In the

Supreme Court of the United States

No. 78-680

Ronald R. Hutchinson, *Petitioner*

William Proxmire and Morton Schwartz, *Respondents*

Brief of American Psychological Association and American Association for the Advancement of Science as amici curiae: Hutchinson v. Proxmire and Schwartz

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-680

RONALD R. HUTCHINSON, *Petitioner,*

v.

WILLIAM PROXMIRE and MORTON SCHWARTZ, *Respondents.*

BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AND AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE AS AMICI CURIAE

CONSENT TO FILING

This Amici Brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

INTERESTS OF AMICI CURIAE

The American Psychological Association ("APA"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The purpose of the APA, as set forth in its Bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all branches in the broadest and most liberal manner."

The American Association for the Advancement of Science ("AAAS"), a nonprofit organization founded in 1848, is a national scientific society embracing all of the sciences. The objectives of AAAS are "to further the work of scientists, to facilitate cooperation among them, to foster scientific freedom and responsibility, to improve the effectiveness of science in the promotion of human welfare and to increase public understanding and appreciation of the importance and promise of the methods of science in human progress."

The APA has 50,000 members and includes the vast majority of psychologists holding doctorate degrees from accredited universities in the United States. The AAAS has 130,000 members and includes scientists from each scientific discipline as well as others interested in the advancement of science. APA is an independent affiliate of AAAS. Most of the members of APA and AAAS have a direct or indirect interest in publicly funded research—the specific matter at issue in this case. Moreover, because this case raises important questions which ultimately bear upon the accessibility, nature and conduct of federally funded scientific research, and the dissemination of the results of that research to other scientists and the public, all members of the APA and AAAS, all other scientists and the public could be directly and adversely affected by the decision of the United States Court of Appeals for the Seventh Circuit.

During the last fiscal year, the federal government expended approximately $8.3 billion on basic and applied scientific research. Some of those expenditures were made in the form of grants by various federal agencies to individuals and institutions. Other expenditures were made in the form of government contracts. Approximately 72% of all university-based scientific research in recent years has been funded in this manner.

The psychological research conducted with the aid of these federal funds covered such topics as learning, motivation, perception, developmental processes, social behavior, physiological correlates of behavior, and behavior pathology. Other scientific research covered a broad scope of topics ranging from mathematics, physics and the medical sciences to social, economic and agricultural sciences. Information concerning particular research experiments and projects was typically published in APA and AAAS periodicals, other scholarly journals, trade magazines and other publications.

APA and AAAS have direct interests in the outcome of this case because the decision of the Court of Appeals, if allowed to stand, could subject every one of their members to public harassment, slander and libel without any meaningful remedy if they choose to accept public research funds and publish their experimental findings.

SUPPLEMENTAL STATEMENT OF THE CASE[1]

This matter arises from a decision of the United States Court of Appeals for the Seventh Circuit affirming the District Court's grant of respondents' motion for summary judgment in an action alleging, *inter alia,* libel and slander. The courts below concluded that petitioner was a public figure for defamation purposes and that he had failed to carry the heavy evidentiary burden imposed on such persons.[2]

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[1] The Supplemental Statement is not a complete statement but rather a summary of those facts germane to the arguments propounded by Amici.

[2] *Hutchinson* v. *Proxmire,* 431 F. Supp. 1311 (W.D. Wis. 1977), *aff'd,* 579 F.2d 1027 (7th Cir. 1978). Amici will address only the

Petitioner, Dr. Ronald R. Hutchinson, is a research scientist who has devoted much of his professional career to the study of aggression in humans and animals. He holds several academic degrees including a Ph.D. in experimental psychology from Yale University. Dr. Hutchinson formerly served as a director of research at Kalamazoo State Hospital and as an associate professor of psychology at Western Michigan University.

From 1966 to 1975, Dr. Hutchinson directed various research projects which involved, among other things, experiments concerning latent aggression. To a large extent, that research was funded by grants from the National Aeronautics and Space Administration, the National Institute for Mental Health, the National Institute for Drug Abuse, the National Science Foundation, and the Office of Naval Research. During the course of his research, a local Kalamazoo newspaper carried a few announcements, based on press releases issued by the university, describing Dr. Hutchinson's research activities. And, the findings and conclusions of his research were published in some scholarly scientific journals.

In March 1975, respondent William Proxmire, United States Senator from Wisconsin, instituted a publicity campaign to call attention to what he considered to be wasteful government spending. The Senator's legislative aide, respondent Morton Schwartz, administered the campaign, which consisted of presenting a "Golden Fleece of the Month Award" to persons or organizations in the government that had spent tax

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public figure issue. It expresses no views on other issues presented by this case, *e.g.*, the scope of the absolute immunity provided by the Speech or Debate Clause.

dollars in the most dubious fashion. Based on legwork by Schwartz, Senator Proxmire issued a press release on April 18, 1975, presenting a joint "award" to the National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research for their funding of certain studies conducted by Dr. Hutchinson.

In the press release, Senator Proxmire ridiculed Dr. Hutchinson and his work, labeling the research "transparently worthless" and "nonsense," and charged that Dr. Hutchinson had "made a fortune" through his "grantsmanship." The press release was widely distributed to the news media and attracted nationwide attention. Senator Proxmire repeated one or more of his charges in a speech printed in the Congressional Record, in a newsletter to his constituents, on a Milwaukee radio program, and on a nationally syndicated television show. Some newspapers that had initially reported the "award" published Dr. Hutchinson's reply to the attacks levelled against him and his research.

The District Court granted respondents' motion for summary judgment, partly on a finding that Dr. Hutchinson was a public figure who had not met the heavy burden of proving that the alleged defamation was published with knowledge of its falsity or reckless disregard for the truth. That court, as well as the Court of Appeals, held that Dr. Hutchinson was a public figure because he had applied for and received federal funds to support his research, had published scholarly articles regarding that research, received news coverage of his work in the local press, and his reply to Senator Proxmire's charges was published in some newspapers.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals, if not reversed, will have an adverse and chilling effect upon scholarly scientific research, much of which is supported by public funds. Categorizing scientists as public figures simply because they accept government grants and publish their research findings would expose them to uncompensated injury from defamation—a powerful disincentive to engage in research activities. The holding of the Court of Appeals upsets the careful balance that this Court has fashioned between privacy interests and the First Amendment.

Although an individual can become a public figure for purposes of a particular public controversy by publishing articles and attracting news media attention, a sharp distinction must be drawn between advocacy and purely informational communication. The scientific articles published by Dr. Hutchinson and the limited news coverage of his research were merely informational. They clearly did not constitute advocatory attempts to influence the resolution of a public controversy.

Similarly, his application for and receipt of government grants were not efforts to engage the public's attention in order to influence any controversy. If the receipt of public funds were determinative, it would cast a "public figure" glow upon all persons who receive government monies, ranging from the mother of six on welfare to the farmer whose crops are subsidized. Moreover, it would be anomalous indeed for private researchers to be deemed public figures because of their government-funded work, when government employees performing similar tasks as part of their normal duties would not be considered public officials.

Finally, the Court of Appeals placed excessive emphasis on Dr. Hutchinson's published response to Senator Proxmire's attack, despite recent decisions of this Court making clear that this factor plays a minor role in the determination of public figure status. Those rebuttal opportunities resulted only from the defamatory charges and the *defendant's* ability to obtain widespread news coverage of them. A defamation plaintiff's status surely cannot hinge on his or her attacker's prominence and access to the channels of communication.

ARGUMENT

THE COURTS BELOW NOT ONLY MISAPPLIED THE PUBLIC FIGURE DOCTRINE, BUT ALSO EXPANDED THE CONCEPT WELL BEYOND THE PARAMETERS ESTABLISHED BY THIS COURT

The issue of whether a plaintiff is a public figure controls the applicability of the stringent fault requirement of *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and, as a practical matter, frequently determines the outcome of a defamation action. The judgment below, if allowed to stand on the grounds that Dr. Hutchinson is a public figure, would represent an extreme departure from the standards previously enunciated by this Court and would have an adverse effect upon scholarly research in this country.

The Court of Appeals devoted less than a page of its opinion to a superficial discussion of Dr. Hutchinson's status as a public figure. The district court's consideration of the issue is more lengthy, but it also lacks reasoned analysis. Neither court focused sharply on the standards established by this Court, and a review of those standards makes plain that the courts below erred in holding that Dr. Hutchinson is a public figure.

Like a public official, a public figure must prove with convincing clarity that the defendant published the alleged defamation with knowledge of its falsity or with reckless disregard for the truth. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 335-36 (1974). Although public figures do not hold public office, they "often play an influential role in ordering society," and "[o]ur citizenry has a legitimate and substantial interest in [their] conduct. . . ." *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 164 (1967) (Warren, C. J., concurring).

Gertz established two major categories of public figures: those who "achieve such pervasive fame or notoriety" so as to become public figures "for all purposes and in all contexts," and, more commonly, those who have "voluntarily inject[ed]" themselves "into a particular public controversy" and thereby become public figures for a "limited range of issues." 418 U.S. at 351. In either case, "such persons assume special prominence in the resolution of public questions." *Id.*[3]

The "pervasive public figure" has achieved general fame or notoriety in the community by occupying positions of "persuasive power and influence," *id.* at 345, by their "pervasive involvement in the affairs of society," *id.* at 352, or, by the "notoriety of their achievements." *Id.* at 342. Indicia of such status include, for example, acknowledgement of prospective jurors that they have heard of the plaintiff and proof that the plaintiff was widely known in the community. *Id.* at 352. In contrast, "limited public figures" are not house-

[3] *Gertz* also indicated that there may be a third class of public figures, *i.e.*, those who are "drawn into" a public controversy, 418 U.S. at 351, and thus achieve "involuntary" public figure status "through no purposeful action of [their] own." *Id.* at 345. However, "instances of truly involuntary public figures must be exceedingly rare." *Id.*

hold names; rather, they have "thrust themselves t the forefront of particular public controversies in or der to influence the resolution of the issues involved.' *Id.* at 345. *See also Curtis Publishing Co.* v. *Butts supra,* 388 U.S. at 164 (Warren, C.J., concurring) Whether an individual falls within this latter category can be determined only by evaluating "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation," his or her discussion of the issue with the news media, or other efforts to "engage the public's attention in an attempt to influence [the] outcome" of the controversy. 418 U.S. at 352. Of minimal importance is the plaintiff's access to the media for purposes of rebutting the defamatory material. *Id.* at 344. *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976).

A. Dr. Hutchinson Is Not a Public Figure Because He Did Not Voluntarily Thrust Himself Into the Vortex of a Public Controversy in an Attempt To Influence Its Outcome

Because Dr. Hutchinson is not a "household name," he cannot be considered a "pervasive" public figure for all purposes and in all contexts. *Compare Carson* v. *Allied News Co.,* 529 F.2d 206 (7th Cir. 1976) (prominent television personality); *Buckley* v. *Littell,* 539 F.2d 882 (2d Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977) (author and political commentator). Accordingly, the relevant inquiry is whether Dr. Hutchinson is a "limited" public figure for purposes of a particular controversy.

As *Time, Inc.* v. *Firestone, supra,* makes clear, the first step in making this determination is defining the scope of the controversy. *See* Note, *Public Figures, Private Figures, and Public Interest,* 30 Stan. L. Rev. 157, 175-78 (1977). The courts below labeled the con-

troversy as "the expenditure of public funds on the precise activities in which [plaintiff] voluntarily participated," 431 F. Supp. at 1327, and "the continued public funding," of plaintiff's research. 579 F.2d at 1035 n.14. Although Senator Proxmire's own statements indicate that this formulation of the controversy is too narrow and that a more accurate description would be "publicly funded research and wasteful government spending,"[4] it is clear that Dr. Hutchinson made no attempt whatsoever to influence the controversy. He made *no* statements prior to the defamation concerning the propriety of continued federal funding of research in general or his project in particular, and he had *no* discussions with the news media concerning this issue. His publications of the findings and conclusions of his experiments were scholarly in nature and did not seek to influence public opinion on the question of public funding of his research. Thus, his "participation in the controversy giving rise to the defamation" was virtually nonexistent.[5]

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[4] The Senator's press release of April 18, 1975, reveals his choice "for the biggest waste of taxpayers' money for the month of April" and explained his plan to offer monthly "Golden Fleece" awards culminating in a "Biggest Waste of the Year Award." In his May 1975 newsletter, he again described his scheme to recognize "the organization or person who has most utterly wasted your tax dollars." *See* 579 F.2d at 1036-38.

[5] It cannot be seriously contended that Dr. Hutchinson was an "involuntary" public figure who was drawn into a public controversy. As this Court said in *Gertz*, this type of public figure is "exceedingly rare." 418 U.S. at 345. Moreover, if Dr. Hutchinson was involuntarily caught up in a controversy, the defamatory statements of Senator Proxmire placed him there. To predicate a plaintiff's public figure status on the defendant's action is bootstrapping at its worst. *See* Robertson, *Defamation and the First Amendment: In Praise of Gertz* v. *Robert Welch, Inc.*, 54 Tex. L. Rev. 199, 221 (1976).

There is no doubt that the publishing of books or articles, as well as news coverage thereof, can significantly impact upon a public controversy. In such circumstances the author's efforts to influence its outcome certainly may constitute a "voluntary thrust" into the vortex of a dispute. *See, e.g., Guitar* v. *Westinghouse Electric Corp.*, 396 F. Supp. 1042 (S.D.N.Y. 1975), *aff'd without opinion,* 538 F.2d 309 (2d Cir. 1976) (freelance writer advocated prevention or restraint of suburban growth); *Exner* v. *American Medical Ass'n,* 12 Wash. App. 215, 529 P.2d 863 (1975) (doctor's book strongly opposed fluoridation). Dr. Hutchinson's publications, however, were scientific, focusing on various aspects of animal and human aggression. Those articles, published in scholarly journals that are not typically read by the public, did not address the question of whether Dr. Hutchinson's research constituted a wise expenditure of public funds or the broader issue of whether publicly funded research amounts to wasteful government spending. Rather, the publications served to inform a professional audience of the nature and extent of Dr. Hutchinson's experiments. Similarly, the news stories that appeared on the back pages of the local newspaper [6] merely reported the basics of Dr. Hutchinson's research, not his views on the controversy at issue here. In short, Dr. Hutchinson's published works and news reports about his research were informational, not advocatory, and the courts below failed to make this crucial distinction. Dr. Hutchinson's publications were contributions to a discrete body of scientific knowledge, not an attempt to "engage the public's attention in an

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[6] The majority of these articles originated in the information department of the University where Dr. Hutchinson was formerly employed. *See* 431 F. Supp. at 1327.

attempt to influence [the] outcome" of the controversy regarding publicly funded research. *Gertz, supra,* 418 U.S. at 352.

The *Gertz* and *Firestone* cases offer useful analogies. In the former, the defamation action stemmed from the killing of a youth by a Chicago policeman, against whom plaintiff brought a civil suit on behalf of the boy's family. Plaintiff, a noted civil rights attorney, was subsequently described in a magazine article as a Communist who was participating in a nationwide, Communist-inspired "war on police," as well as in a "frame-up" of the Chicago policeman. 418 U.S. at 325-26. Despite plaintiff's active involvement in civil liberties matters, his publication of four books and thousands of articles, his prior statements condemning police brutality, and his participation in a sensational case that had attracted extensive media coverage, this Court held that he was not a public figure. He had not discussed the case with the press and, other than representing a private client in a civil suit, had made no attempt to influence the outcome of the controversy. Thus, he had not "thrust himself into the vortex" of the public issue. *Id.* at 352.

In *Firestone,* a weekly newsmagazine erroneously reported that plaintiff's husband had been granted a divorce on grounds of adultery. Plaintiff, a socially prominent woman whose husband was the "scion of one of America's wealthier industrial families," was held to be a private individual for defamation purposes despite having held frequent press conferences during her 17-month divorce trial and having actively sought media attention in regard to her role as a member of

"high society." 424 U.S. at 453-55. Although the press conferences were admittedly voluntary, they were merely informational in nature and thus not deemed to have been held for the purpose of influencing the outcome of the divorce proceedings—the relevant controversy. *Id.* at 454 n.3.

If Mr. Gertz and Mrs. Firestone are not public figures, then neither is Dr. Hutchinson. His involvement in the controversy in no manner approached that of Mr. Gertz, and the limited press coverage of his work was quite insignificant compared to the media attention lavished upon Mrs. Firestone. Accordingly, the courts below plainly erred in concluding that Dr. Hutchinson thrust himself into the vortex of a public controversy to influence its outcome. Although he voluntarily engaged in research and published its results, he played no role in the related but distinct controversy relating to the funding of that activity. That the two are plainly separate is made clear by a simple rhetorical question: would Senator Proxmire have attacked Dr. Hutchinson if his research had been supported by *private* grants?

B. The Criteria Adopted by the Courts Below Impermissibly Broaden the Class of Public Figures Recognized by This Court

There is no doubt that research scientists can and do become public figures, some by active participation in controversial issues, *Pauling* v. *Globe-Democrat Pub. Co.*, 362 F.2d 188 (8th Cir. 1966) (Blackmun, J.), *cert. denied*, 388 U.S. 909 (1967), and others by the mere strength of their ideas. *See Gertz* v. *Robert Welch, Inc., supra*, 418 U.S. at 342. The criteria relied upon

by the courts below, however, are so encompassing that they sweep virtually every researcher who receives government funds into the public figure category, a result plainly inconsistent with *Gertz* and *Firestone*.

The District Court and the Court of Appeals stressed four factors in concluding that Dr. Hutchinson is a public figure: (1) his publication of numerous scholarly articles concerning his research; (2) news stories in the local press regarding his research; (3) his application for and receipt of public funds for his research; and (4) his access to the media to rebut the alleged defamation. 431 F. Supp. at 1327; 579 F.2d at 1034-35. The first two factors, while plainly relevant under *Gertz,* are insignificant here because, as previously noted, neither Dr. Hutchinson's publications nor the local news stories about his research were part of an attempt to influence the resolution of the controversy surrounding the use of government funds for research in general or his particular research activities. Consequently, by relying heavily on the third and fourth factors, the courts below departed significantly from the teachings of this Court, and the decisions thus constitute an unwarranted expansion of the public figure concept.

1. *The mere application for public funds does not thrust an individual into the vortex of the controversy*

The Court of Appeals suggested that Dr. Hutchinson's filing of applications for public funds for his research was a significant factor indicating that he had voluntarily thrust himself into the vortex of the con-

troversy. 579 F.2d at 1035 n.14.[7] But this determination cannot withstand even the most elementary analysis. By filing the applications, Dr. Hutchinson merely invoked the mechanism by which government research funds were to be made available to the public. Like the plaintiff in *Firestone,* he set in motion the public process which had been set up to handle the matter. 424 U.S. at 454.[8] He did not take the crucial step—the "thrusting" step—of seeking to "engage the *public's* attention" in an attempt to influence any decision regarding the propriety of government funding of research in general or his work in particular.

In fact, the application process makes clear that the mere filing of a research proposal is not an attempt to sway public opinion but an effort to communicate one's desire to perform a particular project to those who offer financing opportunities. For example, under the National Science Foundation's guidelines, unsolicited research proposals are subjected to a comprehensive peer review process, with evaluations conducted by agency staff, members of the academic community, and other experts. Projects are funded in the order of their

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[7] Specifically, the Court of Appeals stated that Dr. Hutchinson's efforts to obtain financing for his research "demonstrate his public affirmation of the soundness of the research and the continued funding thereof." *Id.*

[8] While *Firestone* is technically distinguishable to the extent that the public process there, the judicial system, was the only means by which the plaintiff could have legally dissolved her marriage, the principle of the case surely applies here. As noted previously, 72% of all scientific research conducted at universities in recent years was funded by the government. National Science Foundation, *National Patterns of R&D Resources: Funds & Manpower in the United States,* 1953-1977 (NSF 77-310) at 4-5. Thus, as a practical matter, scientists who apply for federal grants are utilizing the only means available for the funding of their university-based research.

merit and to the extent permitted by available funds. *See generally* National Science Foundation, *Grants for Scientific Research* (NSF Pub. No. 78-41).[9] The ultimate decision to fund a project is made by the agency, *not* by the researcher. And, by its selections, the agency serves as an advocate for the expenditure of public monies for research that it considers to be in the public interest.[10]

Moreover, the suggestion that the mere filing of grant applications is a significant factor is squarely at odds with *Gertz*. In *Gertz*, this Court refused to hold that an attorney was a public figure simply because he represented a client in a controversial case. Underlying this refusal was the recognition that such a holding would intimidate lawyers to the point that they might well decline to take controversial cases because of the greater exposure to uncompensated injury from defamation. *See* 418 U.S. at 351. The Court of Appeals' holding that an application for public research funds is a significant factor indicating voluntary involvement in a public controversy serves as a similar disincentive

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[9] Under other research programs, the government plays a more active role in defining the scope of a research project. In contract programs, an agency determines that research is needed on a particular topic, defines the nature and scope of the research projects desired, and solicits proposals. The award is made in the form of a procurement contract. *See* National Science Foundation, *Grant Policy Manual* § 202.3 (NSF Pub. No. 77-47). In addition, an agency may decide that research is necessary in a broad area and invite proposals without specifying the particular type of research to be conducted. *Id.* at § 202.2.

[10] Indeed, the National Science Foundation has funded only about 35% of all unsolicited research proposals in the behavioral and neural sciences in recent years. National Science Foundation, *Justification of Estimates of Appropriation, FY 1980: Report to the United States Congress.* If an agency were to fund inappropriate projects, public opinion toward continued expenditures would undoubtedly be affected.

to all research scientists and, if left standing, would chill the desire to conduct much of the scholarly research which contributes immeasurably to the technical and social advancement of our society.[11]

2. *The receipt of public funds does not make one a public figure*

In holding that Dr. Hutchinson is a public figure, the courts below placed considerable emphasis on his receipt of government funds for his research. However, researchers do not become public figures simply by obtaining government grants to finance their work, just as private institutions do not automatically become the "state" for Fourteenth Amendment purposes because they receive government funds. *See Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725-26 (1961).

It is plain that financial interests of the defamation plaintiff must not be considered in a vacuum, but in the context of the particular public controversy and the plaintiff's role in its resolution. The courts have certainly made the distinction. In *Foster* v. *Laredo Newspapers, Inc.,* 541 S.W.2d 809 (Tex. 1976), *cert. denied,* 429 U.S. 1123 (1977), for example, a private engineer hired by a county government as a consultant for various public works projects was held not to be a public

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[11] Scientific research is a multi-staged process. Included in this process is the collection of observations, the forming of hypotheses that link the observations, the testing of the truth or falsehood of the hypotheses and the using of hypotheses in the examination of further observations. Before ultimate conclusions can be reached, therefore, a great deal of trial and error must take place. The Court of Appeals' holding will dissuade research scientists from seeking to undertake publicly funded scientific research for, among other reasons, fear that each trial and error along the way may be the subject of uncompensated defamatory comment.

figure merely because he received county funds for his work. He "remained strictly within his role as an adviser" to the county and did not attempt to influence the outcome of a controversy involving a project on which he had worked. *Id.* at 817. *Accord, Forrest* v. *Lynch,* 347 So.2d 1255 (La. App.), *review denied,* 351 So.2d 168 (La. 1977), *cert. denied,* 435 U.S. 971 (1978) (consulting engineer engaged by architect to prepare plans and specifications for state building project played no role in influencing resolution of the public controversy surrounding the funding of that project).[12]

Unless the *Foster* analysis is applied in the instant case, any person who receives government funds for any purpose is potentially a public figure, regardless of his or her lack of participation in a particular controversy. Thus, welfare recipients, farmers whose crops receive price supports, recipients of student loans, proprietors of small businesses who peddle their wares to government agencies and Medicare recipients would all stand to be public figures, a clearly untenable result. Dr. Hutchinson performed the job he was paid to do, as did the consulting engineer in *Foster,* and the requisite nexus between his receipt of government funds and the influencing of a public controversy was plainly absent.[13]

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[12] *Compare Greenbelt Cooperative Pub. Ass'n, Inc.* v. *Bresler,* 398 U.S. 6 (1970) (prominent real estate developer held public figure because of his attempts to secure resolution of controversy in manner favorable to his own financial interests); *Martin Marietta Corp.* v. *Evening Star Newspaper Co.,* 417 F. Supp. 947 (D.D.C. 1976) (defense contractor that entertained military officials for purpose of influencing award of defense contracts held public figure).

[13] Implicit in the decision of the courts below is the erroneous assumption that all grants impact upon the recipient's salary. This, however, is typically not the case. For example, most publicly funded research in psychology takes place in university or indus-

Accordingly, the federal funding of Dr. Hutchinson's research affords no basis in either law or policy for holding him to be a public figure.

Moreover, under the approach adopted by the courts below, a private researcher who received a government grant could be forced to shoulder a much heavier burden in a defamation suit than a government employee who performed similar research tasks. The government employee would not, by virtue of his or her research job alone, be a public official under *New York Times Co.* v. *Sullivan, supra*, for the public official designation "applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt* v. *Baer*, 383 U.S. 75, 85 (1966).[14] If a researcher directly employed by the government to perform research in a certain area is not necessarily a public official, it would

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trial settings, and the receipt of a government grant usually does not increase the psychologist's salary, but simply relieves the university or the company of the responsibility for all or part of that salary. Thus, a college professor who earns $18,000 per 9 month academic year does not raise his or her salary by obtaining a $10,000 grant; rather, $10,000 of his or her salary is paid with grant funds and the remaining $8,000 by the university. A grant may include an amount that covers the scientist's summer salary.

[14] The courts have consistently held that, in order to be a public official, a government employee must have some managerial duties or otherwise function as a decisionmaker. *E.g.*, *Silbowitz* v. *Lepper*, 32 A.D.2d 520, 299 N.Y.S.2d 564 (1969) (supervisor of post office branch); *Kapiloff* v. *Dunn*, 27 Md. App. 514, 343 A.2d 251 (1975), *cert. denied*, 426 U.S. 907 (1976) (high school principal). *Compare Chapadeau* v. *Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569 (1975) (public schoolteacher neither public official nor public figure); *Zeck* v. *Spiro*, 52 Misc.2d 629, 276 N.Y.S.2d 395 (1966) (attorney employed by county sewer district not public official in light of his lack of control over government affairs).

be anomalous to hold that a private individual performing similar research under a government grant is a public figure. Neither has control over the decision to spend public funds for a particular research project.

3. *Access to the news media for rebuttal purposes is at most a minor consideration in determining a public figure*

When first developing the public figure doctrine in *Curtis Publishing Co.* v. *Butts, supra,* this Court distinguished public figures from private individuals on the basis that the former, like public officials, generally enjoy greater access to the channels of communication and thus have a more effective opportunity to counter alleged defamation. 388 U.S. at 155. However, more recently this Court has recognized that the availability of this self-help remedy is in reality only "a minor consideration in determining whether an individual is a public figure." *Time, Inc.* v. *Firestone, supra,* 424 U.S. at 486 (Marshall, J., dissenting); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. at 344 n.9.

Despite the de-emphasis of the rebuttal factor in both *Gertz* and *Firestone,*[15] the courts below stressed Dr. Hutchinson's ability to respond to Senator Proxmire's attack. There are at least two serious flaws with this approach: (1) Dr. Hutchinson was unable to reach the same audience that received the defamatory information; and (2) conditioning public figure status on media conduct *after* publication of the defamatory material creates obvious bootstrapping problems.

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[15] The plaintiffs in those cases plainly had access to the news media for rebuttal purposes, for both had been extensively "covered" by the press. Indeed, in *Firestone* the plaintiff had held several press conferences.

This Court alluded to the first difficulty in *Gertz,* noting that "an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood" because "the truth rarely catches up with a lie." 418 U.S. at 344 n.9.[16] Although Dr. Hutchinson's response was published in various newspapers that had reported Senator Proxmire's "award," Dr. Hutchinson had no opportunity to respond via other media utilized by the Senator: a nationally syndicated television show, a local radio program, the Congressional Record and, of course, the Senator's own newsletter.

The second difficulty is more serious, for the clear import of the opinions below is that any person who is defamed becomes a public figure if his or her denial is mentioned by the press. This Court rejected similar bootstrap analysis in *Gertz* and should do so again here. If the media can gain the protection of the *New York Times* standard simply by publishing a denial, there is obviously no incentive to exercise reasonable care in the original publication of the defamatory charge. Robertson, *Defamation and the First Amendment: In Praise of Gertz* v. *Robert Welch, Inc.,* 54 Tex. L. Rev. 199, 229 (1976).

Moreover, under the approach adopted by the courts below, the classification of an individual as a public figure hinges not on his or her status—as *Gertz* clearly

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[16] Courts and commentators have also pointed out this deficiency, describing the "greater access" justification as a makeweight argument. *Reliance Ins. Co.* v. *Barron's,* 442 F. Supp. 1341, 1348 (S.D. N.Y. 1977); Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?,* 18 U.S.L.A. L. Rev. 371, 376 (1970). *See also* Eaton, *The American Law of Defamation Through Gertz* v. *Robert Welch, Inc. and Beyond: An Analytical Primer,* 61 Va. L. Rev. 1349, 1420-21 (1975).

demands—but rather on the status of his or her attacker. Put another way, the prominence of Senator Proxmire undoubtedly led to some opportunities for Dr. Hutchinson to respond, since the news media generally seeks reactions from those who are criticized, attacked or ridiculed by high government officials. It would indeed be circular to hold that defamed individuals become public figures because their attacker commands ready access to the channels of communication.

Thus, in order to prevent the "access to the media" test from distorting *Gertz,* such access for rebuttal purposes must be measured prior to publication of the defamatory information—the plaintiff "must be seen as he was when the [defamation] was published." *Rosanova* v. *Playboy Enterprises, Inc.,* 580 F.2d 859, 861 (5th Cir. 1978). The courts below plainly failed to do so; they placed undue emphasis on the access element, and, by focusing on rebuttal opportunities created by the defamatory statements themselves, went well beyond the contours established in *Gertz* and *Firestone.*

CONCLUSION

For the foregoing reasons, Amici American Psychological Association and American Association for the Advancement of Science respectfully urge that this Court should reverse the decision of the United States Court of Appeals for the Seventh Circuit.

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