SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

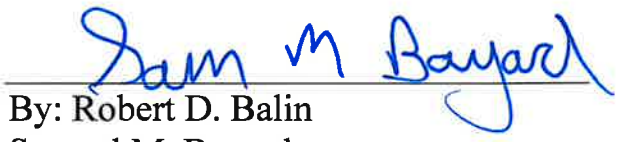
CHRISTOPHER PORCO, Plaintiff-Appellant, -against- LIFETIME ENTERTAINMENT SERVICES, LLC, Defendant-Respondent.	Case No. 522707

NOTICE OF MOTION OF PROPOSED AMICI FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF DEFENDANT-RESPONDENT'S MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Samuel M. Bayard, dated April 3, 2017, a motion will be made at a term of this Court to be held in the City of Albany, New York, on the 17th day of April, 2017, for an order granting the Motion Picture Association of America, Inc. and Home Box Office, Inc. (collectively "Proposed Amici") leave to file the attached brief as amici curiae in support of Defendant-Respondent's motion for leave to appeal this Court's February 23, 2017 Memorandum and Order to the Court of Appeals, and for such other and further relief as the Court may deem just and proper in the circumstances.

Dated: New York, NY
April 3, 2017

Respectfully submitted,
DAVIS WRIGHT TREMAINE LLP



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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

CHRISTOPHER PORCO, Plaintiff-Appellant, -against- LIFETIME ENTERTAINMENT SERVICES, LLC, Defendant-Respondent.	Case No. 522707

AFFIRMATION OF SAMUEL M. BAYARD IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF DEFENDANT-RESPONDENT'S MOTION FOR LEAVE TO APPEAL

Samuel M. Bayard, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalties of perjury as follows:

1. I am a partner at the law firm of Davis Wright Tremaine LLP, attorneys for the Motion Picture Association of America, Inc. ("MPAA") and Home Box Office, Inc. ("HBO") (collectively, "Proposed Amici").[1] I submit this affirmation in support of the Motion of Proposed Amici for Leave to File Brief as Amici Curiae in Support of Defendant-Respondent's Motion seeking leave to appeal this Court's February 23, 2017 Memorandum and Order (the "Decision") to the Court of Appeals.

[1] A detailed description of Proposed Amici is included in Appendix A to the Brief.

2. Attached as Exhibit A is a copy of the brief that Proposed Amici wish to submit to the Court (the "Amici Brief" or "Brief"). Proposed Amici have duly authorized me to submit this Brief on their behalf.

3. Motion picture studios and television companies like Proposed Amici, as well as independent filmmakers, producers, directors, and screenwriters, often are the targets of lawsuits by individuals who either were depicted in biographical or historical feature films and television programs – sometimes called "biopics," "docudramas," or "historical dramas" – or claim to have been the inspiration for a fictional character in a fictional story.[2] Even where the claims are found to be without merit (as they typically are), the litigation can be protracted and expensive.

4. This Court's decision permitting Plaintiff to proceed with a claim under New York Civil Rights Law §§ 50-51 ("Section 51") against Defendant Lifetime's biographical film account of his crime because it allegedly includes some "fictionalization" is in stark conflict with other decisions in New York as well as other jurisdictions. Absent review by the Court of Appeals, this decision risks a significant increase in lawsuits brought in New York against all manner of creators and distributors of expressive works, because every person who is referenced in a film or television program – or who claims to have been the

[2] Moreover, members of the MPAA, HBO, and others involved in the creation and distribution of motion pictures and television programs receive many threatened claims for every lawsuit that is actually filed.

inspiration for a fictional character – could use the threat of expensive litigation to demand payment, simply by alleging that something in the work is "fictional." In fact, Proposed Amici already have received letters from individuals threatening claims under Section 51, citing the Decision as precedent.

5. In light of Proposed Amici's substantial interest and expertise in the production and distribution of biographical and historical films and other expressive works of free speech, I respectfully submit that the Brief will be of special assistance to this Court. The Brief presents law and arguments that draw on Amici's unique perspectives as participants in the film and television industry that might otherwise not be raised for this Court's consideration.

6. Defendant-Respondent has consented to the filing of Proposed Amici's Brief. Proposed Amici have not attempted to obtain permission from Plaintiff-Appellant to file this motion because he presently is incarcerated, and seeking permission in the short timeframe afforded by the Court's briefing schedule would have been futile.

7. Accordingly, I respectfully request that the instant motion be granted in all respects, and that Proposed Amici be given leave to file the Brief attached as Exhibit A in support of Defendant-Respondent's Motion.

Dated: New York, NY
April 3, 2017

Samuel M. Bayard

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

CHRISTOPHER PORCO, Plaintiff-Appellant, -against- LIFETIME ENTERTAINMENT SERVICES, LLC, Defendant-Respondent.	Case No. 522707

BRIEF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC. AND HOME BOX OFFICE, INC. AS AMICI CURIAE IN SUPPORT OF DEFENDANT-RESPONDENT'S MOTION FOR LEAVE TO APPEAL

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici urge this Court to grant the motion filed by Defendant-Respondent Lifetime Entertainment Services, LLC ("Lifetime") seeking leave to appeal the Court's February 23, 2017 Memorandum and Order (the "Decision") to the Court of Appeals. Because this case raises important "questions of law … which . . . ought to be reviewed," CPLR § 5713, leave to appeal is appropriate.

Amici are the Motion Picture Association of America, Inc. ("MPAA") and Home Box Office, Inc. ("HBO").[3] HBO and the members of MPAA regularly produce, broadcast, and distribute constitutionally protected films and television programs in New York and elsewhere, including fact-based, semi-fictional, and fictional works. Amici often have appeared as amici curiae in cases involving claims that potentially implicate the exercise of First Amendment rights, including cases involving misappropriation and right-of-publicity claims that purport to arise from the use of a plaintiff's name and/or likeness in expressive works.

Amici are profoundly concerned that the Decision arguably empowers a trial court to refuse to dismiss a claim brought under New York Civil Rights Law §§ 50-51 ("Section 51") based on the creation and distribution of a constitutionally protected expressive work, if the film or television program is alleged to have "fictionalized" some portion of the portrayal of real-life people or events.

[3] A description of Amici is included in Appendix A to this Brief.

The Decision's broad application of Section 51 is inconsistent with other New York appellate decisions involving expressive works, and with the New York Constitution's expansive protections for freedom of speech. It also cannot be reconciled with decisions from other state and federal courts applying constitutional principles to expressive works. The uncertainty that will result from these inconsistent decisions – and the absence of clear guidance concerning what type of alleged "fictionalization" shifts a non-actionable creative work to one which is potentially actionable under Section 51 – threatens to chill creative expression and deter the creation of valuable new films and television shows based on real people and events.

This is a significant threat to Amici and their creative projects that should be resolved by prompt action by the New York Court of Appeals to clarify the controlling law. The risk to Amici and others is not hypothetical – some MPAA members already have received threats from individuals attempting to censor the content of constitutionally protected movies and television programs, in letters citing the Decision.

The New York Court of Appeals therefore should promptly resolve the question whether Section 51 can be applied to purely expressive works, or whether such works – whether fact-based, semi-fictional, or entirely fictional – are

protected under the First Amendment to the United States Constitution, Article 1, Section 8 of the New York Constitution, or otherwise exempt from Section 51.

For these reasons, as set forth in greater detail below, Amici urge this Court to grant Lifetime's motion.

I. SUMMARY OF ARGUMENT

This Court's Decision allows a convicted murderer to proceed with a claim against a television network under New York's misappropriation statute, based solely on an ambiguous assertion that a film telling the story of his crime contains some unspecified "fictionalization." Although the Decision focused on the unique circumstances of this case,[4] it could have profound implications for anyone involved in the creation or distribution of expressive works about real-life people or events.

Section 51 creates a civil cause of action for the unauthorized use of a living individual's "name, portrait, picture or voice" for "advertising purposes" or "for purposes of trade." To protect the important constitutional interests in free expression, New York courts have recognized that Section 51 must be "narrowly

[4] Among other things, the Decision points out that the film was not in the record, and consequently, its contents were not considered; instead, the plaintiff's allegations about the film, including his allegation that it was "fictionalized," were accepted as true. (Decision at 4 & n.2.)

construed" and "strictly limited to nonconsensual commercial appropriation,"[5] and the terms "advertising" and "trade" do not encompass "publications concerning newsworthy events or matters of public interest."[6]

But notwithstanding the limitations on Section 51, this Court held that the plaintiff can pursue a lawsuit under Section 51 against Lifetime, based on its use of his name and likeness (through an actor portraying him) in a docudrama telling the story of his heinous crimes, entitled "Romeo Killer: The Christopher Porco Story" (the "Film"). This Court's rationale for permitting the claim to proceed was that Plaintiff's Complaint alleged generally that the Film is "a knowing and substantially fictionalized account" of his life, and "a letter written by a producer associated with the film" could be interpreted as suggesting that "the film was considered to be a fictitious program." (Decision at 4.)

This Decision raises serious concerns for creators of films and television programs, like Amici. The members of MPAA and HBO often create culturally significant movies and television shows about matters of substantial public interest, based on or inspired by real people and events. These include fact-based works,

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[5] Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publishing, 94 N.Y.2d 436, 441, 706 N.Y.S.2d 52, 55 (2000) (emphasis added).

[6] Finger v. Omni Publ'ns Int'l, Ltd., 77 N.Y.2d 138, 141-42, 564 N.Y.S.2d 1014, 1016 (1990). Courts have interpreted the newsworthiness exception "broadly." See e.g., Lemerond v. Twentieth Century Fox Film Corp., No. 07 CIV. 4635 (LAP), 2008 WL 918579, at *3 (S.D.N.Y. Mar. 31, 2008) (summarizing New York decisions, and holding that satirical fictionalized documentary was newsworthy as a matter of law).

semi-fictional works, and fictional works, all of which both contribute to public discourse and to the wealth of creative and artistic works that have made New York one of the nation's leaders in the creative industries. The Decision threatens to chill the creation of these works, by permitting a plaintiff to pursue a misappropriation lawsuit under Section 51 merely by alleging that it contains something "fictionalized."

The Decision creates a substantial amount of uncertainty for Amici and other content creators, because it not only conflicts with other New York appellate decisions, it also is inconsistent with an overwhelming body of law elsewhere in the country, which has held that the First Amendment protects expressive works from misappropriation claims regardless of whether the works are fact-based, dramatized, or fictional. In addition, given the ambiguous nature of Plaintiff's allegations, the Decision does not provide guidance that would allow content creators to evaluate when a film or television program might cross a legal line into potentially actionable "fictionalization." Unlike the well-established body of law on libel and slander, which restricts potential claims to materially false statements that are defamatory, this decision does not make clear that even trivial details (the color of a dress, or an individual's hairstyle) or common editorial devices (composite characters, compression of time) are not the type of "fictitious" elements that may result in liability under Section 51.

Given the potential chilling effect on speech while this case makes it through the courts in the normal course, this is an extraordinary circumstance where leave to appeal a non-final order is appropriate. Unless this Court grants Lifetime's motion and allows the New York Court of Appeals to promptly resolve the present uncertainty in the law, creators could be deterred from engaging in projects that draw on real-life events, to the detriment of the viewing public. This case represents an important opportunity for the Court of Appeals to address whether and when Section 51 claims can arise from expressive works, and for the Court to eliminate the inconsistency among New York court decisions. It also would allow the Court to establish a rule of law that brings New York law back in step with established First Amendment jurisprudence from courts in other parts of the country, and with the previously-recognized expansive protection for speech under the New York Constitution. Lifetime therefore should be granted leave to appeal to the Court of Appeals so that the State's highest court can provide clarity on the important constitutional and statutory issues at stake in this lawsuit.

II. AMICI ROUTINELY DEPICT REAL PEOPLE AND EVENTS IN CREATING MOVIES AND TELEVISION SHOWS.

Since the advent of motion pictures and television, filmmakers and television producers have created works that have entertained, inspired, and educated the public by drawing upon actual events and people.[7] In the motion picture industry, these films take many forms, including docudramas, which dramatize historical events;[8] historical fiction, in which real people and events serve as a backdrop for a fictional story;[9] and purely fictional works that may have been inspired by real events or people.[10]

Indeed, the list of Best Picture nominees in the last five years is crowded with films that were based on (or inspired by) real people and events. These

[7] This is a hallmark of great literature as well. From William Shakespeare to Mark Twain, novelists and other writers throughout history have drawn from life experiences, as well as real-life events, to create great works of literature. Authors like Charles Dickens, Virginia Woolf, Ernest Hemingway, Gertrude Stein, Henry Miller, James Baldwin, Erica Jong, and David Foster Wallace, just to name a few, have drawn on their own experiences and the experiences of others to craft their works. Many of these authors themselves have become the subjects of fictional or semi-fictionalized works, including "Midnight in Paris," "The Hours," and "Shakespeare in Love."

[8] "Snowden," "Jackie," "The Theory of Everything," "Capote," "Frost/Nixon," "A Beautiful Mind," and 'The Perfect Storm" are just a few of the many critically-acclaimed films based on real-life people and events.

[9] The Academy-award winning film "Titanic," for example, depicted a real event, and depicted historical figures, but was set against the backdrop of an entirely fictional story. In "Forrest Gump," the filmmakers employed archival newsreel footage of prominent public figures and events to create the backdrop for the title character's fictionalized life.

[10] "Citizen Kane," "Primary Colors," and "The Devil Wears Prada" were all reportedly inspired by (or even loosely based on) actual people or events.

include “Hidden Figures,” a biographical drama about three female African-American mathematicians who played a vital role at NASA during the early days of the U.S. space program; “The King’s Speech,” a Best Picture winner about the true story of King George VI and his efforts to overcome a speech impediment; “Moneyball,” which depicts how Billy Beane and his colleagues from the Oakland Athletics used statistics to change professional baseball; “The Social Network,” which chronicled the rise of billionaire Facebook founder Mark Zuckerberg; and “The Big Short,” which told the story of a group of investors who foresaw the financial crisis of 2008. Other recent examples include “American Sniper,” “Philomena,” “The Help,” “Zero Dark Thirty,” and “The Hurt Locker.”

Real-life crime stories – like the story about the horrific crimes committed by Plaintiff in this case – also have often inspired award-winning films, including such classics as “In Cold Blood” and “Reversal of Fortune.” To different degrees, these films all rely on some degree of fictionalization, including invented conversations, compressed timelines, composite characters, and other literary devices that help bring the story to life, and enable creators to consider how events may have happened where the original participants are unable or unwilling to cooperate with the project.

Television producers similarly routinely draw on real people and events to create educational, entertaining, and critically acclaimed television shows. For

example, HBO produced and distributed "Recount," which examined the torturous recount process in Florida following the 2000 presidential election, by mixing news footage and verbatim dialogue into fictionalized re-creations; "Game Change," which followed John McCain's 2008 presidential campaign, from his selection of former Alaska Governor Sarah Palin as his running mate to their ultimate defeat in the general election; and "Too Big to Fail," which addressed the complex and esoteric subject of the financial crisis of 2008.[11] All of these works tell true stories involving issues of significant public importance involving a multitude of individuals, each of whom have a different perspective on the underlying events. In some cases, there is disagreement among the participants on what the "true" facts are. In other circumstances, the participants are unavailable or unwilling to provide information. Without allowing the writers some literary license, movies, televisions, plays, and books depicting or inspired by real people and events would be confined to the bland, the known, and the uncontroversial, and public discourse would be much poorer as a result.

[11] These HBO programs were nominated for and won multiple television industry awards.

III. THE DECISION CONFLICTS WITH RULINGS BY OTHER NEW YORK COURTS AND CASES FROM FEDERAL AND STATE COURTS THROUGHOUT THE COUNTRY, CREATING UNCERTAINTY IN THE LAW THAT COULD CHILL EXPRESSION.

The Court's holding in this case, which permits Plaintiff to pursue discovery based on an alleged claim under Section 51 involving a film about his crimes, merely by alleging that it contains unspecified "fictionalizations," threatens the creation of acclaimed movies and television shows based on real-life events. If the Decision is not reviewed, and the conflicts between it and other decisions in New York and elsewhere are not resolved, the number of lawsuits brought against filmmakers and television networks could increase substantially, because every person who is referenced in a film or television show – or who claims to have been the inspiration for a character in it – could use the threat of expensive litigation to demand payment or editorial changes.

The Decision conflicts with rulings by other New York courts in two independent ways. First, the Decision is inconsistent with New York cases that have held expressive works like movies, television shows, novels and plays are protected by the First Amendment, and outside the purview of Section 51. Section 51 imposes a threshold requirement – as it must to be reconciled with the First Amendment – that the use of a plaintiff's name or likeness must be for purposes of "advertising" or "trade." NY CIV. RIGHTS LAW § 51. Numerous New York cases

have held that expressive works of entertainment and fiction are not "advertising" or "trade" uses, without even reaching the scope of the "newsworthiness" exception relied on in the Decision. For example:

- In University of Notre Dame Du Lac v. Twentieth Century–Fox Film Corp., 22 A.D.2d 452, 454-58, 256 N.Y.S.2d 301, 304-07 (1st Dep't), aff'd on opinion of App. Div., 15 N.Y.2d 940, 259 N.Y.S.2d 832 (1965), the First Department held that the use of an individual's and a university's names in the novel and fictional movie, "John Goldfarb, Please Come Home," was protected by the First Amendment and reversed the trial court's failure to grant the defendants' motion to dismiss. The First Department emphasized that "[i]t is enough that that the work is a form of expression 'deserving of substantial freedom – both as entertainment and as a form of social and literary criticism.'" The Court of Appeals affirmed the decision on the opinion of the First Department.
- In Hampton v. Guare, 195 A.D.2d 366, 366, 600 N.Y.S.2d 57, 58 (1st Dep't), leave to appeal denied, 82 N.Y.2d 659 (1993), the First Department affirmed the dismissal of a Section 51 claim over the alleged use of the plaintiff's life story in the play "Six Degrees of Separation." The Court reasoned in part that "works of fiction and satire do not fall within the narrow scope of the statutory phrases 'advertising' and 'trade'."

- In Costanza v. Seinfeld, 279 A.D.2d 255, 255, 719 N.Y.S.2d 29, 30 (1st Dep't 2001), the First Department affirmed the dismissal of a Section 51 claim over the alleged use of plaintiff's persona to create the character George Costanza on "Seinfeld." The court reiterated that "works of fiction do not fall within the narrow scope of the statutory definitions of 'advertising' or 'trade.'"

These decisions cannot be reconciled with the Decision here, which permits a claim under Section 51 based on an allegation that unspecified portions of a film were "fictionalized."[12]

Second, by permitting a claim under Section 51 to proceed based solely on an alleged "fictionalization," the Decision appears to permit a claim akin to false light invasion of privacy.[13] But the New York Court of Appeals repeatedly has

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[12] See also Hicks v. Casablanca Records, 464 F. Supp. 426, 430-33 (S.D.N.Y. 1978) (dismissing right-of-publicity claim by heirs of Agatha Christie over use of Agatha Christie's name and likeness in a fictionalized biography); Krupnik v. NBC Universal, Inc., 37 Misc.3d 1219(A), 964 N.Y.S.2d 60 (Sup. Ct., N.Y. Cty. 2010) (dismissing Section 51 claim based on photograph of plaintiff in brochure used in a feature film); Frosch v. Grosset & Dunlap, Inc., 75 A.D.2d 768, 769, 427 N.Y.S.2d 828, 829 (1st Dep't 1980) (biography of Marilyn Monroe written by Norman Mailer was protected against a Section 51 claim because it was a "literary work" and "not simply a disguised commercial advertisement for the sale of goods or services"); Rosemont Enterprises, Inc. v. McGraw-Hill Book Co., 85 Misc. 2d 583, 587, 380 N.Y.S.2d 839 (Sup. Ct., N.Y. Cty. 1975) (unauthorized, fictional biography of Howard Hughes did not provide the basis for a misappropriation claim).

[13] This is distinct from a defamation claim, which requires not only falsity but defamatory meaning and other elements that are not alleged by Plaintiff here.

held that this State does not recognize a claim for false light invasion of privacy. See Messenger, 94 N.Y.2d at 448, 706 N.Y.S.2d at 59 (noting that "New York does not recognize" false light invasion of privacy); Howell v. N.Y. Post Co., 81 N.Y.2d 115, 123-24, 596 N.Y.S.2d 350, 354 (1993) ("in this State the right to privacy is governed exclusively by sections 50 and 51 of the Civil Rights Law; we have no common law of privacy"). Notably, in Messenger, the Court of Appeals rejected the plaintiff's Section 51 claim based on the alleged "false impression" created by the use of her photograph next to an advice column, in part because permitting that claim would have made liability under Section 51 "indistinguishable from the common-law tort of false light invasion of privacy." Messenger, 94 N.Y.2d at 448, 706 N.YS.2d at 59.

These more recent Court of Appeals decisions had departed from early precedents, which predated modern First Amendment jurisprudence: Binns v. Vitagraph Company of America, 210 N.Y. 51 (1913), and Spahn v. Julian Messner, Inc., 18 N.Y. 2d 324, 374 N.Y.S.2d 877 (1966), vacated, 387 U.S. 239 (1967), adhered to on remand, 21 N.Y.2d 124, 286 N.Y.S.2d 832 (1967). New York appeals courts in recent years have implicitly recognized that Binns and Spahn are inconsistent with modern Court of Appeals decisions interpreting Article I, § 8 of the New York State Constitution and decisions from around the country interpreting the First Amendment, and deemed them inapplicable to claims such as

Porco's – until this Court's Decision resurrected the out-of-date interpretation of the intersection between free speech and Section 51.

In addition, by appearing to establish a lower level of constitutional protection for works that are "fictionalized," the Decision creates a significant conflict with decisions from other state and federal courts. Just as news coverage cannot constitutionally be censored by individuals seeking to avoid media attention, it is well established that unauthorized biographies, documentaries, or other expressive works based on real people and events enjoy full First Amendment protection. As one leading commentator explained:

> If the law mandated that the permission of every living person and the descendants of every deceased person must be obtained to include mention of them in news and stories, both in documentary and docudrama telling, then they would have the right to refuse permission unless the story was told "their way." That would mean that those who are the participants in news and history could censor and write the story and their descendants could do the same. This would be anathema to the core concept of free speech and a free press.

McCarthy, Thomas J., 2 Rights of Publicity & Privacy § 8:64 (2d ed. 2017).

Consistent with this principle, courts around the country repeatedly have found that the First Amendment bars misappropriation claims based on feature reporting, documentaries, and biographical works. See, e.g., Rosa & Raymond Parks Institute for Self Development v. Target Corp., 812 F.3d 824, 831 (11th Cir. 2016) (rejecting suit by heirs of civil rights activist Rosa Parks against Target for alleged right-of-publicity violations under Michigan common law based on

Target's sale of non-fiction books and film, and a plaque documenting Parks' role in the civil rights movement); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1185-86 (9th Cir. 2001) (First Amendment protected magazine's use of altered photograph of celebrity in fashion spread); Rhoads v. Margolis, No. B249800, 2015 WL 311932, at *9 (Cal. Ct. App. Jan. 26, 2015) (rejecting misappropriation claim by family members of deceased guitarist Randy Rhoades based on biographical book, finding First Amendment protects reporting on matters of public interest), as modified on denial of reh'g (Feb. 17, 2015) (unpublished); Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536, 542-44, 18 Cal. Rptr. 2d 790, 792-94 (1993) (documentary film about surfing protected).[14]

This same broad constitutional protection consistently has been applied to misappropriation claims purporting to arise from fictional or dramatized works. Sixty years ago, in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501, 502 (1952),

[14] See also Marshall v. ESPN Inc., 111 F. Supp. 3d 815, 837 (M.D. Tenn. 2015) (rejecting misappropriation claim by class of former college athletes arising from use of their names, likenesses and images in sports broadcasts; court held use was not commercial speech and was protected report on matter of public interest), aff'd sub nom. Marshall v. ESPN, No. 15-5753, 2016 WL 4400358 (6th Cir. Aug. 17, 2016); Dryer v. National Football League, 55 F. Supp. 3d 1181, 1186 (D. Minn. 2014) (rejecting class action for right of publicity and the Lanham Act violations based on use of plaintiffs' names and images in NFL Films, holding that films were not commercial speech and had full First Amendment protection), aff'd on other grounds, Dryer v. Nat'l Football League, 814 F.3d 938 (8th Cir. 2016); Daly v. Viacom, Inc., 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002) (dismissing misappropriation claim arising from reality television program on First Amendment grounds).

the United States Supreme Court confirmed that fictional films are "a significant medium for the communication of ideas" entitled to full First Amendment protection – just like books, newspapers and other forms of expressive communication. The Court made clear that these constitutional protections are not diminished by the fact that the work may be properly labeled as "entertainment," noting that "[t]he importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as inform." Id. at 501-02.[15] Accord Winters v. New York, 333 U.S. 507, 510 (1948) (explaining that both entertainment and news are fully protected by the First Amendment because "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right [of a free press]").[16]

Following this rationale, courts repeatedly have found that the First Amendment protects fictional or semi-fictional works from misappropriation and right-of-publicity claims, just as it protects news reporting and other fact-based

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[15] Notably, the First Department relied on this language from Burstyn in dismissing claims against the novel and movie "John Goldfarb, Please Come Home," in University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d at 457, 256 N.Y.S.2d at 306, which the New York Court of Appeals affirmed.

[16] See also Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 790 (2011) ("[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas – and even social messages – through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.").

publications. For example, in Tyne v. Time Warner Entm't Co., 901 So.2d 802, 808-09 (Fla. 2005), the Supreme Court of Florida held that, due to First Amendment concerns, Florida's commercial misappropriation statute did not apply to "The Perfect Storm," a feature film that dramatized the disappearance of a fishing vessel and crew during a powerful storm. In a well-reasoned and thoughtful opinion that has been cited by many courts around the country, the Court reached this holding despite finding that the movie "presented a concededly dramatized account of both the storm and the crew of the Andrea Gail," included an "an admittedly fabricated depiction of [the captain] berating his crew," and "took additional liberties with the land-based interpersonal relationships between the crewmembers and their families." Id. at 804. In fact without fictionalization of the events of the fateful journey of the Andrea Gail, the story never would have been told, since no one survived to tell the tale. The Court held that applying Florida's misappropriation statute to the movie "would raise a fundamental constitutional concern," and observed that other courts "have similarly concluded that works such as the picture in the instant case would be protected by the First Amendment and that they do not constitute a commercial purpose." Id. at 808, 809.

Cases from around the country consistently reach the same result. See, e.g., Guglielmi v. Spelling-Goldberg Prods., 25 Cal.3d 860, 866, 160 Cal. Rptr. 352,

358 (1979) (Bird, C.J., concurring) (holding that First Amendment barred misappropriation claim based on use of Rudolph Valentino's name and likeness in fictionalized film version of his life);[17] Sarver v. Chartier, 813 F.3d 891, 905-06 (9th Cir. 2016) (holding that the First Amendment barred a right-of-publicity claim based on alleged use of Army sergeant's identity and life story in "The Hurt Locker"); Matthews v. Wozencraft, 15 F.3d 432, 439 (5th Cir. 1994) (holding that First Amendment protects use of persona in novel, including plaintiff's "character, occupation, and the general outline of his career, with many incidents of his life"); Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989) (interpreting Oregon law, consistent with First Amendment principles, as precluding right-of-publicity claim based on use of Ginger Rogers' name in title of fictional movie about two dancers); Ruffin-Steinback v. dePasse, 82 F. Supp. 2d 723, 730-31 (E.D. Mich. 2000) (holding, in light of First Amendment concerns, that Michigan misappropriation claim did not apply to a docudrama miniseries about the Temptations), aff'd, 267 F.3d 457, 461-62 (6th Cir. 2001); Seale v. Gramercy Pictures, 949 F. Supp. 331, 337 (E.D. Pa. 1996) (holding that use of the plaintiff's likeness in docudrama about the Black Panther Party was "for the purpose of First

[17] Although written as a concurrence, the California Supreme Court subsequently noted that Chief Justice Bird's opinion "commanded the support of the majority of the court," since her opinion was joined or endorsed by three other Justices. Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 396 n.7, 106 Cal. Rptr. 2d 126, 133 (2001).

Amendment expression," not "for the purposes of trade" or for a "commercial purpose" under Pennsylvania right-of-publicity law).[18] Reflecting this consensus, the Restatement (Third) of Unfair Competition provides that "use in entertainment and other creative works is permitted," unless "the name or likeness is used solely to attract attention to a work that is not related to the identified person." Restatement (Third) of Unfair Competition § 47, cmt. c.

New York courts long have held that Article 1, Section 8 of the New York Constitution is more expansive than the First Amendment, and that the courts of this State have a "consistent tradition … of providing the broadest possible protection" to media activities. O'Neill v. Oakgrove Const., Inc., 71 N.Y.2d 521, 529, 528 N.Y.S.2d 1, 5 (1988). For the Decision – and the older cases on which it relied – to extend less protection to movies, television shows, and other expressive works than courts have recognized in other jurisdictions interpreting the First Amendment is a serious inconsistency, that adds to the confusion and uncertainty arising from the conflict between the Decision and rulings from other New York courts.

[18] See also Moore v. Weinstein Co., LLC, 545 F. App'x 405, 409 (6th Cir. 2013) (alleged use of musician as basis for character is fictional feature film not actionable); Doe v. Roe, 638 So. 2d 826, 829 (Ala. 1994) (rejecting attempt to enjoin fictional novel about the murder of plaintiff's adoptive children's natural mother on constitutional grounds); Polydoros v. Twentieth Century Fox Film Corp., 67 Cal. App. 4th 318, 326, 79 Cal. Rptr. 2d 207 (Ct. App. 1997) (fictional film inspired by screenwriter's childhood experiences, including a character based on a member of his sandlot baseball team, was protected).

Moreover, the Decision (like the decisions in Binns and Spahn) does not provide clear guidance on questions that immediately arise in the minds of creators and distributors of these kinds of works – including questions about what literary devices may be safely used, and how much "fictionalization" will result in potential liability. The last time the Court of Appeals addressed the issue, it "did not attempt to lay down a rule on how to determine when a docudrama or fictionalization passes over the line and becomes 'so infected' that it no longer serves the purposes of free speech." McCarthy, Thomas J, 2 Rights of Publicity & Privacy § 8:76 (2d ed. 2017). This lack of guidance creates further uncertainty that inevitably will chill the creation of new works based on or inspired by real people and events.

Finally, review by the Court of Appeals is important because feature films and television programs are not created and distributed on a state-by-state basis. If the subject matter of movie or television show runs the risk of giving rise to a claim in New York, that prospect alone could dissuade creators from pursuing a particular project. Indeed, if the "fictionalization" rule set forth in the Decision had been the norm historically, many acclaimed motion pictures and television shows about real people and events may never have been made or may have been made differently. Taken to the extreme, the critically acclaimed television docudrama "The People v. OJ Simpson: American Crime Story" might have been

mired in litigation if Simpson could have survived a motion to dismiss by filing a lawsuit from his prison cell alleging that the series was not newsworthy because it was substantially fictionalized, despite its fidelity to the facts. Orson Welles might never have made "Citizen Kane," because it is inconceivable that William Randolph Hearst would have consented to having his "persona" depicted. And Steven Spielberg might have found insurmountable challenges in making the epic film "Saving Private Ryan," which was inspired by the true story of Sgt. Frederick Niland—a real-life paratrooper in the 101st Airborne Division whose three brothers were killed in action.

Amici respectfully submit that immediate review by the Court of Appeals is essential to dispel this pall over the continued production of culturally significant movies and television shows. New York courts have long recognized that the importance of early disposition of cases arising from the exercise of First Amendment rights. See Armstrong v. Simon & Schuster, Inc., 85 N.Y.2d 373, 379, 625 N.Y.S. 2d 477, 480 (1995) (dispositive motions hold "particular value, where appropriate, in libel cases, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms"). See also Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 545, 435 N.Y.S.2d 556, 563 (1980) ("[the] threat of being put to the defense of a lawsuit … may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit

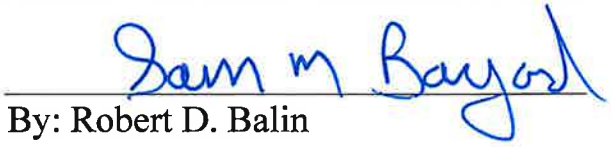
itself") (citing Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966) (alteration in original)). Millions of dollars are invested in New York every year, on film and television projects that draw upon real people and events. If review by the Court of Appeals waits several years, as this case winds its way through the judicial system, new works in the vein of "Hidden Figures," "Dallas Buyers Club," "Game Change," and "Too Big to Fail" may never be created.

CONCLUSION

"This State has long provided one of the most hospitable climates for the free exchange of ideas." Beach v. Shanley, 62 N.Y.2d 241, 255, 476 N.Y.S.2d 765, 773 (1984). But without review, the inconsistency resulting from the Decision threatens to make New Yorker an outlier in the protection of expressive works, a result that is inconsistent with New York's status as a bastion of media freedom. The Court of Appeals should review this case to provide much-needed guidance on important constitutional issues, to bring harmony to the laws governing creativity in the film and television industry nationwide, and to extend appropriate constitutional protection to all expressive works. For all these reasons, Amici respectfully submit that this Court should grant Lifetime's motion for leave to appeal the Decision to the Court of Appeals.

Dated: New York, NY
April 3, 2017

Respectfully submitted,
DAVIS WRIGHT TREMAINE LLP



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APPENDIX A: DESCRIPTION OF AMICI

The Motion Picture Association of America, Inc. ("MPAA") is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion picture industry. The members of MPAA are: Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc. These members and their affiliates are leading producers and distributors of audiovisual entertainment in the theatrical, television and DVD/home video markets.[19]

Home Box Office, Inc. ("HBO") is a New York-based company that provides HBO and Cinemax branded television services to more than 134 million subscribers worldwide. HBO produces and licenses critically acclaimed HBO original programming to television networks in over 150 countries, including series, mini-series and films, which often take viewers behind the scenes of some of the most important events in recent history.

[19] A&E Television Networks, LLC, the parent of Defendant-Respondent Lifetime Entertainment Services, LLC, is a joint venture, one of whose members is an affiliated company of MPAA member Walt Disney Studios Motion Pictures.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

CHRISTOPHER PORCO, Plaintiff-Appellant, -against- LIFETIME ENTERTAINMENT SERVICES, LLC, Defendant-Respondent.	Case No. 522707 **AFFIDAVIT OF SERVICE**

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

TREVOR A. FRANKLIN, being duly sworn, states, I am not a party to the action, am over 18 years of age and reside in Queens, New York. On April 4th, 2017, I served a true and correct copy of the annexed Notice of Motion of Proposed Amici for Leave to File Brief as Amici Curiae, and Affirmation of Samuel M. Bayard in Support, by First Class Mail in the custody of United States Postal Service directed to the following:

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Dated: New York, New York
April 4, 2017

Sworn to before me this
4th day of April, 2017.

Notary Public

SHIRLEY WONG
Notary Public, State of New York
No. 01WO6088427
Qualified in Queens County
Commission Expires March 31, 2019

By: Trevor A. Franklin
Trevor A. Franklin