broad public controversy regarding "corruption in the jai alai industry," and reasoned that "[b]y becoming important members" of this "strictly regulated, high-profile industry . . . [the plaintiffs] invited public scrutiny, discussions, and criticism" of their conduct. *Id.* at 1497.

Likewise, in *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431 (5th Cir. 1987), the Fifth Circuit praised *Waldbaum* as a "sensible" test and accordingly "adopt[ed] it." *Id.* at 434. The court held that the plaintiff, the president of a soft-drink company, was a limited-purpose public figure in his libel suit over an article criticizing his handling of a labor dispute. *Id.* at 432, 434-36. The court rejected his contention "that he cannot have public-figure status because he did not actively 'engage the public's attention' and his name did not appear very frequently in the press." *Id.* at 435. Although "[t]hese facts are to be taken into account," "they are not decisive," because someone who plays an important role in public events "cannot erase his public-figure status" merely by "limiting public comment and maintaining a low public profile." *Id.* at 435-36 (citing *Tavoulareas*, 817 F.2d at 773-774).

The Ninth Circuit too has relied on *Waldbaum*, affirming that "plaintiffs [we]re limited purpose public figures under the test established in *Waldbaum*" because they were prominent businessmen who were involved in a "bitter feud within [their] family for control of U-Haul." *Shoen v. Shoen*, 48 F.3d 412, 413 (9th Cir. 1995). The Ninth Circuit also invoked *Waldbaum* to hold that Trump University was a limited-purpose public figure when it sued over an article criticizing its educational practices. *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 267 (9th Cir. 2013) (quoting *Waldbaum*, 627 F.2d at 1297).

Similarly, the Third Circuit has "cited with approval [*Waldbaum*'s] definition" of a "public controversy" as an issue whose "outcome" will "affect[] the general public or some segment of it." *Marcone v. Penthouse Int'l*, 754 F.2d 1072, 1083 (3d Cir. 1985) (citing *Avins v. White*, 627 F.2d 637, 647 (3d Cir. 1980)). Applying *Waldbaum*, the court in *Marcone* emphasized that it was "of no moment that [the plaintiff] did not desire [public-figure] status," because "[t]he purpose of the first amendment would be frustrated if those persons and activities that most require public scrutiny could wrap themselves in a veil of secrecy and thus remain beyond the reach of public knowledge." *Id.*

The Second Circuit has adopted a limited-public-figure test that is very similar to *Waldbaum*, and has explained that once an individual becomes a public figure by exerting influence on public affairs, "the passage of time will not necessarily change [that] status." *Contemporary Mission, Inc. v. The N.Y. Times Co.*, 842 F.2d 612, 619 (2d Cir. 1988). For example, "a child prodigy who was once a public figure . . . remained a public figure years later even though he had since 'cloaked himself in obscurity,' because 'his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern.'" *Id.* at 619 (quoting *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809 (2d Cir. 1940)). Thus, "an individual who

becomes a limited purpose public figure with respect to a particular controversy retains that status for the purpose of later commentary on that controversy." *Id.*

Similarly, in *Lluberes v. Uncommon Productions, LLC*, 663 F.3d 6 (1st Cir. 2011), the First Circuit held that the plaintiffs, "senior executives of a family conglomerate that own[ed] and operate[d] Dominican sugar plantations," were public figures in their defamation suit over a documentary that criticized the living conditions in the "*bateyes*," or company towns, surrounding their sugar plantations. *Id.* at 10. Citing *Waldbaum*'s holding that "the plaintiff's position as president of a [major company] was a factor in the public-figure inquiry," the court reasoned that the plaintiffs were public figures because they had "leveraged their positions and contacts to influence a favorable outcome in the *batey* controversy." *Id.* at 15-17. Notably, the Court rejected the plaintiffs' argument that they were not public figures because "they did nothing *before 2003* that, standing alone, could subject them to public-figure status." *Id.* at 14. The court explained that "[t]he relevant question is not . . . whether they intended their [pre-2003 activities] to remain private, but whether they 'volunteered for an activity out of which publicity would foreseeably arise.'" *Id.* at 15 n.8.

All of these cases reaffirm the key lessons of *Waldbaum* and *Tavoulareas*: In order to provide breathing space for free and open debate regarding those who involve themselves in matters of public concern, "public controversies" must be

defined broadly and cannot be circumscribed by artificial time limits and other barriers that would chill discussion of relevant actors and information. When a plaintiff assumes a role of public consequence through activities and associations that may impact the public, he becomes a public figure for purposes of related commentary and criticism. And once a plaintiff becomes a public figure, he retains that status as long as his actions and associations, past and present, continue to be relevant to the ongoing debate.

C. The First Amendment Principles Embodied In *Waldbaum* Serve As A Global Model For Free Expression

In light of the factual context here and the interests of *Amici*, the international implications of how this case is resolved also warrant emphasis. Upholding the protections of *Waldbaum* is not only consistent with international human-rights norms, but is also vital to the efforts and credibility of the United States as a global leader in protecting free expression and fighting the insidious practice of "libel tourism."

Article 10 of the European Convention on Human Rights guarantees both the "protection of [] reputation," and "the right to freedom of expression." To strike the proper balance between these rights, the European Court of Human Rights has drawn on principles very similar to the American public-figure doctrine. Specifically, "the Court has consistently held that when private individuals enter the public arena they lay themselves open to public scrutiny and should therefore

display a greater degree of tolerance to criticism." Stijn Smet, *Freedom of Expression and the Right to Reputation: Human Rights in Conflict*, 26 AM. U. INT. L. REV. 183, 205 (2010) (citing cases). "[W]hilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures." *Von Hannover v. Germany*, 2012 Eur. Ct. H.R. 388, 419 (citing *Minelli v. Switzerland*, App. No. 14991/02, 5 Eur. H.R. Rep. 554 (1983)). Thus, the Court has expressly relied on society's "general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible 'chilling' effect on others" that defamation liability can impose on free debate. *Steel and Morris v. United Kingdom*, 2005-II Eur. Ct. H.R. 403, 436. (overturning English libel judgment in favor of the McDonald's corporation).

Of course, the legal protection of free expression is hardly perfect or uniform around the world. When countries fall short of the mark and fail to protect against the abuse of defamation law, they create opportunities for "libel tourists" who shop for friendly jurisdictions to punish their critics through lawsuits. This pernicious practice has implications well beyond the borders of the offending nations, because it creates exposure for defendants whose international presence makes them widely amenable to suit. *See generally* Lili Levi, *The Problem of Trans-National Libel*, 60 AM. J. COMP. L. 507, 508 n. 1, 509-10 (2012); Andrew R. Klein, *Does the World*

Still Need United States Tort Law? Or Did it Ever?: Some Thoughts on Libel Tourism, 38 PEPP. L. REV. 375, 391 (2011).

The United States has been at the forefront of the international fight against libel tourism, and a failure to uphold *Waldbaum*'s strong First Amendment protections *at home* in a case involving an international plaintiff would be a serious setback. *See* Tara Sturtevant, *Can the United States Talk the Talk & Walk the Walk When it Comes to Libel Tourism: How the Freedom to Sue Abroad Can Kill the Freedom of Speech at Home*, 22 PACE INT'L L. REV. 269, 269 (2010). Congress itself has recognized the seriousness of the problem by enacting the SPEECH Act of 2010, which prohibits the enforcement of foreign libel judgments that are inconsistent with free speech. Congress specifically found that plaintiffs have used defamation suits on the international stage to "'obstruct[]' the free expression rights of domestic authors and publishers and 'chill[]' domestic citizens' First Amendment interest in 'receiving information on matters of importance.'" *Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 487 (5th Cir. 2013) (quoting Findings to Pub. L. No. 111-223, § 2, 124 Stat. 2380, reproduced in the Notes section of 28 U.S.C. § 4101).

Given the efforts of the United States to be a world leader in upholding and extending the protection of free expression regarding public figures, it is vitally important that this principle be strongly upheld in America's own courts.

II. ZEPTER IS PRECISELY THE TYPE OF FIGURE WHOSE INVOLVEMENT IN PUBLIC CONTROVERSY HAS INVITED PUBLIC SCRUTINY AND DEBATE

Under *Waldbaum* and its progeny, Zepter's status as a public figure in this case is not a close question. He thrust himself into the controversy over Serbian social and political reform by becoming a public champion, financier, and close associate of the Serbian Prime Minster during the turbulent post-Milosevic period. In doing so, his record of associating with and influencing Serbian political leaders for his own personal and professional gain became fair game for commentary and criticism. Allowing him to silence his critics by suing for defamation without the heightened public-figure constraints of the First Amendment would be a disaster for free speech.

A. Zepter's Power and Influence In Public Affairs Demand Public Scrutiny And Distinguish Him From Private Figures

Public-figure doctrine has evolved to strike a balance between fairness to private plaintiffs and the core First Amendment protection for free speech on public issues. The "private figure" designation recognizes that when plaintiffs do not involve themselves in public controversies, society has a relatively weak interest in subjecting them to the glare of the public spotlight; and when they lack the resources and other "means" to project their voice on the public stage, defamation law is often the only way they can protect their reputation. *Waldbaum*, 627 F.2d at 1291. Here with Zepter, by contrast, the exact opposite is true on both

points: He is one of Serbia's richest and most powerful men, who not only exerts vast influence on matters that affect the public interest, but also has extraordinary "access to the media" to fight back against negative press coverage and to "correct misstatements about [him]." *Id.*

The vital function of the public-figure doctrine is to protect and encourage public scrutiny, which "serve[s] as a check on the power of the famous," and which "must be strongest when the subject's influence is strongest." *Id*. at 1294. Given Zepter's immense power and influence, public scrutiny of his dealings with Serbian government officials is both "appropriate and necessary to balance his . . . impact on the affairs of society." *Id.* at 1295 n.18. Indeed, deeming him a private figure here would be perverse because it would allow him to use his immense resources to threaten litigation that could intimidate his critics into silence, thereby insulating his alleged political influence from public scrutiny. As this Court has recognized, even "[t]he *threat* of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (emphasis added). Without "freedom from the harassment of lawsuits," potential critics "will tend to become self-censors," and "debate on public issues and the conduct of public [figures] will become less uninhibited, less robust, and less wide-open." *Keogh*, 365 F.2d at 968. Such censorship "is 'hardly less virulent for being

privately administered'" by libel suits. *Id*. (quoting *Smith v. California*, 361 U.S. 147, 154 (1959)).

The First Amendment cannot countenance the unbridled use of defamation suits to impose costs on critics in a case of major public importance such as this one. As the Third Circuit recognized in *Marcone*, "[t]he purpose of the first amendment would be frustrated if those persons and activities that most require public scrutiny could wrap themselves in a veil of secrecy and thus remain beyond the reach of public knowledge." 754 F.2d at 1086. Zepter accordingly must be considered a public figure to avoid "chilling the dissemination of truth and opinions" about his influence—past, present, and future—in the ongoing struggle for social and political reform in Serbia. *Waldbaum*, 627 F.2d at 1291.

B. Zepter Easily Qualifies As A Limited-Purpose Public Figure Under *Waldbaum*

As the district court correctly held, a straightforward application of the *Waldbaum* factors clearly shows why Zepter is a public figure for the purposes of this lawsuit. *First*, there can be no serious doubt that the issue of endemic corruption, cronyism, and influence-peddling at the highest levels of Serbian government before and after the fall of Slobodan Milosevic has been and remains a significant "public controversy" both within Serbia and in the international community more broadly. *See Waldbaum*, 627 F.2d at 1296-97.

Second, Zepter's own actions plainly put him at the center of this controversy through his admitted close friendship and political patronage of Serbia's late prime minister, Zoran Djindjic, and his other forays into the political arena. As ICG's brief demonstrates, Zepter not only spoke out widely in the media to support Djindjic's agenda, but provided considerable support for Djindjic's political efforts and *even hired a lobbyist* to represent Serbia's interests abroad. *See* ICG Br. at 8-9, 33. Zepter's deliberate "role" in actively courting and championing Djindjic is thus highly salient to the public interest because Djindjic promised to usher in liberal-democratic reform, but was dogged by persistent allegations of his own shady dealings and cozy relationships with some of the very same oligarchs who had flourished under the Milosevic regime. *See Waldbaum*, 627 F.2d at 1297. Zepter was not a peripheral player in this controversy but a major protagonist.

Third, the commentary published here was highly "germane" to the controversy—and certainly not "wholly unrelated" to it. *Id.* at 1298. Indeed the entire *thesis* of the ICG Report (true or not) was that Serbian reforms were being impeded by the continuing "power of the Milosevic-era financial structures," including "oligarchs" like Zepter, who allegedly have a history of wielding "tremendous influence over government decisions," and who may continue to do so by bankrolling politicians in the post-Milosevic era. Report 145 at 17.

In response to this straightforward analysis, Zepter argues that the "public controversy" here should be narrowly limited to the public debate over "the state of economic and political reforms in Serbia *after* Djindjic's death," and that, under this narrow definition, "Zepter had no involvement in that controversy." Zepter Br. at 13. This argument is doubly flawed.

At the outset, it would be entirely artificial to limit the longstanding controversy over political and social reform in Serbia to the period of time "*after* Djindjic's death." *Id.* As ICG's brief demonstrates, at the time Report 145 was published, there had been a heated public controversy over the political influence exerted by Serbian business elites both during and after the Milosevic regime, including those like Zepter who were fortunate enough to have their enterprises thrive under all regimes. *See* ICG Br. at 8-11. Zepter suggests that this definition of the "public controversy" is too broad, and that it should be limited by the scope of topics that were addressed by Report 145. But the public controversy over the influence of the "oligarchs" in Serbian politics during and after the Milosevic regime is no broader than the "national controversy over the state of the oil industry" in *Tavoulareas*, 817 F.2d at 773, which spanned from "the oil shortages of the 1970's" well into the mid-1980's, or any of the other broad "public controversies" in the numerous cases discussed above in sections I.A & I.B.

In none of this Court's cases has the relevant "public controversy" been narrowly circumscribed to exclude relevant events that occurred in the past. In *Waldbaum* itself, for example, the allegedly defamatory article concerned the plaintiff's performance as the chief executive of the Greenbelt company, but the relevant "public controversy" was defined broadly to include "the viability of cooperatives as a form of commercial enterprise," and "the wisdom of various policies" that the plaintiff advocated. 627 F.2d at 1299. The plaintiff's "role" in the controversy extended back to the time when he was "known as a leading advocate of certain precedent-breaking policies before coming to Greenbelt." *Id.* Similarly, in *Tavoulareas*, the allegedly defamatory article focused on nepotism involving the son of Mobil's CEO, but the relevant "public controversy" extended back to cover all of the relevant issues, including the fact that "numerous public officials, pundits, and commentators [had] criticized both the performance and integrity of the major, integrated oil companies" *years before*, and that "[m]any reform proposals [had been] publicly advanced and considered." 817 F.2d at 773. In the same way, the "public controversy" here plainly covers the broad topic of whether reform in Serbia has been stymied by powerful private interests like Zepter.

In any event, even if the scope of the controversy here were artificially limited to "the state of economic and political reforms in Serbia *after* Djindjic's death," Zepter would *still* qualify as a public figure because his past actions and

associations with the Djindjic regime, and his alleged associations with the Milosevic regime, have enduring relevance to the controversy regarding the role of Serbian "oligarchs" in the political and social reforms that were ongoing at the time of Report 145 in July 2003. It was impossible to have an open debate about the continuing influence of wealthy oligarchs in Serbia after Djindjic's death without discussing the recent history of exactly the same issue.

Both this Court and other courts have recognized that plaintiffs' past actions can give them an important role in subsequent public controversies. In *Clyburn*, for example, this Court noted that the plaintiff's "act[ion]s *before any controversy arose* put him at its center," since he "had numerous contracts with the District government," and he had formed "many social contacts with administration officials." 903 F.2d at 33 (emphasis added). By forming those important contacts in the past, he became a fair subject of comment and criticism for controversy that later arose. Similarly, the Second Circuit recognized in *Contemporary Mission* that once someone becomes a public figure, "the passage of time will not necessarily change [that] status." 842 F.2d at 619. A person who is "once a public figure" can "remain[] a public figure years later even though he ha[s] since 'cloaked himself in obscurity,'" because the connection between his past actions and present events may very well be a legitimate "'matter of public concern.'" *Id*. at 619.

Here the analysis is even easier, because Zepter does not and could not plausibly claim that he somehow "cloaked himself in obscurity" in the few months between when Djindjic died in March 2003 and when ICG published Report 145 in July 2003. Because of his enduring wealth and influence, the public had a right and a duty to remain wary of how he would wield his power in a post-Djindjic Serbia—a vital public question that could not be answered without a free and frank discussion of how he had obtained and wielded influence in the past.

CONCLUSION

For these reasons, the judgment of the court below should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type volume limitations set out for amicus briefs in Federal Rule of Appellate Procedure 29(d). The brief, excluding the portions specified in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), contains 6,993 words, as calculated by Microsoft Word's word-count function.

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief was prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that, on May 11, 2015, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

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