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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES

I. INTRODUCTION

Petitioner Olivia de Havilland ("Petitioner" or "Miss de Havilland") requests that the Court grant her petition for writ of certiorari to correct a dangerous precedent affecting the individual right to freedom of expression. The Opinion of the California Court of Appeal ("Opinion") would grant absolute First Amendment protection for publication of recklessly or knowingly false statements in so-called docudramas, as distinguished from any other type of media. The Opinion also ignores the First Amendment right of a living person to prevent speech or acts which would result in an intentional attribution of false beliefs to them. The Opinion is oblivious to Petitioner's First Amendment rights entirely, while granting wholesale license to producers of docudramas under an absolute theory of First Amendment immunity for a single form of media.

Respondents FX Networks, LLC and Pacific 2.1 Entertainment Group, Inc. (collectively "FX," or "Respondents") have filed an opposition which argues erroneously that this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of the California Court of Appeal. This reply is limited to the challenge to this Court's jurisdiction raised by the FX opposition.

The errors in the state court's First Amendment analysis infect all aspects of the Opinion, including its application to the causes of action and defenses. Without the misguided First Amendment analysis, the complaint could not have been dismissed by the state court below. Petitioner files this reply brief pursuant to Supreme Court Rule 15(6) to correct FX's legal and factual errors, as this

Court clearly has jurisdiction under 28 U.S.C. § 1257(a) to review the Opinion below.

Section 1257(a) authorizes this Court to review state court judgments in which any right, privilege, or immunity is claimed under the Constitution. As set forth in Miss de Havilland's petition, this case originated in California state court where Miss de Havilland sought redress for false light invasion of privacy, violation of her right of publicity, and unjust enrichment under California state law. Petition at 9-12. Respondents claimed absolute immunity from suit under the First Amendment, filing a motion to dismiss Petitioner's complaint, before any discovery, under California's anti-SLAPP statute. The trial court denied the motion, ruling that the First Amendment did not protect docudramas from knowing or reckless publication of false statements attributed to a living person. App. 59a, 72a-74a. The California Court of Appeal reversed the trial court, refusing to apply the *New York Times v. Sullivan* test to docudramas, thereby allowing publication of reckless and knowing falsehoods about living people, including attributing false beliefs to them. App. 18a, 37a, 39a.

FX now requests that this Court overlook the constitutional arguments that formed the basis for its defense, and argues that the Court lacks jurisdiction because, even without the First Amendment defense, this Court can find that FX did not make defamatory statements about Miss de Havilland, whether the statements were knowingly or recklessly false or not. Opposition at 13-15. This argument fails on two grounds. First, the First Amendment analysis in the Opinion is present throughout, and there is no separate attempt to decide the case solely on state law, without reference to

First Amendment principles. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

The decision of the California Court of Appeal is based on the conclusion that the First Amendment provides a complete defense for docudramas, even if knowingly or recklessly false, as a matter of law:

> When the expressive work at issue is . . . a combination of fact and fiction, the "actual malice" [publication of a knowing or reckless falsehood] analysis takes on a further wrinkle. De Havilland argues that, because she did not grant an interview at the 1978 Academy Awards or make the "bitch sister" or "Sinatra drank the alcohol" remarks to Bette Davis, *Feud*'s creators acted with actual malice. But fiction [or part fiction] is by definition untrue. It is imagined, made-up. Put more starkly, it is false. Publishing a fictitious [false] work about a real person cannot mean the author, by virtue of writing [part] fiction, has acted with actual malice.

App. 37a.

Since the Opinion grants constitutional immunity from suit, this Court has jurisdiction to review the ruling of the Court of Appeal, and should exercise that jurisdiction to correct this departure from the standards first set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Further, the state court's position that the knowingly or recklessly false words placed into the mouth of the real, living Miss de Havilland are not defamatory and do not

violate her right of publicity ignores the First Amendment right of the individual, as recently expressed by this Court, to prevent attribution of beliefs to a person which he or she does not hold. A person may not be compelled to speak against their views. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring). Thus, the Opinion implicates the First Amendment right of Miss de Havilland not to be used as a spokesperson for FX in a false (i.e., defamatory) manner, or one which eliminates her right of publicity. *Id.*

II. ARGUMENT

A. This Court Has Jurisdiction Over Petitioner's Claims

1. Legal Standard

Section 1257(a) gives this Court the authority to review state court judgments "where the validity of a treaty or statute of the United States is drawn in question or where … any title, right, privilege, or immunity is specially set up or claimed under the Constitution." Here, when faced with a lawsuit filed by Petitioner in state court under California law, FX elected to use California's anti-SLAPP procedure to assert immunity from Petitioner's claims under the Constitution. 28 U.S.C. § 1257(a) gives this Court jurisdiction to hear this case and decide these constitutional questions raised by FX's conduct and claimed defenses.

Where there is any question that the state court opinion implicates federal constitutional issues, this Court should find in favor of jurisdiction on a matter of

federal constitutional law interpretation. For example, in *Department of Motor Vehicles of State of California v. Rios*, 410 U.S. 425 (1973), an uninsured motorist sought review of a decision by the California Department of Motor Vehicles that suspended his driver's license without a hearing based solely on reports of an automobile accident. 410 U.S. at 425. The California Supreme Court found for the motorist, and the State of California petitioned this Court for review. *Id.* at 425-26. In determining that it had jurisdiction to hear the matter, this Court reasoned:

> We are unable to determine, however, whether the California Supreme Court based its holding upon the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, or upon the equivalent provision of the California Constitution, or both. … Thus, as in *Mental Hygiene Dept. v. Kirchner*, 380 U.S. 194, 196-197 … (1965), "(w)hile we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground." We therefore grant the State of California's petition for certiorari….

Id. at 426.

FX cites *Michigan v. Long*, 463 U.S. 1032 (1983), which in fact supports jurisdiction and the granting of the petition. In *Long*, this Court discussed at length how

to determine whether the Court had jurisdiction in cases involving both federal and state law. 463 U.S. at 1038-41. Ultimately, the Court found that it had jurisdiction to review mixed questions of federal and state law in the absence of a "plain statement" from the state court that its result is compelled solely on the basis of state law. *Id.* at 1041. The Court reasoned:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. … If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1040-41.

FX also relies on two other cases in its challenge to this Court's jurisdiction over Petitioner's case: *Herb*

v. Pitcairn, 324 U.S. 117 (1945) and *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935). As with *Long*, neither case supports a finding of lack of jurisdiction here.

In *Herb v. Pitcairn*, 324 U.S. 117, plaintiffs sought to appeal a decision from the Illinois Supreme Court which found that the court below had lacked jurisdiction to hear the case and that plaintiffs' claims were barred by the federal statute of limitations. 324 U.S. at 119-20. The respondents claimed that the determination of jurisdiction was an "adequate and independent state grounds" for the decision of the Illinois Supreme Court, thus depriving this Court of jurisdiction to review the petition for certiorari. *Id.* at 125. The Court noted the opinion below was unclear on this point and that the question of "what to do with cases in which the record is ambiguous but presents reasonable grounds to believe that the judgment may rest on decision of a federal question has long vexed the Court." *Id.* at 125-26. Initially, this Court did not rule on the petition but ordered a continuance to allow the litigants to seek clarification from the Illinois Supreme Court as to the basis for its ruling. *Id.* at 128. After receiving clarification from the Illinois Supreme Court that its judgment resulted from its interpretation of the federal statute of limitations, this Court then exercised jurisdiction and reversed the Illinois court below. *Herb v. Pitcairn*, 325 U.S. 77, 78-79 (1945).

Forty years later in *Michigan v. Long*, this Court found that such continuances were a disfavored method of addressing this question. 463 U.S. at 1038-39 (noting that the use of such continuances, as well as other approaches, were "antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations

are involved."). Further, this Court held that where there is no clear statement of a separate and independent state law basis for the result, this Court does have jurisdiction. *Id*. at 1040-41.

In *Fox Film Corp. v. Muller*, 296 U.S. 207, a breach of contract action, the court below held that the contracts were unenforceable both because of an improper arbitration provision contained therein and because they violated federal antitrust law. 296 U.S. at 208-09. This Court found that these two determinations were "clearly independent of one another" such that "[t]he case, in effect, was disposed of [on state law grounds] before the federal question said to be involved was reached." *Id*. at 211. That is in sharp contrast to the situation here, where the Opinion relied on federal caselaw and First Amendment analysis throughout in ruling on questions regarding immunity and rights under the federal Constitution. App. 10a-30a, 37a-38a.

The Opinion below not only grants unprecedented immunity to those who recklessly or knowingly publish false statements, but also implicates the line of cases of this Court concerning "compelled speech." "Since *all* speech inherently involves choices of what to say and what to leave unsaid, [citation], one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (internal quotations omitted) (emphasis in original). "Because the government cannot compel speech, it also cannot 'require speakers to affirm in one breath that which they deny in the next.'" *Masterpiece Cakeshop,* 138 S. Ct. at 1745 (Thomas, J., concurring) (quoting *Pacific*

Gas & Electric Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1, 16 (1986)).

Should this Court allow the Opinion below to stand, it would threaten the First Amendment rights of individuals like Miss de Havilland, who would lose the ability to remain silent when television and movie producers would prefer that they speak.

2. The Opinion Is Based on and Raises First Amendment Issues Throughout

The Court of Appeal below began its discussion of the merits of Respondents' appeal with a discussion of the interplay between the California anti-SLAPP statute and the constitutional right to free speech guaranteed by the First Amendment. App. 10a-13a. The court then turned to the question of whether the First Amendment provided a complete defense to Petitioner's right of publicity claim.[1] App. 14a. In ruling on Petitioner's right of publicity claim, the court relied extensively on federal First Amendment case law. App. 14a-23a.[2] The Court of Appeal then addressed the false light claim and again relied throughout

1. FX virtually concedes that this Court has jurisdiction to review the decision below as to Petitioner's right of publicity claim. Opposition at 13 ("This Court need not and—at least as to the false-light claim—cannot review these factbound dismissals….").

2. For example, the court cited *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010); *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015); *In re NCAA Student-Athlete Name & Likeness*, 724 F.3d 1268 (9th Cir. 2013); *Newcombe v. Adolf Coors Co.*, 157 F.3d 686 (9th Cir. 1998); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); and *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016), among others.

on federal caselaw and First Amendment considerations in overturning the trial court's denial of Respondents' motion to strike. App. 29a-38a.[3]

The Opinion contains no "plain statement" indicating that its repeated reference to federal law and the First Amendment as interpreted by the federal courts was merely for guidance and did not lead to the result reached. App. 1a-40a. Furthermore, the language of the published Opinion makes clear it is to be a directive to trial courts that notwithstanding evidence in the record of knowing falsehood, docudramas are special and have immunity under First Amendment principles. App 1a-2a ("Authors write books. Filmmakers make films. Playwrights craft plays. And television writers, directors, and producers create television shows and put them on the air—or, in these modern times, online. The First Amendment protects these expressive works. . . .") The Opinion is important to the media and is being heralded as the end of a living person's ability to protect their beliefs and reputation when misappropriated by the media industry.[4] It defies rationality for FX to assert that this Opinion is

3. The court relied on *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984); *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995); *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991); and *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir. 1990), among others.

4. *See, e.g.*, Times Editorial Board, *Olivia de Havilland's legal loss means historical fiction gets to survive* (Mar. 28, 2018) L.A. Times, http://www.latimes.com/opinion/editorials/la-ed-dehavilland-ruling-20180328-story.html; Ninth Circuit Court Conference, *Rights of Publicity Law*, C-SPAN (July 26, 2018), https://www.c-span.org/video/?448660-2/ninth-circuit-courtconference-rights-publicity-law.

only about Miss de Havilland and some lack of injury from the false statements, rather than a significant declaration about the scope of First Amendment protection applicable to docudramas.

Further, the California Court's determination that FX can compel Miss de Havilland to speak on issues where she prefers to remain silent, or force her to make statements against her beliefs in a docudrama, is also contrary to this Court's First Amendment principles and mandates jurisdiction. *Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Thomas, J., concurring). To render such conduct by FX immune from suit as non-defamatory as a matter of law contradicts these First Amendment principles and their application. This Court has jurisdiction to review the Opinion of the Court of Appeal and should grant the petition.

III. CONCLUSION

It is clear from a review of the Opinion of the California Court of Appeal that this Court has jurisdiction to review the matters of federal constitutional law that are interwoven throughout and form the framework and rationale for the decision. This Court can review this matter, and should do so to correct a judgment from a state court that runs contrary to established precedent from this Court concerning the First Amendment.

For the foregoing reasons, and for the reasons stated in Miss de Havilland's petition, certiorari should be granted here.

Respectfully submitted,

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