APL-2017-00027 & APL-2017-00028
New York County Clerk's Index Nos. 151633/14 & 156443/14

Court of Appeals
of the
State of New York

KAREN GRAVANO,
Plaintiff-Appellant,
– against –

TAKE-TWO INTERACTIVE SOFTWARE, INC. and ROCKSTAR GAMES,
Defendants-Respondents.
– and –

LINDSAY LOHAN,
Plaintiff-Appellant,
– against –

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

ENTERTAINMENT SOFTWARE ASSOCIATION'S MOTION FOR LEAVE TO APPEAR AND FILE BRIEF OF *AMICUS CURIAE*

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Dated: December 21, 2017

COURT OF APPEALS
STATE OF NEW YORK

KAREN GRAVANO, *Plaintiff-Appellant* v. TAKE-TWO INTERACTIVE SOFTWARE INC. and ROCKSTAR GAMES, *Defendants-Respondents.* and LINDSAY LOHAN, *Plaintiff-Appellant* v. TAKE-TWO INTERACTIVE SOFTWARE INC. and ROCKSTAR GAMES, *Defendants-Respondents.*	Case Nos. APL-2017-00027, APL-2017-00028

NOTICE OF MOTION

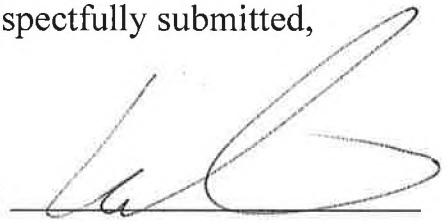
PLEASE TAKE NOTICE that upon the accompanying moving affirmation of Kenneth L. Doroshow, dated December 21, 2017, and the accompanying brief, the Entertainment Software Association (ESA) will move this Court, at the Court of Appeals, Court of Appeals Hall, 20 Eagle Street, Albany, New York, on January 8, 2018 for an Order, pursuant to Court of Appeals Rule § 500.23(a):

1) Granting ESA leave to appear and file a brief as *amicus curiae*. ESA seeks to provide the Court with its unique perspective on the issues presented by these appeals. Specifically, ESA seeks to provide information to the Court regarding the expressive nature of video games and to explain to the Court that it should interpret "advertising" and "trade" under Section 51 so as not to cover video games and other expressive works.

2) Directing such other and further relief as the Court may deem just and proper.

Dated: December 21, 2017

Respectfully submitted,

By: 

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COURT OF APPEALS
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AFFIRMATION OF KENNETH L. DOROSHOW

KENNETH L. DOROSHOW, ESQ., an attorney duly admitted to practice law in the State of New York, duly affirms the following to be true under the penalties of perjury, pursuant to New York Civil Practice Law and Rule 2106:

1. I am a member of the bar of the State of New York, am not a party to this action, and am a partner in the law firm Jenner & Block LLP, located at 1099 New York Avenue, N.W., Washington, D.C., 20001, which is counsel for the Entertainment Software Association (ESA) in this action.

2. I submit this affirmation in support of ESA's Motion for Leave to Appear and File an *Amicus Curiae* Brief, seeking an Order granting ESA leave to appear and file a brief as *amicus curiae* in connection with the above-captioned appeals.

3. ESA is the U.S. association dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers and the Internet. ESA was a respondent in *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), which held that video games are entitled to the same First Amendment protection as other forms of media.

4. The arguments to be raised in ESA's *amicus brief* provide the Court with its unique perspective on the issues presented. Specifically, ESA seeks to provide information to the Court regarding the expressive nature of video games and to explain to the Court that it should interpret "advertising" and "trade" under Section 51 so as not to cover video games and other expressive works.

5. ESA's *amicus curiae* brief explains that video games are a modern and culturally-significant form of artistic expression, entitled to First Amendment protection. The brief explains that the courts of New York commonly rely on free speech concerns when granting motions to dismiss Section 51 claims against expressive works, holding that such works are exempted from the statute, as the legislature intended. The brief argues that these cases should be treated no differently and that this Court should affirm that constitutionally-protected works, such as the video games in question in these cases, do not fall within the text of—and are exempted from—Section 51.

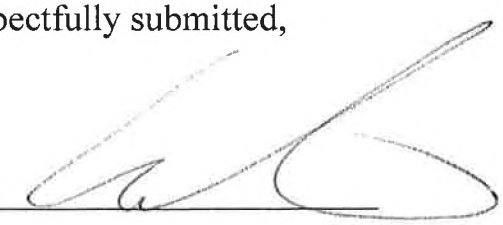
6. ESA has a unique interest and perspective on these issues because of its role in the video game industry.

7. ESA's proposed *amicus curiae* brief, a copy of which is attached hereto as Exhibit A, draws attention to arguments and issues that might otherwise escape the Court's consideration, thus the brief would be of assistance to the Court in adjudicating this appeal.

For all the reasons set forth above, ESA respectfully requests the Court to grant its Motion for Leave to Appear and File an *Amicus Curiae* Brief, and enter the proposed brief.

Respectfully submitted,

Dated: December 21, 2017

By: 

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Counsel for Amicus Curiae Entertainment Software Association

EXHIBIT A

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BRIEF OF *AMICUS CURIAE* ENTERTAINMENT SOFTWARE ASSOCIATION

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Counsel for Amicus Curiae Entertainment Software Association

Dated: December 21, 2017

RULE 500.1(f) CORPORATE DISCLOSURE STATEMENT

Amicus curiae the Entertainment Software Association ("ESA") hereby states that it is a nonprofit corporation that does not have any parent corporations or subsidiaries. Neither ESA nor its affiliate the ESA Foundation is owned in any part by a publicly held corporation.

Dated: December 21, 2017

By: _____
Kenneth L. Doroshow

Counsel for Entertainment Software Association

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INTEREST OF AMICUS CURIAE

The members of the Entertainment Software Association ("ESA") publish computer and video games. ESA was a respondent in *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), which held that video games are entitled to the same First Amendment protection as other forms of media. The decision below must be affirmed, consistent with *Brown*, so that ESA's members' ability to create such expressive works is not hindered.

ESA submits this *amicus curiae* brief, accompanied by a motion for leave to file the same, pursuant to Rule of Practice, N.Y. Comp. Codes R. & Regs. tit. 22, § 500.23(a)(1).

INTRODUCTION

Time magazine declared that "*Grand Theft Auto* Is Today's *Great Expectations.*" Gravano Record at 80 (Nick Gillespie, Grand Theft Auto *is Today's* Great Expectations, Time (Sept. 20, 2013), http://ideas.time.com/2013/09/20/grand-theft-auto-todays-great-expectations/) (hereinafter Gillespie, Today's *Great Expectations*). While such a statement might surprise some Dickens aficionados, it is entirely true—especially from a constitutional perspective. Video games are a modern and culturally-significant form of artistic expression that, like other creative works, are entitled to robust First Amendment protection. The central role of video games in today's culture is reflected by their overwhelming popularity. The serious artistic nature of video games is evident by their treatment in the mainstream press, which review and critique video games alongside other forms of expression, such as literature, movies, television, and theater. The reviews of *Grand Theft Auto V* in the Record in the cases before this Court are prominent illustrations of such treatment.

The U.S. Supreme Court recognized in *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), the incontrovertible fact that video games as expressive works are fully protected by the First Amendment. That is because "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages." *Id.* at 790.

Consistent with this precedent, this Court must interpret "advertising" and "trade" under Section 51 of the New York Civil Rights Law ("Section 51") so as not to cover video games and other expressive works. The courts of New York commonly rely on free speech concerns when granting motions to dismiss Section 51 claims against expressive works, holding that such works are exempted from the statute as the legislature intended. The cases before this Court should be treated no differently.

This Court should articulate a bright-line rule that constitutionally-protected expressive works, such as the video game in question in these cases, do not fall within the text of—and are exempted from—Section 51, and affirm the dismissal of the Appellants' claims. Failure to do so would chill speech and lead creators to self-censor for fear of being sued by public figures who might be depicted in their expressive works. The U.S. and New York constitutions cannot abide such an outcome.

ARGUMENT

I. VIDEO GAMES ARE A MODERN FORM OF ARTISTIC EXPRESSION

Video games are a culturally-significant form of artistic expression entitled to First Amendment protection. Like films, video games incorporate creative elements such as dialogue, music, visual images, plot, and character development. Like literature, video games invoke classic themes that have captivated audiences for

centuries, such as good-versus-evil, triumph over adversity, struggle against corrupt powers, and quest for adventure.

Video games are a mainstream pastime. Nearly two-thirds (65%) of U.S. households are home to at least one person who plays three or more hours of video games a week. *See* Entertainment Software Association, *Essential Facts About the Computer and Video Game Industry: 2017 Sales, Demographic, and Usage Data* 6 (2017), http://www.theesa.com/wp-content/uploads/2017/09/EF2017_Design_FinalDigital.pdf (hereinafter "ESA, Essential Facts"). The average "gamer" is thirty-five years old, and women over the age of eighteen represent a significantly greater portion of the game-playing population than boys under the age of eighteen. *Id.* at 7. Many games can be played online cooperatively with other players anywhere in the world, including on social network sites like Facebook.[1] Over half of frequent gamers play these multiplayer games with others at least once a week, and over two-thirds of parents play video games with their children at least once a

[1] *See, e.g.*, Mark Hachman, *Facebook Instant Games puts games right smack in the middle of News Feed, Messenger*, PCWorld (Nov. 29, 2016), https://www.pcworld.com/article/3145467/software-games/facebook-instant-games-puts-games-right-smack-in-the-middle-of-news-feed-messenger.html (describing Facebook's Instant Games platform as "reorienting its social media empire back towards gaming" and allowing "[s]eventeen games—including arcade classics as *Space Invaders* and *Pac-Man* as well as more modern games like *EverWing* and *Words with Friends: Frenzy*" to be launched from a user's news feed).

week. *Id.* at 8, 10.[2] The gamecasting service Twitch is the largest live-streaming site on the internet, amassing over 660 million unique viewers in 2017—more than twice the combined viewership of HBO, Netflix, ESPN, and Hulu.[3]

As video games have grown more popular, they have become more varied. Some video games, such as the popular *The Elder Scrolls* and *Halo* series, are entirely a product of the creator's imagination, much like science-fiction novels and other works of fantasy. Other video games incorporate elements based on real life, from popular sports games like *Madden NFL 17* and *FIFA 17*, to memoirs and autobiographical games like *Cibele* and *That Dragon, Cancer*.[4] Some games are based directly on popular books, movies, and television shows. For example, *Star Wars Battlefront*, a top-selling game in 2016, is based on the world George Lucas originally created for his famous films. ESA, Essential Facts, at 12. *Walden: A Game*, based on Henry David Thoreau's famous stay by the titular pond, "plunges

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[2] In addition to connecting with others through game play, video games may improve a gamer's ability to connect *outside* of the game itself. *See, e.g.*, Doug Bolton, *Video games may improve children's intellectual and social skills, study finds*, The Independent (Mar. 9, 2016), http://www.independent.co.uk/news/science/video-games-children-learning-intelligence-social-skills-study-a6920961.html.

[3] *See* Ana Valens, *Report Shows Twitch Audience Bigger Than HBO's and Netflix's*, Dot Esports (Oct. 18, 2017), https://dotesports.com/general/news/twitch-audience-hbo-netflix-18122.

[4] Nina White, *Gaming to cope: how developers are tackling real life*, The Telegraph (Jan. 21, 2016), http://www.telegraph.co.uk/gaming/what-to-play/personal-issues-inside-the-fascinating-world-of-interactive-biog/.

you into a virtual Walden Woods, where you can 'live deliberately,' as Thoreau famously put it, replacing drudgery in the pursuit of material comfort with a quest for spiritual fulfillment in harmony with nature."[5] A wide range of animated television characters, from the Simpsons to SpongeBob SquarePants, have starred in their own video games. And generations of children have grown up playing video games starring superheroes in the DC and Marvel comic universes.

As inspiration is a two-way street, video games increasingly are the inspiration for other media, including books and movies. Last year alone saw the theatrical release of the movies *Warcraft*, *Angry Birds*, and *Assassin's Creed*, all based on video games. Video games also feature prominently in the story lines of movies such as *Pixels*, *Wreck It Ralph*, and the upcoming *Ready Player One* directed by Steven Spielberg.

In addition to the artistry inherent in the games, video game scores are often original pieces of music composition, designed, like a film score, to enhance the effect of the visual and narrative elements of the work. For example, Sir Paul

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[5] Britt Peterson, *Can A Video Game Capture the Magic of Walden?*, Smithsonian Magazine (Mar. 2017), http://www.smithsonianmag.com/arts-culture/can-video-game-capture-magic-walden-180962125/?mc_cid=ab6bfdb61c&mc_eid=50ea0bc7ee. Other games reference works of literature more obliquely. For example, *BioShock* explores Ayn Rand's objectivist philosophies. *See* Chloi Rad, *11 Games You Didn't Know Were Based on Books*, IGN (June 2, 2015), http://www.ign.com/articles/2015/06/02/11-games-you-didnt-know-were-based-on-books.

McCartney composed the score for the 2014 game *Destiny* because he was "interested in the challenge of writing orchestral music for an interactive game—that is, musical sequences that would change depending on the game players' actions and interactions."[6] Music from video games is not just consumed at home; for example, this summer, the National Symphony Orchestra performed music from the popular *The Legend of Zelda* video games in the D.C. area's iconic Wolf Trap amphitheater.[7]

As video games have risen in prominence, they have become an important focus of critical commentary. Today, video game reviews and criticism regularly appear in mainstream newspapers and periodicals, such as the *New York Times*, the *Washington Post*, the *New Yorker*, and the *Wall Street Journal*—right alongside reviews of literature, movies, television, and theater. These reviews typically critique a game's value and themes the same way they would for any work of art or literature. For example, the *New York Times*'s review of Take-Two Interactive Software's 2010 hit *Red Dead Redemption*, the long-awaited sequel of which will be released next year, illustrates the way in which modern video games often confront weighty moral issues:

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[6] Allan Kozinn, *Paul McCartney Collaborates on a Video Game Score*, N.Y. Times (Aug. 8, 2014), https://artsbeat.blogs.nytimes.com/2014/08/08/paul-mccartney-collaborates-on-a-video-game-score/.

[7] *See* Wolf Trap, http://www.wolftrap.org/tickets/calendar/performance/17filene/0722show17.aspx (last visited Dec. 18, 2017).

> Like our own, the world of Red Dead Redemption … is one in which good does not always prevail and yet altruism rarely goes unrewarded. This is a violent, unvarnished, cruel world of sexism and bigotry, yet one that abounds with individual acts of kindness and compassion. Like our own, this is a complex world of ethical range and subtlety where it's not always clear what the right thing is. …
>
> Riding along in the desert, you may see two groups of men shooting it out. Whether to intervene is your choice. If you do, it may not be clear which are the good guys. … Do you help?[8]

The reviews of *Grand Theft Auto V* in the Records in these cases provide an especially clear illustration of critical treatment of video games as a serious artistic medium. "Indeed, the notices for *Grand Theft Auto V* aggregated at the site metacritic read like the pages of *The New York Review of Books*." Gravano Record at 80 (Gillespie, Today's *Great Expectations*). In a *Time* magazine review of *Grand Theft Auto V* entitled, "*Grand Theft Auto* Is Today's *Great Expectations*," the author noted that "[i]f there were any lingering questions as to whether video games are *the* defining popular art form of the 21st century, this week's release of *Grand Theft Auto V* should put them all to rest." *Id.*

It is no surprise, then, that cultural institutions have recognized video games' central place among the most established forms of art. For example, in 2012 the Museum of Modern Art in New York City began displaying video games in its galleries, and exhibitions devoted to video games opened at the Smithsonian

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[8] Seth Schiesel, Way Down Deep in the Wild, Wild West, N.Y. Times (May 16, 2010), www.nytimes.com/2010/05/17/arts/television/17dead.html.

American Art Museum and the Museum of the Moving Image, prompting the *New York Times* to declare that "[v]ideo games are now high culture."[9] The Strong National Museum of Play in Rochester houses the World Video Game Hall of Fame, which recognizes individual video games that have exerted influence on the industry or on popular culture and society in general.[10]

Further underscoring the prominence of video games as a modern art form, more than 520 colleges and universities in the U.S. offer degrees in video game design and video game studies.[11] For example, New York University's famous Tisch School of the Arts' Department of Game Design "stand[s] shoulder-to-shoulder with film, television, theater, dance, and other forms of artistic human expression."[12] Department of Game Design students "study the design, production, and scholarship of games in a context of advanced critical theory."[13]

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[9] Allan Kozinn, *MoMA Adds Video Games to Its Collection*, N.Y. Times (Nov. 29, 2012), https://artsbeat.blogs.nytimes.com/2012/11/29/moma-adds-video-games-to-its-collection/. MoMA selects games to acquire using the same criteria the museum uses for other collections, including "historical and cultural relevance, aesthetic expression, functional and structural soundness, innovative approaches to technology and behavior, and a successful synthesis of materials and techniques." *Id.*

[10] World Video Game Hall of Fame, The Strong, http://www.museumofplay.org/about/world-video-game-hall-fame (last visited Dec. 18, 2017).

[11] The Entertainment Software Association, Impact of the Video Game Industry: State by State, http://www.areweinyourstate.org.

[12] Game Center, NYU, http://gamecenter.nyu.edu/academics/ (last visited Dec. 18, 2017).

[13] *Id.*

In summary, there is no question that video games are a culturally-important modern-day form of artistic expression.

II. THE FIRST AMENDMENT PROTECTS VIDEO GAMES BECAUSE THEY ARE A FORM OF ARTISTIC EXPRESSION

Video games, as expressive works, are fully protected by the free speech clauses of the U.S. and New York constitutions. *See Brown*, 564 U.S. at 790 ("[V]ideo games qualify for First Amendment protection."). "[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech . . . , like the First Amendment's command, do not vary' when a new and slightly different medium for communication appears." *Id.* Recognizing this fact, the U.S. Supreme Court in *Brown* sustained a First Amendment challenge to a California law restricting the sale of "violent video games" to minors. *Id.* at 799; *see also E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1096, 1099-1100 (9th Cir. 2008) (holding "producer of a video game in the 'Grand Theft Auto' series has a defense under the First Amendment against a claim of trademark infringement"); *Dillinger, LLC v. Elec. Arts Inc.*, 795 F. Supp. 2d 829, 835-36 (S.D. Ind. 2011) (construing videogames as "literary works" exempted from Indiana's right of publicity statute because "[a]ny holding that 'literary works' in the statute don't encompass videogames would set the right-of-publicity statute up for a constitutional challenge").

Video games speak—they "ha[ve] a message, even an 'ideology,' just as books and movies do." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578 (7th Cir. 2001) (Posner, J) ("*AAMA*"). And they convey these messages "through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)." *Brown*, 564 U.S. at 790.

As the U.S. Supreme Court recognized in *Brown*, video games are fully protected by the First Amendment regardless of whether their primary purpose is entertainment. *Id.* The First Amendment protects "entertainment" media as it does other forms of speech because "[t]he line between the informing and the entertaining is too elusive" to justify any distinction. *Winters v. New York*, 333 U.S. 507, 510 (1948). Indeed, "[w]hat is one man's amusement, teaches another's doctrine." *Id.*; *see also Brown*, 564 U.S. at 790 (quoting same). That is why the First Amendment protects magazines, *Winters*, 333 U.S. at 510, movies, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952), comic books, *see Brown*, 564 U.S. at 797, and adult content, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000), among others, in addition to traditional political speech. Not only is it "difficult to distinguish politics from entertainment," it is "dangerous to try." *Brown*, 564 U.S. at 790. And the New York constitution is even *more* protective of freedom of expression than its federal counterpart and the constitutions of many other states:

this State "has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community" and are not protected by the Supreme Court's First Amendment jurisprudence. *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557 (1986).

These principles apply equally to an interactive medium like video games. As Judge Posner has observed, "[a]ll literature ... is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own." *AAMA*, 244 F.3d at 577; *see also Brown*, 564 U.S. at 798 (quoting same). As the U.S. Supreme Court has recognized, interactivity is "nothing new." *Brown*, 564 U.S. at 798. "Since at least the publication of The Adventure of You: Sugarcane Island in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot." *Id.* Nor is such interactivity in "traditional" art a thing of the past—one of the hottest plays in New York City in recent years, *Sleep No More*, is an interactive theater and dance performance based on Shakespeare's *Macbeth* housed in a five-story warehouse in Chelsea.[14] And virtual reality technology, which

[14] Ben Brantley, *Shakespeare Slept Here, Albeit Fitfully*, N.Y. Times (Apr. 13, 2011), http://www.nytimes.com/2011/04/14/theater/reviews/sleep-no-more-is-a-macbeth-in-a-hotel-review.html.

is inherently interactive, is increasingly popular: one in three frequent gamers said they were likely to buy virtual reality technology in the next year. ESA, Essential Facts, at 9.

Moreover, video games are fully protected even if they contain violent content. In *Brown*, the U.S. Supreme Court struck down as unconstitutional California's restriction on the sale of violent video games to children, observing that children have throughout our history been exposed to such material. 564 U.S. at 795. "Certainly the *books* we give children to read—or read to them when they are younger—contain no shortage of gore." *Id.* at 795-96 (citing Grimm's Fairy Tales (Snow White, Cinderella, and Hansel and Gretel), *The Odyssey*, Dante's *Inferno*, and *Lord of the Flies*). And although children's consumption of violent entertainment encountered resistance throughout our modern history—first dime novels, then movies, radio dramas, comic books, and music lyrics—those activities remained constitutionally protected. *Id.* at 797-98.

In short, video games—no less than books, movies, and plays—are a form of expression fully protected by the First Amendment and the New York constitution.

III. THIS COURT SHOULD INTERPRET "ADVERTISING" AND "TRADE" UNDER SECTION 51 SO AS NOT TO APPLY TO CONSTITUTIONALLY-PROTECTED ARTISTIC EXPRESSION

A. New York Courts Interpret Section 51 Narrowly So As Not To Abridge Constitutionally-Protected Expression

In holding that *Grand Theft Auto V* did not fall within the statutory definition of "advertising" or "trade," the Appellate Division's opinion ensured that Section 51 did not run afoul of vitally important constitutional free expression protections. This Court should affirm that holding and confirm that constitutionally-protected expressive works, like the video game at issue here, are exempted from Section 51.

The origin of the statute shows that it does not apply to the type of constitutionally-protected expression embodied in video games. Section 51 was borne out of the Court of Appeals' opinion in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902). In *Roberson*, a flour company "obtained, made, printed, sold and circulated about 25,000 lithographic prints, photographs and likenesses of plaintiff" without her consent to advertise its product. *Id.* at 542. The Court of Appeals declined to establish a common law right to privacy because it would be too broad, and because it would apply to "a responsible periodical or leading newspaper" or to "an advertising card or sheet" and would therefore result "in a vast amount of litigation . . . bordering on the absurd." *Id.* at 544-45. Still, the Court noted that the legislature could "provide that no one should be permitted for his own selfish

purpose to use the picture or the name of another for advertising purposes without his consent." *Id.* at 545.

And so New York's statutory right of privacy was born. Within a year of the *Roberson* opinion, the New York legislature enacted a statutory right to privacy, which prohibits using a person's "name, portrait, picture or voice" for advertising or trade purposes. As this Court has observed, Section 51 addressed the *Roberson* Court's concern in that it was "drafted narrowly to encompass *only the commercial use* of an individual's name or likeness *and no more*." *Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433, 439 (1982) (emphasis added). Indeed, Section 51 was "drafted with the First Amendment in mind." *Foster v. Svenson*, 128 A.D.3d 150, 156 (1st Dep't 2015) (no claim for individuals photographed without their consent for images shown in galleries and then sold).

Since the passage of the statutory right to privacy, New York courts have repeatedly recognized that the phrases "for advertising purposes" and "for the purpose of trade" in Section 51 must be read narrowly, consistent with the free expression protections of the U.S. and New York constitutions. Indeed, although "[t]he legislature's use of the[se] broad, unqualified terms . . . on their face, appear to support [the] contention that the statutory terms apply to all items which are bought and sold in commerce," courts "have refused to adopt a literal construction of these terms." *Id.* at 155-56. Rather, as this Court noted in *Messenger ex rel.*

Messenger v. Gruner + Jahr Printing & Publishing, 94 N.Y.2d 436 (2000), Section 51 must be "narrowly construed and strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person." *Id.* at 441 (citation and quotation marks omitted).

The rationale for this narrow construction of the terms "trade" and "advertising" is that, in drafting the statute, the Legislature intended to strike a balance between protecting against invasion of privacy and "the values our State and Federal Constitutions bespeak in the area of free speech and free press." *Arrington*, 55 N.Y.2d at 440 (no Section 51 claim for man whose photograph appeared, without his consent, on the cover of the *New York Times Magazine* under the heading "The Black Middle Class: Making It"). Thus, the terms of Section 51 must be "construed narrowly and not used to curtail the right of free speech, or free press, or to shut off the publication of matters newsworthy or of public interest, or to prevent comment on matters in which the public has an interest or the right to be informed." *Rand v. Hearst Corp.*, 31 A.D.2d 406, 409-10 (1st Dep't 1969), *aff'd*, 26 N.Y.2d 806 (1970) (no Section 51 claim for Ayn Rand, whose name was used on the cover of another author's book, in quote from a review); *see also Groden v. Random House, Inc.*, 61 F.3d 1045, 1051 (2d Cir. 1995) (affirming rejection of Section 51 claim of author whose name and photograph were used to advertise another author's book, noting

that "the New York courts have been vigilant in interpreting the right of privacy to permit the free flow of information").

Further, as courts have made clear, the fact that a constitutionally-protected expressive work is *sold* does not transform the work into mere "advertising" or "trade" for purposes of Section 51. Indeed, another Section 51 case brought by Lindsay Lohan, *Lohan v. Perez*, 924 F. Supp. 2d 447 (E.D.N.Y. 2013), is instructive. The recording artist Pitbull referred to Ms. Lohan in one of his songs, and she sued him, among others, alleging a violation of Section 51. The district court granted the defendants' motion to dismiss, holding that the New York Civil Rights law does not apply to protected works of art such as the pop song in question. *Id.* at 454 ("Courts interpreting [Section 51] have concluded that 'pure First Amendment speech in the form of artistic expression . . . deserves full protection, even against [another individual's] statutorily-protected privacy interest." (citation omitted) (first bracket added)). Further, the district court held, "[t]he fact that the Song was presumably created and distributed for the purpose of making a profit does not mean that plaintiff's name was used for 'advertising' or 'purposes of trade' within the meaning of the New York Civil Rights Law." *Id.* at 455.

Other cases likewise reject the argument that the fact that a work is *sold* brings it within Section 51. *See Ann-Margret v. High Soc. Magazine, Inc.*, 498 F. Supp. 401, 406 (S.D.N.Y. 1980) ("[I]t is well established that simple use in a magazine

that is published and sold for profit does not constitute a use for advertising or trade sufficient to make out an actionable claim."); *Simeonov v. Tiegs*, 602 N.Y.S.2d 1014 (Civ. Ct., N.Y. Cty. 1992) (sculptures intended for sale not made "for the purposes of trade"); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967) ("That 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" (quoting *Joseph Burstyn, Inc.*, 343 U.S. at 501-03)). Consistent with this precedent, dismissal is appropriate where the use of a person's "name, portrait, picture or voice" is used for the purposes of constitutionally-protected expression, even where that expression is sold for profit.

In sum, "as has been noted by the New York courts, freedom of speech and the press under the First Amendment transcends the right to privacy." *Ann-Margret*, 498 F. Supp. at 404 (internal quotation marks omitted).

B. Section 51 Claims Do Not Apply To Expressive Works, And Must Be Dismissed Or Else Risk Chilling Expression

Because the law has recognized that Section 51 must be interpreted narrowly and against a constitutional backdrop, courts have relied on the First Amendment when granting motions to dismiss, holding that expressive works are exempted from the statute. For example, the district court in the *Lohan* case granted the defendants' motion to dismiss, holding that "the use of an individual's name—even without his consent—is not prohibited by the New York Civil Rights Law if that use is part of a

work of art." 924 F. Supp. 2d at 454. Because the U.S. Supreme Court had made clear that music is a form of expression and thus protected by the First Amendment, that was the end of the matter. *Id.* ("[B]ecause the Song is a protected work of art, the use of plaintiff's name therein does not violate the New York Civil Rights Law."). Other New York courts have reached the same conclusion. *See, e.g.*, *Altbach v. Kulon*, 302 A.D.2d 655, 657 (3d Dep't 2003) ("[D]efendant'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 exempted from New York's privacy protections."); *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 350 (S.D.N.Y. 2002) (dismissing Section 51 claim by woman whose photograph Barbara Kruger used in artwork, which was then used by the Whitney Museum of American Art to publicize the show: "[t]he Kruger Composite itself is pure First Amendment speech in the form of artistic expression . . . and deserves full protection, even against [plaintiff's] statutorily-protected privacy interests").

Courts must dispose of such claims at the motion to dismiss stage, lest First Amendment free speech rights be chilled. It is axiomatic that meritless lawsuits have a pernicious effect on the exercise of speech rights. As the U.S. Supreme Court has recognized, "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution [of a lawsuit] unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). Indeed,

"[t]he threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545 (1980) (alteration in original) (quoting *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966)).

Right of privacy lawsuits under Section 51 pose an especially acute threat to publishers of expressive works. Such claims have been used to target myriad types of protected expression and will continue to do so unless this Court affirms the Appellate Division. For example, such claims have been brought relating to newspaper and magazine publishers, *see, e.g.*, *Arrington*, 55 N.Y.2d 433; *Time, Inc.*, 385 U.S. 374, fine artists, *see, e.g.*, *Foster*, 128 A.D.3d 150; *Hoepker*, 200 F. Supp. 2d 340; *Simeonov*, 602 N.Y.S.2d 1014, authors and publishing houses, *see, e.g.*, *Rand*, 31 A.D.2d 406, motion picture studios, *see, e.g.*, *Greene v. Paramount Pictures Corp.*, 138 F. Supp. 3d 226 (E.D.N.Y. 2015), television show hosts, *see, e.g.*, *Sondik v. Kimmel*, 131 A.D.3d 1041 (2d Dep't 2015), comic book publishers, *see, e.g.*, *Netzer v. Continuity Graphic Associates, Inc.*, 963 F. Supp. 1308 (S.D.N.Y. 1997), documentary filmmakers, *see, e.g.*, *Candelaria v. Spurlock*, No. 08 Civ. 1830 (BMC) (RER), 2008 WL 2640471 (E.D.N.Y. July 3, 2008), and musicians and music publishers, *see, e.g.*, *Lohan*, 924 F. Supp. 2d 447, in addition to the video game publishers at issue in these cases. It is critical that courts have clear guidance to dispose of these claims at the dismissal stage so that publishers of creative works

do not censor themselves in their protected expression for fear of suit. To allow such suits to proceed through discovery and reach summary judgment or trial would serve only to stifle creative expression.

Moreover, depictions of identifiable individuals and personalities are essential elements of a broad array of expressive works. If this Court were to reverse in these cases and hold that Section 51 applies to *Grand Theft Auto V*, a wide range of expression would be hindered. For example, this year's Tony Award winner for Best Play, *Oslo*, dramatizes the real-life story of a Norwegian couple who initiated a series of secret peace talks between Israel and the Palestinian Liberation Organization, which led to the Oslo Accords.[15] In addition, one of the most critically-acclaimed television shows of last year, Netflix's *The Crown*, depicted Queen Elizabeth II's early years on the throne, set mostly in the 1950s.[16] And an event from Elizabeth's father's reign was the subject of the 2010 Oscar winner for Best Picture, *The King's Speech*.[17] Affirming the Appellate Division's opinion in these cases ensures that such expressive works featuring real-world figures (or

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[15] Ben Brantley, *Review: "Oslo" Fills a Large Canvas in a Thrilling Production*, N.Y. Times (Apr. 13, 2017), https://www.nytimes.com/2017/04/13/theater/oslo-broadway-review.html?mcubz=0.

[16] *See, e.g.*, Matthew Gilbert, *Netflix's "The Crown" bows to the queen*, Boston Globe, Nov. 3, 2016, https://www.bostonglobe.com/arts/television/2016/11/02/netflix-the-crown-bows-queen/bL6EPY2JcAbY8k1py5AJhO/story.html.

[17] Matt Murray & Brianna Bernath, *Behold! A list of every "Best Picture" Oscar winner ever*, Today (Jan. 31, 2017), https://www.today.com/popculture/complete-list-every-best-picture-oscar-winner-ever-t107617.

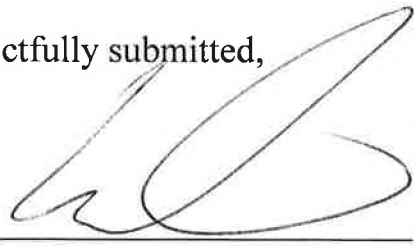
parodied versions of them) will continue to be made, shielded by the First Amendment from meritless suits.

Accordingly, this Court should affirm that constitutionally-protected expressive works, such as the video game in question in these cases, do not fall within the text of and are exempted from Section 51. Failure to do so would chill speech and lead artistic creators to self-censor out of fear of being sued for breach of the statutory right of privacy by the public figures who might be depicted in the expressive work. The U.S. and New York constitutions do not permit such an outcome.

CONCLUSION

For the foregoing reasons, this Court should affirm the dismissal of the Amended Complaints in these cases in their entirety and with prejudice.

Respectfully submitted,



Dated: December 21, 2017

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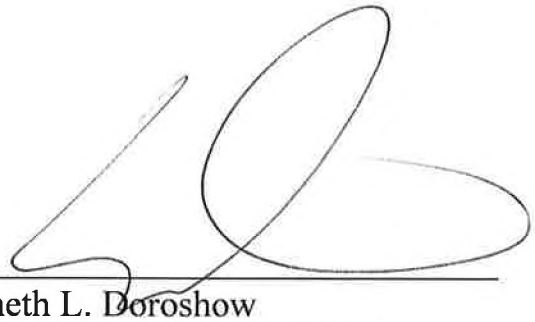
CERTIFICATE OF COMPLIANCE

Pursuant to Rules of Practice 500.23(a)(1)(i) and 500.13(c)(1), I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 5041 words.

December 21, 2017

By: 

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CERTIFICATE OF SERVICE

Kenneth L. Doroshow, an attorney, certifies that he caused ESA's Motion for Leave to Appear and File a Brief as *Amicus Curiae*, and accompanying files, to be served on the following counsel of record via first class mail on the 21st day of December, 2017.

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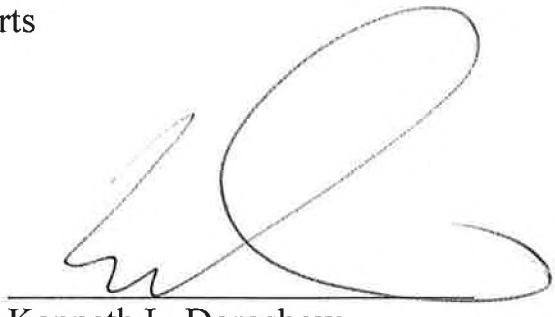

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