IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION 3

Case No. B285629

FX NETWORKS, LLC AND PACIFIC 2.1 ENTERTAINMENT GROUP, INC.,
DEFENDANTS-APPELLANTS

V.

OLIVIA DE HAVILLAND, DBE
PLAINTIFF-RESPONDENT,

On Appeal from the Los Angeles County Superior Court Case No. BC667011
The Honorable Holly E. Kendig, Dept. 42

BRIEF OF *AMICI CURIAE* INTELLECTUAL PROPERTY AND CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

All the *amici* are individuals. They know of no entity or person, other than the parties themselves, that has a financial or other interest in the outcome of the proceeding that they reasonably believe the justices should consider in determining whether to disqualify themselves under canon 3E.

Dated: January 24, 2018

Respectfully Submitted,

By: /s/ Jennifer Rothman
/s/ Eugene Volokh
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INTRODUCTION

The First Amendment protects biographies, docudramas, and fictional works that refer to real people. The right of publicity cannot restrict such works. The trial court's contrary conclusion contradicts clear California and U.S. Supreme Court First Amendment precedents, and misapplies the California Supreme Court's transformative-work test.

The trial court erred in concluding that the filmmakers' efforts to tell a real story meant that their creative contributions were not transformative. Under the trial court's logic, all unauthorized biographies would be unlawful, including traditional written biographies: Authors of biographical books contribute no more—and in some ways less—than do the screenwriters, cinematographers, directors, editors, costume designers, actors, and others who create television shows like *Feud*.

The trial court's decision may have rested in part on the theory that some viewers would think that the plaintiff, Olivia de Havilland, had endorsed *Feud* simply because she was depicted in it. But that too would be an error: The mere presence of a character in a work cannot constitutionally be read as an unlawful endorsement by the underlying person without an additional showing. At the very least, de Havilland should have to show, as other plaintiffs in such cases do, that the use of her name was not artistically relevant to the work and was explicitly directed at misleading viewers as to her endorsement—a showing that cannot be made in this case.

The *amici* do not take a position on de Havilland's defamation and false light claims. This brief focuses solely on her right of publicity claim.

ARGUMENT

I. Portrayals of Real People in Books, Newspapers, and Films Are Fully Protected by the First Amendment

A. Precedents Such as *Guglielmi* and *Comedy III* Make Clear That Such Works Cannot Be Restricted by the Right of Publicity

Depictions of real people in books, newspapers, and films have long been understood to be protected by the First Amendment. (See, e.g., *Guglielmi v. Spelling-Goldberg Prods.* (1979) 25 Cal.3d 860 [Bird., C.J., concurring, in opinion joined by four Justices] [concluding that biographical television movie about Hollywood actor was protected by First Amendment]; *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891 [use of character based on plaintiff in film protected by First Amendment]; *Matthews v. Wozencraft* (5th Cir. 1994) 15 F.3d 432 [use of undercover police officer's identity in film protected by First Amendment]; *Rogers v. Grimaldi* (2d Cir. 1989) 875 F.2d 994 [use of Fred Astaire's and Ginger Rogers' first names in movie title protected by First Amendment]; cf. *Tyne v. Time Warner Entm't Co., L.P.* (Fla. 2005) 901 So.2d 802, 808 [concluding that allowing right of publicity claims based on use of events from plaintiffs' life in film would "raise[] a fundamental constitutional concern"]; *Montgomery v. Montgomery* (Ky. 2001) 60 S.W.3d 524 [holding that use of musician's voice and likeness in a music video was protected by First Amendment]. Though the out-of-state authorities are not binding on California courts, they are interpreting federal First Amendment limits on the right of publicity. Their consensus is some evidence of their soundness; and their position is entirely consistent with *Guglielmi* and the other California precedents that will be discussed below.

If the law mandated that all living persons must give permission before they could be depicted in documentaries, docudramas, and works of fiction,

then they would have the right to refuse permission unless the story was told "their way." That would mean that the famous—and the infamous (as well as the unknown)—could censor and alter the telling of their stories, and the stories of people around them. This would be anathema to the freedom of speech and of the press, and would directly contravene established California precedents. The First Amendment bars the right of publicity from granting a "right to control the celebrity's image by censoring disagreeable portrayals[,]" (*Comedy III Prods., Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 403), which is exactly what Ms. de Havilland is seeking with this lawsuit. (See also *Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542–46 [documentary film about surfing protected under California law from right of publicity and misappropriation claims]; 2 McCarthy, Rights of Publicity & Privacy (2017 ed.) Life Story Rights? Author's comment, § 8:64.)

"Once the celebrity thrusts himself or herself forward into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope. . . . What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through the merchandising of [] the celebrity." (*Comedy III Prods., supra,* 25 Cal.4th at 403.) Here, the defendants (hereinafter "FX") did not produce merchandise with de Havilland's name or likeness on it, nor did advertising for the show focus on her identity—though *amici* note below that advertising for such protected expressive works is also protected by the First Amendment and California law. Here, de Havilland's identity was used solely to tell the underlying story: a fully constitutionally protected fictionalized biographical movie

about real Hollywood actors, including de Havilland, who played a significant role in the era that the work depicts.

In *Guglielmi*, the California Supreme Court confronted a case very similar to this one. The nephew of deceased movie star Rudolph Valentino sued over the use of Valentino's identity and life story in a biographical television movie about the actor, but the Court rejected his right of publicity claim arising out of the use. Chief Justice Rose Bird in her concurring opinion—which was endorsed by a majority of Justices, and which has since been endorsed by majority opinions of the California Supreme Court[1]—observed that "[c]ontemporary events, symbols and people are regularly used in fictional works" and noted that "[f]iction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers." (*Guglielmi*, *supra*, 25 Cal.3d. at 869 [Bird, C.J., concurring].) She continued:

> It is clear that works of fiction are constitutionally protected in the same manner as political treatises and topical news stories. Using fiction as a vehicle, commentaries on our values, habits, customs, laws, prejudices, justice, heritage and future are frequently expressed. . . . Indeed, Dickens and Dostoevski may well have written more trenchant and comprehensive commentaries on their times than any factual recitation could ever yield. . . . Thus, no distinction may be drawn in this context between fictional and factual accounts of Valentino's life. Respondents' election of the former as the mode for their views does not diminish the constitutional protection afforded speech.

(*Id.* at 867–68.)

Addressing the right of publicity claims specifically, Bird explained:

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[1] *Winter v. DC Comics* (2003) 30 Cal.4th 881, 887–88, 891; *Comedy III Prods.*, *supra*, 25 Cal.4th at 396–98, 401; *see also Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal.App.4th 318, 324–25.

> Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity. Moreover, the creation of historical novels and other works inspired by actual events and people would be off limits to the fictional author. An important avenue of self-expression would be blocked and the marketplace of ideas would be diminished.

(*Id.* at 872.) And this was so even though the movie in *Guglielmi*—like *Feud*—depicted a movie star rather than a politician or some other more "serious" figure. Famous entertainers are "good to think with"; precisely because of their fame and accessibility, they help illustrate human nature and recent history. (Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity* (2015) 38 Colum. J.L. & Arts 157, 206.) And entertainers are of course themselves of interest to many viewers and readers. (See *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App. 4th 664, 677 [holding that a five-page editorial feature about indie rock was protected speech and concerned topics of public interest because it discussed "an extremely popular genre of music [and included] commentary on the many bands whose musical works have contributed to the development of the genre"].)

The California Supreme Court's "transformative work" test, announced in *Comedy III Productions Inc. v. Gary Saderup, Inc.*, *supra*, 25 Cal.4th at 391, 404–09, offers full protection to such storytelling.[2] The Court

[2] The *amici* do not endorse the *Comedy III* test as the appropriate test for deciding the federal question of whether and when the First Amendment protects against right of publicity claims. We have serious reservations about the test—highlighted by the trial court's struggle to understand what was meant by a transformative use, and its misguided reading of that test to devalue realistic uses in works of historical fiction and biography.

emphasized that works that "add[] significant expression beyond" just using the celebrity's attributes—works in which the "celebrity likeness is one of the 'raw materials' from which an original work is synthesized"—remain protected by the First Amendment. (*Id.* at 405–06.) Only works in which "the depiction or imitation of the celebrity is the very sum and substance of the work in question" can give rise to a right of publicity claim. (*Id.* at 406.)

The Court in *Comedy III* expressly noted that uses like those in *Feud* were fully protected by the First Amendment. The Court "emphasize[d] that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal." (*Id.* at 406 [citing *Guglielmi, supra*, 25 Cal.3d at 871–72].) *Feud* fits this precisely—it is a mix of "factual reporting" and "fictionalized portrayal" that is synthesized from many "raw materials" (of which de Havilland's identity is a relatively small part) and adds "significant expression" beyond these raw materials.

This conclusion is consistent with the U.S. Supreme Court's holding in *Zacchini v. Scripps-Howard Broadcasting Co.* (1977) 433 U.S. 562, which allowed an unusual right of publicity claim to proceed based on the defendant TV station's broadcast of the plaintiff's *entire* "Human Cannonball" act. In that rare instance, the "literal depiction" of the act—the plaintiff's performance—*was* the creative contribution to the resulting work, and therefore potentially its "very sum and substance." Notably, the Court in *Zacchini* worried that allowing the broadcast of the plaintiff's entire act could potentially destroy his ability to earn a living in his main career because the

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Nevertheless, *Feud* should easily be seen as transformative under the *Comedy III* test.

broadcast could be viewed as an adequate substitute to attending his actual performance.

None of this is true in the instant case. The filmmakers did not use de Havilland's performance or act. And their creation of a secondary character based on the real actress as part of a larger creative work is not the "sum or substance" of the miniseries, nor is the miniseries composed solely of a "literal depiction" of de Havilland. The use by FX does not disrupt the market for de Havilland's acting services, an authorized biography or autobiography, or authorized merchandise. (*Winter v. DC Comics*, *supra*, 30 Cal.4th at 891 [suggesting that in the absence of such substitutionary effect uses of variations on real musicians' names and likenesses in a comic book were protected by the First Amendment].)

The trial court improperly concluded that the use of de Havilland's persona in *Feud* was not transformative because it was too realistic, suggesting that there was "nothing transformative" in the miniseries because the creators sought to make it "as real as possible." (Ruling at 13.) But this reasoning places at risk news reporting, documentaries, biographies, biographical pictures, and all works of fiction that refer to real people—indeed, it would jeopardize purely factual biographies even more than docudramas such as *Feud*, because the more "real" a work is, the less "transformative" (in the trial court's opinion) it would be. Yet, as *Guglielmi* and *Comedy III* make clear, speech need not be fantastical or parodic in order to be transformative and thus constitutionally protected. Realistic stories in which additional elements and features are added to a celebrity being depicted, including realistic details, are constitutionally protected uses.

This constitutional principle is not altered by the industry practice of sometimes paying people for so-called "life-story" rights. Sometimes,

producers pay subjects for their cooperation in researching the story, and thus helping to create the work. They occasionally pay to get the subjects' cooperation in marketing the story (especially if they are worried that otherwise the subject will publicly condemn the story, or cast doubt on its accuracy). And, at times, they may just want to avoid any possible risk of a lawsuit, even a meritless one. But under the First Amendment, producers do not have to get consent from every single person who is depicted in biographical works, documentaries, news, and fiction; otherwise celebrities, and others, could block any critical or unsanitized depictions of them.

B. Fictionalizations Are as Protected as Fully Factual Accounts

Guglielmi and *Comedy III* make clear that speech need not be completely factual to be constitutionally protected; fictionalization is protected as well. "[C]ourts have often observed that entertainment is entitled to the same constitutional protection as the exposition of ideas." (*Comedy III Prods.*, *supra*, 25 Cal.4th at 398 [citing *Guglielmi*, *supra*, 25 Cal.3d at 867 [Bird, C.J., concurring]].) Fictional films are "a significant medium for the communication of ideas," and they are fully protected by the First Amendment even when "they are designed to entertain as well as to inform." (*Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 501–02; see also *Winters v. New York* (1948) 333 U.S. 507, 510 [explaining that both entertainment and news are fully protected by the First Amendment because "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right"].)

Guglielmi itself involved a work of fiction. Likewise, in *Polydoros v. Twentieth Century Fox Film Corp.*, *supra*, 67 Cal.App.4th at 323–25, this Court held that even if the movie *The Sandlot* (Twentieth Century Fox 1993) depicted the plaintiff (Michael Polydoros) as one of the characters (Michael

Palledorous) in the semi-biographical film, the First Amendment protected the use of his identity in the movie from right of publicity and right of privacy claims.[3] (See also *Noriega v. Activision/Blizzard, Inc.* (Cal. App. Oct. 27, 2014, BC551747) 2014 WL 5930149, at *4 [holding that use of former Panamanian dictator's name and likeness as a character in a fictionalized video game was protected by the First Amendment from a right of publicity claim]; *Sarver*, *supra*, 813 F.3d 891 [holding that First Amendment protects filmmakers from right of publicity claim arising out of realistic portrayal of character based on plaintiff].)

Indeed, some degree of artistic license is inevitable in accessible, vivid biography. Consider, for instance, the works of Kitty Kelley, a well-known unauthorized biographer of celebrities, including celebrities such as Frank Sinatra, Oprah Winfrey, and Nancy Reagan. Kelley's practice is to reconstruct conversations imaginatively, as the creators of *Feud* did. (Weinberg, *The Kitty Kelley Syndrome: Why you can't always trust what you read in books* (1991) 30 Colum. Journalism Rev. 36 [discussing liberties taken by Kelley and other biographers].) These biographers try to keep the general outlines of the story and the fundamental truth, but invent details for narrative coherence, convenience, drama, and to engage their viewers and readers. The court below concluded that these same techniques render *Feud* unworthy of protection against de Havilland's right of publicity claim.

Pulitzer-winning author Bob Woodward likewise employs creative interpolation in his histories and biographies of important figures. (Luce,

[3] De Havilland contends that *Polydoros* is not an applicable precedent, Brief in Opp. at 40, but the decision is squarely on point. This Court considered a right of publicity and commercial misappropriation claim brought against a biographical, fictionalized film and held that the First Amendment constitutionally protected the use from such a claim.

Lunch with the FT: Bob Woodward, Financial Times (June 5, 2009) <http://www.ft.com/content/960fcd0c-515e-11de-84c3-00144feabdc0>.)
And many other biographers tell real-life stories but use imagination to fill out the details of incidents. (See, e.g., Anderson, *King: A Comic's Biography* (2005) [featuring imagined conversations with Martin Luther King, Jr.]; Parisi, *Coltrane* (2012) [same, with artist]; Schnakenberg, *Kid Carolina: R. J. Reynolds Jr., a Tobacco Fortune, and the Mysterious Death of a Southern Icon* (2010) [same, with tycoon]; Zweibel, *Bunny: Gilda Radner—A Sort of Love Story* (2000) [same, with comic]; Thomas, *Ben Hogan's Secret: A Fictionalized Biography* (1997) [same, with golf great].) Even greater fictionalization, into a novel or children's book, also occurs regularly. (E.g., Bond & Simon, *Zora and Me* (2010) [about Zora Neale Hurston]; Fowler, *Z: A Novel of Zelda Fitzgerald* (2013); McLain, *The Paris Wife* (2011) [about Ernest and Hadley Hemingway]; Oates, *Blonde: A Novel* (2000) [about Marilyn Monroe]; Muñoz Ryan & Sis, *The Dreamer* (2013) [about Pablo Neruda].)

Such creative license is common even in political discourse: Maureen Dowd and Aaron Sorkin wrote an editorial in which the fictional Jed Bartlett (of the television series *The West Wing*) discusses the 2008 election with the very real Barack Obama. (Dowd, *Aaron Sorkin Conjures a Meeting of Obama and Bartlett*, N.Y. Times (Sept. 20, 2008) http://www.nytimes.com/2008/09/21/opinion/21dowd-sorkin.html.)
Similarly, a Republican official reportedly recently imagined a scenario in which John Kelly and Jim Mattis discuss tackling Trump if he "lunges for the nuclear football." (Preza, *GOP official imagines Kelly and Mattis discussed tackling Trump if he 'lunges for the nuclear football': report*, Rawstory (Oct. 10, 2017) http://www.rawstory.com/2017/10/kelly-and-

mattis-discussed-literally-tackling-trump-in-the-event-he-lunges-for-the-nuclear-football-report/.)

As long as fictionalization is nondefamatory and does not paint the plaintiff in a false light, it is protected by the First Amendment as a form of commentary on real-world events and people. The right of publicity should not be expanded to force changes to artistic and even political judgments of this type. As the Supreme Court has warned: "Giving broad scope to the right of publicity has the potential of allowing a celebrity to accomplish through the vigorous exercise of that right the censorship of unflattering commentary that cannot be constitutionally accomplished through defamation actions." (*Comedy III Prods.*, *supra*, 25 Cal.4th at 398.) The right of publicity cannot provide an end-run around the First Amendment protections afforded against defamation and false light claims that require that a plaintiff establish that the defendant acted with actual malice. (*Id.*.; *Time, Inc. v. Hill* (1967) 385 U.S. 374 [holding, in the context of a magazine article about a play inspired by true events, that liability for false light claims was limited to those in which the defendant had acted with actual malice]; *N.Y. Times Co. v. Sullivan* (1964) 376 U.S. 254 [adopting actual malice test for defamation claims to protect free speech].) The right of publicity cannot nullify these important constitutional protections articulated to prevent defamation and false light claims from obstructing speech about real people and real events, whether in new reporting, documentaries, fictionalized biographies, or straightforward fiction.

It may be that some uses of a public figure's identity in such a fictionalized biopic could be defamatory, but for purposes of right of publicity and privacy-based misappropriation claims there should be an absolute First Amendment bar to claims based on the bare use of a public

figure's identity in such works of fictionalized history. The trial court's holding to the contrary ignores the importance of creative works about the past and jeopardizes large classes of works long thought to be robustly protected by the First Amendment, including biographies, historical fiction, and other films and television shows that depict real people and real events.

Nor does *Eastwood v. Superior Court*, (1983) 149 Cal.App.3d 409, suggest a contrary conclusion here; and, if it did, that would contradict the binding California Supreme Court decisions discussed above. *Eastwood* involved the publication in the National Enquirer of a false story about a love triangle involving the actor Clint Eastwood. The article was presented to the public as factual news reporting and was a featured story on the cover of the paper. This Court distinguished Eastwood's claim from those arising out of works presented as fiction, as is the case here. *Id.* at 425–26. Even in the context of news reporting, this Court held that Eastwood's right of publicity claim could only prevail if he could establish actual malice by the defendant as to the falsity of the story. Eastwood was allowed to move forward in the case only because such actual malice was easily established as the National Enquirer had fabricated the entire story. *Id.* at 424–26.

In contrast, FX did not present *Feud* as news reporting, nor feature de Havilland in its promotion of the miniseries to attract viewers or advertisers. In the context of fiction, including fictionalized histories like *Feud*, there must be latitude for imagined scenarios, as discussed above. These are common conventions, and the mere use of imagined dialogue and scenarios—such as the fictionalized 1978 interview with de Havilland at the Academy Awards used as a framing device—does not remove the constitutional protection provided to uses of public figures in works of fiction.

C. Promotion of Biographical or Historical Works Is Also Protected by the First Amendment

To the extent that FX referred to or depicted the character based on de Havilland in promoting its miniseries *Feud*, such uses are also constitutionally protected. Uses of celebrities and others in advertising and promotion for protected expressive works have been held equally protected by the Supreme Court. (*Winter*, *supra*, 30 Cal.4th at 891 ["If the work is sufficiently transformative to receive legal protection, 'it is of no moment that the advertisements may have increased the profitability of the [work].'"] [citation omitted]; *Guglielmi*, *supra*, 25 Cal.3d at 873 ["Since the use of [a celebrity's] name and likeness in the film was not an actionable infringement of [the celebrity's] right of publicity, the use of his identity in advertisements for the film is similarly not actionable."]; *Polydoros*, *supra*, 67 Cal.App.4th at 325 [same]; *Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790, 797 [holding that advertisements and posters that used quarterback's name and likeness were as protected by First Amendment as underlying news story].)

D. The Trial Court's Decision Would Strip First Amendment Protection from a Vast Range of Important Works

The decision below could impose liability on some of the most successful and culturally significant works of entertainment of the past few decades, threatening an immense amount of creative and artistic work that is based on real people. The makers of the recent *Selma* (Paramount Pictures 2014) might be liable for a host of right of publicity violations unless they got permission from Andrew Young, John Lewis, and Harry Belafonte.[4] *Hidden*

[4] We note that actions by the heirs of the deceased, such as Martin Luther King Jr.'s heirs, are expressly prohibited by California statute in the context of an "audiovisual work" such as a "television program" from bringing a

Figures (Twentieth Century Fox 2016), a biographical drama about three black women who were mathematicians at NASA and played a vital role during the early days of the U.S. space program, might likewise violate the right of publicity of people depicted, including various white characters whose accurately depicted racism might well have led them, or their heirs, to decline permission—and the realistic depiction (similar to the style of *Feud*) would have led the trial court to call the work nontransformative. The makers of *Wormwood* (Netflix 2017), a recently released docudrama directed by Errol Morris that tells the story of a scientist who participates in a secret government biological warfare program, could likewise have been liable to numerous real people because many real people appear as characters. The producers of *I, Tonya* (Neon 2017), might find themselves looking at a lawsuit from the mother of Tonya Harding, depicted in the film (apparently fairly) as a cruel, cold, abusive woman. This is not a far-fetched possibility: Harding's mother is already objecting to scenes in the film, and if this suit by de Havilland proceeds, such biographical films may simply be impossible to make. (Rakowski & Effron, *Tonya Harding's mother says steak knife incident never happened, denies former Olympic Skater's abuse allegations*, ABC News, (Jan. 11, 2018) http://abcnews.go.com/US/tonya-hardings-mother-steak-knife-incident-happened-denies/story?id=52261073.) While filmmakers are not immune from defamation and false light claims, such claims are limited to false factual statements that harm a person's reputation and that (for public figures) were made with knowledge of their falsity (or recklessness as to falsity), and truth is always a defense. By contrast, the trial

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claim. (See Cal. Civ. Code §3344.1(a)(2) (West 2017).) Such claims should also be prohibited by the First Amendment, but such a First Amendment analysis is not necessary under California law for postmortem claims.

court's finding of liability precisely *because* the portrayal appears to be truthful and accurate risks paralyzing the depiction of real events.

Such a loss would be catastrophic for culture, entertainment, literature, and commentary, and would sharply change long-accepted wisdom about what sorts of stories can be told, movies made, and books written. One need only glance at recent Academy Award nominees to see the vast array of real-life stories with depictions of real people who could make the same right of publicity claim as de Havilland does here, from the people depicted in *Selma* and *Hidden Figures*, to *Spotlight* (Open Road Films (II) 2015), the 2016 Best Picture winner that told the true story of a team of investigative reporters who exposed a child molestation scandal and cover-up involving the Catholic church in Boston. Or one could consider *Moneyball* (Sony Pictures 2011), which depicted how Billy Beane and his colleagues from the Oakland Athletics used statistics to change professional baseball; or *The Social Network* (Sony Pictures 2010), which chronicled the rise of billionaire Facebook founder Mark Zuckerberg; or *The Big Short* (Paramount Pictures 2015), which told the story of a group of investors who foresaw the financial crisis of 2008. And the list is virtually endless, including *Jackie* (Fox Searchlight Pictures 2016), *Snowden* (Open Road Films (II) 2016), *American Sniper* (Warner Bros. 2014), *Zero Dark Thirty* (Sony Pictures 2012), *The Help* (Walt Disney Pictures 2011), *Frost/Nixon* (Universal Pictures 2008), *Capote* (Sony Pictures Classics 2005), *A Beautiful Mind* (Universal Pictures 2001), and *The Perfect Storm* (Warner Bros. 2000). Each of these films could have been blocked or used as the basis for liability for violating the rights of publicity of those depicted if the trial court's holding in this case stands. If the permission of every person whose biographical details are used for a minor character were required, it is unlikely that any of these films could

have been made, and significant commentary about vital real-world issues would have been lost or, at best, substantially distorted.

Television producers similarly draw on real people and events to create educational, entertaining, and critically acclaimed television shows. For example, HBO produced and distributed *The Immortal Life of Henrietta Lacks* (Home Box Office 2017), which tells the true story of a black woman whose cells were used to create the first successful, "immortal" human cell line, leading to many significant medical breakthroughs; *Game Change* (Home Box Office 2012), which followed John McCain's 2008 presidential campaign, from his selection of former Alaska Governor Sarah Palin as his running mate to their ultimate defeat in the general election; and *Too Big to Fail* (Home Box Office 2011), which addressed the complex and esoteric subject of the financial crisis of 2008. Many other purely fictional works incorporate real people as characters, or at least use their names; consider E.L. Doctorow's novel *Ragtime*, Steve Martin's play *Picasso at the Lapin Agile*, the musical *Avenue Q*, the Academy Award-winner *Forrest Gump* (Paramount Pictures 1994), and many more.[5]

Because California law protects identifiable indicia of people's personas, and because the court below indicated that accuracy of depiction was

[5] Doctorow, *Ragtime* (1975) [includes Harry Houdini, Evelyn Nesbit, Jacob Riis, and Emma Goldman, among others]; Martin, *Picasso at the Lapin Agile* (1993) [features Albert Einstein and Pablo Picasso and a character who, while not named, is obviously Elvis Presley]; *Avenue Q* (2003) [with a character playing former child star Gary Coleman]; *Forrest Gump* [includes depictions of Elvis Presley, Richard Nixon, John Lennon, and Abbie Hoffman, among others]; see also *Midnight in Paris* (Sony Pictures Classics 2011) [includes depictions of F. Scott Fitzgerald, Zelda Fitzgerald, Ernest Hemingway, Gertrude Stein, Pablo Picasso, and Cole Porter, among others]; *Ginger and Fred* (Metro-Goldwyn-Mayer 1986) [evokes Ginger Rogers and Fred Astaire].

nontransformative, if the result below were affirmed, each use of a recognizable element of a person's identity would risk liability—and be deemed nontransformative because it successfully evoked a celebrity. Orson Welles might never have made *Citizen Kane* (RKO Radio Pictures 1941), because it is inconceivable that William Randolph Hearst would have consented to having his "persona" depicted. Likewise, Steven Spielberg might have found insurmountable challenges in making the epic film *Saving Private Ryan* (DreamWorks Pictures 1998), which was inspired by the true story of Sergeant Frederick Niland, a real-life paratrooper in the 101st Airborne Division whose three brothers were killed in action. The end result would be to stifle numerous creative works—unless authors undertook the hugely expensive, and often impossible, task of obtaining releases from every single individual who might claim that his or her persona was used for a character in the work.

Fortunately, as discussed, the law does not require such results. As *Guglielmi, Comedy III*, and the other cases cited above make clear, the First Amendment fully protects nondefamatory depictions of real people in expressive works, whether in fictional or non-fictional settings, and whether or not the works are created with the hope of profit.

E. The First Amendment Requires Strict Scrutiny of Right of Publicity Claims Arising Out of Uses in Expressive Works

California law is clear that a nondefamatory use of public figures as characters in a fictionalized biopic like *Feud* is fully protected speech immune from right of publicity claims. Any other interpretation of the scope and applicability of California's right of publicity would run afoul of the First Amendment. Recent federal cases make clear that right of publicity claims arising from the use of real-life people in expressive works, like the use of

de Havilland in *Feud*, must be subject to strict scrutiny—and the plaintiff's claim here cannot pass such scrutiny. (See *Sarver*, *supra*, 813 F.3d at 903–04.)[6] In *Sarver*, the Ninth Circuit Court of Appeals noted that the film *The Hurt Locker* (Summit Entertainment 2009) was "fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays." (*Sarver*, *supra*, 813 F.3d at 905–06.) The court concluded that the plaintiff's right of publicity claim arising out of the alleged use of his identity in the film could not survive strict scrutiny.

By targeting particular kinds of information (names, likenesses, and such), "California's right of publicity law clearly restricts speech based upon its content" and is therefore "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." (*Sarver*, *supra*, 813 F.3d at 905–06; see also *In re Brunetti* (Fed. Cir. 2017) 877 F.3d 1330, 1348–349 [holding that limits on the federal registration of trademarks are content-based speech restrictions subject to strict scrutiny, at least as to noncommercial speech]; Volokh, *Freedom of Speech and the Right of Publicity* (2003) 40 Hous. L. Rev. 903, 912 fn. 35 [concluding that the right of publicity is a content-based speech restriction subject to strict scrutiny]; Lemley & Volokh, *Freedom of Speech*

[6] *Sarver* relied on the U.S. Supreme Court's recent decision in *Reed v. Town of Gilbert* (2015) 135 S.Ct. 2218, 2230, which makes clear that content-based speech restrictions (even ones that do not discriminate based on viewpoint, but are based only on subject matter or other elements of content) must be subject to strict scrutiny.

and Injunctions in Intellectual Property Cases (1998) 48 Duke L.J. 147, 206, 216–29 [same].[7])

There is no compelling state interest in letting famous people censor how they are portrayed in biographies, docudramas, or outright fiction. Though the *Sarver* decision involved a private figure, the First Amendment interest is if anything even stronger with speech about the famous and powerful. (*Sarver*, *supra*, 813 F.3d at 905.) The bomb disposal expert in *The Hurt Locker* need not have been identified as any specific person, and indeed was not named in the film. But historical figures, such as Olivia de Havilland, Manuel Noriega, and Martin Luther King Jr., must be identified as those specific people to accurately depict historical events, or to provide the realism and meaning necessary for fictional works that include references to real people and events. "No author should be forced [by threat of a right-of-publicity claim] into creating mythological worlds or characters wholly divorced from reality." (*Guglielmi*, *supra*, 25 Cal.3d at 869 [Bird, C.J., concurring].)

Nor does allowing such uses disrupt celebrities' incentives to continue in their careers or unjustly enrich the storytellers who have brought their own sweat and labor to their creative projects. Celebrities have more than enough incentive to pursue their crafts without the government giving them a monopoly on the use of their names and likenesses in expressive works. (See, e.g., Stacey Dogan & Mark Lemley, *What the Right of Publicity Can Learn from Trademark Law* (2006) 58 Stan. L. Rev. 1161, 1187–88 [noting that

[7] *Amici* focus here on speech other than purely commercial advertising, given that commercial advertising receives less robust First Amendment protection. *Amici* express no opinion on whether the right of publicity could apply more broadly to commercial advertising for nonexpressive products.

there is "[n]ot a shred of empirical data" showing that celebrities are incentivized by publicity rights because they are already "handsomely compensated," and observing that, in any event, "it is not at all clear that society should want to encourage fame for fame's sake"]; Volokh, *supra*, 40 Hous. L. Rev. at 910–11 [the right of publicity provides at most a "small speculative increase" in the incentive to become famous].) The U.S. Supreme Court's decision in *Zacchini* allowed liability for the rebroadcast of a performer's entire act, on the theory that "the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer." (*Zacchini, supra*, 433 U.S. at 576.) But a work such as *Feud* does not even slightly undermine de Havilland's ability to earn a living as an actress, much less "go[] to the heart of" that ability.

Celebrities, by virtue of their fame, also have access to the press to speak for themselves if they disagree with their characterization in works of historical fiction. Counterspeech is a venerable, less restrictive alternative to granting them control over others' speech, and its availability provides another reason why the right of publicity as the trial court interpreted it cannot satisfy strict scrutiny.

Fortunately, this Court need not reach the broader issue of what kinds of right of publicity claims could survive strict scrutiny. *Guglielmi*'s and *Comedy III*'s position as to biographies, docudramas, and the like is consistent with the *Sarver* and *Reed* requirement of strict scrutiny for content-based speech restrictions on noncommercial speech. Precisely because right of publicity liability for such works unduly interferes with

creators' free speech rights, *Guglielmi* and *Comedy III* assure constitutional protection to works such as *The Hurt Locker* and *Feud*.

II. To the Extent that Plaintiff's Claim Depends on an Endorsement Theory, the Proper Approach Is Set Out by the Relatedness Test of *Guglielmi* and the *Restatement (Third) of Unfair Competition*

The trial court, picking up on de Havilland's arguments that viewers might assume that she consented to her portrayal, suggested that this was potentially relevant to a determination of whether *Feud* violated her right of publicity. (Ruling at 10–11; TAC at 10–11.) But depiction alone—without anything else—cannot indicate endorsement. Such an inference of endorsement is both implausible and impermissible under the First Amendment. Indeed, if accepted, it would jeopardize virtually all biographical works, unless the authors have gotten the permission of every character mentioned in the work. Indeed, even biographies marketed "unauthorized" would not be immune from similar claims brought by minor characters—that Donald Trump did not authorize a biography says nothing about Marla Maples' consent.

Chief Justice Bird's analysis in *Guglielmi* (endorsed by a majority of the Court) rejected this basis for allowing right of publicity and false endorsement claims. To fall outside constitutional protection for using a real person as a character in a biographical film, that opinion reasoned, the use must be "wholly unrelated to the individual," such as in a hypothetical "Rudolph Valentino's Cookbook" in which "neither the recipes nor the menus described in the book were in any fashion related to Rudolph Valentino." (*Guglielmi, supra*, 25 Cal.3d at 865 fn.6.) The opinion concluded that, when a use is not "wholly unrelated" or used to "promote or endorse a collateral commercial product or is otherwise associated with a product or service in an advertisement," then the use, such as of Valentino's name in the

television movie and related advertisements, is protected against right of publicity claims. (*Id*.)

This test from *Guglielmi* for determining when the use of a person's identity might lose constitutional protection from right of publicity claims was later adopted by many federal courts and by the *Restatement (Third) of Unfair Competition* as the standard test for when right of publicity and false endorsement claims should survive a First Amendment defense. The Second Circuit in *Rogers v. Grimaldi* cited favorably and extensively to the *Guglielmi* opinion and adopted California's approach as its own, in what is often referred to by courts as the *Rogers* test. (*Rogers*, *supra*, 875 F.2d at 1004.) In *Rogers*, the court concluded that even an expressive work's title—and certainly the work's content—may include a person's identity without triggering liability for false endorsement, unless the use is "'wholly unrelated' to the individual [or] used to promote or endorse a collateral commercial product." (*Id.* at 1004–05.) Such a conclusion, the Second Circuit reasoned, "recogniz[ed] the need to limit the right to accommodate First Amendment concerns." (*Id.* at 1004; see also *Restatement (Third) Unfair Comp.* § 47 cmt. c (1995) [proposing that "entertainment or other creative works" be exempted from all liability for uses of others' identities unless a "name or likeness is used solely to attract attention to a work that is not related to the identified person"].) In *Rogers*, the Second Circuit upheld Federico Fellini's right to use Ginger Rogers' identity in the contents and the title of a fictional work called *Ginger and Fred*, a film about two entertainers who patterned their lives on Ginger Rogers and Fred Astaire.[8]

[8] The *Rogers* test primarily considers, for both trademark and right of publicity claims, whether the use is "artistically relevant." It then considers for trademark cases whether the use is "explicitly misleading" and for right

The use of de Havilland's name and likeness in *Feud* clearly does not lose its constitutional protections under the relatedness test. Such use of de Havilland's identity as a character in *Feud* is artistically relevant to telling the story of the feud between Bette Davis and Joan Crawford. De Havilland was friends with Davis and a well-known part of the Hollywood milieu in which the series of events depicted took place. Nor did the producers of *Feud* use de Havilland's identity to promote any "collateral" or unrelated products or merchandise. FX did not explicitly mislead viewers as to her participation. In fact, the use of de Havilland's identity was fairly minor, and much less than that held constitutionally protected in *Rogers*—de Havilland's name was not used in the title of the work, nor was she a primary character or the focus of the miniseries.

Allowing right of publicity claims like those brought by de Havilland here would eviscerate the speech protections afforded by federal trademark law and the First Amendment that limit false endorsement claims in the context of expressive works. When a right of publicity claim depends on an endorsement theory, it should be treated consistently with other false endorsement claims, at least as to speech outside the special context of commercial advertising. (Cf. *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46, 52–57 [concluding that the tort of intentional infliction of emotional distress had to be subjected to the same First Amendment standards as defamation claims when asserted against a magazine's humorous portrayal of a celebrity].)

California appellate courts and the Ninth Circuit Court of Appeals agree that the *Guglielmi*/*Rogers*/relatedness standard governs First Amendment-

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of publicity cases whether the use is really a "disguised commercial advertisement." (*Rogers, supra*, 875 F.2d at 1000, 1004.)

based defenses to false endorsement claims arising out of the content of an expressive work or related promotion. (See, e.g., *Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal.App.4th 579, 587–95 [applying *Rogers* to reject false endorsement claim arising out of use of plaintiff's marks in the title of a film and on the DVD cover]; *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.* (9th Cir. 2008) 547 F.3d 1095, 1100 [applying *Rogers* test in context of videogame]; *Mattel, Inc. v. MCA Records* (9th Cir. 2002) 296 F.3d 894, 902 [same in context of song title].)

The right of publicity, which has no likelihood of confusion requirement, is "potentially more expansive than [federal trademark law]." (*Rogers, supra*, 875 F.2d at 1004.) At the same time, the interests furthered by the right of publicity are less significant than those furthered by trademark law—the right of publicity mainly protects the private interests of celebrities, whereas trademark law protects the interests of the entire consuming public as well as of trademark holders against consumer confusion. Use of a celebrity's identity itself, absent some other affirmative and misleading act indicating endorsement, cannot be parlayed into an endorsement claim without threatening liability for every portrayal of a celebrity.

CONCLUSION

The trial court erred by allowing de Havilland's right of publicity claim to proceed. Her claim cannot withstand constitutional scrutiny. References to real people in works of fiction, fictionalized biographies, and nonfiction, like that of a character-based on de Havilland in *Feud*, are categorically protected under both California law and the First Amendment to the U.S. Constitution.

Dated: January 24, 2018

Respectfully submitted,

By: /s/ Jennifer E. Rothman
/s/ Eugene Volokh
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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief is produced using 13-point Times New Roman font including footnotes and contains 7,139 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of Word 365, the computer program used to prepare this brief.

Dated: January 24, 2018

Respectfully Submitted,

By: /S/ Jennifer Rothman
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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is UCLA School of Law, 405 Hilgard Ave., Los Angeles, CA 90095.

On January 24, 2018, I served true copies of the BRIEF OF *AMICI CURIAE* INTELLECTUAL PROPERTY AND CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLANTS on the interested parties in this action as follows:

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AS TO SERVICE BY MAIL: I caused the document to be enclosed in a sealed envelope addressed to the persons at the addresses listed in the Service List as being served by mail, and to have it placed in the U.S. Postal Service mailbox with the postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 24, 2018, at Los Angeles, California.

s/ Eugene Volokh
Eugene Volokh

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