

New York Supreme Court

APPELLATE DIVISION—THIRD DEPARTMENT

CHRISTOPHER PORCO and JOAN PORCO,

Plaintiffs-Respondents-Cross-Appellants,

—against—

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellant-Cross Respondent.

**BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION,
ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
THE AUTHORS GUILD, INC., COMIC BOOK LEGAL DEFENSE FUND,
FREEDOM TO READ FOUNDATION AND
MEDIA COALITION FOUNDATION, INC. AS *AMICI CURIAE***

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	II
INTEREST OF <i>AMICI</i>	1
ARGUMENT	2
I. THE TRIAL COURT’S DECISION CONSTITUTES AN UNWARRANTED EXPANSION OF NEW YORK’S LIMITED STATUTORY RIGHT OF PRIVACY/PUBLICITY	2
A. New York Law Limits the Protection of a Person’s Right Of Privacy/Publicity to the Nonconsenting Use of a Person’s “Name, Portrait, Picture or Voice ... for Advertising Purposes or for the Purposes of Trade.”	3
B. New York’s Limited Right of Publicity/Privacy Is In Accord with Limitations Recognized Throughout the Country	6
II. THE TRIAL COURT’S DECISION, UNLESS REVERSED, WILL SUBSTANTIALLY CHILL <i>AMICI</i> ’S FIRST AMENDMENT PROTECTED SPEECH IN A BROAD RANGE OF BOOKS, PLAYS, AND OTHER EXPRESSIVE WORKS	8
A. Biographies.....	9
B. Nonfiction Novels and Drama.....	11
C. Fiction That Includes Characters Based on Real Persons.....	12
D. Graphic Books, Including Graphic Memoirs and Graphic Novels.....	14
E. Visual Works of Art	15
CONCLUSION	17
PRINTING SPECIFICATIONS STATEMENT	18
APPENDIX A	19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Freihofer v. Hearst Corp.</i> , 65 N.Y.2d 135 (1985).....	3
<i>Frosch v. Grosset & Dunlap, Inc.</i> , 75 A.D.2d 768 (1st Dep’t 1980).....	8, 12
<i>Gravano v. Take-Two Interactive Software, Inc.</i> , 31 N.Y.3d 988 (2018).....	14
<i>Guglielmi v. Spelling-Goldberg Prods.</i> , 25 Cal. 3d 860 (1979).....	7
<i>Hicks v. Casablanca Records</i> , 464 F. Supp. 426 (S.D.N.Y. 1978).....	6
<i>Hoepker v. Kruger</i> , 200 F. Supp. 2d 340 (S.D.N.Y. 2002).....	6
<i>Lohan v. Take-Two Interactive Software, Inc.</i> , 31 N.Y.3d 111 (2018).....	14
<i>Matthews v. Wozencraft</i> , 15 F.3d 432 (5th Cir. 1994).....	6
<i>Messenger v. Gruner + Jahr Print. & Publ’g</i> , 94 N.Y.2d 436 (2000).....	3, 4
<i>Moore v. The Weinstein Company LLC</i> , 545 F. App’x 405 (6th Cir. 2013).....	6
<i>Ruffin-Steinback v. dePasse</i> , 267 F.3d 457 (6th Cir. 2001).....	6
<i>Seale v. Gramercy Pictures</i> , 949 F. Supp. 331 (E.D. Pa. 1996).....	6

<i>Spahn v. Julian Messner, Inc.</i> , 18 NY 2d 324 (1966)	5
<i>Spahn v. Julian Messner, Inc.</i> , 21 N.Y.2d 124 (1967)	5, 6
<i>University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.</i> , 22 A.D.2d 452, <i>aff'd on opinion of App. Div.</i> , 15 N.Y.2d 940 (1965)	8, 14
<i>Wojtowicz v Delacorte Press</i> , 43 N.Y.2d 858 (1978)	3
Constitution and Statutes	
Civil Rights Law	
§ 50	3
§ 51	<i>passim</i>
United States Constitution	
First Amendment	<i>passim</i>

American Booksellers Association, Association of American Publishers, Inc., The Authors Guild, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation and Media Coalition Foundation, Inc. respectfully submit this brief, as *amici curiae*, in support of Defendant-Appellant Lifetime Entertainment Services, LLC (“Appellant” or “Lifetime”).

INTEREST OF *AMICI*

Amici's members (“*amici*”) write, create, publish, produce, distribute, and sell books and printed materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining. Libraries and librarians represented by *amicus* Freedom to Read Foundation provide such materials to readers and other library patrons. All of the *amici* both practice and promote the free expression and exchange of ideas.

Although this case concerns a docudrama, the detrimental impact of the trial court's unwarranted expansion of New York's limited statutory right of publicity is by no means limited to that genre. *Amici* present this brief to focus on the unconstitutional, profoundly chilling effect that the trial court's decision, unless reversed, will have on the writing, publication and distribution of books, plays, and other forms of expression using the printed word and image. This is a matter of particular importance because New York is the hub of book publishing in the United States.

The trial court held that, because Lifetime’s film—a dramatization of real events—used common literary devices such as inventing dialogue, creating composite characters, and changing the setting of events, a trial on the merits is required to determine whether those creative devices made the docudrama “materially and substantially fictitious.” Such a construction of Section 51 would seriously impair *amici*’s constitutional right to create and publish fiction and non-fiction material, including authorized and unauthorized biographies, “non-fiction novels,” plays, and myriad other creative works. It would substantially undermine this State’s traditional, strong protection for free speech, especially for expressive works that draw inspiration from real people and real events.

Amici respectfully ask this Court to reverse the decision below. Descriptions of each of the *amici* are set forth in Appendix A.

ARGUMENT

I.

THE TRIAL COURT’S DECISION CONSTITUTES AN UNWARRANTED EXPANSION OF NEW YORK’S LIMITED STATUTORY RIGHT OF PRIVACY/PUBLICITY

With its holding that a creative work violates the rights of persons depicted if the work is “materially and substantially fictitious,” even if the work is presented as a fictionalization, the trial court unduly expanded New York’s limited right of privacy/publicity, and thereby chilled the First Amendment rights of authors,

publishers, booksellers, librarians, and those who read, listen to, and watch creative works.

A. New York Law Limits the Protection of a Person’s Right Of Privacy/Publicity to the Nonconsenting Use of a Person’s “Name, Portrait, Picture or Voice ... for Advertising Purposes or for the Purposes of Trade.”

New York does not have a common law right of privacy or publicity.

Messenger v. Gruner + Jahr Print. & Publ’g, 94 N.Y.2d 436, 441 (2000);

Freihofer v. Hearst Corp., 65 N.Y.2d 135, 140 (1985); *Wojtowicz v Delacorte*

Press, 43 N.Y.2d 858, 860 (1978). Instead, the right of privacy or publicity

recognized in New York is provided exclusively by statute: Sections 50 and 51 of the Civil Rights Law. *Messenger*, 94 N.Y.2d at 441.

Civil Rights Law § 51, by its terms and as construed by the Court of Appeals and other courts of this State, provides a bulwark of established law, ensuring that all persons may freely engage in the creation and dissemination of expressive works so long as the “name, portrait, picture or voice” of a person is not used “for advertising purposes or for the purposes of trade” absent consent. The statute is thus clearly limited both as to the *subject matter protected* (“name, portrait, picture, or voice”) and *uses proscribed* (“for advertising purposes or for the purposes of trade”). These two limitations work together; a cause of action under Section 51 arises only if the defendant engages in a proscribed use of a protected

subject matter. The Court of Appeals has held that Section 51 should be “narrowly construed” and “strictly limited” both as to protected subject matter and proscribed use. *Messenger*, 94 N.Y.2d at 441 (citation omitted).

In presenting a dramatization of a real story, the docudrama at issue in this case, *Romeo Killer: The Chris Porco Story* (the “Film”) used the names of plaintiffs Christopher Porco and Joan Porco, but that use was not “for advertising purposes or for the purposes of trade.” That placed the Film outside the scope of Section 51. The trial court’s holding that a work otherwise outside Section 51 may be deemed “for purposes of trade” if the work is “materially and substantially fictitious,” even if the work is presented as a fictionalization of real events, constitutes an unwarranted expansion of Section 51, and is contrary to decisions of this State’s courts applying Section 51.

The trial court’s expansion of the scope of Section 51 was exacerbated by the trial court’s holding that

It is a challenge for the Court to conceive of any evidence that either party might submit on a summary judgment motion that could establish, as a matter of law, that the film is, or is not, materially and substantially fictitious. Indeed, deciding whether the film comports with the truth is largely a matter of opinion.

JA26. That holding means that when a creative work uses literary devices such as invented dialog, compression of dates, and composite characters, the author,

publisher, and others sued on a Section 51 claim would not only bear the risk of liability, but also the costs and uncertainty of a jury trial.

The trial court's departure from this State's settled law is reviewed in detail in the briefs of Lifetime and *amici* FX Networks LLC, *et. al.*, and need not be reviewed here, except to note that the case principally relied upon by the trial court in this case, *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124 (1967), does not support the trial court's decision. The work at issue in *Spahn*—what purported to be a truthful and accurate biography of the pitching great Warren Spahn—was not merely “materially and substantially fictitious.” The so-called Spahn biography “made no effort and had no intention to follow the facts concerning [Spahn's] life,” 21 N.Y.2d at 127, even though it “*purports to be his biography.*” *Spahn v. Julian Messner, Inc.*, 18 NY 2d 324, 328 (1966) (emphasis in original). Here, instead, the docudrama that portrayed plaintiff Christopher Porco *did follow the central facts* concerning the heinous crime for which he was convicted, even though it *did not purport to be a documentary*. The docudrama opens with the disclosure that it is merely “Based on a true story.” JA248 [Film] at 00:00:01.22, and contains this explicit notice before the closing credits:

While this film is a dramatization based on a true story, some names have been changed, some characters are composites and certain other characters and events have been fictionalized.

JA248 [Film] at 01:28:33.73. Neither *Spahn*, nor any other decision of the Court of Appeals, supports the decision of the trial court in this case.

B. New York’s Limited Right of Publicity/Privacy Is In Accord with Limitations Recognized Throughout the Country

Courts throughout the country have recognized that the First Amendment imposes limits on privacy/publicity rights claims relating to books and other creative works. *See, e.g., Matthews v. Wozencraft*, 15 F.3d 432, 439-40 (5th Cir. 1994) (novel about plaintiff’s life story “falls within protection of the First Amendment”); *Moore v. The Weinstein Company LLC*, 545 F. App’x 405, 408 (6th Cir. 2013) (“First Amendment ... fundamentally constrain[s]” right of publicity claim); *Ruffin-Steinback v. dePasse*, 267 F.3d 457, 462 (6th Cir. 2001) (“use of plaintiffs’ fictionalized likenesses in a work protected by the First Amendment and the advertising incidental to such uses did not give rise to a claim for relief under the plaintiffs’ rights of publicity”); *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 348-349 (S.D.N.Y. 2002) (no Section 51 liability for artwork incorporating photograph of plaintiff because “free speech rights clearly transcend privacy rights when the speech concerns ‘newsworthy events or matters of public interest.’”) (citation omitted); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 337 (E.D. Pa. 1996) (“Defendants’ use of the Plaintiff’s name and likeness [in motion picture and book] was for the purpose of First Amendment expression”); *Hicks v. Casablanca*

Records, 464 F. Supp. 426, 433 (S.D.N.Y. 1978) (“[F]irst [A]mendment protection usually accorded novels and movies outweighs whatever publicity rights plaintiffs may possess”).

The First Amendment and the free speech protections of New York’s Constitution similarly compel rejecting the trial court’s expansion of the prohibitions of Section 51. A proper interpretation of Section 51, consistent with federal and New York constitutional protection for freedom of expression, is aligned with the concurring opinion of Chief Justice Bird of the California Supreme Court:

Contemporary events, symbols and people are regularly used in fictional works. Fiction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. No author should be forced into creating mythological worlds or characters wholly divorced from reality. The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment. Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction.

Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 869 (1979).

II.

THE TRIAL COURT’S DECISION, UNLESS REVERSED, WILL SUBSTANTIALLY CHILL *AMICI’S* FIRST AMENDMENT PROTECTED SPEECH IN A BROAD RANGE OF BOOKS, PLAYS, AND OTHER EXPRESSIVE WORKS

Although this case concerns a docudrama, other plaintiffs have brought cases under Section 51 based on books and other forms of expressive work. With limited exceptions not applicable here, these cases have been unsuccessful for a variety of reasons, including because the courts of this State properly cabin Section 51 to “advertising or for purposes of trade.” *See, e.g., Frosch v. Grosset & Dunlap, Inc.*, 75 A.D.2d 768, 769 (1st Dep’t 1980) (*book* about Marilyn Monroe did not give rise to Section 51 claim because “the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services”¹); *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452, 457- 58 (1st Dep’t), *aff’d on opinion of App. Div.*, 15 N.Y.2d 940 (1965) (using the names of Notre Dame University and its living president, Father Theodore M. Hesburgh, in a *novel* and fictionalized movie based on the novel was not actionable; “It is enough that that the work is a form of expression ‘deserving

¹ In *Frosch v. Grosset & Dunlap, Inc.*, the First Department also noted that New York’s statutory right of publicity does not survive the death of the person depicted, but the court’s holding was based on the principle that “the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services” *Id.*

of substantial freedom – both as entertainment and as a form of social and literary criticism.”) (citation omitted).

Were the trial court’s approach to Section 51 left standing, it would have a substantial chilling effect on a broad range of books and other expressive works, including the following.

A. Biographies

Many, if not most, biographies are unauthorized by the subject. Some are avowedly so, such as *Tom Cruise: An Unauthorized Biography*, *Kim Jong Un: The Unauthorized Biography*, and *Adam Sandler: An Unauthorized Biography*, while others, such as *Saban: The Making of a Coach*, *Crash Landing* about Lance Armstrong, and *Game Change* about Senator John McCain, while unauthorized, do not highlight that fact in their titles. Biographies necessarily use not only the name and persona of the subject, but also use the names and personas of other persons who played a role in the events described (colleagues, friends, enemies, spouses, lovers, etc.), many of whom would likely not be public figures.

Either intentionally (as was done in the Film at issue here), or due to reliance on information that turns out to be inaccurate despite thorough research, or due to inadequate research, a biography may not be entirely accurate. It may compress events, portray events as occurring in a sequence different than what actually took place, attribute statements or conduct to the wrong person, attribute statements or

conduct of many persons to one person, and reconstruct or invent dialog that may be different than what was actually spoken, all the while adhering to the central facts of the life story being portrayed. Many creative works that intentionally use such literary devices so state—as was done in the Film.

Whether such departure from the true facts is intentional or not, under the reasoning of the decision below, authors, publishers, booksellers and librarians who write, publish, sell, or loan such biographies would be subject to the threat of the costs of a jury trial to determine whether the biography—even if non-defamatory—is “materially and substantially” fictionalized. If that subjective standard is found to have been met, the biography would be subject to Section 51’s prohibition. That means that no author, publisher or distributor of a biography having any creative component, or that might contain errors, published without the consent of the subject, would be free of the fear of expensive litigation, particularly if the subject of the biography were rich or powerful.

Indeed, by permitting a claim not only by Christopher Porco but also by his mother, Joan Porco, the trial court’s decision appears to call for a jury trial to determine if the non-defamatory portrayal of a person not the subject of the biography was “materially and substantially” fictionalized. Thus, even authorized biographies could run afoul of Section 51 unless consent were obtained from all other living persons named in the work, many of whom would likely not be public

figures. That would make the task of clearing the requisite rights impossible, and make publishing biographies hazardous.

B. Nonfiction Novels and Drama

The concept of creating a work that weaves real persons and real events into a work of fiction—sometimes called nonfiction novels—is a recognized literary genre. One of the most famous examples of this genre is Truman Capote’s *In Cold Blood*. More recent examples are Michael Herr’s *Dispatches* about his reporting from Vietnam, J.T. Rogers’ Tony Award-winning play *Oslo* (about the Middle East peace process) and the Robert Lopez and Jeff Marx’s Tony Award-winning musical *Avenue Q* (with a Gary Coleman character).

Come From Away, a musical that opened on Broadway in 2017, and was still playing until performances were temporarily suspended due to the pandemic, is based on the true story of when, because of the September 11 terrorist attack, dozens of airplanes landed in Gander, Newfoundland, stranding thousands of passengers. The characters in the musical are based on and in some cases share the names of real Gander residents and real stranded travelers whom they welcomed. The musical’s website promotes *Come From Away* as “the hit musical based on the remarkable true story.” The music, lyrics, and book are by Irene Sankoff and David Hein. The words spoken and the lyrics sung on stage are not all those of the persons portrayed.

As the First Department held in a challenge to a book about the life of Marilyn Monroe:

Plaintiff disputes the characterization of the book as a biography. We think it does not matter whether a book is properly described as a biography, fictional biography, or any other kinds of literary work. It is not for a court to pass on literary categories, or literary judgment. It is enough that the book is a literary work and not simply a disguised commercial advertisement for the sale of goods or services.

Frosch v. Grosset & Dunlap, Inc., 75 A.D.2d at 769.

C. Fiction That Includes Characters Based on Real Persons

There is an established literary tradition not only of historical novels (with only deceased persons portrayed) but also fiction that includes characters based on living persons. Whether or not the name of the depicted person is used, such novels are not prohibited by Section 51.

Rodham, a novel by Curtis Sittenfeld published in 2020, imagines what Hillary Rodham's life would have been had she never married Bill Clinton.

King Charles III, a play by Mike Bartlett produced on Broadway in 2015-2016, envisions the future reign of the real Charles, Prince of Wales, and includes among the characters other members of the royal family, using the actual names of real, living persons.

Thomas Mallon's work includes the novel *Landfall*, published in 2019, set in the presidency of George W. Bush during the time of the Iraq insurgency and

Hurricane Katrina, and includes appearances by Barbara Bush, Condoleezza Rice, Donald Rumsfeld, Tony Blair, Vladimir Putin, Nancy Reagan, and John Edwards. Mallon's novel *Watergate*, published in 2012, is a fictional account of the Nixon presidency, with appearances by Rose Mary Woods, H.R. Haldeman, Dwight Chapin, John W. Dean III, E. Howard Hunt, and many other real people involved in the events. In both of these novels, real names are used, and many of the people are still alive (or were alive when the novels were published).

The Secret Memoirs of Jacqueline Kennedy Onassis, a 2006 novel by Ruth Francisco, imagines the memoirs that Jacqueline Kennedy Onassis might have written, and includes real people (using their actual names) who are still alive today, including Caroline Kennedy.

In the Time of the Butterflies by Julia Alvarez, published in 1994, is a fictionalized telling of the Mirabal sisters, who opposed the regime of Rafael Trujillo in the Dominican Republic. The novel uses their real names. Three of the sisters were murdered; the fourth survived and was living when the novel was published.

Under the trial court's subjective balancing, these works (if the name of a living person was used) could not safely be published without consent, even though the New York courts have permitted such use for many years. *See, e.g.*,

University of Notre Dame du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d at 457-58.

D. Graphic Books, Including Graphic Memoirs and Graphic Novels

Graphic images of characters—such as “Lacey Jonas” and “Antonia Bottino”²—appear not only in videogames but also in graphic books, including graphic memoirs, graphic novels and comics. Graphic books generally include invented or reconstructed dialog, which appears in the familiar “speech balloons” (also known as speech bubbles or dialog balloons) that make it clear which character is “speaking.”

Graphic books—whether or not based on real living persons, and whether or not their real names are used—are not prohibited by Section 51 and, as long as the uses are not defamatory, are also protected by the First Amendment.

An excellent example is the National Book Award-winning MARCH trilogy by the late Congressman John Lewis, Andrew Aydin, and Nate Powell, published as three individual volumes between 2013 and 2017. Congressman Lewis’ graphic memoir—also called a graphic novel—dramatizes his civil rights experiences and

² *Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 121-122 (2018) (holding that computer-generated image may constitute a “portrait” within the meaning of Civil Rights Law § 51, but rejecting Section 51 claim upon finding that plaintiff Lindsay Lohan was not recognizable from the “Lacey Jonas” avatar in videogame); *Gravano v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 988, 989 (2018) (same holding with respect to Section 51 claim by Karen Gravano claim regarding “Antonia Bottino” avatar).

includes many actual persons, both living and dead. If consents from all the living were required, it is unlikely that the work could have been published.

Graphic books tell stories as varied as those of books containing only words. *Green River Killer: A True Detective Story*, a 2011 graphic book by Jeff Jensen and Jonathan Case, tells the story, in graphic form, of Gary Ridgway, a serial murderer whose case was solved by Detective Tom Jensen (the father of the author). *Primates* is a 2013 graphic biography by Jim Ottaviani and Maris Wicks, with invented dialog in dialog balloons, which tells the true story of the work of Jane Goodall, Dian Fossey, and Birute Galdikas, renowned scientists who researched and became advocates for chimpanzees, gorillas, and orangutans. *Fun Home*, a 2006 graphic memoir by Alison Bechdel, recounts her difficult relationship with her father, a teacher who was also director of the town's funeral home, her coming out as a lesbian, and her discovery that her father was also gay. *Fun Home* became a successful Broadway musical.

E. Visual Works of Art

Artists historically have used, and today continue to use, visual art as a means of expression, to engage, to inspire, to entertain, and to comment on social, political, economic, and other issues. Works of art include depictions of real and imagined people, as well as composites that evoke specific people or types of people. Such works, which are often published in catalogs and books, are

produced by artists as diverse as Norman Rockwell (whose painting of Ruby Bridges’ history-changing walk integrating a New Orleans public school became an iconic symbol of the civil rights movement) to Andy Warhol (whose paintings include images of Jacqueline Kennedy Onassis, Mao Tse Tung, and many others) to Robert Rauschenberg (whose mixed media works include images of many identifiable persons, both well-known and not). Many such works alter or distort the images of the persons depicted while still leaving them recognizable—that is, render the images “materially and substantially” false.

New York and the nation also have a rich history of the use of drawings, caricatures, and cartoons as social commentary—from Thomas Nast (portrayals of Boss Tweed) to David Levine (caricatures) to Edward Sorel (caricatures) to Garry Trudeau (1975 Pulitzer Prize for editorial cartoons for *Doonesbury*) to Adam Zyglis of *The Buffalo News* (2015 Pulitzer Prize for editorial cartoons).

All of these works are expression protected by the First Amendment which would be chilled by the change in law sought by plaintiffs.

In 1563, Queen Elizabeth I issued a Royal proclamation that forbade unauthorized portraits of herself (and subsequently caused the destruction of such extant portraits).³ The First Amendment prohibits construing Section 51 with that breadth.

³ Tittler and Jones, *A Companion to Tudor Britain*, p. 454 (Wiley-Blackwell 2009).

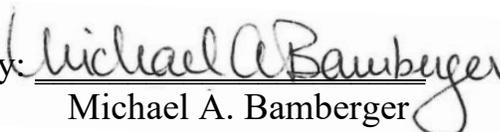
CONCLUSION

The trial court's unwarranted expansion of Section 51 will, unless reversed by this Court, seriously impair *amici*'s constitutional right to create, publish, sell, read, and view a broad range of creative works. *Amici* respectfully ask this Court to reverse the decision below, and direct that summary judgment be entered dismissing the complaint.

Date: October 1, 2020

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer. A proportionally spaced, serif typeface was used, as follows:

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APPENDIX A

American Booksellers Association, founded in 1900, is a trade organization devoted to meeting the needs of its core members—independently owned bookstores with storefront locations nationwide—through education, information dissemination, business products and services, and advocacy. ABA represents more than 1,700 bookstores operating in 2,000 locations throughout the country. ABA exists to protect and promote the interests of independent retail book businesses, and to promote and protect the free exchange of ideas, particularly those contained in books.

Association of American Publishers, Inc. (“AAP”) represents book, journal, and education publishers in the United States on matters of law and policy, including major commercial houses, small and independent houses, and university presses and other noncommercial scholarly publishers. AAP members publish hardcover, paperback, and electronic books in every field, scholarly and professional journals, educational materials for the elementary, secondary, postsecondary, and professional markets, as well as computer software and electronic products and services. AAP represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The Authors Guild, Inc., founded in 1912, is the nation’s oldest and largest professional organization for writers. Its over 10,000 members include novelists,

historians, journalists and poets, as well as literary agents and representatives of writers' estates. The Guild advocates for authors on many issues, including free speech.

Comic Book Legal Defense Fund (“CBLDF”) is a non-profit organization dedicated to protecting the First Amendment rights of the comics medium.

CBLDF's work takes it into courtrooms, classrooms, conventions and libraries all over the United States where it provides legal aid, education, and advocacy to protect the First Amendment rights of the readers, creators, retailers, publishers, and librarians of comics, manga, and graphic novels.

Freedom to Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

Media Coalition Foundation, Inc. monitors potential threats to free expression, and engages in litigation and education to protect free speech rights, as guaranteed by the First Amendment.