

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.

MOTION OF FX NETWORKS, LLC, NATIONAL GEOGRAPHIC PARTNERS, LLC, NBCUNIVERSAL MEDIA, LLC, NETFLIX STUDIOS, LLC, PARAMOUNT PICTURES CORPORATION, SONY PICTURES TELEVISION INC., VIACOMCBS INC., WARNER MEDIA, LLC, DISCOVERY, INC., EPIX ENTERTAINMENT LLC, HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS LLC, MACMILLAN PUBLISHING GROUP, LLC, METRO-GOLDWYN-MAYER STUDIOS INC., PENGUIN RANDOM HOUSE LLC, AND UNIVISION COMMUNICATIONS INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT-CROSS-RESPONDENT

NATHAN E. SIEGEL
ADAM LAZIER
DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas, 21st Floor
New York, New York 10020
(212) 489-8230
nathansiegel@dwt.com
adamlazier@dwt.com

Of Counsel:

KELLI L. SAGER
DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street, Suite 2400
Los Angeles, California 90017
(213) 633-6800
kellisager@dwt.com

Attorneys for Amici Curiae

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT**

CHRISTOPHER PORCO and JOAN
PORCO,

Plaintiffs-Respondents-
Cross-Appellants,

-against-

LIFETIME ENTERTAINMENT
SERVICES, LLC,

Defendant-Appellant-
Cross-Respondent.

Case No. 531681

**NOTICE OF MOTION OF FX NETWORKS, LLC, NATIONAL
GEOGRAPHIC PARTNERS, LLC, NBCUNIVERSAL MEDIA, LLC,
NETFLIX STUDIOS, LLC, PARAMOUNT PICTURES CORPORATION,
SONY PICTURES TELEVISION INC., VIACOMCBS INC., WARNER
MEDIA, LLC, DISCOVERY, INC., EPIX ENTERTAINMENT LLC,
HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS
LLC, MACMILLAN PUBLISHING GROUP, LLC, METRO-GOLDWYN-
MAYER STUDIOS INC., PENGUIN RANDOM HOUSE LLC, AND
UNIVISION COMMUNICATIONS INC. FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT-CROSS-
RESPONDENT**

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Nathan E. Siegel, dated October 1, 2020, a motion will be made at a term of this Court to be held in the City of Albany, New York, on the 19th day of October, 2020, for an order granting FX Networks, LLC, National Geographic Partners, LLC,

NBCUniversal Media, LLC, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Television Inc., ViacomCBS Inc., Warner Media, LLC, Discovery, Inc., EPIX Entertainment LLC, Hachette Book Group, Inc., HarperCollins Publishers LLC, Macmillan Publishing Group, LLC, Metro-Goldwyn-Mayer Studios Inc., Penguin Random House LLC, and Univision Communications Inc. leave to file the attached brief as amici curiae in support of Defendant-Appellant-Cross-Respondent on this appeal, and for such other and further relief as the Court may deem just and proper in the circumstances.

PLEASE TAKE FURTHER NOTICE that pursuant to C.P.L.R. 2214(b), any answering papers shall be served on or before October 13, 2020, and any reply papers in support hereof shall be served on or before October 16, 2020.

Dated: New York, NY
October 1, 2020

Respectfully submitted,
DAVIS WRIGHT TREMAINE LLP



By: Nathan E. Siegel
Adam Lazier
1251 Avenue of the Americas
21st Floor
New York, NY 10020
(212) 603-6440
nathansiegel@dwt.com
adamlazier@dwt.com

Attorneys for Proposed Amici

Of Counsel:

Kelli L. Sager

DAVIS WRIGHT TREMAINE LLP

865 S. Figueroa Street, Suite 2400

Los Angeles, California 90017-2566

(213) 633-6800

kellisager@dwt.com

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT**

CHRISTOPHER PORCO and JOAN
PORCO,

Plaintiffs-Respondents-
Cross-Appellants,

-against-

LIFETIME ENTERTAINMENT
SERVICES, LLC,

Defendant-Appellant-
Cross-Respondents.

Case No. 531681

**AFFIRMATION OF NATHAN E. SIEGEL IN SUPPORT OF MOTION
FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF
DEFENDANT-APPELLANT-CROSS-RESPONDENT**

Nathan E. Siegel, 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 FX Networks, LLC, National Geographic Partners, LLC, NBCUniversal Media, LLC, Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Television Inc., ViacomCBS Inc., Warner Media, LLC, Discovery, Inc., EPIX Entertainment LLC, Hachette Book Group, Inc., HarperCollins Publishers LLC, Macmillan Publishing Group, LLC, Metro-

Goldwyn-Mayer Studios Inc., Penguin Random House LLC, and Univision Communications Inc. (“Proposed Amici”).¹ I submit this affirmation in support of the Proposed Amici’s Motion for Leave to File Brief as Amici Curiae in Support of Defendant-Appellant-Cross-Respondent (“Lifetime”) on this appeal.

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

3. Motion picture companies, television producers, podcast distributors and book publishers like Proposed Amici, as well as other independent creators of expressive works, often are the targets of lawsuits by individuals who were or claim to have been depicted in feature films and television programs, as well as creative works in audio and book form, that are based on real-life persons and events.² Even where the claims are found to be without merit (as they typically are), the litigation can be protracted and expensive.

4. The Supreme Court’s summary judgment decision allows a tort claim involving a non-defamatory expressive work to proceed to trial, on the premise that a claim may arise under New York Civil Rights Law §§ 50-51 (“Section 51”) if the Lifetime film at issue (“Film”) included elements that were “materially and

¹ A detailed description of Proposed Amici is included in Appendix A.

² Moreover, Proposed Amici receive many threatened claims for every lawsuit that is actually filed.

substantially fictionalized” – even though the Film does not purport to be a literal depiction of historical facts. This decision is inconsistent with other New York appellate decisions applying Section 51, and with New York and federal constitutional protections for expressive works; if allowed to stand, it would significantly undermine the ability of filmmakers to create culturally significant works that are inspired by, or relate to, real people and events.

5. In light of Proposed Amici’s substantial interest and expertise in the production and distribution of docudramas and other expressive works based on real persons and events, I respectfully submit that the Brief will be of special assistance to this Court. The Brief presents law and arguments that draw on Proposed Amici’s perspectives as participants in the film and television industry, and in related industries that involve the dissemination of creative works, that might otherwise not be raised for this Court’s consideration.

6. In light of this expertise, New York courts previously have granted many of these Proposed Amici leave to submit amicus briefs dealing with Section 51 and related First Amendment issues. For example, the Motion Picture Association and the Association of American Publishers, organizations to which some of these Proposed Amici belong, each submitted amicus briefs to the New York Court of Appeals in the two most recent Section 51 cases before that Court, Lohan v. Take-Two Interactive Software, Inc., No. 2017-24, and Gravano v. Take-

Two Interactive Software, Inc., No. 2017-27.

7. Lifetime has consented to the filing of the Brief. Plaintiffs-
Respondents-Cross-Appellants do not consent.

8. 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.

Dated: New York, NY
October 1, 2020



Nathan E. Siegel

APPENDIX A: DESCRIPTION OF PROPOSED AMICI

FX Networks, LLC³

FX is the flagship general entertainment basic cable channel of FX Networks, LLC, a wholly-owned, indirect subsidiary of The Walt Disney Company. Launched in June of 1994, FX is carried in 85 million homes. Its diverse schedule features a growing roster of critically-acclaimed and award-winning hit drama series, comedy series, docuseries and documentary features, and in particular limited docudrama series, including *American Crime Story: The People v. OJ Simpson* and *The Assassination of Gianni Versace, FEUD: Bette and Joan*, and *Fosse/Verdon*.

National Geographic Partners, LLC

National Geographic Partners, LLC, a joint venture between The Walt Disney Company and the National Geographic Society, is based in Washington, D.C., and is committed to bringing the world premium science, adventure, and exploration content across an unrivaled portfolio of media assets. NGP combines its global television channels with its media and consumer-oriented assets, including its magazines, studios, books, maps, and children's media.

NBCUniversal Media, LLC

NBCUniversal is one of the world's leading media and entertainment companies in the development, production, and marketing of entertainment, news and information to a global audience. It owns and operates a valuable portfolio of news and entertainment television networks, a premier motion picture company, significant television production operations, a leading television stations group, world-renowned theme parks, and a suite of leading Internet-based businesses.

Netflix Studios, LLC

Netflix Studios, LLC is based in Los Angeles, California and produces award-winning movies, documentaries and television series. Those programs are distributed on Netflix's internet television network with over 150 million streaming members in over 190 countries, including in New York.

³ A&E Television Networks, LLC, the parent of Defendant-Appellant Lifetime Entertainment Services, LLC, is an affiliated joint venture of The Walt Disney Company. Proposed Amici FX Networks, LLC, and National Geographic Partners, LLC, are affiliates of The Walt Disney Company.

Paramount Pictures Corporation

Paramount Pictures Corporation is a major global producer and distributor of filmed entertainment, with an extensive library of more than 1,000 film titles with rights to an additional 2,500, as well as a wide range of original, premium television content across all types of media platforms.

Sony Pictures Television Inc.

Sony Pictures Television (“SPT”) is one of the television industry’s leading content providers, producing, distributing and carrying programming worldwide in every genre and for every platform. In addition to managing one of the industry’s largest libraries of award-winning feature films, television shows and formats, SPT is home to a thriving global content business, operating a robust portfolio of wholly-owned and joint-venture production companies across the U.S., Europe, Latin America, and Asia Pacific, as well as linear and digital channels around the world. SPT is a Sony Pictures Entertainment Company.

ViacomCBS Inc.

ViacomCBS Inc. is a leading global media and entertainment company, based in New York, NY, which creates premium content for audiences worldwide. With a portfolio that includes CBS, Showtime Networks, Paramount Pictures, Nickelodeon, MTV, Comedy Central, BET, CBS All Access, Pluto TV and Simon & Schuster, among others, the company delivers the largest share of the U.S. television audience and boasts one of the industry’s most extensive libraries of TV and film titles.

Warner Media, LLC

Warner Media, LLC (“WarnerMedia”) is a New York-based company whose entertainment, news and sports brands bring people, technology, and the world’s best storytellers together to drive culture and meaningful connection. WarnerMedia’s iconic brands and networks include HBO, HBO Max, Warner Bros. and CNN, among many others.

Discovery, Inc.

Discovery, Inc. is a global leader in real life entertainment, serving a passionate audience of superfans around the world with content that inspires, informs and entertains. Available in 220 countries and territories and nearly 50 languages, Discovery’s portfolio of premium brands includes Discovery Channel, HGTV, Food Network, TLC, Investigation Discovery, Travel Channel, Motor Trend, Animal Planet, and Science Channel, as well as OWN: Oprah Winfrey Network in

the U.S., Discovery Kids in Latin America, and Eurosport, the leading provider of locally relevant, premium sports and Home of the Olympic Games across Europe.

EPIX Entertainment LLC

EPIX Entertainment LLC (“EPIX”) is a wholly-owned subsidiary of Metro-Goldwyn-Mayer Studios Inc. Headquartered in New York, EPIX is a premium television network delivering a broad line-up of quality original series, docuseries based on real people and events, documentaries, and the latest movie releases and classic film franchises, all of which are available nationwide through cable, telco, satellite, and digital distribution platforms.

HarperCollins Publishers LLC

HarperCollins Publishers LLC is the second largest consumer book publisher in the world, with operations in 17 countries. With 200 years of history and more than 120 branded imprints around the world, HarperCollins publishes approximately 10,000 new books every year in 16 languages and has a print and digital catalog of more than 200,000 titles. Writing across dozens of genres, HarperCollins authors include winners of the Nobel Prize, the Pulitzer Prize, the National Book Award, the Newbery and Caldecott Medals and the Man Booker Prize. HarperCollins, headquartered in New York, is a subsidiary of News Corp.

Hachette Book Group, Inc.

Hachette Book Group, Inc. is a leading book publishing company, organized under the laws of Delaware, with its principal place of business in New York City. Hachette has been publishing books since 1837, and its publishing imprints include prominent brands such as Little, Brown and Company, Little, Brown Books for Young Readers, Grand Central Publishing, Basic Books, Public Affairs, Orbit, FaithWords, and Center Street. Hachette’s books and authors have won Pulitzer Prizes, National Book Awards, Newbery Medals, Caldecott Medals, and Nobel Prizes, and its best-selling authors have been published all over the world.

Macmillan Publishing Group, LLC

Macmillan Publishing Group, LLC is a New York-based group of U.S. publishers that includes Celadon Books, Farrar, Straus and Giroux, Flatiron Books, Henry Holt & Company, Macmillan Audio, Macmillan Children’s Publishing Group, St. Martin’s Publishing Group and Tor Books. The U.S. publishing group is part of Macmillan Publishers, a global trade book publishing company with prominent imprints around the world. Macmillan publishes a broad range of award-winning books for children and adults in all categories and formats.

Metro-Goldwyn-Mayer Studios Inc.

Metro-Goldwyn-Mayer Studios Inc. (“MGM”) is a leading entertainment company focused on the production and global distribution of film and television content across all platforms. MGM owns one of the world’s deepest libraries of premium film and television content, and has produced and is currently developing numerous biopics and other entertainment content based on or inspired by real people and events.

Penguin Random House LLC

Penguin Random House LLC publishes adult and children’s fiction and nonfiction in print and digital trade book form throughout the U.S. The Penguin Random House global family of companies employ more than 10,000 people across almost 250 editorially and creatively independent imprints and publishing houses that collectively publish more than 15,000 new titles annually. Its publishing lists include more than 60 Nobel Prize laureates and hundreds of the world’s most widely read authors of fiction, historical fiction, narrative non-fiction and non-fiction. Penguin Random House LLC is organized under the laws of Delaware and maintains its principal place of business in New York, New York.

Univision Communications Inc.

Univision Communications Inc. is the leading Hispanic media company in the U.S. serving Hispanics with news, sports and entertainment content across broadcast and cable television, audio and digital platforms. Based in Miami, the company’s media portfolio includes the Univision and UniMás broadcast networks, cable networks Galavisión and TUDN, and 65 owned or operated local television stations in major U.S. Hispanic markets.

EXHIBIT A

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 AMICI CURIAE FX NETWORKS, LLC, NATIONAL GEOGRAPHIC PARTNERS, LLC, NBCUNIVERSAL MEDIA, LLC, NETFLIX STUDIOS, LLC, PARAMOUNT PICTURES CORPORATION, SONY PICTURES TELEVISION INC., VIACOMCBS INC., WARNER MEDIA, LLC, DISCOVERY, INC., EPIX ENTERTAINMENT LLC, HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS LLC, MACMILLAN PUBLISHING GROUP, LLC, METRO-GOLDWYN-MAYER STUDIOS INC., PENGUIN RANDOM HOUSE LLC, AND UNIVISION COMMUNICATIONS INC. IN SUPPORT OF DEFENDANT-APPELLANT-CROSS-RESPONDENT

NATHAN E. SIEGEL
ADAM LAZIER
DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas, 21st Floor
New York, New York 10020
(212) 489-8230
nathansiegel@dwt.com
adamlazier@dwt.com

Of Counsel:

KELLI L. SAGER
DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street, Suite 2400
Los Angeles, California 90017
(213) 633-6800
kellisager@dwt.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICI CURIAE	1
I. SUMMARY OF ARGUMENT.....	2
II. DOCUDRAMAS ARE A CRITICALLY ACCLAIMED PART OF CONTEMPORARY CULTURE THAT DO NOT PURPORT TO BE WORKS OF NON-FICTION.....	4
III. THE FIRST AMENDMENT AND NEW YORK LAW PROTECT EXPRESSIVE WORKS INPIRED BY REAL PEOPLE OR EVENTS....	11
IV. SECTION 51 MUST BE NARROWLY CONSTRUED TO PROTECT EXPRESSIVE WORKS IN A MANNER CONSISTENT WITH THE FIRST AMENDMENT AND NEW YORK LAW.....	22
CONCLUSION.....	30

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>Alfano v. NGHT, Inc.</u> , 623 F. Supp. 2d 355 (E.D.N.Y. 2009)	18
<u>Altbach v. Kulon</u> , 302 A.D.2d 655 (3d Dep’t 2003)	17, 19
<u>Arrington v. N.Y. Times Co.</u> , 55 N.Y.2d 433 (1982)	29
<u>Bartnicki v. Vopper</u> , 532 U.S. 514 (2001)	11
<u>Binns v. Vitagraph Co. of America</u> , 210 N.Y. 51 (1913)	22, 23
<u>Brinkley v. Casablancas</u> , 80 A.D.2d 428 (1st Dep’t 1981)	26
<u>Chapadeau v. Utica Observer-Dispatch</u> , 38 N.Y.2d 196 (1975)	21
<u>Comedy III Productions, Inc. v. Gary Saderup, Inc.</u> , 25 Cal.4th 387 (2001)	14
<u>Cruz v. Latin News Impacto Newspaper</u> , 216 A.D.2d 50 (1st Dep’t 1997)	20
<u>Davis v. Costa-Gavras</u> , 654 F. Supp. 653 (S.D.N.Y. 1987)	9, 13
<u>de Havilland v. FX Networks, LLC</u> , 21 Cal. App. 5th 846 (2018)	15, 28
<u>Delan v. CBS, Inc.</u> , 91 A.D.2d 255 (2d Dep’t 1983)	26

<u>Duncan v. Universal Music Group, Inc.</u> , 2012 WL 1965398 (E.D.N.Y. May 31, 2012).....	18
<u>Finger v. Omni Publ’ns Int’l</u> , 77 N.Y.2d 138 (1990).....	28
<u>Foster v. Svenson</u> , 128 A.D.3d 150 (1st Dep’t 2015).....	19
<u>Frank v. National Broadcasting Co.</u> , 119 A.D.2d 252 (2d Dep’t 1986).....	18
<u>Gautier v. Pro-Football, Inc.</u> , 304 N.Y. 354 (1952).....	19
<u>Gross v. N.Y. Times Co.</u> , 82 N.Y.2d 146 (1993).....	21
<u>Guglielmi v. Spelling-Goldberg Productions</u> , 25 Cal.3d 860 (1979).....	13, 14, 15, 16
<u>Hampton v. Guare</u> , 195 A.D.2d 366 (1st Dep’t 1993).....	18, 19
<u>Hicks v. Casablanca Records</u> , 464 F. Supp. 426 (S.D.N.Y. 1978).....	19, 25
<u>Hill v. Hayes</u> , 20 N.Y.2d 738 (1967).....	24
<u>Holmes v. Winter</u> , 22 N.Y.3d 300 (2013).....	21, 22, 30
<u>Howell v. N.Y. Post Co.</u> , 81 N.Y.2d 115 (1993).....	28
<u>Immuno AG. v. Moor-Jankowski</u> , 77 N.Y.2d 235 (1991).....	2, 21, 29
<u>Joseph Burstyn, Inc. v. Wilson</u> , 343 U.S. 495 (1952).....	13

<u>Lohan v. Take-Two Interactive Software, Inc.</u> , 31 N.Y.3d 111 (2018).....	12, 17, 18, 19
<u>Masson v. New Yorker Magazine, Inc.</u> , 501 U.S. 496 (1991).....	9
<u>Matthews v. Wozencraft</u> , 15 F.3d 432 (5th Cir. 1994)	15
<u>Messenger v. Gruner + Jahr Publ’g Co.</u> , 94 N.Y.2d 436, 441 (2000).....	17, 20, 23, 28
<u>Nichols v. Item Publishers</u> , 309 N.Y. 596 (1956)	20
<u>O’Neill v. Oakgrove Constr., Inc.</u> , 71 N.Y.2d 521 (1988).....	21
<u>Partington v. Bugliosi</u> , 56 F.3d 1147 (9th Cir. 1995)	9
<u>Porco v. Lifetime Entm’t Servs., LLC</u> , 147 A.D.3d 1253 (3d Dep’t 2017).....	26, 27
<u>R.A.V. v. City of St. Paul</u> , 505 U.S. 377 (1992).....	12
<u>Rosemont Enters., Inc. v. McGraw-Hill Book Co.</u> , 85 Misc. 2d 583 (Sup. Ct. N.Y. Cty. 1975).....	19
<u>Ruffin-Steinback v. dePasse</u> , 82 F. Supp. 2d 723 (E.D. Mich. 2000), <u>aff’d</u> , 267 F.3d 457 (6th Cir. 2001).....	15
<u>Sarver v. Chartier</u> , 813 F.3d 891 (9th Cir. 2016)	15
<u>Seale v. Gramercy Pictures</u> , 949 F. Supp. 331 (E.D. Pa. 1996).....	15
<u>Spahn v. Julian Messner, Inc.</u> , 21 N.Y.2d 124 (1967).....	3, 22

<u>Spahn v. Julian Messner, Inc.</u> , 18 N.Y.2d 324 (1966).....	<i>passim</i>
<u>Time, Inc. v. Hill</u> , 385 U.S. 374 (1967).....	23, 24, 27, 28
<u>Tyne v. Time Warner Entertainment Co.</u> , 901 So.2d 802 (Fla. 2005)	14
<u>United States v. Alvarez</u> , 567 U.S. 709 (2012).....	12
<u>United States v. Stevens</u> , 559 U.S. 460 (2010).....	12
<u>University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.</u> , 22 A.D.2d 452 (1st Dep’t), <u>aff’d</u> , 15 N.Y.2d 940 (1965).....	3, 13, 18
<u>Waters v. Moore</u> , 70 Misc. 2d 372 (Sup. Ct. Nassau Cty. 1972)	25
<u>Whitehurst v. Showtime Networks, Inc.</u> , 2009 WL 3052663 (E.D. Tex. Sept. 22, 2009).....	15
Statutes	
New York Civil Rights Law § 50	1, 11, 17
New York Civil Rights Law § 51	<i>passim</i>
Constitutional Provisions	
U.S. Const. amend. I	<i>passim</i>
N.Y. Const., art. I, § 8.....	21
Other Authorities	
Thomas J. McCarthy, 2 <u>Rights of Publicity & Privacy</u> § 8:64 (2d ed. 2017)	10
Thomas J. McCarthy, 2 <u>Rights of Publicity and Privacy</u> § 8:77 (2d ed. 2017)	25

IDENTITY AND INTEREST OF AMICI CURIAE

Amici Curiae are companies that regularly create and distribute expressive works, including fact-based, semi-fictional, and fictional films, television programs, books, and podcasts. Amici often appear in cases in New York and elsewhere involving claims that affect the exercise of their First Amendment and state law rights, including cases involving misappropriation claims that purport to arise from the use of a plaintiff's name and/or likeness in expressive works.

The Supreme Court's summary judgment decision ("Decision") allows a tort claim involving a non-defamatory Lifetime film ("Film") to proceed to trial, on the premise that a claim may arise under New York Civil Rights Law §§ 50-51 ("Section 51") if the Film included elements that were "materially and substantially fictionalized" – even though the Film does not purport to be a literal depiction of historical facts. This Decision is inconsistent with other New York appellate decisions applying Section 51, and with New York and federal constitutional protections for expressive works; if allowed to stand, it would significantly undermine the ability of filmmakers to create culturally significant works that are inspired by, or relate to, real people and events. Amici urge this Court to reverse the Decision and order judgment to be entered for Lifetime.

I. SUMMARY OF ARGUMENT

Docudramas and other creative works based on real people and events are a mainstay of American culture. By combining historical facts involving real people and events with fictional elements, these films – many of which are critically acclaimed – allow filmmakers to explore ideas and consider perspectives that could not be expressed within the confines of history books or documentaries. The Supreme Court’s Decision threatens this entire genre, by suggesting that a filmmaker may be liable in tort for a work that is not defamatory, if a jury finds that it is “materially and substantially fictitious.” If the Decision is affirmed, the impact on creative expression would be more than chilling; it risks stifling entire categories of films, including docudramas and historical fiction.

This draconian scenario is not compelled by Section 51; to the contrary, the notion that a filmmaker can be held liable merely for including content that is “fictionalized” finds no support in New York or First Amendment jurisprudence. For decades, courts throughout the country have recognized that docudramas are constitutionally protected from misappropriation and right-of-publicity claims. Consistent with these controlling principles, and this State’s “consistent tradition ... of providing the broadest possible protection” to media activities,¹ a long line of New York precedent has held that the depiction of real persons and events in semi-

¹ Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 249 (1991).

fictional, expressive works does not constitute a use for “advertising” or “trade” purposes under Section 51. E.g., University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 457 (1st Dep’t), aff’d, 15 N.Y.2d 940 (1965).

The Supreme Court’s Decision allowing the Section 51 claim to proceed ignores that precedent, and misapplies the narrow holding in Spahn v. Julian Messner, Inc., 18 N.Y.2d 324 (1966) & 21 N.Y.2d 124 (1967). At most, the Court of Appeals’ decision in Spahn recognized a limited exception to Section 51’s broad protection for expressive works if a fictionalized work is affirmatively misrepresented to be entirely factual. The gravamen of the claim there was the misrepresentation of the work; it did not sanction imposing liability for alleged “fictionalization” alone.

Assuming the narrow exception recognized in Spahn remains valid at all, given subsequent developments in the law, it has no application here. Lifetime’s Film does not purport to be a non-fiction biography of Christopher Porco; by their very nature, docudramas like the Film are understood to include dramatized and imagined scenes. By misconstruing Spahn, the Decision dramatically expands the scope of Section 51 far beyond the limits permitted by the First Amendment and by decades of decisions by the Court of Appeals, which require the statute to be

construed narrowly when expressive works are involved. The Decision therefore should be reversed, and judgment should be entered for Lifetime.

II. DOCUDRAMAS ARE A CRITICALLY ACCLAIMED PART OF CONTEMPORARY CULTURE THAT DO NOT PURPORT TO BE WORKS OF NON-FICTION

Since the advent of motion pictures, filmmakers have created works that have entertained, inspired, and educated the public by drawing upon actual events and people. These often take the form of docudramas, which combine real people and events with dramatized elements that help bring the story to life.

This genre encompasses some of the most acclaimed and beloved films ever made – classics such as “The Pride of the Yankees,” “In Cold Blood,” “Raging Bull,” “Patton,” “The Right Stuff,” and “Schindler’s List.” Indeed, Academy Award nominees for Best Picture in recent years are replete with films depicting or inspired by real people and events. These include “Spotlight,” a Best Picture winner dramatizing The Boston Globe’s investigation into child sex abuse in the Catholic Church; “American Sniper,” about decorated U.S. Navy SEAL sniper Chris Kyle; and “The Post,” which chronicled the Washington Post’s publication of the Pentagon Papers. It also includes four of the nine Best Picture nominees in

2020 – “Ford v. Ferrari,” “The Irishman,” “1917,” and “Once Upon a Time in Hollywood” – which all were based on or inspired by real people or events.²

Television producers also routinely draw on real people and events to create educational, entertaining, and critically-acclaimed programs. Award-winning examples include “The People v. O.J. Simpson: American Crime Story,” about the O.J. Simpson murder trial; “The Wizard of Lies,” which focused on fraudster Bernard Madoff; “The Crown,” about the British monarchy; and “Too Big to Fail,” which addressed the complex events preceding the 2008 financial crisis.

Docudramas are not – and do not purport to be – documentaries, non-fiction biographies, or historical works. Many docudramas, including the Film, explicitly notify viewers that although they are “based on” or “inspired by” true stories, some of the events, characters, and dialogue are dramatized and imagined. But even without such express language, these kinds of works are replete with obvious dramatization, in an attempt to “create an interesting form and a compelling dramatic structure out of fascinating but often muddled, seemingly shapeless, and complex real-life events.”³ Because “real people’s lives rarely fall into a three-act

² These Best Picture nominees represent only a fraction of the recent critically-acclaimed films that were based on, or inspired by, real-life events, which include “Richard Jewell,” “United 93,” “Black Hawk Down,” and “13 Hours,” among many others.

³ Alan Rosenthal, From *Chariots of Fire* to *The King’s Speech*: Writing Biopics and Docudramas 48 (2014).

structure,”⁴ docudramas adapt real events to the structure of films or television programs. Some examples of the creative techniques used in this genre include:

- **Imagined dialogue and scenes.** “Where feasible, and when it is sufficiently dramatic, [screenwriters] try to retain authentic dialogue.” Rosenthal, *supra*, note 3, at 155. But real people do not keep verbatim records of all their daily conversations, and those conversations typically do not take place in an orderly way that advances a storyline, or develops characters. That is why, “probably 90 percent of the time,” screenwriters must “go on to create [their] own” dialogue. *Id.*
- **Composite characters.** Many of humanity’s most noteworthy achievements were accomplished by groups of people. A film or television program attempting to depict all of these people would be interminably long, and often incomprehensible to viewers. A common solution is to compress groups of people into one or more composite characters. *Id.* at 90. For example, the classic 1963 movie “The Great Escape” combined a group of prisoners involved in the actual prison break into a few fictionalized characters. Similarly, “Apollo 13” and “Hidden Figures” replaced large teams of scientists

⁴ David Howard & Edward Mabley, The Tools of Screenwriting: A Writer’s Guide to the Craft and Elements of a Screenplay 9 (1995).

with a handful; films like “The Longest Day” and “A Bridge Too Far” condensed vast military operations into a small group of soldiers.

These changes allowed filmmakers to give engaging and comprehensible narrative structure to important stories.

- **Time compression and expansion.** Filmmakers and writers often use flashbacks, time compression, and similar temporal devices to tell a story. Time compression allows filmmakers to describe events that took place over many years in a medium that may allow for only an hour or two; filmmakers also use flashbacks and re-creations to explore a character’s motivations and personal perspectives of events that may have taken place in a few seconds.

These and other dramatic elements give docudramas immediacy, tension, and insights that surpass the rote presentation of facts in a court transcript or a history book. For example:

- In “The Big Short,” characters frequently break the “fourth wall” to speak directly to the audience. These narrations plainly did not happen in real life, but allowed the filmmakers to highlight or explain decisions that resulted in the 2008 financial crisis.
- “Apollo 13” depicts flight director Gene Kranz telling engineers that “failure is not an option.” Although those words were crafted by

screenwriters,⁵ they captured the spirit of NASA’s frantic efforts to save the astronauts so perfectly that Kranz later used the phrase for his autobiography. See Gene Kranz, *Failure is Not an Option: Mission Control From Mercury to Apollo 13 and Beyond* (2000).

- In “Hidden Figures,” the challenges faced by black women mathematicians at NASA are exemplified in dramatic fashion by depicting math genius Katherine Johnson’s important work being interrupted because she has to leave the building to use a “colored” restroom. Although the specific events were fictionalized,⁶ the existence of segregated bathrooms at NASA was not; the dramatization provided a more compelling condemnation of Jim Crow laws than merely reciting the facts.

“Romeo Killer: The Chris Porco Story” is no exception. It is replete with elements that make clear to viewers that the Film is not a documentary, or limited only to literal historical facts. A title card at the beginning of the Film says that it is “*based on a true story*,” and another card at the end states that “some names have been changed, some characters are composites and certain other characters and

⁵ Marcia Dunn, “Apollo 13’s most famous quotes originated in Hollywood,” Associated Press (Apr. 9, 2020), <https://apnews.com/c17fd5526198f00139b097452206bc77>.

⁶ “History vs. Hollywood,” <https://www.historyvshollywood.com/reelfaces/hidden-figures>.

events have been fictionalized.” It also contains many elements that viewers would recognize easily as dramatic storytelling devices. For example, the Film repeatedly interrupts the storyline to feature “interviews” with its characters, providing commentary about events that have just occurred. No one watching the Film could reasonably believe that those individuals (or their real-life counterparts) were followed around by camera crews, or that they periodically interrupted their daily routines to give impromptu interviews.

Courts have recognized that audiences are sophisticated enough to understand that docudramas are not – and do not claim to be – literally true. E.g., Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 513 (1991) (“an acknowledgment that the work is so-called docudrama or historical fiction ... might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed.”); Partington v. Bugliosi, 56 F.3d 1147, 1155 (9th Cir. 1995) (“viewers in this case would be sufficiently familiar with [the docudrama] genre to avoid assuming that all statements within them represent assertions of verifiable facts. To the contrary, most of them are aware by now that parts of such programs are more fiction than fact.”); Davis v. Costa-Gavras, 654 F. Supp. 653, 658 (S.D.N.Y. 1987) (“[s]elf-evidently a docudrama partakes of author’s license – it is a creative interpretation of reality....”).

In short, viewers can distinguish between docudramas and the nightly news. They recognize that dramatizations, literary license, and imagined dialogue allow creators – and audiences – to consider how events might have happened, where the facts are unknown or unknowable, or where actual participants are unable or unwilling to participate. Without literary license, filmmakers faced with needing permission from every living person who might be identified in a docudrama would be stymied, particularly for films about controversial subjects, or which present a critical perspective about a public figure. Expressive works based on true stories would be confined to the bland, the known, and the uncontroversial; public figures effectively would have the power to veto unflattering depictions; and culture and literature would be poorer as a result. As one leading commentator explained:

If the law mandated that the permission of every living 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.

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

Yet under the Supreme Court’s expansive interpretation of Section 51, that might be the result. Plaintiffs’ counsel even admitted, at the hearing on Lifetime’s summary judgment motion, that all of the subjects of docudramas nominated for

Best Picture in 2019 might have a cause of action under Section 51, under Plaintiffs’ theory of the law. Despite this concession, the Supreme Court adopted an expansive interpretation of Section 51 because it concluded that the decision in Spahn compelled it to do so. That was error. During the five decades since Spahn was decided, there have been hundreds of docudramas exhibited in this State that arguably meet the test the Supreme Court applied here, because they may have “materially and substantially” fictionalized some aspect of their subjects. If the Decision is correct, all of the filmmakers and writers involved in these works violated New York law.⁷ But that is not what New York courts have found, nor can that conclusion survive even superficial scrutiny – let alone be reconciled with the broad speech protections provided by the federal and New York constitutions.

III. THE FIRST AMENDMENT AND NEW YORK LAW PROTECT EXPRESSIVE WORKS INSPIRED BY REAL PEOPLE OR EVENTS.

Both the First Amendment and New York law broadly protect docudramas and other creative works from claims purporting to arise from the non-defamatory “use” of a subject’s name or likeness. As a threshold matter, because such claims seek to sanction speech based on its content, they must be subjected to strict

⁷ The consequences arguably go beyond potential civil liability. Anyone found civilly liable under Section 51 also may be “guilty of a misdemeanor” under Section 50 of the Civil Rights Law – meaning the Supreme Court’s interpretation of the statute potentially subjects writers and filmmakers to criminal liability for including dramatized elements.

constitutional scrutiny. E.g., Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) (speech regulation is content-based when it cannot be “justified without reference to the content of the regulated speech”) (citation and emphasis omitted); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (content-based speech regulation is subject to highest level of scrutiny); see also Lohan v. Take-Two Interactive Software, Inc., 31 N.Y.3d 111, 120 (2018) (“courts have cabined section 51 ‘to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest’ guaranteed by the First Amendment.”) (citation omitted).

Exceptions to the general rule against content-based speech regulations have been narrowly limited to “historic and traditional categories,” including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. United States v. Stevens, 559 U.S. 460, 468-69 (2010) (citation omitted). These categories do not include speech that is merely “fictionalized.” As modern First Amendment jurisprudence makes clear, speech does not lose constitutional protection simply because it is alleged to be “false.” United States v. Alvarez, 567 U.S. 709, 718-27 (2012) (holding statute “that targets falsity and nothing more” to be unconstitutional).

In keeping with these principles, courts repeatedly have recognized that the mere fact a film contains fictional or dramatized elements, or is entertaining, does

not deprive it of constitutional protection. Sixty-five years ago, the United States Supreme Court recognized that films of all varieties are “a significant medium for the communication of ideas” entitled to full First Amendment protection; these protections are not diminished by the fact that “they are designed to entertain as well as to inform.” Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952). See also Davis, 654 F. Supp. at 658 (“[t]he cases on point demonstrate that the First Amendment protects such dramatizations [in docudramas] and does not demand literal truth in every episode depicted.”). The Court of Appeals applied this principle in University of Notre Dame, holding that using the names of the University and its real-life president in a novel and fictionalized movie was not actionable: “It is enough that the work is a form of expression ‘deserving of substantial freedom – both as entertainment and as a form of social and literary criticism.’” 22 A.D.2d at 458 (citation omitted), aff’d, 15 N.Y.2d 940 (1965).

Courts around the country similarly have held that the First Amendment protects semi-fictional works from misappropriation and right-of-publicity claims, just as it protects news reporting and other fact-based publications. For example, in Guglielmi v. Spelling-Goldberg Productions, 25 Cal.3d 860 (1979), the California Supreme Court rejected a right-of-publicity claim brought by actor Rudolph Valentino’s heirs, arising from a docudrama that told a fictionalized story about Valentino’s life. The court held that the First Amendment barred the

plaintiffs' claim because "[w]hether exhibited in theatres or on television, a film is a medium which is protected by the constitutional guarantees of free expression." Id. at 865 (Bird, C.J., concurring).⁸ The court noted, "[c]ontemporary events, symbols and people are regularly used in fictional works," observing that "[f]iction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers." Id. at 869.

Similarly, in Tyne v. Time Warner Entertainment Co., 901 So.2d 802, 808-09 (Fla. 2005), the Florida Supreme Court held that the First Amendment barred the application of Florida's commercial misappropriation statute to "The Perfect Storm," a feature film dramatizing the events leading up to the disappearance of fishing vessel Andrea Gail and its entire crew in a 1991 storm. Because there were no survivors, the story could not have been told without fictionalization. But in a well-reasoned opinion that has been cited by many other courts, the Tyne court held that applying Florida's misappropriation statute to the movie would "raise[] a fundamental constitutional concern." Although the movie "presented a concededly dramatized account of both the storm and the crew of the Andrea Gail" (id. at 804),

⁸ The California Supreme Court subsequently noted that Chief Justice Bird's opinion "commanded the support of the majority of the court" because it was joined or endorsed by three other Justices on the seven-member court. Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal.4th 387, 396 n.7 (2001).

the court concluded that it did not “constitute a commercial purpose” and it was “protected by the First Amendment” Id. at 808-09.

Other courts consistently have reached the same result in cases involving docudramas and similar expressive works. E.g., de Havilland v. FX Networks, LLC, 21 Cal. App. 5th 846, 859-62 (2018) (“[o]ur courts have often observed that entertainment is entitled to the same constitutional protection as the exposition of ideas,” and “no distinction may be drawn in this context between fictional and factual accounts of [a plaintiff’s] life.”) (quoting Guglielmi, 25 Cal.3d at 865-868), cert. denied, 139 S. Ct. 800 (2019); Sarver v. Chartier, 813 F.3d 891, 905-06 (9th Cir. 2016) (First Amendment barred right-of-publicity claim based on alleged use of Army sergeant’s life story in film “The Hurt Locker”); Matthews v. Wozencraft, 15 F.3d 432, 438 n.5 (5th Cir. 1994) (First Amendment protected novel that used plaintiff’s “character, occupation and the general outline of his career, with many incidents in his life”); Whitehurst v. Showtime Networks, Inc., 2009 WL 3052663, at *6-7 (E.D. Tex. Sept. 22, 2009) (movie’s “fictionalized depiction” of murder victim was not actionable because “expression by means of motion pictures” is constitutionally protected; thus, the work did not “constitute a ‘commercial purpose’ necessary to support a claim for misappropriation.”); Ruffin-Steinback v. dePasse, 82 F. Supp. 2d 723, 730-31 (E.D. Mich. 2000) (recognizing First Amendment concerns in holding Michigan’s misappropriation law did not

apply to 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) (use of the plaintiff's likeness in docudrama about Black Panther Party was "for the purpose of First Amendment expression," not "for the purposes of trade" or for a "commercial purpose" under Pennsylvania law).

The justifications for protecting these kinds of works from misappropriation and right-of-publicity claims are compelling. As Chief Justice Bird explained in Guglielmi:

Using fiction as a vehicle, commentaries on our values, habits, customs, laws, prejudices, justice, heritage and future are frequently expressed.... Indeed, Dickens and Dostoevski may well have written more trenchant and comprehensive commentaries on their times than any factual recitation could ever yield.

25 Cal.3d at 867-68 (Bird, C.J., concurring) (footnotes omitted). Addressing right-of-publicity claims specifically, she concluded:

Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity. Moreover, the creation of historical novels and other works inspired by actual events and people would be off limits to the fictional author. An important avenue of self-expression would be blocked and the marketplace of ideas would be diminished.

Id. at 872 (footnotes omitted).

That does not mean filmmakers are categorically immune from any potential liability: docudramas can give rise to defamation claims, if the standards that apply to that tort are satisfied in a particular case. But allowing plaintiffs to circumvent the constitutional requirements for defamation claims by bringing claims under Section 51, like the claim at issue here, poses an unprecedented – and virtually insurmountable – hurdle to an entire genre of works, which would likely never be brought to fruition if creators have to fear potential lawsuits from anyone who might be portrayed in a “substantially fictionalized” manner.

For these reasons, New York law has long limited the scope of Section 51, holding that expressive works do not constitute “advertising” or “trade” under that statute. Just two years ago, the Court of Appeals emphasized that Sections 50 and 51 “were drafted narrowly to encompass only the commercial use of an individual’s name or likeness and no more,” noting that limitation is necessary to avoid conflicts with protected First Amendment rights. Lohan, 31 N.Y.3d at 120 (emphasis added); see also Messenger v. Gruner + Jahr Publ’g Co., 94 N.Y.2d 436, 441 (2000) (“the statute is to be narrowly construed and ‘strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person’ ... these principles reflect ‘constitutional values in the area of free speech.’”) (emphasis added) (citations omitted); Altbach v. Kulon, 302 A.D.2d 655, 657 (3d Dep’t 2003) (dismissing Section 51 claim, holding that “artistic

expressions ... are entitled to protection under the First Amendment and excepted from New York's privacy protections.”).

These protections for expressive works apply equally to works containing “fictionalized” elements, even if they contain the names or images of real people. The wide range of dramatized works New York courts have found to be protected include the following:

- The novel and fictional movie “John Goldberg, Please Come Home,” which named Notre Dame University and its president in a fictional story. University of Notre Dame, 22 A.D.2d at 454-58 (cited in Lohan, 31 N.Y.3d at 120).
- The play “Six Degrees of Separation.” Hampton v. Guare, 195 A.D.2d 366, 366 (1st Dep’t 1993) (cited in Lohan, 31 N.Y.3d at 120).
- A “Saturday Night Live” television show skit allegedly based on the plaintiff. Frank v. National Broadcasting Co., 119 A.D.2d 252, 256 (2d Dep’t 1986).
- The film “Get Rich or Die Tryin’,” a fictionalized film based on the life of the rapper “50 Cent.” Duncan v. Universal Music Group, Inc., 2012 WL 1965398, at *3 (E.D.N.Y. May 31, 2012).
- The docudrama “Inside the Mafia.” Alfano v. NGHT, Inc., 623 F.Supp.2d 355, 359 (E.D.N.Y. 2009).

- The film “Agatha,” a fictionalized depiction of Agatha Christie’s unsolved 1926 disappearance. Hicks v. Casablanca Records, 464 F.Supp. 426, 430-33 (S.D.N.Y. 1978).
- A fictionalized book about Howard Hughes. Rosemont Enters., Inc. v. McGraw-Hill Book Co., 85 Misc. 2d 583, 587 (Sup. Ct. N.Y. Cty. 1975).

Various rationales have been given for excluding dramatized works and other forms of artistic expression from Section 51. Some courts have construed the “newsworthiness” or “public interest” exemption broadly, to exempt such works. E.g., Gautier v. Pro-Football, Inc., 304 N.Y. 354 (1952) (applying public interest exemption to a circus act aired during halftime at a football game); Foster v. Svenson, 128 A.D.3d 150, 156-57 (1st Dep’t 2015) (“the newsworthy and public concern exemption has been applied to many types of artistic expressions, including literature, movies and theater”). Other courts, including this Court, have held that expressive works do not fall under the ambit of the statute at all, because they are not “advertising” or “trade” uses. E.g., Altboch, 302 A.D.2d 655; Hampton, 195 A.D.2d 366. As the Court of Appeals emphasized in Lohan, regardless of the rationale, the end result is the same: Section 51 should be “cabined ... ‘to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest’ guaranteed by the First Amendment” Lohan, 31 N.Y.3d at 120 (citations omitted).

In contrast, the Decision here, which permits liability under Section 51 to arise from “fictionalization” in a docudrama that is not alleged to be defamatory, essentially turns Section 51 into a tort of “falsity.” That not only conflicts with the First Amendment, it contravenes well-established New York law, which “does not recognize a tort for reporting inaccurate, but not defamatory information.” Cruz v. Latin News Impacto Newspaper, 216 A.D.2d 50, 51 (1st Dep’t 1997) (citing Nichols v. Item Publishers, 309 N.Y. 596 (1956)). Instead, the Court of Appeals has made clear that Section 51 should not be broadly construed to create, in effect, a substitute for the false light invasion of privacy tort, which New York law does not recognize. Messenger, 94 N.Y.2d at 448 (rejecting construction of Section 51 under which that claim “becomes indistinguishable from the common-law tort of false light invasion of privacy,” because “New York does not recognize such a common-law tort.”). Yet that is what the Supreme Court’s standard purports to do, by measuring whether “the content is materially and substantially fictitious,” and permitting a tort claim for non-defamatory “fictitious” content.⁹

The Decision also cannot be reconciled with New York’s expansive historical commitment to freedom of speech. The Court of Appeals has noted, “[t]his State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas,” and its courts have had a “consistent

⁹ Even the false light tort does not sweep as broadly as the Supreme Court’s proposed standard. See note 12, infra.

tradition ... of providing the broadest possible protection” to media activities. Immuno AG., 77 N.Y.2d at 249. Recognizing this State’s “own exceptional history and rich tradition” in protecting free speech, id. at 250, the Court repeatedly has held that Article I, Section 8 of the New York Constitution provides even broader protection than the federal constitution. See id. at 249-50; Holmes v. Winter, 22 N.Y.3d 300, 307 (2013) (“[t]he drafters chose not to model our provision after the First Amendment, deciding instead to adopt more expansive language.”); O’Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 529 n.3 (1988) (“[t]he protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment.”).

On issues affecting freedom of speech, New York’s law is among the most protective of any State in the Nation. E.g., Holmes, 22 N.Y.3d at 310 (New York’s “mantle of protection for those who gather and report the news – and their confidential sources – ... has been recognized as the strongest in the nation.”); Gross v. N.Y. Times Co., 82 N.Y.2d 146, 152 (1993) (standard for non-actionable opinion under New York law “is decidedly more protective of ‘the cherished constitutional guarantee of free speech’” than the standard required by the First Amendment); Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196, 199 (1975)

(adopting gross-irresponsibility standard for private-figure defamation claims on matters of public concern).

The Supreme Court’s Decision flips this longstanding history on its head. If it is affirmed, New York will offer far less protection to filmmakers, writers, and other creators involved in making and distributing docudramas than any other State. It is difficult to imagine a result less in keeping with this State’s “long tradition, with roots dating back to the colonial era, of providing the utmost protection of freedom of the press.” Holmes, 22 N.Y.3d at 307.

IV. SECTION 51 MUST BE NARROWLY CONSTRUED TO PROTECT EXPRESSIVE WORKS IN A MANNER CONSISTENT WITH THE FIRST AMENDMENT AND NEW YORK LAW.

The Supreme Court construed the Court of Appeals’ decisions in Spahn, 18 N.Y.2d 324 & 21 N.Y.2d 124, and Binns v. Vitagraph Co. of America, 210 N.Y. 51 (1913), as requiring Lifetime to “establish that the film is not materially and substantially fictitious” to prevail on its summary judgment motion. JA23-25. That was plain error. At most, Spahn recognized a very narrow exception to the broad protections from Section 51 claims that apply to expressive works, including semi-fictional and fictional works. That narrow exception does not apply here.

Spahn involved a book written for teenage readers that expressly held itself out to be a non-fiction biography of renowned pitcher Warren Spahn. The Court of Appeals emphasized that Mr. Spahn was not challenging the book merely because

it was unauthorized or objectionable to him; instead, he sought “only to restrain the publication of that which purports to be his biography.” Spahn, 18 N.Y.2d at 328 (original emphasis). The Court of Appeals agreed with the trial court that the book was not the non-fiction biography its publisher claimed, because it was replete with “dramatization, imagined dialogue, manipulated chronologies, and fictionalization of events.” Id. at 328-29. But the Court did not hold, or even suggest, that including fictionalized elements in an expressive work was by itself enough to create a claim under Section 51; the key element was the misrepresentation of “fiction” as “fact.” Likewise, to the extent that Binns retains any relevance at all, the film at issue there was found to be actionable because the fictionalized film was “represented by the defendant to be a true picture of the plaintiff, and exhibited to the public as such” 210 N.Y. at 57 (emphasis added).¹⁰

The Decision also misconstrues the U.S. Supreme Court’s fractured decision in Time, Inc. v. Hill, 385 U.S. 374 (1967), incorrectly interpreting it as supporting an expansive interpretation of Spahn. To the contrary, the plurality decision in Hill explained that it construed Spahn as permitting a cause of action under Section 51 **only** because it involved “the unauthorized publication of what purported to be a biography” of Spahn’s life. Id. at 385 (emphasis added).

¹⁰ In Messenger, the Court of Appeals reiterated that Binns and Spahn were limited to circumstances where the “defendants invented biographies of plaintiffs’ lives,” which Lifetime’s Film does not purport to do. Messenger, 94 N.Y.2d at 446.

Hill also involved a fictionalized publication that was misrepresented to be a factual account. The lawsuit arose from a Life magazine article that mischaracterized a fictionalized play about a kidnapped family as an accurate depiction of a real family’s harrowing ordeal. See id. at 379 (“[a]lthough the play was fictionalized, Life’s article portrayed it as a reenactment of the Hills’ experience.”) (quoting Appellate Division opinion adopted by Court of Appeals). The U.S. Supreme Court noted that an initial draft of the magazine article accurately explained that the play was “somewhat fictionalized,” but a Life editor removed that information from the final article. Id. at 393. Because the publication misrepresented the nature of the underlying work, Hill rejected the magazine’s argument that the First Amendment barred a claim under Section 51. Yet even with that narrow construction, Hill did not conclude that a judgment for the family would survive constitutional scrutiny: the Court reversed a jury verdict in the plaintiffs’ favor, and remanded the case for further proceedings, because the jury instructions failed to make clear that the plaintiffs had the burden of proving that the defendants knew that the play was fictionalized and nonetheless falsely represented it to be a factual account.¹¹

¹¹ Following remand, the Court of Appeals returned the case to the trial court for a new trial, Hill v. Hayes, 20 N.Y.2d 738 (1967), but the case reportedly settled. See Samantha Barbas, “When Privacy Almost Won: Time, Inc. v. Hill”, 18 U. Pa. J. Const. L. 505, 580 (2015). Consequently, no court ever decided whether a final judgment for the plaintiffs would have survived constitutional

Thus, none of the authorities relied on by the Supreme Court support the conclusion that an expressive work can be subjected to liability under Section 51 merely because a jury might find that the work contains “materially or substantially” fictionalized elements. New York law is squarely to the contrary. E.g., Hicks, 464 F. Supp. at 432 (presence of Agatha Christie character in fictionalized novel and film about her 1926 disappearance was not actionable because “the Spahn holding should be and was intended to be limited to its facts,” and the defendant did not present the novel or film as true); Waters v. Moore, 70 Misc. 2d 372, 432 (Sup. Ct. Nassau Cty. 1972) (“‘The French Connection’ identifies itself as ‘fictitious’, albeit based on an actual event, does not purport to be a biography, and does not use the plaintiff’s name. It is thus significantly distinguishable” from Spahn). Instead, as New York courts have made clear, such works are not actionable under Section 51, because they do not use names or likenesses for purposes of “advertising” or “trade.”

Notably, Spahn has never been applied by any appellate court in this State as supporting the expansive theory offered by Plaintiffs here. To the contrary, Spahn

scrutiny. In the intervening decades, many commentators have questioned whether Spahn still survives constitutional scrutiny, given subsequent developments in First Amendment law. E.g., McCarthy, 2 Rights of Publicity and Privacy § 8:77 (“[t]he First Amendment does not permit a court to act as a super editor and determine if the defendant in telling the story dramatized the plaintiff’s involvement in a story ‘too much’ or inserted a ‘more than necessary’ amount of fictionalized dialogue.”). Although these Amici believe that it does not, this Court need not reach that issue, because properly interpreted, Spahn does not support Plaintiffs’ claim here.

most often is cited for the proposition that Section 51 must be construed narrowly, because “[w]here First Amendment guarantees are involved, however, [Section 51’s] application has been restricted ‘to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.’” Brinkley v. Casablancas, 80 A.D.2d 428, 432 (1st Dep’t 1981) (quoting Spahn, 18 N.Y.2d at 328). See also Delan v. CBS, Inc., 91 A.D.2d 255, 258 (2d Dep’t 1983) (“[s]uch construction [of Section 51], however, is necessarily subject to constitutional limitations and accordingly the sections in question must be accorded an interpretation which avoids constitutional infirmities.”) (citing Spahn, 21 N.Y.2d 124). The Decision thus dramatically departs from more than a half century of this State’s jurisprudence that consistently has interpreted Spahn as applying only to a rare circumstance where a fictionalized work is falsely represented to be a non-fiction biography.

Three years ago, when this case previously was before this Court, it noted that it could not determine whether the Film could be subjected to a claim under Section 51 under Spahn’s rationale. That was because the Film was not in the record then, and such a determination only can be made based “solely on its [the Film’s] content.” Porco v. Lifetime Entm’t Servs., LLC, 147 A.D.3d 1253, 1256 n.2 (3d Dep’t 2017) (citation omitted). Consequently, this Court allowed the case to proceed, because the Complaint sufficiently alleged “that defendant knowingly

produced a materially and substantially fictitious biography that violates the statutory right of privacy.” Id. at 1255.

Now that the Film is before this Court, however, it is clear that there is no basis for a claim under Section 51. The Film does not purport to be non-fiction, nor could it reasonably be understood by viewers as depicting only provable historical facts. To the contrary, the Film includes precisely what the United States Supreme Court in Hill found was missing from the magazine article in that case: a notice to readers that the work is “somewhat fictionalized.” Here, in addition to an express notice, the Film includes dramatic elements that, by their very nature, make clear that it is not replicating real-life events (such as the live “interviews” with various characters referenced previously). Indeed, unlike non-fiction biographies, the essence of docudramas is that they do not purport to depict literally accurate history.

Moreover, this Court can and should find that there was no misrepresentation as a matter of law, based on a review of the work itself. Courts faced with Section 51 claims routinely have assessed, as a threshold matter, whether creative works used the plaintiff’s name or likeness for “advertising” or “trade” or were “advertisement[s] in disguise”; whether the works were newsworthy; and whether the use of the plaintiff’s name or likeness bore a “real

relationship” to an accompanying article. E.g., Howell v. N.Y. Post Co., 81 N.Y.2d 115, 124 (1993); Finger v. Omni Publ’ns Int’l, 77 N.Y.2d 138, 143 (1990).

The Supreme Court relegated what should have been a dispositive issue in this case to a footnote, stating that a plaintiff may not “recover for a fictionalized account of true events where it is obvious to the viewer that the content is fictitious.” JA17 n.2. The court did not explain why it would not be obvious to viewers that the Film is a docudrama. But more importantly, the standard articulated by the Supreme Court is incorrect, because it creates a much broader exemption from free speech protections than the limited circumstances set forth in Spahn and Hill. Those cases both focused exclusively on affirmative misrepresentations by the defendant publisher, not on what might, or might not be, “obvious” to every possible reader. The former is more consistent with the quasi-criminal nature of Section 51 itself, which focuses on the defendant’s attempt to “misuse” a name or likeness.¹²

¹² As previously discussed, the Court of Appeals has made clear that Section 51 should not be broadly construed to effectively create a claim for false light, which New York does not recognize. Messenger, 94 N.Y.2d at 448. The Supreme Court’s standard, measuring only whether “the content is material and substantially fictitious,” would allow Section 51 to sweep even more broadly than that tort. For example, states recognizing false light claims require the speech not only to be false, but also “highly offensive to a reasonable person”; they also require that works be assessed from the perspective of a reasonable viewer, rather than permitting claims if a work’s fictionalized nature is not “obvious” even to less-than-reasonable viewers. E.g., de Havilland, 21 Cal. App. 5th at 865-67.

Moreover, the Supreme Court rested its decision on several extraordinarily sweeping propositions that almost guarantee that any claims based on docudramas result in a jury trial. For example, if a plaintiff establishes that a docudrama contains “imaginary incidents, manufactured dialogue and manipulated chronology,” the Decision says “that constitute[s] material and substantial fictionalization as a matter of law.” JA23. The Supreme Court also wrote that, applying its standard, it was hard to “conceive of any evidence” either party could submit to avoid having a jury determine whether the Film was materially fictionalized. If upheld, that analytic framework could effectively eliminate the docudrama genre, which by its very nature incorporates fictionalized incidents, imagined dialogue, and altered chronologies. E.g., Immuno AG., 77 N.Y.2d at 256 (citing the “particular value of summary judgment” in cases involving the media, because of “[t]he chilling effect of protracted litigation”).

In short, by misconstruing Spahn broadly, in a manner that puts most docudramas at risk for tort liability, the Supreme Court failed to accord Section 51 the requisite “narrow reading” that is required by “the values our State and Federal Constitutions bespeak in the area of free speech and free press.” Arrington v. N.Y. Times Co., 55 N.Y.2d 433, 440 (1982). Instead, the Decision radically expanded the scope of Section 51 in a manner that creates the very “constitutional infirmities” that Spahn warned against. This unprecedented Decision cannot be

reconciled with the First Amendment and New York law’s protection for quasi-fictional speech, or with New York’s “long tradition, with roots dating back to the colonial era, of providing the utmost protection of freedom of the press.” Holmes, 22 N.Y.3d at 307.

CONCLUSION

For these reasons, Amici respectfully request that the Supreme Court’s decision be reversed, and judgment be entered for Lifetime.

Dated: New York, NY
October 1, 2020

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP



By: Nathan E. Siegel
Adam Lazier
1251 Avenue of the Americas
21st Floor
New York, NY 10020
(212) 603-6440
nathansiegel@dwt.com
adamlazier@dwt.com

Attorneys for Amici Curiae

Of Counsel:
Kelli L. Sager
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, California 90017-2566
(213) 633-6800
kellisager@dwt.com

PRINTING SPECIFICATIONS STATEMENT

The foregoing brief was prepared on a computer. A proportionately spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any other authorized addendum containing statutes, rules, regulations, etc., is 6,894.

Dated: October 1, 2020

Signed:  _____