

**SUNTRUST BANK as Trustee of
the Stephens Mitchell Trusts f/b/o Eugene
Muse Mitchell and Joseph Reynolds Mitchell,**

Plaintiff-Appellee,

v.

HOUGHTON MIFFLIN COMPANY,

Defendant-Appellant,

**On Appeal from the United States District Court
for the Northern District of Georgia**

**BRIEF OF GEORGIA FIRST AMENDMENT FOUNDATION, AMICUS CURIAE,
IN SUPPORT OF APPELLANT HOUGHTON MIFFLIN COMPANY'S
REQUEST FOR REVERSAL**

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CERTIFICATE OF INTERESTED PERSONS

The following is, to the best of knowledge, a complete list of the interested persons or entities required to be disclosed pursuant to FRAP 26.1 and 11th Cir. R. 26.1-1:

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REQUEST FOR ORAL ARGUMENT

Amicus Curiae, Georgia First Amendment Foundation, seeks oral argument pursuant to FRAP 34. Amicus argues one single point of law: whether or not Plaintiff's claims of copyright infringement are ultimately found to have any merit, the injunction granted below must be reversed because it violates the First Amendment. In the district court opinion, there is practically no discussion whatsoever of the constitutional gravity or the extraordinary nature of banning a book with a clear, critical, political message. However, under clear United States Supreme Court authority, this case is "worlds apart" from the "simple piracy" situation in which injunctive relief is justified. To address these reasons, Amicus Curiae respectfully seeks the opportunity to present oral argument before this Court.

TABLE OF CONTENTS

Certificate of Interested Persons and Corporate Disclosure Statement i

Request for Oral Argument iii

Table of Contents iv

Table of Authorities v

Statement of the Identity of Amica, her Interest, and her Authority to File 1

Statement of the Issues and Summary of the Argument 2

Factual Statement 4

Argument 9

 The Preliminary Injunction Granted
 Below Violates the First Amendment 9

 A. The general principles governing
 this case are not in dispute 9

 B. Injunctive relief for copyright infringement
 ordinarily does not effect a prior restraint 11

 C. By contrast, an injunction to prevent infringement
 does raise serious First Amendment concerns when
 it bans speech with a clear political message
 independent of and critical of the original work 11

 D. The injunction granted below works especially
 grave and unjustifiable injuries to First Amendment
 interests and therefore must be reversed 15

Conclusion 21

Certificate of Compliance with FRAP 32(a)(7) 22

<i>New Era Publ. v. Henry Holt & Co.</i> , 873 F.2d 576 (2d Cir. 1989)	11
<i>New York Times v. United States</i> , 403 U.S. 713 (1971)	10, 11, 15
<i>Religious Tech. Ctr. v. Lerma</i> , 897 F. Supp. 260 (E.D. Va. 1995)	11
<i>Rosemont Enters., Inc. v. Random House, Inc.</i> , 366 F.2d 303 (2d Cir. 1966), <i>cert. denied</i> , 385 U.S. 1009 (1967)	10, 20
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975)	12, 16
<i>Spence v. Washington</i> , 418 U.S. 405 (1974)	16
<i>Trust Co. Bank v. Putnam Publ. Co.</i> , 5 U.S.P.Q.2d 1874 (C.D. Cal. 1988)	10
<i>U2 Home Entm't, Inc. v. Sang Kim</i> , 1998 U.S. Dist LEXIS 17683 (E.D. Pa. Nov. 4, 1998)	12
<i>United Christian Scientists v. Christian Science Bd. of Dirs.</i> , 829 F.2d 1152 (D.C. Cir. 1987)	19
<i>Universal City Studios v. Film Ventures Int'l</i> , 543 F. Supp. 1134 (C.D. Cal. 1982)	13, 17
<i>Wojnarowicz v. American Family Ass'n</i> , 745 F. Supp. 130 (S.D.N.Y. 1990)	20
<u>Statutory Provisions</u>	
17 U.S.C. § 304	18
17 U.S.C. § 502(a)	9
<u>Other</u>	
Alice Randall, <i>The Wind Done Gone</i>	passim
Jean Rhys, <i>Wide Sargasso Sea</i>	7
Lemley & Volokh, <i>Freedom of Speech and Injunctions in Intellectual Property Cases</i> , 48 DUKE L.J. 147 (1998)	11

Statement of Issues and Summary of Argument

This brief makes a single point of law. Whether or not plaintiff's claims of copyright infringement are ultimately found to have any merit, the injunction granted below must be reversed because it violates the First Amendment.

In the district court's 51-page opinion, the First Amendment is finally mentioned on page 48 and then disposed of in a single, conclusory paragraph. Astonishingly, there is no discussion whatsoever of the constitutional gravity or the extraordinary nature of banning a book with a clear, critical, political message. In effect, Judge Pannell treated Ms. Randall's novel as if, from a First Amendment point of view, it were the legal equivalent of a garden hose allegedly made with patented technology, or as if it were a bootleg, pirated copy of Margaret Mitchell's text.

Wind Done Gone is not a garden hose, and it is not a pirated copy of anyone's text. It is a book with a wholly new protagonist and a new story. It is a book that punctures cultural myths. It is, above all, a book with a clear political message: that *Gone with the Wind*—today the canonical work of popular American culture concerning the Old South—inviciously suppresses the realities, the miseries, the sufferings and strivings, indeed the entire life-world of blacks enslaved on the plantation where that beautiful story unfolds.

Accordingly, under clear United States Supreme Court authority, this case is "worlds apart" from the "simple piracy" situation in which injunctive relief is justified. "[W]hile in the 'vast majority of cases, [an injunctive] remedy is justified because most infringements are simple piracy,' such cases are 'worlds apart from many of those raising

reasonable contentions of fair use.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1993) (citation omitted).

It would be constitutionally unthinkable to ban an academic book excoriating *Gone with the Wind* for its dismissive, insulting treatment of blacks – even if the book recounted *Gone with the Wind*’s plot, explored its characters, and quoted some of Margaret Mitchell’s memorable sentences verbatim. *The Wind Done Gone* is entitled to no less protection. If anything, Ms. Randall’s novel is entitled to greater protection from prior restraint, because while an academic book would reach very few readers, *The Wind Done Gone* brings the same critical message to life more powerfully, more accessibly, and, potentially, to a much larger audience. There is no legally cognizable reason why Ms. Randall’s novel is entitled to less protection from prior restraint than a professor’s monograph expressing the identical message in drier prose.

The fact that political speech is sold at a profit does not deprive it of constitutional protection. If it did, newspapers could be banned. Novels have frequently been the vehicles of political speech. Should the courts ultimately determine that *Wind Done Gone* borrows too much from *Gone with the Wind*, plaintiff will be free to press whatever monetary claims against defendant it may have. But an injunction banning publication – especially a preliminary injunction – is grossly unconstitutional.

The former states of the Soviet Union routinely banned books that punctured reigning political or cultural myths. No such book has been banned in the United States for a very long time. This Court is emphatically urged to reverse.

Factual Statement

The facts of this case are largely undisputed. Only three points need to be highlighted here.

1. The words “piracy” and “plagiarism” have been used by plaintiff in this case, especially in its press reports, and these words unfortunately appear in the district court’s opinion below. *See* slip op. at 14 (“unabated piracy”), *id.* at 17 (“plagiarism”); Declaration of Anton Mueller ¶ 8. These terms convey an impression about *The Wind Done Gone* so far from the truth that, but for the usual exaggerations allowed to litigators and the protections of the First Amendment itself, they might almost be actionable.

In ordinary usage, “piracy” means robbery. In copyright contexts, the word connotes raw, shameless thievery (as in a “pirated” copies of the movie “Titanic”).¹ Similarly, “plagiarism” is among the most serious charges that can be brought against an author who holds out work as original. In ordinary usage, “plagiarism” suggests copious, near-verbatim lifting of another’s text without crediting the original author.

None of this remotely applies to *The Wind Done Gone*. To begin with, a work that deliberately and prominently calls to readers’ minds an earlier text manifestly does not attempt to conceal its connection to that text. No one would say that *Rosencrantz and*

¹ *E.g.*, *Dowling v. United States*, 473 U.S. 207, 211 n.2 (1985) (a “pirated” record is “an unauthorized copy of a performance already commercially released”).

Guidermstern are Dead “plagiarizes” *Hamlet* – although the title of Mr. Stoppard’s play is of course a verbatim quotation from Shakespeare’s.²

Moreover, only minuscule sentence-fragments of *The Wind Done Gone*, representing an infinitesimal portion of the text, could possibly be said to have been taken from *Gone with the Wind*, and even these fragments are usually profoundly transformed. Thus – to consider one of three supposed instances of “stolen verbatim dialogue” charged in plaintiff’s initial memorandum to the court below – the last words of *Gone with the Wind* are “tomorrow is another day,” while the last words of *Wind Done Gone* are “For all those we love for whom tomorrow will not be another day, we send the sweet prayer of resting in peace.”³

To call this an instance of “piracy,” “plagiarism,” or “stolen verbatim dialogue” is recklessly misleading. Ms. Randall’s text ostentatiously cites Ms. Mitchell’s here, while profoundly altering it. An act of plagiarism or “stolen dialogue” would copy without citation.

The significance of this point is not only to emphasize how far this case is from the “simple piracy” situation in which an “injunctive remedy is justified.” *Campbell*, 510 U.S. at 578 n.10. The significance also goes to the harms threatened by the injunction granted below.

The charges of “plagiarism” and “piracy,” first made by plaintiff, then repeated by Judge Pannell in his published opinion, and then picked up by national news organs such

² William Shakespeare, *Hamlet*, V, ii.

³ See Memorandum of Law in Support of Plaintiff’s Motion for a Temporary Restraining Order and Preliminary Injunction, dated Mar. 23, 2001, at 13.

as *The New York Times* when reporting Judge Pannell's decision, threaten direct, personal, irreparable injury to Ms. Randall – to her reputation, to her good standing in her community, and to that of her family. These harms are utterly ignored in the district court's opinion. The only way Ms. Randall can refute these charges is to expose *The Wind Done Gone* to public scrutiny so that it can be measured against the text of *Gone with the Wind*. But the injunction granted below makes this impossible.

A copyright plaintiff who, taking every advantage of the First Amendment, indulges in reckless, public charges of "plagiarism," "piracy" and "stolen verbatim dialogue," should not be heard to deny that an injunction will cause the author irreparable injury, nor permitted to deprive the impugned author of the only opportunity she has to refute the charges.

2. Whatever might be said of the film, and however painful it may be to acknowledge, Margaret Mitchell's much-loved book contains many passages that are deeply, repugnantly racist. See, e.g., *Gone with the Wind* at 409 ("How stupid negroes were!"); *id.* at 427 ("niggery smell . . . increased her nausea"); *id.* at 432 ("house nigger"); *id.* at 472 ("Negroes were . . . stupid and lazy"); *id.* at 589 ("insolent grins," "black apes"); *id.* at 639 ("lazy and shiftless"); *id.* at 654 ("creatures of small intelligence," "like monkeys"); *id.* at 904 ("negroes sat in the legislature where they spent most of their time eating goobers").

The book's racism is as often implicit as it is explicit. *Gone with the Wind* generally depicts blacks with no more of an inner life than animals have; indeed blacks are repeatedly compared to animals such as "dogs," "monkeys," and "apes." Such at any rate is Ms.

Randall's view, *see* Declaration of Alice Randall ¶¶ 2-4, and she is not alone in holding it. "*Gone with the Wind* – especially in its book form – is widely regarded in the black community as one of the most racist depictions of slavery and black slaves in American literature." Declaration of Harvard University Professor Henry Louis Gates, Jr., ¶ 5.

The point here is not to cast obloquy on Ms. Mitchell, nor to tar plaintiff with guilt by association, nor to rebuke the millions of enthusiastic readers of *Gone with the Wind*. The point is simply to reemphasize the great public importance of the message expressed by *The Wind Done Gone*. Outside the black community, Americans generally do not know or do not want to believe that one of their cherished cultural icons is as racist as in fact it is.⁴ A book written to bring this point home and thereby bring the issue into public debate makes an obvious contribution to First Amendment interests of large and lasting importance.

3. As is widely known, a significant number of literary works, old and new, take a character (other than the main character) from a well-known earlier work and retell the earlier work's story from this other character's point of view. Contemporary examples include the above-mentioned *Rosencrantz and Guildenstern are Dead* and *Wide Sargasso Sea*.⁵ But *Wind Done Gone* differs from these works in an important respect.

⁴ This was repeatedly evinced in the public controversy surrounding this case and can, in any event, under long-standing authority be judicially noticed. *See, e.g., Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (Circuit Ct. D. Cal. 1879) (Field, Circuit Justice) (taking judicial notice of general anti-Chinese sentiment) ("[w]hen we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men").

⁵ *Wide Sargasso Sea*, by Jean Rhys, is based on *Jane Eyre*, by Charlotte Brontë.

The protagonist of *The Wind Done Gone* is wholly new. Its heroine is a character that does not exist in the pages of *Gone with the Wind*. She is a slave girl born on Tara, called "Cynara" or "Cinnamon," effectively the daughter of Scarlett's father and the "house nigger" Mammy. Raised unloved, uneducated, and unrecognized, she is sold off at a young age. Because *Wind Done Gone* takes the form of a first-person narrative, Cynara is in every scene of the book, and as a result every scene of *Wind Done Gone* is either wholly new or substantially different from *Gone with the Wind*. Most of the events in *The Wind Done Gone* take place after the story told in *Gone with the Wind* has come to an end.

Once again, the significance of all this is not only to emphasize the original, transformative components of *Wind Done Gone*. The deeper point has to do with *Wind Done Gone's* ability to communicate its message.

The very idea that such a person as Cynara existed, without being mentioned in *Gone with the Wind*, will ineluctably remind readers that Ms. Mitchell's story suppresses the dreadful realities that would have existed behind the scenes at Tara: the lost and ruined black lives, the sexual exploitation, the children deprived not only of white wealth, freedom and education, but of their own mothers and of every spring of comfort and care as well. Making Cynara come to life, and through her eyes making all the blacks at Tara come to life, is the most effective – perhaps the *only* effective – means of communicating the message about *Gone with the Wind* that Ms. Randall sought to express.

Argument

The Preliminary Injunction Granted Below Violates the First Amendment.

The district court dismissed the constitutional issues implicated by plaintiff's motion to enjoin *The Wind Done Gone* on the basis of a general, well-recognized principle: "Injunctive relief may be freely granted by a court in order to prevent infringement of a copyright." Slip op. at 48 n.21. At the same time, however, the district court ignored another general, well-recognized principle: that the First Amendment does not permit prior restraints.

Superficially, these two principles may seem to conflict, implying that courts can follow one only by violating the other. In fact, however, the two principles are entirely consistent, and together they demand reversal here.

A. The general principles governing this case are not in dispute.

The general availability of injunctions for copyright infringement is beyond dispute. See 17 U.S.C. § 502(a). As this Court has stated more than once, injunctive relief is a "common judicial response" in infringement actions. *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 849 (11th Cir. 1990), quoted in *In re Capital Cases, Inc.*, 918 F.2d 140, 144 (11th Cir. 1990).

At the same time, however, there is no constitutional guarantee more fundamental than the First Amendment's bar against prior restraints. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (referring to prior restraint as "the most serious and

least tolerable infringement on First Amendment freedoms”); *Near v. Minnesota*, 283 U.S. 697 (1931) (overturning injunction) (“liberty of the press is . . . essential to . . . a free state,” and this liberty “consists in laying no previous restraints upon publication”) (citation omitted); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (overturning injunction involving *The Pentagon Papers*, publication of which, the government claimed, would “irreparably impair the national security”).

These two principles have led to what some regard as a conflict in the copyright case law. On the one hand, it is clear that “the First Amendment is not a license to trammel on legally recognized rights in intellectual property.” *Cable Home Communication Corp.*, 902 F.2d at 849 (quoting *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979)). Thus injunctions have frequently issued in infringement cases – including at least one case involving *Gone with the Wind*. See *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Co-op. Productions*, 479 F. Supp. 351 (N.D. Ga. 1979) (enjoining musical production similar to “Gone with the Wind”).

On the other hand, courts have also repeatedly recognized the First Amendment as a brake on, or even a bar to, the issuing of injunctions in copyright cases – including at least one case involving *Gone with the Wind*. See, e.g., *Trust Co. Bank v. Putnam Publ. Co.*, 5 U.S.P.Q.2d 1874 (C.D. Cal. 1988) (denying preliminary injunction of “The Blue Bicycle,” alleged to violate the “Gone with the Wind” copyright). See also, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966), cert. denied, 385 U.S. 1009

(1967) (“The normal reluctance to impose a summary restraint in advance of a full and complete trial is particularly acute in a case such as this which deals with the publication of a book.”) (citation omitted); *New Era Publ. v Henry Holt & Co.*, 873 F.2d 576, 597 (2d Cir. 1989) (Oakes, C.J., concurring) (“From a first amendment viewpoint, the effect of an injunction is to restrain the infringing expression altogether – an effect which goes beyond what is necessary to secure the copyright property.”); *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 262-63 (E.D. Va. 1995) (rejecting preliminary injunction) (“if a threat to national security was insufficient to warrant a prior restraint in *New York Times v. U.S.*, the threat to plaintiff’s copyrights and trade secrets is woefully inadequate”).

Because of these seemingly conflicting opinions, some have argued that the First Amendment and copyright law are at war on this point and, as a result, that the ordinary availability of injunctive relief for infringement must be rejected. *See, e.g.*, Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998). In fact, however, the two principles are entirely consistent.

**B. Injunctive relief for copyright infringement
ordinarily does not effect a prior restraint.**

The chief purpose of the First Amendment’s bar on prior restraints is to prevent censorship. *E.g.*, *Near v. Minnesota*, 283 U.S. at 713, 716 (discussing the history of prior restraints and describing the “chief purpose” of the freedom of the press as securing an “immunity . . . from censorship”); *Chesapeake B. & M. v. Harford County*, 58 F.3d 1005,

1010 (4th Cir. 1995) (describing “the risks of censorship and suppression associated with prior restraints on speech”).

By prohibiting prior restraints, the First Amendment protects the public dissemination of ideas, opinions, criticism or information of public interest, even if such speech may later be found to have violated the law. *Nebraska Press*, 427 U.S. at 559 (“If . . . a threat of criminal or civil sanctions . . . ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.”); *Near*, 283 U.S. at 714 (a prior restraint is designed “to suppress,” not to punish); see *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (“Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.”).

These concerns simply do not apply to ordinary infringement cases. The gravamen of an infringement claim is the unauthorized copying of others’ work. *E.g.*, *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (“To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”). Hence an infringement injunction, without more, restrains not speech, but only the copying of speech that itself remains fully published or publishable.

Enjoining the rental of pirated copies of commercial videotapes, *e.g.*, *U2 Home Entmt, Inc. v. Sang Kim*, 1998 U.S. Dist LEXIS 17683 (E.D. Pa. Nov. 4, 1998), is not a

prior restraint in the constitutional sense at all. The speech is fully available to the public and remains so notwithstanding the injunction. Enjoining a movie found to be essentially a copy of "Jaws" under a different name, *see Universal City Studios v. Film Ventures Int'l*, 543 F. Supp. 1134 (C.D. Cal. 1982), does not censor speech. It merely prevents the illegal copying of extant speech.

The "vast majority" of infringement cases involve "simple piracy" of one kind or another. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1132 (1990)). Thus in the vast majority of copyright actions, an injunction will raise no First Amendment problems. An injunction in such cases does *not* censor, does *not* suppress any opinions, information, or criticism, and hence does *not* effect a prior restraint.

C. By contrast, an injunction to prevent infringement does raise serious First Amendment concerns when it bans speech with a clear political message independent of and critical of the original work.

But as the United States Supreme Court has expressly noted, the general justification for injunctive relief in infringement actions disappears in cases dealing with critical, transformative works. "[W]hile in the 'vast majority of cases, [an injunctive] remedy is justified because most infringements are simple piracy,' such cases are 'worlds apart from many of those raising reasonable contentions of fair use.'" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1993) (quoting Leval, *supra*, at 1132).

The *Campbell* Court explicitly cautioned courts against issuing injunctions when dealing with parodic or other critical works – even *after* there has been a final determination of excessive borrowing:

Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law . . . are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.

Id. at 578 n.10. Where, as here, there has been no trial and no final determination of infringement, courts must surely be even more reluctant to grant injunctive relief.

As mentioned above, the district judge below held that injunctions in infringement actions are to be “freely granted.” Slip op. at 48. This ruling simply ignored the Supreme Court’s express cautionary statements in *Campbell*. Under *Campbell* and under fundamental First Amendment principles, an injunction should *not* be “freely granted” where, as here, the allegedly infringing work raises contestable fair use issues and expresses a clear, political message different from and critical of the original.

This conclusion is buttressed by this Circuit’s repeated, careful statements in its copyright cases urging district judges to avoid injunctions that would deprive the public of protected expression or of valuable information. *See, e.g., Capital Cities*, 918 F.2d at 144-45 (calling for “surgically” precise remedies in copyright actions in order to protect free speech interests); *Greenberg v. Nat’l Geographic Soc’y*, No. 00-10510, 2001 WL 280075 at * 7 (11th Cir. Mar. 22, 2001) (“In assessing the appropriateness of injunctive

relief, we urge the court [on remand] to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public's computer-aided access to this educational and entertaining work.”).

In this case, the district court's injunction does much more than foreclose access to “educational and entertaining work.” Banning a book with a clear, critical, political message is tantamount to censorship. It deprives the public of political speech at the core of First Amendment protection. In these circumstances, an injunction raises all the constitutional concerns that underlie the First Amendment's bar on prior restraints. Accordingly, such an injunction should not be permitted in the absence of the compelling necessity demanded – and *not* found – by the Supreme Court in the “Pentagon Papers” case. *See New York Times v. United States*, 403 U.S. 713 (1971).

D. The injunction granted below works especially grave and unjustifiable injuries to First Amendment interests and therefore must be reversed.

In fact, Judge Pannell's decision to ban *Wind Done Gone* involves especially grave and unjustifiable injuries to First Amendment interests, beyond those that would be implicated in many other parody cases. There are several distinct but related reasons why.

1. Unlike many parodic works – for example, the the successful music video send-up, entitled “Eat It,” of Michael Jackson's hit song, “Beat It” – *The Wind Done Gone* communicates a particularized, political message that its audience will certainly understand. This entitles Ms. Randall's novel to special First Amendment protection. *Cf.*

Spence v. Washington, 418 U.S. 405 (1974) (display of American flag with peace symbol affixed was protected political expression because an “intent to convey a particularized message was present, and . . . the likelihood was great that the message would be understood by those who viewed it”).

Indeed, in many respects this case is surprisingly analogous to *Spence*. In both, a “particularized message” of political criticism is conveyed by adding to and thereby transforming a potent, pre-existing and cherished American icon. One major difference between the present action and *Spence* cuts entirely in Ms. Randall’s favor: *The Wind Done Gone* borrows much less, adds much more, and is a great deal more transformative than was *Spence*’s flag.

If, nevertheless, *The Wind Done Gone* is found to have borrowed too much, damages will always be available. But for much the same reasons that *Spence* could not constitutionally be convicted for his use of an American icon to communicate a “particularized message,” *The Wind Done Gone* should not be subjected to a prior restraint. Cf. *Southeastern Promotions*, 420 U.S. at 558-59 (“The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties.”).

2. *Gone with the Wind* is a fantastically successful work that has sold “tens of millions of copies,” Complaint ¶ 2, has been published “in over 30 languages,” *id.*, and has achieved near-mythic status in American popular culture. It is in essence a “public figure”

in the world of letters. Criticism of *Gone with the Wind* therefore carries special First Amendment weight, just as do criticisms of public figures in other arenas. *See, e.g., Associated Press v. Walker*, 388 U.S. 130, 164 (1967) (plurality opinion) (article claiming that retired general had led anti-segregation demonstration) (“Our citizenry has a legitimate and substantial interest in the conduct of [public figures], and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials.’”).

Because of the special, canonical status of *Gone with the Wind*, plaintiff’s demand for an injunction should by analogy be analyzed with the same skepticism and heightened scrutiny that applies in copyright cases involving historical public figures. *See, e.g., Capital Cities*, 918 F.2d at 144 (“in the context of works involving public figures which are historical or biographical in nature, the degree of copying necessary to constitute actionable infringement must be high” and the improper use “flagrant”). *See also, e.g., Nash v. CBS, Inc.*, 899 F.2d 1537 (7th Cir. 1990); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir.1981); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

3. *Wind Done Gone* is “core political speech,” and thus a prior restraint upon it is “the most serious and least tolerable infringement on First Amendment freedoms.” *Nebraska Press Ass’n*, 427 U.S. at 559.

4. *Gone with the Wind* has been under copyright for approximately 65 years, and indeed the copyright would have expired in 1992 if the length of copyright protection had not been retroactively extended by Congress long after Ms. Mitchell wrote her novel.⁶ This retroactive extension is arguably unconstitutional per se, see *Eldred v. Reno*, 239 F.3d 372, 380-82 (D.C. Cir. 2001) (Sentelle, J., dissenting) (expressing the view that retroactive copyright extensions are unconstitutional), but assuming it is not, the considerable age of the *Gone with the Wind* copyright renders an injunction against *The Wind Done Gone* even more ill-suited to serving the proper purposes of copyright law.

The “goals of the copyright law” are “to stimulate the creation and publication of edifying matter.” *Campbell*, 510 U.S. at 578 n.10 (citation omitted). Over sixty-five years after *Gone with the Wind* was written, almost a decade after its copyright was originally scheduled to expire, enjoining *The Wind Done Gone* cannot be deemed necessary or even rationally related to the goal of stimulating “the creation and publication of edifying matter.” It is extremely difficult, if not absurd, to believe that authors today will be deterred from creating by the possibility that a work parodying or otherwise criticizing theirs might not be enjoined a century or more from now.

5. If copyright holders can “freely” obtain injunctive relief against works that borrow from the copyrighted material in order to criticize it, the copyright code will

⁶ Under the law as it stood at the time Ms. Mitchell wrote *Gone with the Wind*, the total allowable copyright term was 56 years, see Act of March 4, 1909 § 23, 35 Stat. 1075, 1080, and hence the *Gone with the Wind* copyright would have expired in 1992. Under subsequent amendments, the term has been extended to 95 years. See 17 U.S.C. § 304.

become the vehicle of censorship. The risks of such censorship are all too visibly on display in this case.

Plaintiff has permitted the publication of authorized sequels to *Gone with the Wind* and apparently plans to do so in future. Complaint ¶¶ 13-16. According to plaintiff, *The Wind Done Gone* is simply another “mere sequel” to *Gone with the Wind*, but this “mere sequel” the Mitchell trusts want to suppress. Perhaps this is because *Wind Done Gone* dares to tell the life story of an unknown, unloved slave girl born on Tara. Or perhaps because it suggests that miscegenation occurred there.⁷ Or perhaps because it will bring home to readers that *Gone with the Wind* had to tell a few brutal white lies, and cover up more than a few black truths, in order to make possible the romantic, nostalgic story of Scarlett and the Old South that so many of us fondly remember.

Copyright law was not intended to facilitate censorship. See, e.g., *United Christian Scientists v. Christian Science Bd. of Dirs.*, 829 F.2d 1152, 1156 n.18, 1168 (D.C. Cir. 1987) (discussing attempts by one group of Christian Scientists to use copyright to block the distribution of another group’s “unorthodox” version of Mary Baker Eddy’s writings, and holding that Congress’s grant of copyright to the First Church of Christ Science “amounts to little more than a prior restraint”); *Lerma*, 908 F. Supp. at 1368 (rejecting preliminary injunction in part on the ground that plaintiff was attempting to use copyright law to suppress criticism of Scientology); *Grundberg v. Upjohn Co.*, 137 F.R.D. 372, 388

⁷ The Mitchell Trusts apparently refuses to permit scenes of miscegenation in authorized *Gone with the Wind* sequels. See Conroy Declaration.

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(D. Utah 1991) (rejecting manufacturer's attempt to use copyright law to protect 90,000 pieces of litigation documents from public access); *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130, 147 (S.D.N.Y. 1990) (finding fair use and noting artist's attempt to use copyright law to prevent advocacy group from criticizing his work).

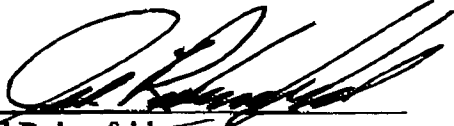
As Judge Lumbard of the Second Circuit wrote 35 years ago, "courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature." *Rosemont Enters., Inc.*, 366 F.2d at 311 (Lumbard, J., concurring). In this case, the holders of the *Gone with the Wind* copyright are attempting to use their legal protections to suppress critical, political speech, a purpose far from the goals that copyright law was designed to serve.

However bent or bowed the Constitution may sometimes be, it stands for certain bedrock principles. One is that a book exposing the racism of a canonical work of American popular culture cannot be banned. Ms. Randall has the right to publish this book. The public has a right to read it.

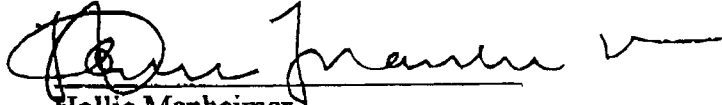
Conclusion

For the foregoing reasons, this Court is respectfully requested immediately to reverse the preliminary injunction entered by the district court.

Respectfully submitted, this 15 day of May, 2001.



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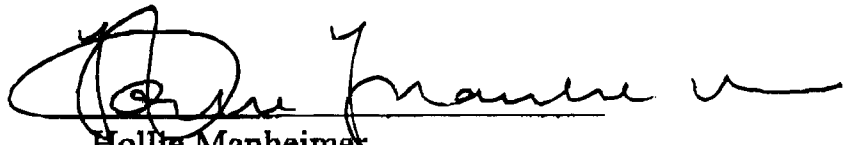


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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

Pursuant to FRAP 32(a)(7), I hereby certify that the foregoing brief, not including the Corporate Disclosure Statement, Table of Contents, or Table of Citations, does not exceed 7,000 words.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUNTRUST BANK as Trustee of
the Stephens Mitchell Trusts f/b/o Eugene
Muse Mitchell and Joseph Reynolds Mitchell,

Plaintiff-Appellee,

v.

HOUGHTON MIFFLIN COMPANY,

Defendant-Appellant.

CASE NO.:
01-122-00HH

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Brief of Amicus Curiae, Georgia First Amendment Foundation*, was served, by placing same in the United States mail in a properly address envelope with adequate postage affixed thereto, to the following individuals:

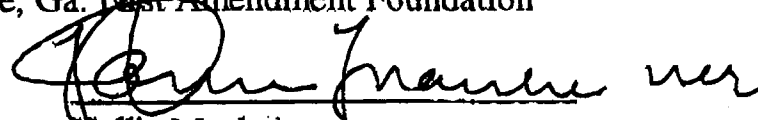
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