

**STATE OF NEW YORK
COURT OF APPEALS**

KAREN GRAVANO,

Plaintiff-Appellant,

-against-

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

Defendants-Respondents.

APL-2017-00027

New York County Clerk's Index No.
151633/14

**NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE IN SUPPORT OF DEFENDANTS-RESPONDENTS**

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Samuel M. Bayard, dated December 18, 2017, the Motion Picture Association of America, Inc. and Home Box Office, Inc. (collectively "Proposed Amici") will move this Court at 20 Eagle Street, Albany, New York, on January 8, 2018, or as soon thereafter as counsel can be heard, for an order, pursuant to Rule of Practice 500.23 of this Court, granting Proposed Amici leave to file a brief as amici curiae in support of Defendants-Respondents in the above-captioned action, and for such other and further relief as the Court may deem just and proper in the circumstances.

Dated: New York, NY
December 18, 2017

Respectfully submitted,
DAVIS WRIGHT TREMAINE LLP



By: Robert D. Balin
Samuel M. Bayard
1251 Avenue of the Americas
21st Floor
New York, NY 10020
(212) 489-8230
robbalin@dwt.com
samuelbayard@dwt.com

Attorneys for Proposed 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

To: Jeremy Feigelson
Jared I. Kagan
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000
jfeigelson@debevoise.com
jikagan@debevoise.com

Attorneys for Defendants-Respondents

Thomas A Farinella
Law Office of Thomas A. Farinella, PC
260 Madison Avenue, 8th Floor
New York, NY 10016
(917) 319-8579
tf@lawtaf.com
Attorneys for Plaintiff-Appellant

**STATE OF NEW YORK
COURT OF APPEALS**

KAREN GRAVANO,

Plaintiff-Appellant,

-against-

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

Defendants-Respondents.

APL-2017-00027

**AFFIRMATION OF SAMUEL M. BAYARD
IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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. I submit this affirmation in support of the Motion of the Motion Picture Association of America, Inc. (“MPAA”) and Home Box Office, Inc. (“HBO”) (collectively, “Proposed Amici”) for leave to file a brief as amici curiae in support of Defendants-Respondents in the above-captioned action.

2. Attached as Exhibit A is a copy of the brief that Amici wish to submit to the Court (the “Amici Brief” or “Brief”). The MPAA and HBO have duly

authorized me to submit this Brief on their behalf.

3. The 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.

4. 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.

5. Proposed 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.

6. 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 are 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.¹ Even where the claims are found to be without merit (as they typically are), the litigation can be protracted and expensive.

7. If this Court adopts the expansive view of the scope of New York Civil Rights Law §§ 50-51 urged by Appellant Karen Gravano, valuable speech could be chilled, because every person who is referenced in a film or television program – or who claims to have been the inspiration for a fictional character in that work – could use the threat of expensive litigation to demand payment.

8. Pursuant to Rule 500.23 of the Rules of Practice of this Court, I respectfully submit that, because Proposed Amici have substantial experience and expertise in the production and distribution of fictional films and television shows that tell stories about, are inspired by, or are merely evocative of, real people and events, the MPAA and HBO are in a position to identify law and arguments that might otherwise escape the Court’s consideration, and to provide information that

¹ Moreover, HBO, members of the MPAA, 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.

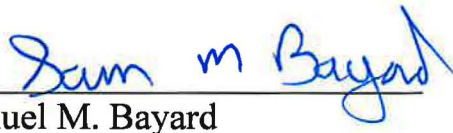
would be of assistance to the Court. Accordingly, the Brief presents law and arguments that draw on Amici's unique perspectives as participants in the film and television industry.

9. Counsel for Defendants-Respondents has consented to the filing of the Proposed Amici Brief.

10. On December 5, 2017, I emailed Thomas A Farinella, counsel for Plaintiff-Appellant Gravano, and asked him if Gravano would consent to the filing of the Proposed Amici Brief. Mr. Farinella responded on December 12 and indicated that he had forwarded my request to his client. He did not subsequently respond or provide consent.

11. For all these reasons, I respectfully request that this Court grant the instant motion in all respects and that the MPAA and HBO be given leave to file the Proposed Amici Brief in this appeal.

Dated: New York, NY
December 18, 2017



Samuel M. Bayard

EXHIBIT A

Court of Appeals
STATE OF NEW YORK

KAREN GRAVANO,

Plaintiff-Appellant,

—against—

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

Defendants-Respondents.

**BRIEF FOR *AMICI CURIAE* THE MOTION PICTURE
ASSOCIATION OF AMERICA, INC. AND HOME BOX OFFICE, INC.
IN SUPPORT OF DEFENDANTS-RESPONDENTS**

Of Counsel:

KELLI L. SAGER
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street, Suite 2400
Los Angeles, California 90017
Telephone: (213) 633-6800
Facsimile: (213) 633-6899

ROBERT D. BALIN
SAMUEL M. BAYARD
DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas,
21st Floor
New York, New York 10020
Telephone: (212) 489-8230
Facsimile: (212) 489-8340

*Attorneys for Amici Curiae
The Motion Picture Association of
America, Inc. and Home Box
Office, Inc.*

December 18, 2017

STATE OF NEW YORK
COURT OF APPEALS

KAREN GRAVANO,

Plaintiff-Appellant,

-against-

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

Defendants-Respondents.

APL-2017-00027

New York County Clerk's Index No.
151633/14

**CORPORATE DISCLOSURE STATEMENT OF
THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

Pursuant to Section 500.1(f) of the Court of Appeals Rules of Practice, the undersigned counsel for amicus curiae the Motion Picture Association of America, Inc. certifies that it is a not-for-profit trade association that does not issue any stock, and it has the following subsidiaries and affiliates:

Motion Picture Association – Canada

Sixteen Hundred Eye Street Corp.

Motion Picture Association

Motion Picture Association – International

Copyright Collective of Canada

Australian Screen Association

Hong Kong International Screen Association, Ltd.

New Zealand Screen Association Limited

MPA Korea, Ltd.

Motion Picture Association – America Latina

Dated: December 18, 2017

Respectfully submitted,



By: Robert D. Balin
Samuel M. Bayard
DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas
21st Floor
New York, NY 10020
(212) 489-8230
robbalin@dwt.com
samuelbayard@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

STATE OF NEW YORK
COURT OF APPEALS

KAREN GRAVANO,

Plaintiff-Appellant,

-against-

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

Defendants-Respondents.

APL-2017-00027


New York County Clerk's Index No.
151633/14

**CORPORATE DISCLOSURE STATEMENT OF
HOME BOX OFFICE, INC.**

Pursuant to Section 500.1(f) of the Court of Appeals Rules of Practice, the undersigned counsel for amicus curiae Home Box Office, Inc. certifies that its ultimate parent company is Time Warner Inc., a publicly traded company.

Dated: December 18, 2017

Respectfully submitted,



By: Robert D. Balin
Samuel M. Bayard
DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas
21st Floor
New York, NY 10020
(212) 489-8230
robbalin@dwt.com
samuelbayard@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

TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE FIRST AMENDMENT FULLY PROTECTS MOTION PICTURES, TELEVISION SHOWS, AND OTHER EXPRESSIVE WORKS THAT TELL STORIES ABOUT, OR ARE INSPIRED BY, REAL PEOPLE AND EVENTS.	4
II. THIS COURT SHOULD CONSTRUE SECTION 51 TO PROTECT EXPRESSIVE WORKS IN A MANNER CONSISTENT WITH THE FIRST AMENDMENT.....	14
III. GRAVANO’S ARGUMENTS FOR REVERSAL ARE INCONSISTENT WITH NEW YORK LAW AND THE FIRST AMENDMENT.	17
CONCLUSION	26

TABLE OF AUTHORITIES

Page(s)

Cases

<u>Altbach v. Kulon,</u> 302 A.D.2d 655 (3d Dep’t 2003).....	20
<u>Arrington v. New York Times Co.,</u> 55 N.Y.2d 433 (1982)	19
<u>Bartnicki v. Vopper,</u> 532 U.S. 514 (2001).....	14
<u>Beach v. Shanley,</u> 62 N.Y.2d 241 (1984)	26
<u>Brown v. Entm’t Merchants Ass’n,</u> 564 U.S. 786 (2011).....	17, 26
<u>Comedy III Productions, Inc. v. Gary Saderup, Inc.,</u> 25 Cal.4th 387, 21 P.3d 797 (2001).....	9, 23, 25, 26
<u>Costanza v. Seinfeld,</u> 279 A.D.2d 255 (1st Dep’t 2001)	20
<u>Davis v. Electronic Arts, Inc.,</u> 775 F.3d 1172 (9th Cir. 2015) (following <u>Keller</u>).....	23, 24, 25
<u>Doe v. TCI</u> Cablevision, 110 S.W.3d 363 (Mo. 2003).....	22
<u>Dora v. Frontline Video, Inc.,</u> 15 Cal. App. 4th 536, 18 Cal. Rptr. 2d 790 (1993)	7
<u>Finger v. Omni Publ’ns Int’l, Ltd.,</u> 77 N.Y.2d 138 (1990)	21
<u>Foster v. Svenson,</u> 128 A.D.3d 150 (1st Dep’t 2015)	21
<u>Guglielmi v. Spelling-Goldberg Productions,</u> 25 Cal.3d 860 (1979)	<i>passim</i>

<u>Hampton v. Guare,</u> 195 A.D.2d 366, <u>leave to appeal denied</u> , 82 N.Y.2d 659 (1993)	19
<u>Hart v. Electronic Arts, Inc.,</u> 717 F.3d 141 (3d Cir. 2013)	22, 23, 25
<u>Hart-Hanks Communications v. Connaughton,</u> 491 U.S. 657 (1989).....	18
<u>Hicks v. Casablanca Records,</u> 464 F. Supp. 426 (S.D.N.Y. 1978)	21
<u>Hilton v. Hallmark Cards,</u> 599 F.3d 894 (9th Cir. 2009)	24
<u>Hoepker v. Kruger,</u> 200 F. Supp. 2d 340 (S.D.N.Y. 2002)	21
<u>Howell v. N.Y. Post Co., Inc.,</u> 81 N.Y.2d 115 (1993)	15
<u>Joseph Burstyn, Inc. v. Wilson,</u> 343 U.S. 495 (1952).....	8, 18
<u>Krupnik v. NBC Universal, Inc.,</u> 37 Misc.3d 1219(A)(Sup. Ct., N.Y. Cty. 2010)	21
<u>Lemerond v. Twentieth Century Fox Film Corp.,</u> No. 07 CIV. 4635 (LAP), 2008 WL 918579 (S.D.N.Y. Mar. 31, 2008)	21
<u>Lohan v. Perez,</u> 924 F. Supp. 2d 447 (E.D.N.Y. 2013)	20
<u>Matal v. Tam,</u> 137 S. Ct. 1744.....	15
<u>Matthews v. Wozencraft,</u> 15 F.3d 432 (5th Cir. 1994)	11
<u>Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publishing,</u> 94 N.Y.2d 436 (2000)	19, 21

<u>In re NCAA Student-Athlete Name & Likeness Licensing Litig.</u> , 724 F.3d 1268 (9th Cir. 2013)	23, 24, 25
<u>Newton v. Thomason</u> , 22 F.3d 1455 (9th Cir. 1994)	12
<u>O’Neill v. Oakgrove Const., Inc.</u> , 71 N.Y.2d 521 (1988)	17
<u>People v. Charles Scribner’s Sons</u> , 205 Misc. 818 (N.Y. Magis. Ct. 1954)	10, 11
<u>Polydoros v. Twentieth Century Fox Film Corp.</u> , 67 Cal. App. 4th 318, 79 Cal. Rptr. 2d 207 (1997)	10
<u>R.A.V. v. City of St. Paul</u> , 505 U.S. 377 (1992)	15
<u>Rhoads v. Margolis</u> , No. B249800, 2015 WL 311932 (Cal. Ct. App. Jan. 26, 2015), <u>as</u> <u>modified on denial of reh’g</u> (Feb. 17, 2015)	7
<u>Roberson v. Rochester Folding Box Co.</u> , 171 N.Y. 538 (1902)	15
<u>Rogers v. Grimaldi</u> , 875 F.2d 994 (2d Cir. 1989)	11
<u>Rosa & Raymond Parks Institute for Self Development v. Target Corp.</u> , 812 F.3d 824 (11th Cir. 2016)	7
<u>Rosemont Enterprises, Inc. v. McGraw-Hill Book Co.</u> , 85 Misc. 2d 583 (Sup. Ct. N.Y. Cty. 1975)	11
<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)	11
<u>Sable Comm’ns of California, Inc. v. FCC</u> , 492 U.S. 115 (1989)	15
<u>Sarver v. Chartier</u> , 813 F.3d 891 (9th Cir. 2016)	10, 16, 24

<u>Seale v. Gramercy Pictures,</u> 949 F. Supp. 331 (E.D. Pa. 1996)	11
<u>Simeonov v. Tiegs,</u> 159 Misc.2d 54 (Civ. Ct., N.Y. Cty. 1993)	21
<u>Stephano v. News Group Publications, Inc.,</u> 64 N.Y.2d 174 (1984)	19
<u>Tyne v. Time Warner Entm't Co.,</u> 901 So.2d 802 (Fla. 2005)	9, 10
<u>University of Notre Dame Du Lac v. Twentieth Century Fox Film Corp.,</u> 22 A.D.2d 452, <u>aff'd on opinion of App. Div.,</u> 15 N.Y.2d 940 (1965)	4, 8, 18, 19
<u>Winter v. DC Comics,</u> 30 Cal.4th 881, 69 P.3d 473 (2003)	25, 26
<u>Winters v. New York,</u> 333 U.S. 507 (1948)	8

Statutes

NY CIV. RIGHTS LAW §§ 50-51	<i>passim</i>
-----------------------------------	---------------

Other Authorities

Stacey L. Dogan & Mark A. Lemley, <u>What the Right of Publicity Can Learn from Trademark Law,</u> 58 Stan. L. Rev. 1161 (2006)	24
F. Jay Dougherty, <u>All the World's Not A Stooge: The "Transformativeness" Test for Analyzing A First Amendment Defense to A Right of Publicity Claim Against Distribution of A Work of Art,</u> 27 Colum. J.L. & Arts 1 (2003)	25
Michael Madow, <u>Private Ownership of Public Image: Popular Culture and Publicity Rights,</u> 81 Cal. L. Rev. 125 (1993)	24
Thomas J. McCarthy, <u>Rights of Publicity & Privacy</u> (2d ed. 2017)	7, 15, 25
Heidi Stam, <u>Defamation In Fiction: The Case for Absolute First Amendment Protection,</u> 29 Am. U. L. Rev. 571 (1980)	13

Eugene Volokh, <u>Freedom of Speech and the Right of Publicity</u> , 40 Hous. L. Rev. 903 (2003)	24, 25
David S. Welkowitz & Tyler T. Ochoa, <u>The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech</u> , 45 Santa Clara L. Rev. 651 (2005)	22
Diane Leenheer Zimmerman, <u>Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights</u> , 50 B.C. L. Rev. 1503 (2009).....	22

IDENTITY AND INTEREST OF AMICI CURIAE

Amici are the Motion Picture Association of America, Inc. (“MPAA”) and Home Box Office, Inc. (“HBO”).¹ HBO and the members of the MPAA regularly produce, broadcast, and distribute constitutionally protected films and television programs in New York and elsewhere. This case presents issues of substantial importance to Amici because filmmakers and television producers routinely create movies and television shows that tell stories about – or are inspired by – real people and events, whether in fact-based, semi-fictional, or fictional works. In doing so, they rely on the First Amendment and on longstanding New York precedent – applied by the First Department in the decision below – holding that movies, television shows, plays, and other fictional and artistic works do not constitute “advertising” or “trade” under New York Civil Rights Law §§ 50-51 (“Section 51”). Because the arguments urged by Appellant Karen Gravano in this appeal, if accepted, have the potential to significantly impact the ability of filmmakers and television producers to create culturally significant works about real people and events, Amici urge this Court to affirm the First Department’s decision below.

¹ A description of Amici is included in the Affirmation of Samuel Bayard in support of this Brief, ¶¶ 3-4.

SUMMARY OF ARGUMENT

Filmmakers and television producers routinely draw on real people and events in creating fact-based, semi-fictional, and fictional films and television programs. Sometimes these are highly realistic biographical or historical works, which strive to recreate important or notorious events with fidelity to every detail. Sometimes they are wholly fictional stories that include characters inspired by, or intended to poke fun at, real people. And sometimes these works include names or images of real people in a fictional story – to provide important cultural references that establish a place and time; to give insight into a character’s tastes and attitudes; or to generate the illusion that the fictional world is interacting with the “real” world. Regardless of the particular storytelling technique, works that are based on, inspired by, or include references to real people and events make an invaluable contribution to the marketplace of ideas, fostering public debate on important social issues, furthering self-expression, and entertaining and enlightening the public.

Appellant Gravano may or may not be right in claiming that one of the fictional characters in the video game “Grand Theft Auto V” (“GTAV5”) was based on her; for purposes of this Brief, Amici assumes that allegation is true. In that event, she would join thousands of men, women, and children around the world, living and dead, whose lives have served as the inspiration for authors,

screenwriters, and playwrights since the advent of the written word. But Gravano is wrong in claiming that this connection – even if irrefutable – entitles her to demand payment from the creators of GTAV5, or to otherwise control public discourse about (or inspired by) her. The First Amendment’s broad protection for free speech and press simply does not permit this kind of monopolization of expression relating to real people or events. To the contrary, modern First Amendment jurisprudence requires any content-based restriction on expressive speech – like Gravano’s claim here – to survive strict scrutiny. To avoid the grave constitutional conflict that would arise if Section 51 were applied to expressive works, this Court should affirm the First Department’s holding that expressive works of fiction, satire, and art do not constitute “advertising” or “trade” under Section 51.

The First Department’s decision is consistent with a long line of New York cases excluding movies, television shows, and other fictional and artistic works from the application of Section 51, and with this Court’s repeated recognition that Article 1, Section 8 of the New York Constitution is more expansive than the First Amendment. More than fifty years ago, the First Department recognized that motion pictures are “a significant medium for the communication of ideas” and

“no ordinary subject of commerce.”² Building off this early precedent, New York courts repeatedly have affirmed that expressive works of art, fiction, and satire are absolutely protected, rejecting Section 51 claims brought against such disparate works as “Six Degrees of Separation” and “Seinfeld.” Amici urge this Court to continue New York’s tradition as a bastion for media freedom by affirming the First Department’s straightforward and speech-protective interpretation of Section 51.

ARGUMENT

I. THE FIRST AMENDMENT FULLY PROTECTS MOTION PICTURES, TELEVISION SHOWS, AND OTHER EXPRESSIVE WORKS THAT TELL STORIES ABOUT, OR ARE INSPIRED BY, REAL PEOPLE AND EVENTS.

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 on actual events and people.³ In the motion picture industry, these works take many forms, including docudramas, which dramatize

² University of Notre Dame Du Lac v. Twentieth Century Fox Film Corp., 22 A.D.2d 452, 457 (1st Dep’t), aff’d on opinion of App. Div., 15 N.Y.2d 940 (1965).

³ 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 works of literature. Charles Dickens, Virginia Woolf, Ernest Hemingway, Gertrude Stein, Henry Miller, James Baldwin, Erica Jong, and David Foster Wallace, to name a few, have drawn on their own experiences and the experiences of others to craft their works. Many of these authors have themselves become the subjects of fictional or semi-fictionalized works, including “Midnight in Paris,” “The Hours,” and “Shakespeare in Love.”

historical events;⁴ historical fiction, in which real people and events serve as a backdrop for a fictional story;⁵ and purely fictional works inspired by real events or people.⁶

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 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; “Spotlight,” a Best Picture winner about a team of investigative reporters that exposed a child molestation scandal and cover-up involving the Catholic church in Boston; “Moneyball,” which depicted 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

⁴ “Snowden,” “Jackie,” “The Theory of Everything,” “Capote,” “Frost/Nixon,” “A Beautiful Mind,” and “The Perfect Storm” are some examples of recent critically-acclaimed films based on real-life people and events.

⁵ The Academy-award winning “Titanic” depicted a real event and historical figures as the setting for 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.

⁶ “Citizen Kane,” “Primary Colors,” and “The Devil Wears Prada” were reportedly inspired by (or even loosely based on) actual people or events.

recent examples include “American Sniper,” “Philomena,” “The Help,” “Zero Dark Thirty,” “The King’s Speech,” and “The Hurt Locker.”

Television producers similarly draw on real people and events to create educational, entertaining, and critically acclaimed television shows. For example, HBO produced and distributed “The Immortal Life Of Henrietta Lacks,” which tells the true story of an African-American woman whose cells were used to create the first immortal human cell line, leading to many significant medical breakthroughs; “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 2008.⁷

The recognition that such works are constitutionally protected is nothing new. Just as news coverage cannot constitutionally be censored by individuals seeking to avoid media attention, it is well established that unauthorized biographies, documentaries, and 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

⁷ These HBO programs either won or were nominated for multiple television industry awards.

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)

(“McCarthy”).

Consistent with this principle, courts around the country repeatedly have found that the First Amendment bars misappropriation and right-of-publicity 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 based on Target’s sale of non-fiction books and film, and a plaque documenting Parks’ role in the civil rights movement); 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 Rhoads 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).

This same broad constitutional protection consistently has been applied to misappropriation and right-of-publicity claims purporting to arise from fictional or dramatized works. Sixty-five years ago, in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501, 502 (1952), the United States Supreme Court confirmed that fictional films are “a significant medium for the communication of ideas” entitled to full First Amendment protection, and these constitutional protections are not diminished by the fact that “they are designed to entertain as well as to inform.” Id. at 501.⁸ 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”).

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 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, based on a biographical film that told a fictionalized version of Valentino’s life story. The court held that

⁸ New York’s Appellate Division, First Department relied on this language from Burstyn in dismissing Section 51 and unfair competition claims against the novel and movie “John Goldfarb, Please Come Home.” See University of Notre Dame Du Lac, 22 A.D.2d at 457.

“[w]hether exhibited in theatres or on television, a film is a medium which is protected by the constitutional guarantees of free expression,” and therefore the First Amendment barred the claim. Id. at 865 (Bird, C.J., concurring).⁹ The court noted that “[c]ontemporary events, symbols and people are regularly used in fictional works,” and observed 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.

Addressing the right-of-publicity claims specifically, the court explained:

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.

Similarly, in Tyne v. Time Warner Entm’t Co., 901 So.2d 802, 808-09 (Fla. 2005), the Supreme Court of Florida held that the First Amendment prevented

⁹ 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” because her opinion 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, 21 P.3d 797, 802 (2001).

application of Florida’s commercial misappropriation statute 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 opinion that has been cited by many other courts, 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. 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.” *Id.* at 804.

Courts from around the country consistently have reached the same result. See, e.g., Polydoros v. Twentieth Century Fox Film Corp., 67 Cal. App. 4th 318, 326, 79 Cal. Rptr. 2d 207 (1997) (holding that fictional film inspired by screenwriter’s childhood experiences, including a character based on a member of his sandlot baseball team, was protected by First Amendment);¹⁰ Sarver v.

¹⁰ The Polydoros court found “particularly compelling” the reasoning of a decision from New York holding that misappropriation claims should not be permitted for works of fiction, because writers must be allowed to draw from their personal experience in creating such works. In People v. Charles Scribner’s Sons, 205 Misc. 818 (N.Y. Magis. Ct. 1954), Joseph Anthony Maggio sued under a criminal statute that prohibited the appropriation of name and likeness, based on the publication of the fictional book and movie “From Here to Eternity.” The fictional works were inspired by the author’s army experience when he served in Hawaii with Maggio. The court dismissed the misappropriation charges, explaining that

Chartier, 813 F.3d 891, 905-06 (9th Cir. 2016) (holding that 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, 438 n.5 (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's misappropriation law 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) (use of the plaintiff's likeness in docudrama about the Black Panther Party was "for the purpose of First Amendment expression," not "for the purposes of trade" or for a "commercial purpose" under Pennsylvania right-of-publicity law); Rosemont Enterprises, Inc. v. McGraw-Hill Book Co., 85 Misc. 2d 583, 587 (Sup. Ct. N.Y. Cty. 1975)

(unauthorized, fictional biography of Howard Hughes could not provide the basis

"[i]t is generally understood that novels are written out of the background and experiences of the novelist," and that characters often "grow out of real persons the author has met or observed. This is so also with respect to the places which are the setting of the novel." Id. at 821.

for a misappropriation claim); see also Newton v. Thomason, 22 F.3d 1455, 1461 (9th Cir. 1994) (fictional television character based on living person not a commercial use).

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

It is clear that works of fiction are constitutionally protected in the same manner as political treatises and topical news stories. 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 on their times than any factual recitation could ever yield....

Thus, no distinction may be drawn in this context between fictional and factual accounts of Valentino's life. Respondents' election of the former as the mode for their views does not diminish the constitutional protection afforded speech.

25 Cal. 3d at 867-68 (Bird, C.J., concurring) (footnotes omitted).

Another commentator has noted that drawing on real life often is essential to the craft of storytelling:

Novelists need the resource of real life to adequately present their views. They intentionally use real people in a fictional context to mark the time, heighten interest, or interpret a character, process, or era.... [T]he use of a familiar personality may be crucial to the desired impact of the book. Punishing the use of an actual person in this instance detracts from the usefulness of fiction as a medium for the expression of ideas. The genre of fiction that employs this device serves an important social purpose and often is no less fictional than other works.

Heidi Stam, Defamation In Fiction: The Case for Absolute First Amendment Protection, 29 Am. U. L. Rev. 571, 580-81(1980) (emphasis added; citations and footnotes omitted).

The need for broad protection of such creative works is plain: as a matter of practice and necessity, screenwriters and authors frequently draw upon people that they have encountered in real life, without seeking permission from those individuals before incorporating their personas, or depicting their life experiences, in works of fiction. Permitting misappropriation and right-of-publicity claims to arise from fictional characters that are based on, inspired by, or even largely copied from real-life people or events would pose an unprecedented – and all but insurmountable – hurdle; an inestimable number of valuable and entertaining fictional works never would be published if their creators had to fear potential lawsuits by those who might claim to be portrayed in the work.

Indeed, if Gravano's view of the law had been the norm, many acclaimed motion pictures about or inspired by real people might never have been made, or might have been made differently. Orson Welles might never have made "Citizen Kane," because it is inconceivable that William Randolph Hearst would have consented to having his "persona" depicted. Likewise, 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. The end result would be to stifle numerous creative works derived from authors' life experiences – unless they undertook the hugely expensive, and often impossible, task of obtaining releases from every single individual who might claim that his or her persona was used for a character in the work. The First Amendment does not permit this dramatic restriction on the exercise of free speech rights.

II. THIS COURT SHOULD CONSTRUE SECTION 51 TO PROTECT EXPRESSIVE WORKS IN A MANNER CONSISTENT WITH THE FIRST AMENDMENT.

The First Department's holding that works of fiction and satire do not fall within the narrow scope of the statutory phrases "advertising" and "trade" under Section 51 comports with First Amendment principles, because it provides a categorical exclusion for expressive works that avoids an otherwise inevitable constitutional conflict. Amici urge this Court to affirm that decision, and hold that expressive works of fiction, satire, and artwork are excluded from Section 51 claims.

Misappropriation and right-of-publicity claims arising from expressive works are inconsistent with the First Amendment because they do not pass the strict constitutional test applicable to content-based restrictions on speech.

Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) (a speech regulation is content

based when it cannot be “justified without reference to the content of the regulated speech”); Matal v. Tam, 137 S. Ct. 1744, 1765-66 (Kennedy, J., concurring) (plurality opinion) (“[t]he First Amendment guards against laws ‘targeted at specific subject matter,’ a form of speech suppression known as content based discrimination.”) (quoting Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2230 (2015)). Under the First Amendment, such content-based restrictions on expressive speech are subjected to strict scrutiny. See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (content-based speech regulation subject to the highest level of scrutiny); Sable Comm’ns of California, Inc. v. FCC, 492 U.S. 115, 126 (1989) (content-based speech restrictions must be narrowly drawn to serve a compelling government interest). Because the New York legislature enacted Section 51 to protect against the use of an individual’s name or likeness in advertising for commercial products, which is not implicated by the use of a plaintiff’s name or likeness in an expressive work like a movie, television show or video game,¹¹ there is no sufficiently compelling government interest to weigh against the public’s significant interest in free expression.¹²

¹¹ See Howell v. N.Y. Post Co., Inc., 81 N.Y.2d 115, 123 (1993) (noting that the New York legislature enacted Section 51 in direct response to this Court’s decision in Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (1902), which involved the use of plaintiff’s photograph to advertise flour, id. at 542).

¹² The right-of-publicity tort is a modern innovation that falls outside the historical categories where limitations on speech have been accepted. McCarthy, Preface

The Ninth Circuit recently applied First Amendment strict scrutiny to a right-of-publicity claim targeting the film “The Hurt Locker,” holding that “California’s right of publicity law clearly restricts speech based upon its content” and was therefore “presumptively unconstitutional and may only be justified if the government proves that [it is] narrowly tailored to serve compelling state interests.” Sarver, 813 F.3d at 903-04. An Army sergeant claimed that the film violated his publicity rights because the main character was based on him and his experiences as an ordnance disposal technician in Iraq. The Court noted that the motion picture was “fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life – including the stories of real individuals, ordinary or extraordinary – and transform them into art, be it articles, books, movies, or plays,” and concluded that the plaintiff’s claim could not survive strict scrutiny. Id. at 905-06.

In contrast to the morass of different “balancing” tests applied by courts in many other jurisdictions (without any discussion of the constitutional strict scrutiny test), New York’s historical approach to Section 51 claims targeting expressive works of fiction, satire, and art – which the First Department’s decision followed – is to apply a bright-line rule: as used in Section 51, the terms

(noting right of publicity is “still a relatively raw and brash newcomer”). The rationale for permitting individuals to restrict the use of their personas in advertising commercial products is not sufficiently compelling to warrant restrictions on expressive works. See also note 17, infra.

“advertising” and “trade” do not apply to expressive works of fiction, satire, and artwork. This categorical exclusion not only is consistent with the language of Section 51, it avoids the constitutional conflict that otherwise would arise, and comports with the longstanding recognition that Article 1, Section 8 of the New York Constitution is even more protective than the First Amendment. O’Neill v. Oakgrove Const., Inc., 71 N.Y.2d 521, 529 (1988).

III. GRAVANO’S ARGUMENTS FOR REVERSAL ARE INCONSISTENT WITH NEW YORK LAW AND THE FIRST AMENDMENT.

Gravano asks this Court to abandon decades of settled New York precedent and bedrock First Amendment principles, intimating that video games are somehow different from other expressive works because they are consumer products. Her arguments should be rejected.

First, as a threshold matter, Gravano’s arguments are inconsistent with controlling U.S. Supreme Court authority, which holds that video games, “like the protected books, plays and movies that preceded them,” are core expressive works “as much entitled to the protection of free speech as the best of literature.” Brown v. Entm’t Merchants Ass’n, 564 U.S. 786, 796 (2011). The Supreme Court, as well as New York courts, consistently have rejected the imposition of aesthetic or moral judgments about the perceived intellectual value of a particular expressive work, as a means of limiting constitutional or statutory protections. Id. at 796 n.4 (noting

that the video game “Mortal Kombat” stands on equal constitutional footing with Dante’s “Divine Comedy”); University of Notre Dame Du Lac, 22 A.D.2d at 457-58 (noting that “[w]hat seems to one to be trash may have for others fleeting or even enduring values,” and cautioning that “we may not import the role of literary or dramatic critic into our functioning as judges in this case”).

Second, Gravano’s arguments are inconsistent with a long line of New York cases holding that expressive works about or inspired by real people – whether in motion pictures, television shows, books, plays, visual art, or other expressive works – do not constitute “advertising” or “trade” under Section 51. This threshold requirement – that the use of a plaintiff’s name or likeness must be for purposes of “advertising” or “trade” (NY CIV. RIGHTS LAW § 51) – is consistent with well-established constitutional principles which make clear that First Amendment protection is not diminished merely because an expressive work is sold for a profit. See, e.g., Joseph Burstyn, 343 U.S. at 501 (“[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.”); Hart-Hanks Communications v. Connaughton, 491 U.S. 657, 667 (1989) (“[i]f a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from New York Times to Hustler Magazine would be little more than empty vessels.”). This Court similarly has

admonished that profit motive does not strip expressive speech of its protection or transform it into an “advertising” or “trade” use. See, e.g., Messenger ex rel. Messenger v. Gruner + Jahr Printing & Publishing, 94 N.Y.2d 436, 442 (2000); Stephano v. News Group Publications, Inc., 64 N.Y.2d 174, 184–85 (1984); Arrington v. New York Times Co., 55 N.Y.2d 433, 440, (1982).

For more than fifty years, New York courts overwhelmingly have embraced these principles, holding that expressive works of entertainment, fiction, and satire are not “advertising” or “trade” uses within the meaning of Section 51. For example:

- In University of Notre Dame Du Lac, 22 A.D.2d at 454-58, the First Department held that the use of an individual’s and a university’s real names in the novel and fictional movie, “John Goldfarb, Please Come Home,” were not for purposes of “advertising” or “trade” under Section 51 and the analogous provision of Section 397 of the New York General Business Law. The court emphasized that movies and books “are no ordinary subject of commerce” and noted that their “importance ‘as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.’” Id. at 457 (quoting Joseph Burstyn, 343 U.S. at 501).
- In Hampton v. Guare, 195 A.D.2d 366, 366 (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 (1st Dep't 2001), the First Department affirmed the dismissal of a Section 51 claim over the alleged use of plaintiff's name and persona to create the character George Costanza on the television show "Seinfeld." The court reiterated that "works of fiction do not fall within the narrow scope of the statutory definitions of 'advertising' or 'trade.'"
- In Altbach v. Kulon, 302 A.D.2d 655 (3d Dep't 2003), the Third Department held that use of the plaintiff's likeness in a satirical oil painting, shown in flyers advertising the defendant's gallery, was not actionable under Section 51. The court noted that "the painting and its publication in defendant's flyers are artistic expressions – specifically a caricature and parody of plaintiff in his public role as a town justice – that are entitled to protection under the First Amendment and excepted from New York's privacy protections." Id. at 657.¹³

¹³ See also Lohan v. Perez, 924 F. Supp. 2d 447, 454 (E.D.N.Y. 2013) (dismissing Section 51 claim brought by Lindsay Lohan against hip-hop song that used her name because the song was "a 'protected work of art,'" and thus the use of her

Although this Court has not directly addressed the issue, these decisions are consistent with this Court’s recognition that Section 51 must be construed narrowly to avoid conflict with the First Amendment and with the New York Constitution’s expansive free-speech protections. Messenger, 94 N.Y.2d at 441. As this Court has stated, Section 51 “prohibit[s] the use of pictures, names or portraits for advertising purposes or for the purposes of trade only, and nothing more.” Finger v. Omni Publ’ns Int’l, Ltd., 77 N.Y.2d 138, 141-142 (1990) (internal marks and citations omitted and emphasis added). It is “strictly limited to nonconsensual commercial appropriations.” Messenger, 94 N.Y.2d at 441 (citation omitted).

Third, the alternative tests that Gravano presses on this Court are inconsistent with New York’s longstanding approach to Section 51 claims, and

name was lawful); Hicks v. Casablanca Records, 464 F. Supp. 426, 430-33 (S.D.N.Y. 1978) (dismissing Section 51 claim by heirs of Agatha Christie over use of Christie’s name and likeness in a fictionalized biography when it was “evident to the public that the events so depicted were fictitious”); Krupnik v. NBC Universal, Inc., 37 Misc.3d 1219(A)(Sup. Ct., N.Y. Cty. 2010) (dismissing Section 51 claim based on photograph of plaintiff in brochure used in a fictional feature film); Hoepker v. Kruger, 200 F. Supp. 2d 340, 349-50 (S.D.N.Y. 2002) (holding use of plaintiff’s likeness in collage artwork was not actionable; “New York courts have taken the position in the right of privacy context that art is speech, and accordingly, that art is entitled to First Amendment protection”); Simeonov v. Tiegs, 159 Misc.2d 54 (Civ. Ct., N.Y. Cty. 1993) (use of plaintiff’s likeness in bronze sculpture was artistic expression protected by First Amendment and not subject to Section 51); Lemerond v. Twentieth Century Fox Film Corp., No. 07 CIV. 4635 (LAP), 2008 WL 918579, at *3 (S.D.N.Y. Mar. 31, 2008) (satirical fictionalized documentary was not actionable, relying on newsworthiness exception); Foster v. Svenson, 128 A.D.3d 150, 158-59 (1st Dep’t 2015) (use of plaintiffs’ likenesses in art photography was not actionable, relying on newsworthiness exception).

cannot be squared with the First Amendment. For example, Gravano argues that a “predominant use” test should be used to determine whether her alleged portrayal in GTAV serves a predominantly commercial (i.e., profit-motivated) purpose. Appellant’s Brief at 15-16. But New York courts never have applied a “predominant use” test to expressive works in Section 51 cases, and doing so would be inconsistent with New York law and basic free speech principles. The only decision to apply this test to an expressive work, from the Supreme Court of Missouri,¹⁴ has been criticized as incompatible with freedom of expression.¹⁵

Gravano also argues that this Court should consider video game cases from other jurisdictions that applied California’s so-called “transformative-use” test. Appellant’s Brief at 25-28. Under that test, created by the California Supreme

¹⁴ Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003).

¹⁵ David S. Welkowitz & Tyler T. Ochoa, The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech, 45 Santa Clara L. Rev. 651, 670 (2005) (“[t]he U.S. Supreme Court has held that whether speech is sold for profit is legally irrelevant to whether it receives protection under the First Amendment, yet Doe holds that a profit motive can disqualify speech from First Amendment protection.”); Diane Leenheer Zimmerman, Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights, 50 B.C. L. Rev. 1503, 1510 (2009) (characterizing the Doe test as “so ... tilted against situations where expressive and commercial motivations coexist, that it is hard to see why magazines and newspapers would not also be routinely liable for the common practice of using stories and pictures of celebrities to boost their circulation.”). Even the Third Circuit’s decision in Hart v. Electronic Arts, Inc., 717 F.3d 141 (3d Cir. 2013), on which Gravano relies, rejected this test. Id. at 154 (“[b]y our reading, the Predominant Use Test is subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics.”).

Court in a case involving t-shirts and mass-produced lithographs, a right-of-publicity claim is barred if the work “contains significant transformative elements” such that its value “does not derive primarily from the celebrity’s fame.” Comedy III, 25 Cal. 4th at 407. In the cases relied on by Gravano, the plaintiffs asserted right-of-publicity claims based on the use of their personas in sports video games that allowed users to manipulate avatars that resembled real-world athletes. The Third and the Ninth Circuits held, in split decisions applying the transformative-use test, that the claims were not constitutionally barred because the games were not sufficiently “transformative,” reasoning that the games depicted the players realistically and allowed users to manipulate them in “performance of the same activity for which they are known in real life.” In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1276 (9th Cir. 2013) (“Keller”); Davis v. Electronic Arts, Inc., 775 F.3d 1172, 1178 (9th Cir. 2015) (following Keller); Hart, 717 F.3d at 166 (“[t]he digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game. This is not transformative.”).

None of these decisions considered a constitutional “strict scrutiny” analysis. Moreover, none of the cases involved application of Section 51, which has never been limited by California’s “transformative-use” test. This Court should not

break with established New York precedent to adopt this constitutionally infirm test here, which cannot be reconciled with Supreme Court precedent mandating that content-based restrictions on core expressive speech be subject to strict scrutiny. As the Ninth Circuit acknowledged in Sarver, its earlier decisions in Keller and Davis did not consider this constitutional test,¹⁶ which should be applied to content-based restrictions on expressive speech. Sarver, 813 F.3d at 903-906.¹⁷

¹⁶ Even before Sarver, the Ninth Circuit noted that the First Amendment might furnish a defense to right-of-publicity claims beyond the protection of the transformative-use test. E.g., Hilton v. Hallmark Cards, 599 F.3d 894, 909 n.11 (9th Cir. 2009); Keller, 724 F.3d at 1273.

¹⁷ In Sarver, the Ninth Circuit tried to reconcile its holding with the decisions in Keller and Davis, but neither case applied strict scrutiny, and there is no compelling state interest in stamping out realistic portrayals of people. The Sarver court's reference to the fact that the plaintiff there was a private individual (813 F.3d at 905) does not justify a different analysis or result for celebrities. Under strict scrutiny, a speech restriction must be narrowly tailored to a compelling government interest. Celebrities have more than sufficient incentives to pursue their crafts without the government giving them a monopoly on the use of their names and likenesses in expressive works. See, e.g., Stacey L. Dogan & Mark A. Lemley, What the Right of Publicity Can Learn from Trademark Law, 58 Stan. L. Rev. 1161, 1187–88 (2006) (noting that there is “[n]ot a shred of empirical data” showing that celebrities are incentivized by publicity rights because they are already “handsomely compensated,” and observing that, in any event, “it is not at all clear that society should want to encourage fame for fame’s sake”); Eugene Volokh, Freedom of Speech and the Right of Publicity, 40 Hous. L. Rev. 903, 910-11 (2003) (the right of publicity provides at most a “small speculative increase” in the incentive to become famous). See generally Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal. L. Rev. 125, 134 (1993) (the main arguments advanced in favor of publicity rights “are significantly less persuasive than commonly believed”).

Furthermore, the transformative-use test, as applied in Keller, Davis, and Hart,¹⁸ creates a constitutionally perverse standard because it extends protection to fanciful or distorted portrayals, but not accurate or realistic ones. See, e.g., Guglielmi, 25 Cal. 3d at 869 (“[n]o author should be forced [by threat of a right-of-publicity claim] into creating mythological worlds or characters wholly divorced from reality.”). The test also chills expression, because the inquiry requires courts to make subjective judgements about whether a use is “artistic” or “transformative” enough to justify protection, making its application unpredictable.¹⁹

For all these reasons, Amici urge this Court to reject the transformative-use test advocated by Gravano, and instead to apply the same settled principle to

¹⁸ These cases applied a narrow version of the transformative-use test, which focuses primarily on whether the plaintiff’s likeness – rather than the work as a whole – is transformative. See Keller, 724 F.3d at 1276; Davis, 775 F.3d at 1178; Hart, 717 F.3d at 166. But the California Supreme Court’s articulation of the test asks whether the defendant’s work contains enough other creative elements so that the work as a whole is transformative. Winter v. DC Comics, 30 Cal.4th 881, 888, 69 P.3d 473 (2003); Comedy III, 25 Cal.4th at 406. Properly applied, Gravano’s Section 51 claim would fail even under the transformative-use test, given the plethora of independently creative elements in GTAV5 that make it highly transformative.

¹⁹ Professor McCarthy, for example, observed that the transformative-use test is “extremely difficult to predict and apply because it requires a court to make an aesthetic judgment” about “the degree of the artistic transformation” required for a work to qualify for First Amendment protection. 2 McCarthy § 8:72. For additional criticisms of the test, see Volokh, supra, at 916-925; F. Jay Dougherty, All the World’s Not A Stooge: The “Transformativeness” Test for Analyzing A First Amendment Defense to A Right of Publicity Claim Against Distribution of A Work of Art, 27 Colum. J.L. & Arts 1, 35-71 (2003).

creative video games like GTAV that New York courts consistently have applied to expressive works: such works – movies, television shows, literature, and art – do not constitute “advertising” or “trade” under Section 51.²⁰

CONCLUSION

New York has long been considered “one of the most hospitable climates for the free exchange of ideas.” Beach v. Shanley, 62 N.Y.2d 241, 255 (1984). Consistent with that well-established tradition, the First Department correctly applied decades of precedent that categorically has protected expressive works from Section 51 claims. Its ruling not only comports with New York law, but with the First Amendment and good public policy. For all these reasons, Amici respectfully urge this Court to affirm the First Department’s order dismissing Gravano’s Amended Complaint.

²⁰ Even if this Court were to decide, notwithstanding the U.S. Supreme Court’s decision in Brown, that some video games may have a lower degree of First Amendment protection, this Court should make clear that claims arising from the content of expressive works like motion pictures, television programs, and similar expressive works are subject to strict constitutional scrutiny. Before Comedy III was decided, the California Supreme Court ruled in Guglielmi that motion pictures are categorically exempt from right-of-publicity claims under the First Amendment. See supra Part I. Both in Comedy III and later cases, the Court reaffirmed that Guglielmi remains good law. Comedy III, 25 Cal. 4th at 397 (citing Guglielmi with approval in discussion of how expressive works about real people play an important role in society and quoting its statement that “prominence invites creative comment”); Winter, 30 Cal. 4th at 887 (same).

Dated: New York, NY
December 18, 2017

Respectfully submitted,
DAVIS WRIGHT TREMAINE LLP




By: Robert D. Balin
Samuel M. Bayard
1251 Avenue of the Americas
21st Floor
New York, NY 10020
(212) 489-8230
robbalin@dwt.com
samuelbayard@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

CERTIFICATION

I certify, pursuant to Court of Appeals Rule 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the corporate disclosure statements, the table of contents, the table of cases and authorities required by Rule 500.13(a), and any addendum containing material required by Rule 500.1(h), is 6798 words.



By: Robert D. Balin
Samuel M. Bayard
1251 Avenue of the Americas
21st Floor
New York, NY 10020
(212) 489-8230
robbalin@dwt.com
samuelbayard@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