APL-2017-00027 AND APL-2017-00028

State of New York
Court of Appeals

KAREN GRAVANO,

Plaintiff-Appellant,

-against-

TAKE-TWO INTERACTIVE SOFTWARE, INC.
and ROCKSTAR GAMES,

Defendants-Respondents.

LINDSAY LOHAN,

Plaintiff-Appellant,

-against-

TAKE-TWO INTERACTIVE SOFTWARE, INC.
and ROCKSTAR GAMES, ROCKSTAR GAMES, INC. and
ROCKSTAR NORTH,

Defendants-Respondents.

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, ASSOCIATION OF AMERICAN PUBLISHERS, INC., AUTHORS GUILD, COLLEGE ART ASSOCIATION, COMIC BOOK LEGAL DEFENSE FUND, DRAMATISTS LEGAL DEFENSE FUND, FREEDOM TO READ FOUNDATION, MPA - THE ASSOCIATION OF MAGAZINE MEDIA, AND MEDIA COALITION FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-RESPONDENTS

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American Booksellers Association, American Society of Journalists and Authors, Authors Guild, Association of American Publishers, Inc., College Art Association, Inc., Comic Book Legal Defense Fund, Dramatists Legal Defense Fund, Freedom to Read Foundation, MPA - The Association of Magazine Media, and Media Coalition Foundation respectfully submit this *amicus* brief in support of Defendants-Respondents.

INTEREST OF *AMICI*

Amici's members ("*amici*") write, create, publish, produce, distribute, sell, and manufacture books, magazines, videos, printed materials, and visual works of art 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 viewers. All of the *amici* both practice and promote the free expression and exchange of ideas.

Plaintiffs' proposed reading of this state's privacy statute would have a profoundly chilling effect on free speech. Were the Court to accept Plaintiffs' contention that Defendants' incorporation of characters allegedly based on them into a highly creative video game implicates their rights under Section 51 of the N.Y. Civil Rights Law, that novel construction of the statute would seriously impair *amici*'s constitutional right to create and publish fiction and non-fiction material, including both authorized and unauthorized biographies, "non-fiction

novels," political cartoons, photographs, paintings and other works of art, plays, and myriad other creative works. It would substantially undermine this state's traditional strong protection for free speech, including for expressive works that draw inspiration from real people and events.

Descriptions of each of the *amici* are set forth in Appendix A.

INTRODUCTION

Civil Rights Law § 51, by its terms and as long construed by this Court, 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 purposes of trade" absent consent.

Plaintiffs argue for a radical and unprecedented expansion of Section 51, both in terms of the covered subject matters ("name, portrait, picture, or voice") and proscribed uses ("advertising purposes or for purposes of trade"). Plaintiffs would rewrite the covered subject matters to include "image,"[1] "likeness,"[2] and "persona,"[3] and they would define "purposes of trade" to include any work for which the creator or publisher seeks compensation.[4] Accepting this proposed

[1] *See, e.g.*, Lohan Br. at 2.

[2] *See, e.g.*, Gravano Br. at 5.

[3] *See, e.g.*, Lohan Br. at 2.

[4] *See, e.g.*, Gravano Br. at 16.

expansion of Section 51 would negate both the plain language and long-established judicial construction of Section 51, and would have the effect of imposing severe restrictions on free expression. It would adversely affect the ability to publish an unauthorized biography (except, perhaps, if the subject were newsworthy) because biographies necessarily use the "name" and "persona" of the subject, and, unless distributed free of charge, they are, in Plaintiffs' view, made "for purposes of trade." Indeed, it would be impossible, without risk of liability, to publish a biography authorized by the subject (or even an autobiography), absent the consent of all other persons named, discussed, or pictured in the book. Similarly endangered would be works of fiction or art that wove in or portrayed real persons and real events or that included fictional characters that might be seen as bearing some resemblance to—and thus reflecting the "persona" of—real persons (similar to the facts alleged in these cases).

In addition to falling outside the scope of Section 51, all of these uses, and many others discussed below, are protected by the First Amendment to the United States Constitution and the even broader protection of free speech in Article 1, Section 8, of the New York Constitution. Accordingly, Gravano's plea for "a change in the law"[5] should be rejected.

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[5] Gravano Br. at 32.

A proper interpretation of Section 51, and a proper conception of federal and state constitutional protection for freedom of expression, is aligned with the eloquent concurring opinion of California Supreme Court Chief Justice Bird:

> 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 869, 870 (1979).

ARGUMENT

I.
PLAINTIFFS PROPOSE AN UNWARRANTED EXPANSION OF NEW YORK'S LIMITED STATUTORY RIGHT OF PUBLICITY

A. New York Law Limits the Protection of a Person's Right Of Publicity/Privacy to the Nonconsenting Use of a Person's Name, Portrait, Picture or Voice for Advertising or for 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: Section 51 of the Civil

Rights Law. *Messenger*, 94 N.Y.2d at 441; *Howell v. New York Post Co.*, 81 N.Y. 2d 115, 123 (1993). The statute is clearly limited both as to the subject matter protected and the uses proscribed. 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. This Court 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.

1. Subject Matters

The protected subject matters are limited to a person's "name, portrait, picture or voice." In response to the Appellate Division's correct finding that the video game "Grand Theft Auto V" ("GTA V") did not include any of these aspects of either Plaintiff,[6] both Plaintiffs urge this Court to broaden the statute to cover "likeness" or "persona." Plaintiffs thereby ignore this Court's instruction that Section 51 be "strictly limited" to the subject matters enumerated in the statute. *Messenger,* 94 N.Y. 2d at 441. In so doing, Plaintiffs propose additional subject matters that are vague and difficult to apply and therefore present a particular risk of chilling speech. For example, in developing a fictional character who bears some personality traits of real persons (as virtually all fictional characters do), an author would reasonably be concerned that if the character is seen as having one

[6] *Gravano v. Take-Two Interactive Software, Inc.,* 142 A.D. 3d 776, 777 (1st Dep't 2016).

trait too many in common with a real person, he or she might be found liable under Section 51.[7]

2. Proscribed Uses

Even if a use includes the name, portrait, picture, or voice of a person, Section 51 does not apply unless the use is nonconsensual ***and*** for "advertising purposes or for the purposes of trade." The courts of this state have held consistently that works of fiction "do not fall within the narrow scope of the statutory definitions of 'advertising' or 'trade'." *Costanza v. Seinfeld*, 279 A.D.2d 255 (1st Dep't 2001) (television show). The same is true of expressive works in other mediums, such as a play (*Hampton v. Guare*, 195 A.D. 2d 366 (1st Dep't 1993)); a work of art (*Foster v. Svenson,* 128 A.D. 3d 150, 158 (1st Dep't 2015); *Hoepker v. Kruger*, 200 F. Supp. 2d 340 (S.D.N.Y. 2002)); and caricature (*Altbach v. Kulon*, 302 A.D.2d 655, 657 (3d Dep't 2003)). *Cf. Lacoff v. Buena Vista Publ'g Inc.,* 183 Misc. 2d 600, 608 (Sup. Ct. N.Y. Cnty 2000) ("The Book here is noncommercial speech—it was clearly not designed to sell another product. Neither the fact that it was sold for a profit, nor defendant publishers' economic

[7] Adding the vague terms "likeness" and "persona," through judicial construction, to the protected subject matters is also troublesome because Section 51 has a criminal counterpart, Civil Rights Law § 50. Section 50 provides that "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor." If Section 51 were expanded through vague language, there would be a grave risk that Section 50, its criminal counterpart, would be similarly construed, through equally vague language—chilling speech even more than would Section 51 alone.

motivation, is sufficient to turn the Book into commercial speech.") *See Nussenzweig v. diCorcia*, 38 A.D.3d 339, 347 (1st Dep't 2007) ("the use of a person's likeness as a component in a work of art … is protected by the First Amendment), *aff'd on other grounds*, 9 N.Y.3d 184 (2007). And the U.S. Supreme Court has recognized that video games are constitutionally protected expressive works no less than books, plays, and movies. *Brown v. Entm't Merchs. Ass'n*, 564 US 786, 790 (2011).

Gravano's principal argument as to how the alleged use of her persona in GTA V is "for purposes of trade" is that Defendants "make their commercial purpose clear in the boastful manner that GTA V 'reach[ed] $1 billion in sales in just three days.'" Gravano Br. at 16. Plaintiffs would thus sweep aside Section 51's limitations on proscribed uses and have this Court instead apply a simple, vastly overbroad test: If an expressive work is profitable (or even just for sale), then it is commercial, and therefore it is "for purposes of trade." But an expressive work—be it a book, play, newspaper article, photograph, painting, videogame, or other work—does not become an "advertisement" or a use for "purposes of trade" simply because it is sold or attains financial success. Were it otherwise, the only uses not proscribed by Section 51 would be works produced by authors, photographers, artists, and others who sought no royalties or compensation, and

distributed by publishers, sold by bookstores, and offered by galleries for free. This Court has held otherwise:

> [T]he fact that a publication may have used a person's name or likeness "solely or primarily to increase the circulation" of a newsworthy article—and thus to increase profits—does not mean that the name or likeness has been used for trade purposes within the meaning of the statute. Indeed, "most publications seek to increase their circulation and also their profits."

Messenger, 94 N.Y.2d at 442 (*quoting Stephano v News Gp. Publ'ns, Inc.*, 64 N.Y.2d 174, 184-85 (1984)).

3. Other Limitations

There are two further significant limitations on Section 51 recognized by this Court as "a matter of legislative intent and a reflection of constitutional values in the area of free speech and free press." *Howell,* 81 N.Y. 2d at 123 (citations omitted).

First, to ensure that Section 51 does not limit rights protected by the First Amendment to the U.S. Constitution or the free speech clause of the New York Constitution, art 1, § 8, New York courts recognize a "newsworthiness" exception. This permits the unauthorized use of a person's name, picture, or portrait when the publication concerns "newsworthy events or matters of public interest" unless the use has no real relationship to the article or is an advertisement in disguise. *Finger v. Omni Publ'ns. Int'l, Ltd.* 77 N.Y. 2d 138, 141-42 (1990).

Second, courts also have recognized that incidental advertising or marketing materials for protected works that incorporate a name or portrait found in the work being advertised or marketed "does not fall afoul of the statutory prohibitions" of Section 51. *Booth v. Curtis Publ'g Co.*, 15 A.D.2d 343 (1st Dep't 1962), *aff'd without opinion*, 11 N.Y.2d 907 (1962); *Hoepker v. Kruger*, 200 F. Supp. 2d at 349-51.

Lohan dramatically misconstrues these important limitations, taking the position that a plaintiff can survive a motion to dismiss a Section 51 claim simply by alleging that material was included in a published work as a pretext for using that same material to advertise the published work, even when that allegation is negated by the work itself (as well as by the complaint). Thus, for example, Lohan's complaint alleges that the avatar "Lacey Jonas" is used in a "game mission" in GTA V that "cop[ies] biographical references to actual events in Ms. Lohan's life," Lohan Br. at 3, while at the same time alleging that women in two visual artworks used as transition screens must have been inserted into GTA V as a pretext for using the image in an advertisement. *Id.*

The incidental advertisement or marketing provision is critical to authors and publishers. It recognizes that the protection of the First Amendment is rendered near meaningless if authors, publishers, galleries, and museums are denied effective ways to market and advertise their works and exhibitions.

Therefore, when a person's "name, portrait, picture, or voice" is included in a work, it also must be permitted to use it to advertise that work. Here, where the use of the claimed Lohan avatar in advertising is clearly related to the work in question, Lohan's claim as to the advertising is properly rejected as a matter of law. *Finger*, 77 N.Y. 2d at 143 ("We conclude here that it cannot be said, as a matter of law, that there is no 'real relationship' between the content of the article and the photograph of plaintiffs.").

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

Contrary to Plaintiffs' suggestion that New York is an outlier with respect to its recognition of publicity/privacy rights, *see* Gravano Br. at 25-31, federal courts throughout the country have recognized that the First Amendment imposes limits on publicity/privacy rights claims relating to 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*, 545 F. App'x 405, 408 (6th Cir. 2013), *aff'g* 2012 WL 1884758 (M.D. Tenn. May 23, 2012) ("First Amendment provides an additional hurdle" that "fundamentally constrains" 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, 200 F. Supp. 2d at 348 (no liability for photographs depicting plaintiff shown at Whitney Museum and art gallery and advertised by them on billboards and gift items on ground that free speech rights clearly transcend privacy rights when the speech concerns a matter of public interest); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 337 (E.D. Pa. 1996) ("Defendants' use of plaintiff's name and likeness [in movie] was for the purpose of First Amendment expression"); *Hicks v. Casablanca Records*, 464 F. Supp. 426, 433 (S.D.N.Y. 1978) ("[F]irst Amendment protection usually accorded novels and movies outweighs whatever publicity rights plaintiffs may possess").

Many other courts have reached the same result. In *Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d 723, 731 (E.D. Mich. 2000), *aff'd*, 267 F.3d 457 (6th Cir. 2001), the district court dismissed the plaintiffs' right of publicity and unjust enrichment claims arising from the use of their names and likenesses in a television miniseries about the musical group *The Temptations*. 82 F.Supp.2d at 730. The Sixth Circuit affirmed, holding that the First Amendment protected the use of the plaintiffs' fictionalized likenesses. 267 F.3d at 462. Another federal court dismissed Bobby Seale's right of publicity claim arising from a film about his role in the Black Panthers, explaining that the First Amendment protected the defendants' "creation, production, and promotion of a motion picture . . . which

integrates fictitious people and events with the historical people and events." *Seale*, 949 F. Supp. at 337.

The First Amendment and the free speech protections of New York's Constitution similarly compel rejecting Plaintiffs' invitation to expand the prohibitions of Section 51.

II.
PLAINTIFFS' PROPOSED EXPANSION OF SECTION 51 WOULD SUBSTANTIALLY CHILL *AMICI'S* FIRST AMENDMENT - PROTECTED SPEECH

Adopting Plaintiffs' proposed expansion of the right of publicity/privacy would have a substantial chilling effect on a broad range of 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 a "Saban: The Making of a Coach," "Crash Landing" about Lance Armstrong, and "Game Change" about John McCain, while unauthorized, do not highlight that fact in their titles.

Biographies necessarily use not only the name, likeness, and persona of the subject, but often include photographs of the subject. Under Plaintiffs' proposed expansion of Section 51, all biographies sold to the public would be subject to

Section 51's prohibition on unauthorized use for "purposes of trade." That means that no biography could be published without the consent of the subject.

Even authorized biographies would run afoul of Section 51 unless consent were obtained from all other living persons named in the work (spouses, lovers, business colleagues, friends, enemies, etc.), many of whom would likely not be public figures. That would make the task of clearing the requisite rights impossible. These scenarios are wholly untenable. The world would be left with only authorized expurgated biographies.

B. Nonfiction Novels and Drama

The concept of creating a work that weaves real persons and events into a work of fiction 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, and the Tony Award-winning plays "Oslo" (about the Middle East peace process) and "Avenue Q" (with a Gary Coleman character). Just a few months ago, a book entitled "The Fact of a Body: A Murder and a Memoir" by Alexandria Marzano-Lesnevich was published that combined the author's own story with that of a pedophile/child murderer who was represented by a law firm for whom the author worked. As the New York Times Book Review noted:

> In the book's memoir sections, [the author] writes candidly of her father's rages, the hidden death of an infant sister, her eating disorder.

> But in sections about Langley, she inserts inventive flourishes and fabricated details atop real-life events. Though she has engaged in extensive research to reconstruct the case . . . she does not seem to have interviewed the living characters for her book. Instead, she explains, she pored over documentation and then "layered my imagination onto the bare-bones record of the past to bring it to life."[8]

C. Fiction That Includes Characters Based on Real Persons

If, as Lohan and Gravano contend, the avatars "Lacey Jonas" and "Antonia Bottino" in GTA V are based on them—a contention that Defendants deny—then those avatars would simply be fictional characters based on real persons. And, if that is the case, the avatars would reflect an established literary tradition as evidenced not only by historical novels (with only deceased persons portrayed) but also in fiction that includes characters based on living persons. Such usage is not prohibited by Section 51.

In *Anne of Green Gables*, published in 1908, the character Anne Shirley's appearance was based on Evelyn Nesbit, an American actress who was very much alive (24 years old) at the time. More recently, the novel *Primary Colors* (which was made into a major motion picture) was a thinly-veiled account of Bill Clinton's campaign for president, with not only Bill Clinton and Hillary Clinton, but a wide range of other easily recognizable characters. *King Charles III,* a play produced on Broadway in 2015-2016, envisioned the future reign of the real

[8] New York Times Book Review, July 23, 2017 p. 25.

Charles, Prince of Wales, and included among the characters other members of the royal family, using the actual names of real persons.

Under Plaintiffs' view of Section 51, none of these works could be published without consent.

D. Graphic Novels of Current Events

Graphic images of characters—such as "Lacey Jonas" and "Antonia Bottino"—appear not only in videogames but also in graphic novels and comics. These uses are also protected by the First Amendment and not prohibited by Section 51.

An excellent example is the National Book Award-winning MARCH trilogy by Congressman John Lewis, Andrew Aydin, and Nate Powell. Congressman Lewis' graphic memoir (also termed a graphic novel) dramatizes his civil rights experiences and 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.

E. Paintings, Photographs and Other 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 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). New York and the nation 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).

There is a similarly rich history of important photographic works including images of people—not only well-known people[9], but ordinary people photographed without their consent in public places.[10] Walker Evans photographed ordinary people on the New York subways, as well as in rural America. Helen Levitt photographed children playing on the street in New York City. Robert Frank's 1958 book, The Americans, photographed people across the nation. And in 1968, Paul Fusco photographed the people from all walks of life

[9] For example, one member of CAA based in New York City, Deborah Bright, has used images of otherwise famous people such as Vanessa Redgrave, Glenda Jackson, Julie Andrews and others in her photo-based Dream Girl' series.

[10] *See Nussenzweig v. diCorcia*, *supra*.

who lined the tracks as the train carrying Robert F. Kennedy's body passed by on its way to Washington, photographs later published in the book RFK Funeral Train (Magnum 1999).

All of these works are expression protected by the First Amendment which would be chilled by the change in law sought by plaintiffs.[11]

CONCLUSION

As this Court stated in *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991):

> This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas. That tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that "[e]very citizen may freely speak, write and publish * * * sentiments on all subjects." (N.Y. Const, art 1, 8.) Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms.
>
> The expansive language of our State constitutional guarantee (compare, N.Y. Const, art I, 8, with US Const 1st Amend.), its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States * * * the recognition in very early New York history of a constitutionally guaranteed liberty of the press * * * and the consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and

[11] In 1563, Queen Elizabeth I issued a Royal proclamation that forbade unauthorized portraits of herself (and subsequently caused the destruction of such extant portraits). Tittler and Jones, A Companion to Tudor Britain, p. 454 (Wiley-Blackwell 2009). The First Amendment prohibits construing Section 51 with that breadth.

> disseminating news of public events' * * * all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference.

(citations omitted).

Amici urge this Court not to alter the interpretation of Section 51 as it currently applies to books, movies, dramatic works and artistic works generally. The Court should instead affirm the judgments of the Appellate Division.

Date: December 21, 2017

Respectfully submitted,

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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.

American Society of Journalists and Authors(ASJA) was founded in 1948 and is the nation's professional organization of independent nonfiction writers. Its membership consists of outstanding freelance writers of magazine articles, trade books, and many other forms of nonfiction writing, each of whom has met ASJA's exacting standards of professional achievement. ASJA members write articles and books about many different topics, exercising their right of free expression as guaranteed by the First Amendment.

Association of American Publishers, Inc. ("AAP") is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. 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, 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.

Authors Guild, founded in 1912, is the nation's oldest and largest professional organization for writers. Its approximately 9,000 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.

College Art Association ("CAA") is a New York based not-for-profit membership organization, now more than 100 years old, that is the principal organization in the United States for the visual arts. It has over 9,000 individual members, who are practitioners and interpreters of visual art and culture. Its membership includes artists, art historians, scholars, curators, collectors, educators, art publishers and other visual arts professions, who join together to cultivate the ongoing understanding of art as a fundamental form of human expression. Their work and scholarship is presented in museum exhibitions throughout the United States. More than 500 university art and art history department, museums, libraries and professional and commercial organizations are institutional members

of CAA or subscribers to its peer-reviewed academic journals. CAA is committed to the highest professional and ethical standards of scholarship, creativity, connoisseurship, criticism, and teaching.

Comic Book Legal Defense Fund ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world.

Dramatists Legal Defense Fund ("DLDF") was formed in 2009 by the Dramatists Guild of America, Inc. to advocate for free expression in the dramatic arts as guaranteed in the First Amendment of the United States Constitution, and to encourage the vitality of a robust public domain. The DLDF is governed by an elected Board of Directors that currently includes such renowned dramatists as J.T. Rogers (*Oslo*, *Blood and Gifts*), Sarah Ruhl (*In the Next Room*), Lydia Diamond (*Stick Fly*), and the current President, John Weidman (*Assassins, Contact, Anything Goes*). The Board also includes several lawyers well established within the theatre industry. The sole member of the DLDF is the Guild, a century-old trade association with a governing board of playwrights and musical theatre authors that includes Marsha Norman (*The Color Purple*, *Night Mother*), Stephen Sondheim (*Sweeney Todd*, *Company*), Tony Kushner (*Angels in America*), and John Guare (*House of Blue Leaves*, *Six Degrees of Separation*).

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.

Magazine Publishers of America, Inc. (d/b/a MPA – The Association of Magazine Media) ("MPA") is the industry association for multi-platform magazine companies. Established in 1919, MPA represents about 100 domestic magazine media companies with close to 1000 national publications that span an enormous range of genres, from nationally known household brands to local and niche enthusiast titles. In addition to domestic magazine media companies, MPA's membership includes international magazine media companies and associate members that support the industry throughout the supply chain. MPA is a non-profit organization representing magazine media, print and digital. MPA provides an organized forum in which publishers can advance their common interests. MPA has a long history of defending free speech and the First Amendment. MPA is the primary advocate and voice for the magazine media industry, driving thought leadership and game-changing strategies to promote the medium's vitality,

increase revenues and grow market share. MPA is headquartered in New York City, with a government affairs office in Washington.

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

CERTIFICATION

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I certify pursuant to 22 N.Y.C.R.R. § 500.13(c) (1) that the total word count for all printed text in the body of the brief, exclusive of the table of contents and the table of cases and authorities required by subsection (a) of this section, is 5,101 words.

Dated: December 21, 2017
New York, New York

Michael A. Bamberger