No. 18-453

# In the Supreme Court of the United States

OLIVIA DE HAVILLAND, DBE,

*Petitioner,*

v.

FX NETWORKS, LLC AND PACIFIC 2.1 ENTERTAINMENT GROUP, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether the California Court of Appeal erred in holding, under the state's anti-SLAPP statute, that Petitioner could not proceed with her claims for:

(1) false-light invasion of privacy, because (a) as a matter of California law, Respondents' portrayal of Plaintiff was not "highly offensive" and thus not actionable; and (b) as a matter of law, Petitioner, who indisputably is a "public figure," could not show that Respondents acted with "actual malice" in their depiction of Petitioner; and

(2) violation of California's common law and statutory right of publicity, where the court concluded that Respondents' portrayal of a character based on Petitioner was "transformative" as a matter of law and therefore subject to a complete defense under California Supreme Court precedent?

## CORPORATE DISCLOSURE STATEMENT

Respondents are FX Networks, LLC and Pacific 2.1 Entertainment Group. Inc. Respondents' ultimate parent company is Twenty-First Century Fox, Inc., a publicly traded company. There is no parent or publicly held company owning 10% or more of Twenty-First Century Fox, Inc.'s stock.

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## INTRODUCTION

Applying its state's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, the California Court of Appeal unanimously held that Petitioner had no probability of prevailing on her claims that Respondents placed her in a false light or violated her right of publicity through their inclusion of an Olivia de Havilland character in the Emmy-winning miniseries *Feud: Bette and Joan* ("*Feud*"). The court's decision rested on a straightforward application of well-established law. Petitioner's mischaracterizations of *Feud* and of the court of appeal's opinion fail to obscure the fact that there is nothing cert-worthy about this case.

Contrary to Petitioner's hyperbole, the court of appeal did not hold that the First Amendment "grant[s] absolute immunity to docudramas," (Pet. at 13)—nor anything close to that. The court actually held, far more modestly, that Petitioner's false-light claim failed as a matter of law because (1) she could not show that the snippets of dialogue that formed the basis for her claim were "highly offensive to a reasonable person," as they must be under California law for Petitioner to have a claim (Pet. App. at 29a-34a); and (2) alternatively, Petitioner had no evidence that Respondents, who indisputably tried to portray Petitioner as the wise and respectful counselor and friend to Davis that she was in real life, acted with "actual malice," as *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny require in a case of alleged public-figure defamation (Pet. App. at 37a-38a).

The court's first holding, which Petitioner barely acknowledges, provides an adequate and independent state-law ground for the decision below, with the consequence that this Court has no certiorari juris-

diction under 28 U.S.C. § 1257 to review the dismissal of the false-light claim. Moreover, the court's alternative holding is a factbound application of the "actual malice" standard that does not merit this Court's review, even if the Court had jurisdiction.

Petitioner's arguments for review of the court of appeal's right-of-publicity ruling—set forth largely in one footnote in the Petition—likewise miss the mark. The court of appeal did not hold that the First Amendment absolutely immunizes any use of "the name and identity of a living person" in a docudrama, irrespective of other facts; nor did the court's decision rest on a purely quantitative analysis of "how many minutes of time are spent on subjects other than the" right-of-publicity plaintiff. (Pet. at 19 n.34.) The court instead held that the First Amendment applied to *Feud*, an expressive work, and that there was no evidence that Respondents falsely implied Petitioner's endorsement of the miniseries. The court also held, under California Supreme Court precedent, that Respondents had a "transformative" defense to Petitioner's right-of-publicity claim, both because Petitioner's name and likeness were simply "raw materials" from which the larger work was "synthesized," and because the primary economic value of *Feud* did not derive from Petitioner's fame. (Pet. App. at 27a.) Petitioner presents no grounds justifying this Court's review of these factbound determinations.

## STATEMENT OF THE CASE

### A. Factual Background

#### 1. *Feud: Bette and Joan*

*Feud* is an eight-part televised miniseries that tells the story of the legendary rivalry between the actors Bette Davis and Joan Crawford.

The series' initial episodes focus on the conflicts between Davis and Crawford during the 1962 filming of *Whatever Happened to Baby Jane?* ("*Baby Jane*"), the only movie in which both appeared. Later episodes portray the fallout from that experience, including the ill-fated attempt by *Baby Jane*'s director, Robert Aldrich, to reprise the Davis-Crawford pairing during the 1964 filming of *Hush … Hush, Sweet Charlotte* ("*Charlotte*"). Crawford was eventually fired from *Charlotte*, and Petitioner replaced her in the movie.

*Feud* uses the Davis-Crawford relationship from 1960s Hollywood to explore current-day issues affecting women, including ageism, sexism, the glass ceiling, and how the culture of Hollywood pits women against each other. (Pet. App. at 4a.)

*Feud* was not written, developed, produced, or presented as a documentary. (Pet. App. at 6a.) Nor could any viewer reasonably think *Feud* was presenting a verbatim retelling of history. Pithy dialogue, stylized action, pointed song cues, and narrative structure bring the Davis-Crawford feud to life for a contemporary audience. An all-star cast, including Oscar winners Susan Sarandon and Jessica Lange in the title roles, lends dramatic performances that are

set against original music, editing, lighting, and cinematography.

Any viewer would immediately recognize *Feud* as a docudrama, a time-honored genre that includes everything from Shakespeare's histories to modern-day miniseries and movies. Docudramas by their nature draw narratives and universal themes from historical events.[1] In the tradition of this genre, *Feud*'s creators conducted extensive research to ground the show's dramatized scenes in the historical record. (*See, e.g.*, Pet. App. at 46a, 50a, 56a (quoting Minear Decl. ¶¶ 15-16).) As with all docudramas, the writers' primary objective was not to summarize or reprise reported facts, but rather to create an original narrative that provides the audience with a "dramatized retelling of history." (Pet. App. at 6a.)

*Feud* earned widespread praise for its depiction of its "stark theme" and for its transformation of a much-discussed Hollywood rivalry into "lovely, heartbreaking art."[2] It received 18 Emmy nominations

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[1] *See, e.g.*, *Citizen Kane*, *Schindler's List*, *Ed Wood*, *Apollo 13*, *A Beautiful Mind*, *Life with Judy Garland: Me and My Shadows*, *Catch Me If You Can*, *Angels in America*, *The Aviator*, *Walk the Line*, *The Queen*, *Milk*, *The Blind Side*, *Selma*, *Game Change*, *The Social Network*, *The King's Speech*, *Argo*, *Too Big to Fail*, *Behind the Candelabra*, *The Big Short*, *Fruitvale Station*, *Straight Outta Compton*, *Steve Jobs*, *The People v. O.J. Simpson: American Crime Story*, *Loving*, *Hidden Figures*.

[2] *See, e.g.*, Emily Nussbaum, *"Feud": A Bittersweet Beauty*, THE NEW YORKER (Mar. 20, 2017), *available at* https://www.newyorker.com/magazine/2017/03/20/feud-a-bittersweet-beauty; Melanie McFarland, *With "Feud: Bette and Joan," a Hollywood Rivalry for the Ages Becomes an Epic TV Experience*, SALON (Mar. 4, 2017), *available at* https://www.salon.com/2017/03/04/ (footnote continued)

across multiple categories, including writing, directing, production design, costumes, title design, music composition, and acting. (Pet. App. 4a.)

### 2. *Feud*'s de Havilland Character

*Feud*'s creators included a de Havilland character because Petitioner was a close friend and well-known confidante of Davis and was a real-life participant in events that *Feud* dramatizes. For example, Crawford's firing from *Charlotte*, and Petitioner's replacement of her, is a pivotal plot point in *Feud*. In addition, Petitioner had a well-known and much-publicized "feud" with her own "Joan," namely, her sister, the actor Joan Fontaine.

The Petition erroneously describes the de Havilland character as *Feud*'s "narrator, allegedly endorsing the theme of vulgar-speaking, cat-fighting, back-biting female Hollywood stars." (Pet. at 5.) The de Havilland character did not "narrate" the series. She is one of a number of characters based on Davis-Crawford contemporaries who appear in mock "interviews" just offstage at the 1978 Academy Awards, and whose comments serve as jumping-off points for the story's main action, which is set in the previous decade. (Pet. App. at 4a, 6a.)

As the court of appeal observed, *Feud*'s portrayal of Petitioner "is overwhelmingly positive." (*Id*. at 33a.) Oscar winner Catherine Zeta-Jones portrayed Petitioner. The de Havilland character comes across "as beautiful, glamorous, self-assured, and considerably ahead of her time in her views on the importance of equality and respect for women in Hollywood." (*Id*.

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with-feud-bette-and-joan-a-hollywood-rivalry-for-the-ages-becomes-an-epic-tv-experience/.

at 4a, 33a.) The de Havilland character also appears in a small number of scenes with Davis, and is portrayed as "a wise, respectful friend and counselor" to her longtime friend. (*Id.* at 4a, 38a.)

The de Havilland character plays a limited role in the series. The character appears on screen for just 17 of *Feud*'s nearly 400 minutes of running time. (*Id.* at 4a.)

### B. State Court Proceedings

#### 1. Petitioner's Claims

Petitioner filed suit in California Superior Court on June 30, 2017, asserting claims for (1) false light invasion of privacy, and (2) violation of California's common law and statutory right of publicity.[3]

***False-light claim***. Petitioner alleged that four elements of *Feud* cast her in a false light:

(i) Petitioner first alleged that *Feud*'s portrayal of her in the offstage interview at the Academy Awards was false, because she gave no such interview. She further alleged that the interview was "highly offensive" (a necessary element of her false-light claim, *see* Pet. App. at 29a) because, according to Petitioner, the interview made her out to be a "gossip." (Pet. App. at 31a (internal quotations omitted).)

(ii) Petitioner also alleged that *Feud* cast her in a false light because the de Havilland character twice

[3] Petitioner also asserted a claim for unjust enrichment. The court of appeal held as a matter of California law that without a false-light or right-of-publicity claim, Petitioner had no basis for seeking unjust enrichment. (Pet. App. at 38a.) Petitioner does not challenge that ruling in this Court.

utters the word "bitch" in references to her sister. Petitioner asserted that she did not use that particular word to describe Fontaine, and that she had avoided publicly discussing her and Fontaine's famously fraught relationship. The de Havilland character first uses the word in a scene depicting a private telephone call with the Davis character. During that call, Davis describes her contentious relationship with Crawford and the press's efforts to fuel the animosity. (*Id.* at 35a.) The de Havilland character "decries gossip" and counsels Davis to fend off press inquiries about Crawford with a simple "no comment." (*Id.* at 51a (quoting Minear Decl. ¶ 18).) Davis then refers to the much-publicized de Havilland-Fontaine feud, which prompts the de Havilland character to say that her "bitch sister" has started telling the press that she broke Fontaine's collarbone when they were children. (*Id.* at 35a.)

(iii) The other instance of the de Havilland character saying "bitch" occurs in a scene depicting a private telephone conversation between Aldrich (the director of *Baby Jane* and *Charlotte*) and de Havilland. The Aldrich character begs de Havilland to replace Crawford in *Charlotte*, which de Havilland ultimately did. In the scene in question, however, the de Havilland character demurs, telling Aldrich: "Oh no, I don't do bitches. They make me so unhappy. You should call my sister." (Pet. App. at 35a.) *Feud*'s writers took this line nearly verbatim from a 1989 book, *Bette & Joan: The Divine Feud*, which describes the same Aldrich-de Havilland conversation. (*Id.* at 36a, n. 15.)

(iv) Finally, Petitioner challenged a line of dialogue referring to Frank Sinatra during a Davis-de Havilland scene at the 1963 Academy Awards. Sina-

tra hosted the Awards that year, and de Havilland accompanied Davis, who had been nominated for Best Actress for her performance in Baby Jane, to the show. The scene in question takes place while Davis and de Havilland are waiting in Sinatra's dressing room for the Best Actress announcement. The de Havilland character tries to lift the spirits of a nervous Davis, and at one point says, "This is supposed to be a celebration." Davis laughingly responds by asking, "Well then, where's the booze?," and de Havilland quips, "I think Frank must've drunk it all." (*Id.* at 28a-29a.) Petitioner alleged that she had never commented to Davis about Sinatra's drinking habits. Although Sinatra's fondness for drinking is legendary, Petitioner alleged it was highly offensive for *Feud* to portray her making a lighthearted joke about it.

***Right-of-publicity claim***. Petitioner also alleged that Respondents unlawfully misappropriated her name and likeness by including a de Havilland character without her consent. (Pet. App. at 2a.) Petitioner asserted that she had a right, under both California common law and statute, to be compensated for the appearance of a de Havilland character, even in a work that dramatized Petitioner's actual role in real-life events. Petitioner submitted a report from a putative "expert" asserting that Petitioner was entitled to be paid $1.38 and $2.1 million for the use of a character based on her—compensation that, as the court of appeal noted, would have amounted to between $84,000 and $127,000 for each minute that Zeta-Jones appeared on screen as Petitioner. (*Id.* at 7a.)

### 2. The Trial Court's Decision

Respondents filed a motion to strike the complaint under California's anti-SLAPP statute, which provides a "procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party's constitutional rights of [] free speech." (*Id.* at 10a.) To maintain her suit, Petitioner had to prove with admissible evidence a probability that she would be able to establish every element of each of her claims. Cal. Civ. Proc. Code § 425.16(b)(1); *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006). Respondents supported their motion with extensive video, documentary, and physical evidence (including declarations from *Feud*'s creators and all eight episodes of the series), all of which showed the extensive historical research and artistic intentions that went into crafting *Feud*. (Pet. App. at 6a.)

The trial court denied Respondents' anti-SLAPP motion. The court held that Petitioner had established a probability of prevailing on her false-light claim by submitting a declaration in which she denied uttering the challenged lines of dialogue. (*Id.* at 46a-50a.)

The trial court also held that Petitioner's right-of-publicity claims survived Respondents' anti-SLAPP motion because Respondents tried "to make the appearance of [Petitioner] as real as possible." (*Id.* at 69a.)

### 3. The Court of Appeal's Decision

Respondents exercised their right under state law to appeal immediately the trial court's denial of the anti-SLAPP motion. Without opposition from Respondents, Petitioner moved for, and was granted,

expedited treatment of the appeal at the California Court of Appeal. That court unanimously reversed the trial court's decision in a careful, comprehensive 39-page opinion. Proceeding element by element through both of Petitioner's claims, the court held that long-standing principles of California law and the First Amendment compelled dismissal of both claims for several reasons. Neither of the court's holdings relied on any novel rules of law for docudramas or granted works in the genre "absolute immunity" from suit under the First Amendment. (*Contra* Pet. at 13.)

***False-light claim***. The court of appeal held that Petitioner's false-light claim failed on multiple grounds. As a threshold matter, given viewers' general understanding that dramatic devices and dialogue are part of the "drama" in docudrama, the court "question[ed] whether a reasonable viewer would interpret *Feud*—a docudrama—as entirely factual." (Pet. App. at 31a.)

"[A]ssuming for argument's sake" that viewers "would see the scenes in question as literal statements of actual fact," the court of appeal held, as a matter of state law, that *Feud*'s depiction of Petitioner would not be "highly offensive to a reasonable person," nor was it defamatory. (*Id*. at 31a-34a.) The court emphasized the "overwhelmingly positive" portrayal of the de Havilland character, "[t]aken in its entirety and in context," as it must be under settled California law. (*Id.* at 33a.)

The court of appeal further held that the "bitch" remarks were not actionable because, in addition to not being highly offensive to a reasonable person, they were "substantially truthful characterizations of [Petitioner's] actual words" in describing her sister.

(*Id.* at 34a-36a.) The court relied on uncontroverted evidence that Petitioner had said in a published interview that she had taken to referring to her sister as "Dragon Lady." (Pet. App. at 6a-7a.) *Feud*'s writers had the de Havilland character use "bitch," rather than "Dragon Lady," in order to dramatize the undisputed acrimony between Petitioner and her sister in a way that would resonate with a contemporary audience. (*Id.* at 35a-36a.)

Finally, the court held that the false-light claim independently failed because Petitioner had not demonstrated a probability of showing actual malice, as the First Amendment required her to do. (*Id.* at 36a-37a.) Petitioner's claim was based on defamation by implication, *i.e.*, she challenged statements that were "of ambiguous meaning, or innocent on their face and [claimed to be] defamatory only in light of extrinsic circumstances." *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 33 (2007) [quotation omitted].) The court of appeal held that because the defamatory aspect of the portrayal was implied, Petitioner had to introduce evidence that Respondents "intended to convey the defamatory impression." (Pet. App. at 37a (quoting *Dodds v. American Broad. Co.*, 145 F.3d 1053, 1063-1064 (9th Cir. 1998)). This meant Petitioner had to show that Respondents "either deliberately cast [her] statements in an equivocal fashion in the hopes of insinuating a defamatory import to the [viewer], or that [Respondents] knew or acted in reckless disregard of whether [their] words would be interpreted by the average [viewer] as defamatory statements of fact." (*Id.* (quoting *Good Gov't Grp. of Seal Beach, Inc. v. Superior Court*, 22 Cal.3d 672, 684 (1978)).) The court held Petitioner could not meet this standard as a matter of law because the evidence only allowed the opposite conclusion: *Feud*'s creators

intended to convey a *positive* impression of Petitioner. (Pet. App. at 38a.)

***Right-of-publicity claim***. The court held that Petitioner's right-of-publicity claim failed for two independent reasons.

First, the court held that Respondents' expressive work about real-life events was protected by the First Amendment, and that there was no evidence supporting Petitioner's claim that Respondents falsely implied Petitioner's endorsement of *Feud*. (*Id.* at 17a-23a.)

Second, the court of appeal held that Petitioner's right-of-publicity claim failed in light of California law's "transformative" defense. The California Supreme Court formulated this exception to California's right of publicity in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001). The court held that Petitioner could not overcome this defense as a matter of law because her likeness was but "one of the 'raw materials' from which [the] original work [*Feud*] [was] synthesized," and because *Feud*'s marketability and economic value derived "principally from . . . the creativity, skill, and reputation" of *Feud*'s creators and actors, not Petitioner's fame. (Pet. App. at 27a (quoting *Comedy III*, 25 Cal.4th at 406-407).)

The court of appeal directed the trial court to enter a new order granting Respondents' motion to strike Petitioner's complaint and awarding Respondents their attorney's fees and costs, as required under the anti-SLAPP statute. (Pet. App. at 39a. (quoting Cal. Civ. Proc. § 425.16(c)).) The California Supreme Court denied Petitioner's petition for review. (Pet. App. at 75a.)

## REASONS FOR DENYING THE PETITION

The Petition's central argument is that the California Court of Appeal adopted a sweeping rule that "the First Amendment grants absolute protection for knowing or recklessly published false statements in a docudrama format." (Pet. at 1.) The court of appeal did no such thing. Instead, the court correctly applied well-settled law and concluded, based on the particular facts before it, that Petitioner had no probability of establishing the requisite elements of her false-light and right-of-publicity claims. This Court need not and—at least as to the false-light claim—cannot review these factbound dismissals, neither of which conflicts with any decision of this Court or any other. The Petition should be denied.

### I. This Court Cannot and Should Not Review the Dismissal of Petitioner's False-Light Claim

#### A. This Court Lacks Jurisdiction Over Petitioner's False-Light Claim

It is well established that this Court's "only power over state court judgments is to correct them to the extent they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). As a result, this Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court where that judgment rests on a state ground that is both "independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *see also Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (where state court decision is based on "bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision").

In seeking review of the court of appeal's decision to dismiss her false-light claim, Petitioner runs up against this longstanding limitation on the Court's 28 U.S.C. § 1257(a) jurisdiction. Separate and apart from its First Amendment holding that Petitioner could not prove actual malice, the court of appeal held that Petitioner's false-light claim failed under California law because the portrayal of Petitioner was not, as a matter of California law, highly offensive. This alternative state-law ground for the dismissal of the false-light claim means this Court has no jurisdiction over that ruling.

To proceed with her state-law false-light claim over Respondents' anti-SLAPP motion, Petitioner bore the burden to demonstrate a reasonable probability that she could prove each of the four elements of her false-light claim: that the challenged statements in *Feud* were "(1) assertions of fact, (2) actually false or create a false impression about her, (3) highly offensive to a reasonable person or defamatory, and (4) made with actual malice." (Pet. App. at 29a-30a.) After evaluating the parties' evidence, the court of appeal concluded that Petitioner could not prevail *as a matter of state law*, before even reaching any constitutional issues. (*Id.* at 32a-34a.)

The court's state-law ground was tied to the "highly offensive" (or defamatory) element of the tort. After viewing *Feud* in its entirety, the court of appeal held that the series' portrayal of Petitioner did not cast her in a "highly offensive" light. (*Id.* at 31a-33a.) Under settled California law, the "highly offensive" inquiry considers whether the audience would recognize the portrayal as "expos[ing] a person to hatred, contempt, ridicule, or obloquy." *Brodeur v. Atlas Entm't, Inc.*, 248 Cal. App. 4th 665, 678 (2016). This

question is considered from the perspective of a reasonable person "of ordinary sensibilities" viewing the statements in their original context. (Pet. App. at 31a (quoting *Aisenson v. American Broad. Co.*, 220 Cal. App. 3d 146, 161 (1990)).) Viewed through that lens, the court of appeal concluded, as a matter of state law, that Petitioner could not meet her burden to prove objective offensiveness because "Zeta-Jones's portrayal of de Havilland is overwhelmingly positive." (*Id.* at 33a.)

The court of appeal's holding on this score is a "bona fide separate, adequate, and independent" ground for the court's decision. *Long*, 463 U.S. at 1041. Petitioner makes a glancing reference to the fact that the court of appeal held "as a matter of law" that the claimed falsehood "was not offensive." (Pet. at 11a.) But Petitioner scrupulously avoids the fundamental implication that flows from the court's state-law holding.

Because the decision below was based on the determination, under state law, that *Feud* is not highly offensive, "the same judgment would be rendered by the state court" no matter how this Court were to resolve Petitioner's broad challenge to the decision under the First Amendment. *Long*, 463 U.S. at 1042. For this reason alone, the Court should decline Petitioner's request to review the false-light holding.

### B. Even if this Court had Jurisdiction, the Court of Appeal's Factbound Application of the Actual Malice Rule Does Not Merit Certiorari Review

Even if this Court could exercise jurisdiction over Petitioner's false-light claim, it lacks compelling reasons to do so. Petitioner gamely tries to cast the

holding below as a broad grant of absolute immunity that runs counter to the decisions of this Court and other courts of appeals. But neither Petitioner's characterization, nor her assertion of a split, is accurate. The court of appeal issued a factbound decision that is entirely consistent with each of the cases Petitioner cites.

### 1. The Court of Appeal Did Not Issue a Sweeping Holding, but Rather Conducted a Factual Analysis Consistent with Settled Law

The court of appeal did not hold that docudramas enjoy absolute First Amendment immunity. Rather, the court of appeal assessed Petitioner's false-light claim by applying the well-settled actual-malice principle mandated by this Court. Based on the facts before it, the court concluded that Petitioner could not carry her burden under that standard. That factbound holding does not merit this Court's review.

In numerous decisions over the last half-century, this Court has grappled with how to balance the "constitutional protections for speech and press" with the need to protect public officials and public figures from injurious defamatory statements.

In *New York Times*, the Court considered a libel suit brought by a Public Safety Commissioner against the New York Times because of an advertisement the newspaper had published that contained several allegedly false statements. The Court began by emphasizing its commitment "to the principle that debate on public issues should be uninhibited, robust, and wide-open" and by explaining that "the freedoms of expression" require some degree of "breathing space . . . to survive," particularly where matters of

public interest or public officials are concerned. *Id.* at 270, 271–72. To safeguard that "breathing space," the Court held that the First Amendment forecloses a public official from recovering damages for a falsehood "unless he proves that the statement was made with 'actual malice.'" *Id.* at 279–80. In other words, the Court said, the public official must prove that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280.

Three years later, the Court extended the "actual malice" rule to public figures. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162–65 (1967) (Warren, C.J., concurring in result); *id.* at 170 (opinion of Black, J.); *id.* at 172 (opinion of Brennan, J.). The Court has reiterated that standard time and again in the years since. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 771–72 (1986). "Today, there is no question that public figure [defamation] cases are controlled by the *New York Times* [actual-malice] standard." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989).

Consistent with this precedent, the court of appeal faithfully applied the actual-malice standard in dismissing Petitioner's false-light claim. First, the court of appeal correctly articulated Petitioner's burden: Because Petitioner is a public figure, to succeed on her claims, "she must demonstrate by clear and convincing evidence that the defendant acted with 'actual malice.'" (Pet. at 12a.) The court then assessed whether Petitioner marshaled sufficient evidence to "prove actual malice" and concluded that she had not. (*Id.* at 36a–38a.) In reaching that conclusion, the court relied on a sworn declaration from Ryan Mur-

phy, *Feud*'s co-creator, stating that he "intended Zeta-Jones's portrayal of de Havilland to be that of 'a wise, respectful friend and counselor to Bette Davis, and a Hollywood icon with a unique perspective on the past.'" (*Id.* at 38a.) The court of appeal found insufficient Petitioner's claim that the writers' use of stylized dialogue amounted to evidence of actual malice. (*Id.* at 37a.) Instead, the court found the evidence uncontroverted that *Feud*'s creators sought to portray Petitioner in a positive light and consistent with the historical record. Based on these evaluations of the record evidence, the court held that Petitioner could not establish "by clear and convincing evidence" that Respondents had acted with actual malice. (*Id.* at 29a, 38a.)

The court of appeal's actual analysis belies Petitioner's characterization of that court as having granted docudramas absolute First Amendment immunity. (*Id.* at 2.) To the contrary, the court of appeal applied the well-settled *New York Times* standard and held, after reviewing all the evidence, that Petitioner could not prove actual malice. This fact-bound holding does not warrant this Court's attention.

### 2. Petitioner Has Not Identified a Conflict Between the Decision Below and a Decision of Any Other Court

1. The court of appeal's decision is entirely consistent with this Court's precedents. Petitioner asserts a conflict with *United States v. Alvarez*, 567 U.S. 709 (2012), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). (Pet. at 13–15.) But the decision below does not conflict with either case.

In *Alvarez*, this Court considered the constitutionality of a statute that criminalized falsely representing oneself as having been awarded a military honor. 567 U.S. at 716 (plurality opinion). Petitioner quotes from the *Alvarez* dissent. (Pet. at 13 (quoting *Alvarez*, 567 U.S. at 746–47 (Alito, J., dissenting)).) Petitioner ignores, however, that a majority of the Court held, consistent with *New York Times*, that "falsity alone [does] not suffice to bring . . . speech outside of the First Amendment." [4] *Alvarez*, 567 U.S. at 719 (plurality opinion); *id.* at 733-34 (Breyer, J. concurring, joined by Kagan, J.). In explaining its holding, the Court reiterated its approach to defamation cases: A "statement must be a knowing or reckless falsehood" "as [a] condition for recovery." *Id.* at 719-20 (plurality opinion). As discussed *supra* pp. 16–18, that is precisely the well-settled rule that the court of appeal applied before finding, as a factual matter, that Petitioner could not show actual malice by clear and convincing evidence. There is no conflict between *Alvarez* and the decision below.

The asserted conflict between *Gertz* and the decision below is equally illusory. Petitioner quotes a lengthy passage from *Gertz*, and says that the Court there rejected "the absolutist view of the First Amendment even in application to the news media." (Pet. at 14.) True enough. In *Gertz*, the Court again confirmed that the First Amendment requires courts to balance "society's interest in 'uninhibited, robust, and wide-open' debate on public issues" with the need

[4] *Alvarez* is not germane to the court of appeal's analysis in any event because the court of appeal in this case did not find that Respondents had actually made any false statements of fact. (Pet. App. at 34a.)

to compensate "individuals for the harm inflicted on them by defamatory falsehood." 418 U.S. at 340–41 (quoting *Sullivan*, 376 U.S. at 270). This call for careful balancing, however, is entirely consistent with the decision below. As noted *supra* pp. 16–17, the actual-malice standard that the court of appeal applied is this Court's answer to the question of how to balance our "profound national commitment" to robust debate with the need to protect our public figures and officials from defamation. *Sullivan*, 376 U.S. at 279–80. *Gertz* does not contradict this approach, but instead confirms its legitimacy: "Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures . . . may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." 418 U.S. at 342. *Gertz*, accordingly, cannot support Petitioner's argument for review.

2. Petitioner also fails to identify a conflict between the court of appeal's decision and an opinion from another court. Petitioner asserts that the courts are divided between those that apply *New York Times*'s actual-malice standard and others (including the decision below) that supposedly apply a "'modified' standard" that grants absolute immunity where the underlying work is a docudrama. (Pet. at 17.) Petitioner is incorrect.

Petitioner first cites *Thoroughbred Legends, LLC v. The Walt Disney Co.*, No. 1:07-CV-1275-BBM, 2008 WL 616253 (N.D. Ga. Feb. 12, 2008), a district court decision that Petitioner says applied the "modified" rule of absolute immunity. (Pet. at 17 n.32.) The

case did no such thing. *Thoroughbred Legends* involved a defamation claim against the producers of a docudrama about a famous racehorse. 2008 WL 616253, at *13. The court held that the plaintiffs were public figures, and that the actual-malice standard applied: "[I]f a defamation plaintiff is classified as a public figure in general or for a limited purpose, the plaintiff is also required to prove that the defendant made the claim with actual malice, that is, with knowledge that the statement was false or with reckless disregard of whether it was true or false." *Id.* The court then held that discovery should proceed on the actual-malice element of plaintiffs' defamation claim. *Id.* Petitioner fails to explain how this opinion, which *denies* the defendants' motion to dismiss the plaintiffs' defamation claims, sanctions a "modified" approach to the First Amendment that amounts to absolute immunity for docudramas.

The only other case that Petitioner cites as purportedly applying a "modified" rule of absolute immunity is *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860 (1979). (Pet. at 18 n.32.) *Guglielmi* is a right-of-publicity case, not a defamation or false-light case. 25 Cal. 3d at 861. The oft-cited concurring opinion in *Guglielmi*, which Petitioner quotes, does not say that the First Amendment provides absolute immunity in the case of docudramas. That opinion instead specifically stated that (1) individuals who publish defamatory statements with actual malice may be held liable for defamation, *id.* at 871; and (2) individuals who use "a celebrity's name . . . to promote or endorse a collateral commercial product" may be held liable for misappropriation of the right of publicity, *id.* at 865 n.6. Neither of these rules can plausibly be characterized as granting absolute immunity.

In short, Petitioner is unable to identify any cases, federal or state, that say docudramas are entitled to absolute First Amendment immunity. The conflict that Petitioner posits is illusory.

## II. The Court of Appeal's Dismissal of Petitioner's Right-of-Publicity Claim Does Not Warrant Review

Aside from her sweeping—and erroneous—assertions about absolute immunity, Petitioner separately addresses the court's dismissal of her right-of-publicity claim only in a footnote. (*See* Pet. at 19 n.34.) To the extent Petitioner does in fact mean to challenge separately the court of appeal's dismissal of her right-of-publicity claim, she fails to present any question warranting this Court's review.

Petitioner does not even purport to identify any authority that conflicts with the court of appeal's analysis of her right-of-publicity claim. The court of appeal held that the First Amendment extends to expressive works, irrespective of the defendant's profit-making purpose; that Respondents did not falsely imply Petitioner's endorsement of *Feud* by including a character based on her participating in mock interviews; and that Respondents were not required to obtain Petitioner's consent before including the de Havilland character in *Feud*. (Pet. App. at 17a-23a.) Petitioner does not cite any cases that contradict these holdings.

Petitioner also all but ignores the court of appeal's alternative ground for dismissing Petitioner's right-of-publicity claim. The court of appeal held that Petitioner had no actionable claim because *Feud* is transformative, and not a mere facsimile of Petitioner's name and likeness. (Pet. App. at 23a-28a.) Petitioner does not challenge the court's reliance on California's

"transformative" defense, but instead suggests the court of appeal misapplied that defense. (Pet. at 19 n.34.) In particular, Petitioner claims that the court of appeal simply calculated the number of minutes she was on screen in *Feud*, as compared to the total number of minutes "of 'expression'" in the docudrama. (*Id.*) Petitioner mischaracterizes the court's actual decision. The court of appeal certainly mentioned the de Havilland character's minimal screen time in *Feud*, but that factor was not dispositive. (Pet. App. at 26a.) Instead, the court emphasized that "Zeta-Jones's 'celebrity likeness [of De Havilland] is one of the raw materials from which [the] original work [*Feud*] is synthesized.'" (*Id.* (quoting *Comedy III*, 25 Cal. 4th at 406) (alterations in original).) As for the transformative test's "useful . . . subsidiary inquiry" into the work's "marketability and economic value," the court of appeal highlighted the de Havilland character's significance in the series' broader narrative; "the creativity, skill, and reputation of *Feud*'s creators and actors"; and the lack of evidence that "de Havilland as a character was a significant draw" for viewers. (*Id.* at 27a–28a (quoting *Comedy III*, 25 Cal. 4th at 407).) This highly factbound application of the transformative test does not meet this Court's standards for review.

Finally, Petitioner's case is a poor vehicle for considering any broad questions regarding the application of the First Amendment to right-of-publicity claims. The court of appeal was skeptical whether California's right-of-publicity statute—which deals with the use of names or likenesses in "products, merchandise, or goods"—even authorizes such tort claims involving biographical docudramas like *Feud*. (Pet. App. at 14a-16a (quoting Cal. Civ. Code § 3344); *see also Sarver v. Chartier*, 813 F.3d 891, 905, n.9 (9th

Cir. 2016) (questioning whether "California would extend its right of publicity" to dramatized biographical works).) The court of appeal did not have to resolve this issue in light of its rulings on Respondents' defenses. But the uncertainty whether California's right-of-publicity law even applies to a case such as this is another reason why the Petition presents a poor vehicle for addressing the sweeping questions that Petitioner asks this Court to decide.

## CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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