No. 03-615

IN THE

Supreme Court of the United States

TODD MCFARLANE, *et al.*,

Petitioners,

v.

ANTHONY R. "TONY" TWIST,

Respondent.

On Petition for Writ of Certiorari to the Missouri Supreme Court

BRIEF OF *AMICI CURIAE* WRITERS MICHAEL CRICHTON, LARRY DAVID, JEREMIAH HEALY, ELMORE LEONARD, HARRY SHEARER, RON SHELTON, SCOTT TUROW, PAUL WEITZ, AND THE AUTHORS GUILD, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The *amici* joining in this brief are individual writers and a guild representing professional writers, all of whom have a direct interest in the legal rules governing literary and artistic expression.

Michael Crichton is the author of over a dozen novels, including *Jurassic Park*, *The Andromeda Strain*, and *Timeline*, as well as the screenplays for *Westworld* and *Twister*. His novel *A Case of Need*, published under the pseudonym Jeffrey Hudson, won the Edgar Award from the Mystery Writers of America in 1968. He is also the creator, executive producer, and sometime writer of *E.R.*; he received the Writers Guild of America award for that show's pilot. Crichton is likely one of

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

the very few *amici* to appear before this Court who has had a dinosaur named after him, *Bienosaurus crichtoni* (2000).

Larry David is the co-creator and co-writer of *Seinfeld*, and the creator and writer of *Curb Your Enthusiasm*.

Jeremiah Healy, who also writes under the name Terry Devane, is the author of over 15 detective novels, including *Staked Goat*, which won the 1987 Shamus Award from the Private Eye Writers of America.

Elmore Leonard is the author of over 35 novels, including *Be Cool*, *Get Shorty*, *Rum Punch*, and *Out of Sight*. He was awarded the Grand Master award by the Mystery Writers of America in 1992; his novel *LaBrava* received the Edgar Award in 1984.

Harry Shearer co-wrote and starred in *This Is Spinal Tap*, and is the creator of *Le Show*, a nationally syndicated public radio political satire program that is now in its 19th year. He was a writer and performer on *Saturday Night Live*, and is the voice of Mr. Burns, Flanders, Principal Skinner, Reverend Lovejoy, and others on *The Simpsons*.

Ron Shelton has written a dozen movies, including *Bull Durham*, *Blaze*, and *White Men Can't Jump*, all three of which he also directed. His *Bull Durham* screenplay was nominated for an Academy Award, and won awards from the Writers Guild of America and the National Society of Film Critics.

Scott Turow is the author of the novels *Presumed Innocent*, *Burden of Proof*, *Pleading Guilty*, *The Laws of Our Fathers*, *Personal Injuries*, and *Reversible Errors*, as well as the non-fiction books *One L* and *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty*. *Reversible Errors* was just awarded this year's Heartland Prize in Fiction by the *Chicago Tribune*. He is also a partner at Sonnenschein Nath & Rosenthal.

Paul Weitz is the co-writer of various movies, including *About a Boy* and *Antz*, and the co-director of several movies, including *American Pie*.

The Authors Guild, Inc., founded in 1912, is the nation's oldest and largest organization of professional authors. The Guild is a nonprofit membership association of more than 8,400 published book and periodical writers of all genres.[2]

The *amici* hope that they can help provide a perspective on why the decision below harms writers and readers.

STATEMENT

Petitioner Todd McFarlane was sued for allegedly violating respondent's right of publicity because petitioner had used respondent's name—Tony Twist—as the name of a fictional character in a comic book. The Missouri Supreme Court rejected petitioner's First Amendment defense, holding that because the use of respondent's name "was not a parody or other expressive comment or a fictionalized account of the real Twist,"

> the metaphorical reference to Twist, though a literary device, has very little literary value compared to its commercial value. On the record here, the use and identity of Twist's name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under these circumstances, free speech must give way to the right of publicity.

Doe v. *TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003). (reproduced at Pet. App. 19a).

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[2] The Authors Guild, Inc. has no parent corporation and no publicly held company owns 10% or more of the Guild's stock.

SUMMARY OF ARGUMENT

The First Amendment fully protects writers' choices to name characters after famous figures. Authors such as Aldous Huxley, Robert A. Heinlein, Paul Simon, and Steve Martin have all done this, for many reasons: historical or literary allusion, absurdist humor, homage, and more. These are eminently legitimate literary decisions, as other court decisions (with which this decision creates a split) have recognized. So long as the use is clearly fictional, and thus conveys no false statements of fact, it must remain constitutionally protected.

The Missouri Supreme Court reasoned otherwise, concluding that in this case "the metaphorical reference to [plaintiff], though a literary device, has very little literary value compared to its commercial value." Pet. App. 19a. But First Amendment law does not allow judges and juries to compare the relative weight of the literary and commercial value of a discrete passage or reference in a work. Such a subjective and indeterminate test leaves writers with little guidance about when they may use a particular literary device—which is one reason why First Amendment law generally protects speech, including entertainment, with no regard for a judge's or jury's assessment of its "literary value."

The one narrow, carefully bounded field where judges and juries do inquire into the literary value of works is obscenity law. But even there, this Court has repeatedly stressed that a work is protected so long as it has value when *taken as a whole*. And once such value is found in the work as a whole, there is no subsequent balancing of the value of discrete snippets of the work against the presumed commercial value of those snippets. The Missouri Supreme Court would allow damage awards based on a judge's or jury's decision that a *single literary device* within an otherwise valuable work lacks literary value—the very approach that has been rejected even for obscenity.

Finally, the Missouri Supreme Court tried to distinguish speech made "with the intent to obtain a commercial advantage"—speech that is "predominantly a ploy to sell comic books"—from "artistic or literary expression." Pet. App. 19a. That, though, is inconsistent with this Court's precedents, which hold that speech is protected even if it is motivated by profit. It is also inconsistent with the premises of our copyright law, which tries to foster "artistic or literary expression" precisely by harnessing the human impulse to try to "obtain a commercial advantage."

And it is inconsistent with the nature of our economic system generally, and of the book and movie business specifically. In America, writers make money by creating artistic or literary expression; and their making money makes it possible for them to create still more such expression. The motivations cannot be disentangled, and courts cannot decide which of them "predomina[tes]."

ARGUMENT

I. The Missouri Supreme Court's Decision Violates Authors' Free Speech Rights.

Authors routinely use the names of famous figures—politicians, athletes, scientists, and others—in their fiction. Sometimes writers include those people as characters, as in the movies *Forrest Gump* (Paramount 1994) and *Zelig* (Orion 1983), or in Steve Martin's play *Picasso at the Lapin Agile* (1996) (which has as its lead characters Pablo Picasso and Albert Einstein). Sometimes writers just refer to those people in passing, or name characters after them. *See, e.g.,* the cartoon character Yogi Bear; Aldous Huxley, *Brave New World* (1932) (featuring the characters Bernard Marx, Lenina Crowne, and Benito Hoover, which allude to Karl Marx, Vladimir Lenin, Benito Mussolini, and Herbert Hoover); Federico Fellini's film *Ginger & Fred* (MGM/UA 1986) (fea-

turing characters who were nicknamed after Ginger Rogers and Fred Astaire, discussed in *Rogers* v. *Grimaldi*, 875 F.2d 994 (CA2 1989)); Paul Simon, *Mrs. Robinson* (1968) (referring to Joe DiMaggio); Maria Testa, *Becoming Joe DiMaggio* (2002) (a poem collection in which a recurring theme is a child's dream of becoming Joe DiMaggio).

This is a widespread and perfectly legitimate practice, and part of an author's constitutionally protected freedom of speech. Authors' works, even fantastic ones, are based on the real world. Famous people, not just events and ideas, are part of that world—and important events and ideas are often defined or exemplified by famous people. The names and personalities of famous people are a proper part of the author's palette.

The decision below jeopardizes that artistic freedom. Under the Missouri Supreme Court's reasoning, authors are no longer free to include a famous person's name in a novel, screenplay, or other work, if a jury finds that the name was used "with the intent to obtain a commercial advantage." Pet. App. 20a. If authors do write their works as they wish, they might be subjected to a $24.5 million verdict. (Though the Missouri Supreme Court upheld the reversal of the verdict, the court made clear that if the comic book author used the name with the intention of commercial advantage, he would be liable.) And because expressive works are distributed throughout the country, the Missouri Supreme Court's decision potentially affects any work created by authors in any State.

The only sure way of avoiding liability is to obtain the famous person's permission, or the permission of a dead person's heirs or assignees, if they can be identified and tracked down.[3] That permission, though, may not be given, or the

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[3] The right of publicity in some states endures for 50, 70, 75, or 100 years past the death of the celebrity. *See, e.g.*, Cal. Civ. Code § 3344.1 (2003) (70 years); Ky. Rev. Stat. § 391.170 (2002) (50 years); Nev. Rev. Stat.

famous person may insist that the author change the work to be more flattering. Freedom of speech that requires another's permission is not freedom.

Other courts that have faced the same issue have correctly held that authors *do* have the constitutional right to use others' names in their commercially distributed works (so long as they do not commit defamation or false light invasion of privacy by making constitutionally unprotected false statements of fact, something that is not an issue in this case). *Winter* v. *D.C. Comics*, 69 P.3d 473 (Cal. 2003); *Rogers* v. *Grimaldi,* 875 F.2d 994 (CA2 1989).

But the court below specifically stated that it was disagreeing with *Winter* and with the *Restatement (Third) of Unfair Competition* approach, with which *Winter* and *Rogers* are consistent. Pet. App. 17a-19a. Only a prompt decision from this Court can resolve the split of authority, and, we hope, restore authors' First Amendment rights to their traditionally recognized breadth.

II. The Decision's Purported Limiting Principles Rest on a Misunderstanding of the Writing Process.

The Missouri Supreme Court offered two possible boundaries for its ruling rejecting the writer's First Amendment defense: (A) The ruling applies only to "reference[s]" that have "very little value compared to [their] commercial value," because the reference is "not a parody or other expressive comment or a fictionalized account." (B) The ruling applies only when the use of a name "has become predominantly a ploy to sell" works, as opposed to "an artistic or literary expression." Pet. App. 19a.

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§ 597.790 (2003) (50 years); 12 Okla. Stat. Ann. § 1448 (2003) (100 years); Tex. Prop. Code Ann. § 26.012(d) (2003) (50 years); Rev. Code Wash. Ann. § 63.60.040 (2003) (75 years).

Those limiting principles, though, are inadequate: Even with them, the Missouri Supreme Court's decision unconstitutionally restricts authors' artistic freedom, and conflicts with the decisions of the California Supreme Court and the Second Circuit.

A. The Unsoundness of Comparing "Literary Value" to Commercial Value.

To begin with, the court below erred in concluding that references to famous people "have very little literary value" when the references are not "parody," "expressive comment," or "a fictionalized account" of the person's real life. *Id.* The court's view rests on a misunderstanding of the value that character names and other allusions bring to a literary work.

Sometimes, references to real people in a work are parodies or expressive comments. But sometimes the work includes a real person as a minor character, without any intention of parodying him, commenting on him, or providing an account of his life, as when Forrest Gump is shown meeting Bob Hope, John Lennon, Lyndon Johnson, and others.

Sometimes the work does not include a person as a character, but rather names a character after a real person, as an element of absurdist humor—consider the cartoon character Yogi Bear, or Placido Flamingo, the opera-singing bird on *Sesame Street*. Sometimes the name ties a character to an era, for instance when a character born in the Philippines during World War II is given "Douglas McArthur" as his first and middle names, or a character born in the U.S. during the 1916 election is likewise named "Woodrow Wilson." *See* Neal Stephenson, *Cryptonomicon* (1999) (the Douglas McArthur Shaftoe character); Robert A. Heinlein, *Time Enough for Love* (1973) (the Woodrow Wilson Smith character, better known as Lazarus Long).

Sometimes the reference to a famous person's name expresses another character's personality, for instance when the cartoon boy genius Jimmy Neutron (whose full name is James

Isaac Neutron) names his dog Goddard, alluding to the rocketry pioneer. *The Adventures of Jimmy Neutron, Boy Genius* (Nickelodeon 1999). Sometimes such a reference reflects an author's conjecture about which current figures will be remembered in the future, as when Robert A. Heinlein's *Starship Troopers* (1959) is largely set on the spaceship *Rodger Young*; the novel makes clear that the spaceship was named after a World War II hero of the same name.

Sometimes the naming of a character affects people's reactions to the character, as in the movie *Office Space* (Twentieth Century Fox 1999), where one of the recurring jokes is a character's annoyance at the effect his name—Michael Bolton—has on people. Sometimes the use of a famous person's name links a fictional story to real events or real people, whether humorously or otherwise. *See, e.g.,* Aldous Huxley, *Brave New World* (1932) (featuring Bernard Marx, Lenina Crowne, and Benito Hoover); the movie *Major League* (Paramount 1989) (featuring a baseball-playing character, played by Wesley Snipes, named Willie Mays Hayes); Larry Niven & David Gerrold, *The Flying Sorcerers* (1971) (featuring alien bicycle inventors named Wilville and Orbur, references to Wilbur and Orville Wright, who were bicycle-makers before they became airplane inventors).

Sometimes the use of a name is an homage to a famous person, though an homage that might not have been cleared with the person (or his heirs). *See, e.g.*, Larry Niven & Jerry Pournelle, *Footfall* (1987) (featuring a science fiction writer named Robert Anson and his wife Virginia, an allusion to science fiction great Robert Anson Heinlein and his wife Virginia); Goddard the dog in *Jimmy Neutron*; the spaceship Rodger Young in *Starship Troopers*.

And sometimes it gives listeners the pleasure of recognizing the allusion. For instance, the character Nute Gunray in *Star Wars*: *The Phantom Menace* (Twentieth Century Fox 1999), the monster Ebersisk in the movie *Willow* (MGM/UA 1988), the characters Mayor Ebert and his assistant Gene in

Godzilla (Columbia TriStar 1998), and the character Samuel Beckett on the TV show *Quantum Leap* are not really criticisms, parodies, or fictionalized accounts of Newt Gingrich, Ronald Reagan, Gene Siskel, Roger Ebert, or Samuel Beckett. They are just amusing references, though ones that contribute to the overall literary value of a work. Yet all these uses are just as much a traditional part of a writer's legitimate expression as are parodies, commentary, and fictionalized accounts.

The Missouri Supreme Court would presumably leave it to jurors to decide whether each of these references nonetheless has "very little literary value" as compared to the supposed commercial value of the references, and thus loses First Amendment protection. But that approach is fundamentally misguided. Different people have different views of which literary devices have literary value and how such literary value might compare to the devices' commercial value. How is an author to know whether jurors will find a metaphor, allusion, or character trait to have "very little literary value" (leading, perhaps, to a $24.5 million judgment)? And how will authors know which aspects of a work will capture the public's interest in a way that translates into commercial value in excess of the literary value of author's choice? The risk of liability may pressure authors and publishers to avoid any references—even supposedly "valuable" and nondefamatory ones—to real people.

Moreover, hard as it is to determine the literary value of a *work*, determining the literary value of a particular item within the work is even harder. We can all agree that, for instance, Charles Dickens's *The Christmas Carol* has substantial literary value; but how can one decide whether the character names (Ebenezer Scrooge, Tiny Tim, Jacob Marley) and the "literary devices" they embody (such as the alliteration in Tiny Tim, the forbidding-sounding Ebenezer, and so on) have "very little literary value" or "quite a bit of literary value"? Such devices are not intended to be valuable themselves, in the abstract, and readers, judges, and jurors are not used to

evaluating them in the abstract. Rather, the devices are intended to be contributions that help create part of a valuable whole.

That is why the one First Amendment doctrine that does rely on "literary value"—obscenity law, which has been upheld partly because of a historical pedigree that the right of publicity (especially as applied to characters in a literary work) does not share—instructs judges and juries to focus not on "isolated excerpt[s]," but on the work "taken as a whole." This Court has repeatedly stressed that requirement. *See, e.g., Miller* v. *California*, 413 U.S. 15, 24 (1973); *Manuel Enters.* v. *Day*, 370 U.S. 478, 487 (1962) (stating that the Court has "rejected the 'isolated excerpt'" test of obscenity); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 n. 11 (1985) (likewise). And yet the Missouri Supreme Court's decision flouts even that basic principle, by focusing not on the value of a work or even an individual scene in a work, but rather of individual "literary devices."

Even words, images, and sounds that are not supposed to have any "particularized message"—such as Lewis Carroll's *Jabberwocky*, Jackson Pollock's paintings, and Arnold Schoenberg's music—are "unquestionably shielded" by the First Amendment. *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Even profanity is constitutionally protected, because of the Court's recognition that "forbid[ding] particular words" "also run[s] a substantial risk of suppressing ideas in the process." *Cohen* v. *California*, 403 U.S. 15, 26 (1971). Surely the "literary devices" that the Missouri Supreme Court dismisses in its opinion are at least as entitled to protection.

B. The Unsoundness of the Supposed Distinction Between Speech Said with an "Intent To Obtain a Commercial Advantage" and "Artistic or Literary Expression."

The Missouri Supreme Court's approach also relies on a fundamentally unsound distinction between (a) speech that is said "with the intent to obtain a commercial advantage"—speech that is "predominantly a ploy to sell comic books"—and (b) "artistic or literary expression." Pet. App. 19a.

Most successful creators intend *both* to obtain a commercial advantage *and* to express themselves. By expressing yourself in a way that readers want to read, you make money. By making money, you get the free time needed to express yourself. The prospect of making more money gives you an incentive to produce more works, and to make your works better.

That is a basic aspect of the free market, where, in Adam Smith's words, a producer "promotes the public interest" even while "intend[ing] only his own gain"; "by pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote [the societal interest]."[4] And it is also the view embodied in the Constitution's Copyright and Patent Clause. "'[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.'" *Eldred* v. *Ashcroft*, 537 U.S. 186, 219 (2003) (quoting *Harper & Row* v. *Nation Enterps.*, 471 U.S. 539, 558 (1985)). Just as, in Abraham Lincoln's words, "the patent system add[s] the fuel of interest to the fire of gen-

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[4] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 456 (Roy Hutcheson Campbell, *et al.*, eds., Liberty Fund Glasgow 1981) (1776).

ius,"[5] so does copyright law. Those two intentions, commercial advantage and literary expression, thus cannot be separated, and one cannot tell which of them "predomina[tes]."

But even if it were possible to decide which works are motivated more by "commercial advantage" and which more by a desire to "express[]" oneself, a work should be protected regardless of its profit motive. *See, e.g.*, *Time, Inc.* v. *Hill*, 385 U.S. 374, 396-97 (1967) ("The requirement that the jury [in a false light invasion of privacy case] also find that the article was published 'for trade purposes,' as defined in the charge, cannot save the charge from constitutional infirmity. 'That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.'") (citing *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501-02 (1952)). Analogously, as this Court held in *Garrison* v. *Louisiana*, the value of speech is not diminished by the speaker's motivation, even if the motivation is one of hatred: Even those who "speak out of hatred * * * contribute to the free interchange of ideas." 379 U.S. 64, 73 (1964). Moreover, this Court pointed out, allowing speech to lose its protection because of the speaker's hateful motivation may unduly deter speakers, because "it may be almost impossible [for the speakers] to show freedom from ill-will or selfish political motives." *Id.*

The same is true here. Speech that is motivated by commercial advantage contributes to the marketplace of ideas. A biography is valuable whether the biographer is motivated predominantly by "commercial advantage," by a desire for "literary expression," or by both. Likewise for a comedy routine that mentions a famous person, or a story or novel (whether purely textual or graphic) that does the same.

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[5] *Abraham Lincoln: Speeches and Writings* 1859-1865, at 11 (Don E. Fehrenbacher ed., 1989).

And it may be almost impossible for a writer—who, after all, is making a living as a writer—"to show freedom from * * * selfish [commercial] motives." If even speech motivated by hatred (which is usually a reprehensible motive) retains its constitutional protection, the same should be true for speech motivated by commercial advantage, a motive that the Framers themselves wanted to stimulate.

CONCLUSION

The Missouri Supreme Court frankly acknowledged that under its decision in this case, "free speech must give way to the right of publicity"; and it frankly acknowledged that its decision creates a split with the rule adopted by the California Supreme Court, and with the dominant view expressed in the *Restatement (Third) of Unfair Competition*. The result is a serious infringement of the free speech rights of writers who live and work throughout the country. That makes it important for this Court to resolve the issue, and, we hope, to make clear that writers are free (within the limits imposed by defamation law) to draw on real people's lives and names, just as they can draw on real people's ideas and actions.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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