IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1251

ERICA TYNE, et al.,

Appellants/Movants,

v.

TIME WARNER ENTERTAINMENT CO., L.P.
d/b/a WARNER BROS. PICTURES, et al.,

Appellees/Respondents.

On a Certified Question from the
United States Court of Appeals For the Eleventh Circuit
Case No. 02-13281

AMICI CURIAE BRIEF OF FLORIDA MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEES/RESPONDENTS

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IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST

The Amici Curiae are the Florida Press Association, the Florida Association of Broadcasters, the First Amendment Foundation, Orlando Sentinel Communications, Sun-Sentinel Co., and their parent, Tribune Company, the New York Times Regional Newspapers, on behalf of its 14 daily newspapers, including *The* (Lakeland) *Ledger*, *Sarasota Herald-Tribune*, (Ocala) *Star-Banner*, and *The Gainesville Sun*, and Media General Operations, Inc., publisher of *The Tampa Tribune, Highlands Today,* and the *Jackson County Floridan*, and owner of WFLA-TV Channel 8, WJWB-TV Channel 17 and WMBB Channel 13.

[1]

The Florida Press Association and the Florida Association of Broadcasters are trade associations incorporated in Tallahassee, Florida under Section 501(c)(6) of the Internal Revenue Code. The Florida Press Association represents the daily and weekly newspapers in Florida in a variety of issues, including those that affect the First Amendment rights of its member newspapers. The Florida Association of Broadcasters has 334 members, including 263 radio members and 71 television members, and also seeks to protect and preserve the constitutional rights of its members.

The First Amendment Foundation is a Florida not-for-profit corporation,

[1] Amici Curiae will be referred to as "the **Florida Media Organizations**." Appellants/Movants Erica Tyne, Billy-Jo Tyne, Dale R. Murphy, Jr., Debra Tigue, and Douglas Kosko will be referred to as "**Appellants**." Appellees/Respondents Time Warner Entertainment Co., L.P., d/b/a Warner Bros. Pictures, Baltimore/Spring Creek Pictures, L.L.C., and Radiant Productions, Inc. will be referred to as "**Warner Bros.**"

qualified under Section 501(c)(3) of the Internal Revenue Code. It was formed for the purpose of helping preserve and advance freedom of speech and of the press as provided in the United States Constitution and the Florida Constitution.

The remaining Amici are newspaper and broadcasting companies. They publish daily and weekly newspapers and broadcast daily television and radio news and entertainment programs throughout Florida.

As publishers and broadcasters, the Florida Media Organizations use the names and likenesses of countless public figures and private individuals without consent on a daily basis. These names and likenesses invariably are used in publications and broadcasts that are created, produced, and/or distributed for profit. Often, the Florida Media Organizations use a person's name or likeness in contexts that are not strictly factual or entirely fictional.

The Appellants in this case seek to expand Section 540.08, Florida Statutes, to reach the Florida Media Organizations's day to day operations as described above. In this regard, the Florida Media Organizations have a substantial interest in the interpretation of Section 540.08, Florida Statutes. Indeed, if the statutory term "commercial" is construed as expansively as Appellants urge, such a construction will seriously chill the Florida Media Organization's ability to publish news – causing serious First Amendment ramifications.

SUMMARY OF THE ARGUMENT

Appellants are attempting to rewrite Section 540.08 to include an element of falsity not found in the clear language of the statute and are proposing that liability hinge on some undefined level of culpability for that falsity. If adopted by this

Court, the Appellants' new tort would impermissibly burden the Florida Media Organizations's free speech rights under the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution, and would create uncertainty in the application of Florida's publication laws.

The Florida Media Organizations respectfully request that rather than recognizing an entirely new theory of Section 540.08 liability, this Court reaffirm the interpretation given the statute by Loft v. Fuller, 408 So. 2d 619 (Fla. 4th DCA 1981), in which the Fourth District Court of Appeal held that Section 540.08 applies only to the unauthorized use of a person's name or likeness directly to promote the product or service of the publisher. Under Loft's proper construction of the statute, Section 540.08 does not reach the conduct of Warner Bros., and Appellants' claims would more properly be pled and resolved under established defamation and false light law.

ARGUMENT

I. NEITHER FALSITY NOR FICTIONALIZATION RENDERS SECTION 540.08 APPLICABLE TO PROTECTED FIRST AMENDMENT CONTENT.

Section 540.08, Florida Statutes, is a codification of the common law right of publicity tort (also known as the commercial misappropriation tort). It is intended to prohibit the commercial exploitation of a person's identity for trade or advertising purposes. Section 540.08 is not, by contrast, a defamation or false light statute. Tellingly, the statute makes no reference to falsity, false light, defamation, libel, or slander. Similarly, Section 540.08 does not create a "fictionalization" tort. Indeed, no Florida court ever has construed the statute as codifying the common law of defamation or false light invasion of privacy or as prohibiting fictional expressive speech.

Nevertheless, Appellants are attempting to rewrite the statute so that liability turns on falsity. Under Appellants' revision of Section 540.08, a plaintiff can state a Section 540.08 cause of action if she pleads the following elements:

> The sale of a work using the name or likeness of a real person;
>
> For a profit;
>
> Regardless of newsworthiness or public interest in the work;
>
> Wherein some of the facts are inaccurate or fictionalized;
>
> The publisher has some level of culpability for the falsehood; and
>
> The action is brought within forty (40) years after the death of the aggrieved individual and within four (4) years after the objectionable publication.

See Movants' Brief on Question Certified by the Eleventh Circuit ("Movants'

Brief") at pp. 37, 38 (citing Messenger v. Gruner + Jahr USA Publ'g, 994 F. Supp. 525 (S.D. N.Y. 1998)).

[2] In particular, Appellants maintain that a publisher is subject to Section 540.08 liability if the movie/newspaper article/expressive work suggests that the work is true (or is based on a true story) but contains factual errors. Movants' Brief at p. 37. Appellants assert that the existence of factual errors vitiates the newsworthiness/public interest exemption expressed in Section 540.08(3)(a). Id.

As discussed below, the injection of falsity or fictionalization into Section 540.08 creates serious constitutional problems for the statute. These constitutional problems were rightly avoided by the Loft court.

A. Appellants' Revision of Section 540.08 Creates Uncertainty in the Interplay between the Laws of Defamation, False Light Invasion of Privacy, and Commercial Misappropriation and Undermines Established Constitutional Protections.

Each and every day, the Florida Media Organizations' newspapers and television stations publish articles or broadcast stories of and concerning people – famous, infamous, and previously unknown – who have done something newsworthy, or are involved in some event of public interest, regardless of whether those people sought the public spotlight. To some degree, every news article published and every news story broadcast relies on the use of a person's name to

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[2] Appellants' Initial Brief fails to mention that Messenger was reversed by the Second Circuit Court of Appeals after it certified a question to the New York Court of Appeals. Messenger v. Gruner + Jahr USA Printing & Publ'g, 208 F.3d 122 (2d Cir. 2000). See also Messenger v. Gruner + Jahr Printing & Publ'g, 727 N.E.2d 549, 556 (N.Y. 2000) ("plaintiff may not recover under [New York's law] even if the use of the likeness creates a false impression about the plaintiff").

give the story a foundation of accuracy.

Furthermore, newspapers and broadcasters publish these stories for financial gain.

[3] The Florida Media Organizations are, after all, in the business of publishing or broadcasting news, entertainment, and information. Moreover, in the course of this business, the Florida Media Organizations assert that these articles are true or substantially true. (Of course, credibility is the Florida Media Organizations's stock in trade.) But regardless of the publishers' and broadcasters' relentless attempts to ensure accuracy, factual errors still occur every day.

As the United States Supreme Court and this Court have recognized, these factual errors are "inevitable." New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); see also Ross v. Gore, 48 So. 2d 412, 415 (Fla. 1950) (noting that "it is only reasonable to expect that occasional errors will be made"). It is unclear whether under Appellants' construction of Section 540.08, these errors convert the daily fare of news coverage into actionable Section 540.08 misappropriation.

Equally important, newspaper and television stations often intentionally

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[3] While Appellants never really define "commercial" within Section 540.08, they repeatedly suggest that the production and distribution of *The Perfect Storm* for profit constitutes a "commercial purpose" within the meaning of the statute. See, e.g., Movants' Brief at pp. 34-35, n.14. Appellants' position on this is untenable. The existence of a speaker's profit motive never has deprived his speech of constitutional protection. As the United States Supreme Court explained: "If 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." Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 (1989).

exaggerate, embellish, and even "fictionalize" for the purpose of entertaining, informing, or expressing opinion. For instance, political cartoons often are "based on exploration of unfortunate physical traits or politically embarrassing events" and are not strictly accurate. Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988) (depiction of Jerry Falwell
engaged in a "drunken incestuous rendezvous with his mother in an outhouse"). Historically, columnists such as Dave Berry, Jimmy Breslin, or Mike Royko have placed actual people into fictional situations and fabricated dialogue to express an opinion or to comment on events. Under Appellants' conception of the statute, such fictionalizations, though not actionable in defamation, would be actionable under Section 540.08. See, e.g., Horsley v. Rivera, 292 F.3d 695, 701 (11th Cir. 2002) (recognizing that defamation actions do not protect against non-literal expressions of "fact"); Pullum v. Johnson, 647 So. 2d 254, 258 (Fla. 1st DCA 1994) (calling plaintiff a "drug pusher" not defamatory because "[t]he First Amendment requires neither politeness or fairness"), rev. denied 654 So. 2d 919 (Fla. 1995).

In essence, Appellants' mutation of Section 540.08 makes the torts of defamation and false light invasion of privacy nearly indistinguishable from a commercial misappropriation claim. In fact, the commercial misappropriation claim that Appellants propose would strongly favor plaintiffs, allowing for a broader right of recovery than defamation and false light because the statute does not expressly incorporate the constitutional protections that apply to the common law torts. As such, Appellants' formulation of Section 540.08 raises the following significant and

troublesome questions that require substantial reinterpretation of the boundaries of Section 540.08 to be consistent with First Amendment protections. These questions include:

1. *What Is The Appropriate Standard Of Culpability Under Section 540.08?*

Appellants' Section 540.08 claim is founded on the idea that culpably false speech plus profit-motive will overcome any public interest in disseminating information, unless the speech is labeled as complete fiction.
[4] Appellants do not define the standard for determining culpability but merely assert that "culpable falsity" vitiates a work's newsworthiness. Movants' Brief at pp. 35-38.[5] If this Court recognizes this type of claim, it will have to incorporate the notion of "culpability" into a statute that heretofore has none.

Defining culpability for the purposes of a Section 540.08 claim would require this Court to act as a Legislature. That is because as written, Section 540.08 imposes liability based on the purpose for which the name or likeness is used. If the name is used to promote a product or service, liability arises regardless of fault. Loft, 408 So. 2d at 622-23. In this regard, Section 540.08 is similar to other

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[4] The Florida Media Organizations confine their discussion to works portrayed as true because Appellants admit that where "avowed" fiction occurs, the Section 540.08 claim would not stand. Movants' Initial Brief at p. 45.
[5] Appellants support their idea of adding a "culpable falsehood" element to commercial misappropriation analysis by referencing Time, Inc. v. Hill, 385 U.S. 374 (1967). The United States Supreme Court has recognized that Time, Inc. is a false light case, not a commercial misappropriation case. See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 571-572 (1977). Similarly, the Court has asserted that the actual malice test is wholly inappropriate in a commercial misappropriation case. See Hustler, 485 U.S. at 52.

statutes that protect the use of intellectual property, wherein *scienter* is relevant only to a claim for exemplary damages, and not to the underlying claim. See U.S. Copyright Act, 17 U.S.C. § 501.

If Section 540.08 is rewritten, what is the appropriate standard of culpability? For instance, the Court could recognize an "actual malice" standard (knowing falsity or reckless disregard of the truth). Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967) (applying actual malice standard in false light claim). This standard ignores that newspaper columns, editorials, political cartoons, and other items often are intentionally factually inaccurate or embellished to comment, criticize, or question. The Supreme Court has observed that "our political discourse would have been considerably poorer" without such embellishments. Hustler, 485 U.S. at 55; see also Horsley, 292 F.3d at 701 (noting that "imaginative expression" and "rhetorical hyperbole" traditionally have "added much to the discourse of our Nation"). Additionally, would this standard apply to works concerning private figures? Heekin v. CBS Broadcasting, Inc., 789 So. 2d 355, 359 (Fla. 2d DCA 2001) (suggesting the actual malice standard is inapplicable to a false light case involving a private individual).

The Hustler case suggests another possible standard for determining publishers' fault. In that decision, the United States Supreme Court stated that liability should not turn on the publisher's knowledge of the truth or falsity of the facts, but rather on whether the publisher entertained serious doubts that an audience would understand those facts to be true. Hustler, 485 U.S. at 56-57. Which standard would apply to Section 540.08? And finally, what standard of

proof would apply to this yet-undefined level of culpability? See, e.g., Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 772-73 (1986) (noting plaintiff must prove fault by clear and convincing evidence in defamation actions).

Significantly, it is rare that newspaper columns, cartoons, and editorials contain an express warning that would satisfy Appellants' "avowed fiction" labeling requirement. See Movants' Brief at p. 45-48 (attempting to distinguish the Film – which actually contained two disclaimers – from those cases in which the work is "marketed as avowed fiction"). Instead, the publisher almost always relies on the protections for hyperbole and opinion that are well established in the law of defamation and false light. See, e.g., Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); Horsley, 292 F.3d at 701; Palm Beach Newspapers, Inc. v. Early, 334 So. 2d 50 (Fla. 4th DCA 1976). Under Appellants' view, this reporting would be actionable under Section 540.08 because it would be published for a profit, it would contain false facts – therefore vitiating the newsworthy defense – and it would use the name or likeness of an individual without consent. An entire body of speech would be subsumed by the statute.

2. *How Much Falsity Is Necessary To Satisfy Appellants' 540.08 Claim?*

Among the uncertainties that arise from Appellants' redrafting of Section 540.08 is how false must the facts be to constitute actionable commercial misappropriation. In other words, to state a Section 540.08 claim, must there be some relationship between the false facts and the purpose of the commercial misappropriation? Will any amount of falsity establish the claim? If not, what is

the threshold percentage of fact versus fiction that will create liability? And what happens when the circumstances are such that there is no way to prove whether the facts are false?

These answers are clear in defamation and false light claims. For instance, in a defamation claim, mere falsity is insufficient to state a claim. The false fact must be "of and concerning" the plaintiff,
[6] must be defamatory[7] (capable of subjecting the person to hatred, distrust, ridicule or disgrace), and must be substantially related to the injury to reputation[8] (i.e., if the gist of the article is substantially true, then the falsity is not actionable).[9] The defamation plaintiff bears the burden of proving falsity, and the Supreme Court has recognized that placing the burden on the plaintiff sometimes will defeat the claim. See, e.g., Hepps, 475 U.S. at 778 ("We recognize that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so . . . '[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.'") (quoting Gertz, 418 U.S. at 341).

In Appellants' formulation, there seems to be no need for defamatory

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[6] See, e.g., O'Neal v. Tribune Co., 176 So. 2d 535 (Fla. 2d DCA 1965).
[7] See, e.g., Byrd v. Hustler, 433 So. 2d 595 (Fla. 4th DCA 1983), rev. denied, 443 So. 2d 979 (Fla. 1984); Wolfson v. Kirk, 273 So. 2d 774 (Fla. 4th DCA 1973), cert. denied 279 So. 2d 32 (Fla. 1973).
[8] See, e.g., Masson v. New Yorker Magazine, 501 U.S. 496, 517 (1991); Smith v. Cuban Am. Nat'l Found., 731 So. 2d 702 (Fla. 3d DCA 1999), rev. denied 753 So. 2d 563 (Fla. 2000).
[9] In a false light case, the falsity, while not necessarily defamatory, must place the plaintiff before the public in a highly objectionable false light. See, e.g., Heekin, 789 So. 2d at 358.

meaning or objectionable publication. Appellants do not suggest that the falsity must have some nexus to the purpose of the publication. Indeed, the relationship between the falsity and the commercial misappropriation is unstated. Mere falsity, in itself, seems enough to justify a Section 540.08 claim. Furthermore, if the burden of disproving falsity is on the defendant, such proof could never be made in any circumstances that involve speculation as to the events that occurred solely among deceased people.

Even in New York – the jurisdiction that Appellants' inappropriately contend served as a model for Florida's Section 540.08 – the answers to these questions are far from certain. For example, in Messenger, photographs of a 14-year-old model were used to illustrate a magazine article about a teenager having sexual intercourse with multiple partners. Neither the child nor her guardian agreed to the use of the photographs. In answering a certified question, the New York Court of Appeals held that the false implication arising from the photographs was not actionable under the New York statute because (1) there was a real relationship between the article and the photograph; and (2) the article was not an advertisement in disguise. Messenger, 727 N.E.2d at 555.

[10] However, the Messenger court recognized the existence of false facts may create

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[10] It should be stressed that the court's conclusion in Messenger wholly deprived this teenager of any remedy. While a Florida teenager could have brought a claim for false light invasion of privacy in Florida, New York does not recognize a common law false light claim. See, e.g., Costanza v. Seinfeld, 693 N.Y.S.2d 897, 899 (N.Y. Sup. Ct. 1999) (dismissing false light and defamation claims against creators of *Seinfeld* television program and holding that program's fictional presentation does not fall within New York's right of publicity statute) (citing Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902)).

a claim when the article is "so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exemption." Id.

The holding (that the depiction was not actionable because it bore a real relationship and was not for a direct advertising purpose) and its dicta (some works are so infected with fiction as to fall outside the exemption) create contradiction and confusion. It was unquestionably "fictional" to use the photograph a 14 year-old girl to illustrate a story, wholly unrelated to the girl herself, about a teenager having multiple sexual partners. It is difficult to decipher why that use is less infected with fiction than the use of created dialogue in a movie for the purposes of dramatization.

Apparently, in New York, the court is delegated the responsibility of acting as a literary critic, tasked with determining the relationship between the article and the fictionalization and judging whether the amount of fictionalization is necessary to fulfill the newsworthy purpose. Without any standards on what fictionalization constitutes infection and what use is appropriately related to the public interest, the New York court stands perilously close to violating – if not actually violating – the First Amendment principle that:

> [T]he fact society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.

FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978); Hustler, 485 U.S. at 55-56 (quoting same). By rejecting Appellants' variation of Section 540.08, this Court can avoid these constitutional infirmities.

3. *Does Appellants' Version Section 540.08 Authorize an Unconstitutional Prior Restraint?*

Section 540.08 explicitly allows for an injunction preventing the unauthorized use of a person's name or likeness. See Fla. Stat. § 540.08(2). This Court must square the available injunctive relief, which would halt the publication of a book, film, news article, or other work that contains core protected speech, against the First Amendment prohibition against prior restraints.

A prior restraint – which bans speech before it occurs – is the most offensive and least tolerable curtailment of free expression under the First Amendment. As such, "[a]ny system of prior restraints of expression comes to [the courts] bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); see also New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam). Few, if any, justifications permit a court to enter a prior restraint. In jurisdictions where prior restraints are not per se unconstitutional, they are valid only in the most extraordinary circumstances, such as the "the publication of the sailing dates of transports" of troops during wartime or "incitements to acts of violence and the overthrow by force of orderly government." Near v. Minnesota, 283 U.S. 697, 716 (1931).

If Appellants' interpretation of Section 540.08 is correct, a plaintiff could obtain an injunction against the publication of a book, movie, or news article that does not raise national security or war-making concerns. Such an injunction would have be tested by the same standards utilized in other contexts, i.e., whether there is "clear and present danger or a reasonable likelihood of a serious and imminent

threat to the administration of justice." Bernard v. Gulf Oil Co., 619 F.2d 459, 475 (5th Cir. 1980). Section 540.08, however, contains no standards or procedural protections for issuing an injunction banning the publication of First Amendment protected content.

4. Are There Any Other Statutory or Common Law Protections That Will Now Travel with a Section 540.08 Commercial Misappropriation Claim based on False Facts?

Because the essence of Appellants' commercial misappropriation action is the publication of false facts, the question arises whether such a claim requires pre-suit notice or whether the plaintiff's recovery will be limited to actual damages if the false statement is retracted. See Fla. Stat. §§ 770.01, 770.02 (2003). Also unanswered by the Appellants' formulation is whether any common law privileges will protect publication of false facts (even knowingly false facts) under Section 540.08. See, e.g., Ortega v. Post-Newsweek Stations, Fla., Inc., 510 So. 2d 972, 975-76 (Fla. 3d DCA 1987), rev. denied 518 So. 2d 1277 (Fla. 1987) (privilege in defamation actions to publish a fair and accurate report of official proceedings imposes no duty on the publisher to determine the accuracy of the statements made at the proceeding before publishing them).

Finally, will such a claim need to be asserted within the two-year statute of limitations that applies to defamation claims? See Fla. Stat. § 95.11(4)(g) (2003). To date, Florida courts consistently have held that a claim that has the attributes of a defamation claim should not escape these statutory protections merely because the claim comes to the court under another label. For example, in Orlando Sports Stadium, Inc. v. Sentinel Star, Inc., 316 So. 2d 607 (Fla. 4th DCA 1975), the

plaintiff asserted a two-count complaint: one for defamation and another for intentional interference. The thrust of both counts was that the defendant's newspaper articles injured the appellant. Because the plaintiff failed to fulfill the Section 770.01 pre-suit notice requirements, the court dismissed both counts.

In upholding the dismissal, the Fourth District Court observed that the defamation claim and the interference claim were simply "separate elements of damage flowing from the alleged wrongful publications. Florida courts have held that a single wrongful act gives rise to a single cause of action, and that the various injuries resulting from it are merely items of damage arising from the same wrong." Id. at 609 (citations omitted); Ovadia v. Bloom, 756 So. 2d 137 (Fla. 3d DCA 2000) (applying same reasoning to false light invasion of privacy and intentional interference claim); see also Heekin, 789 So. 2d at 358 ("[w]
hen a plaintiff has a cause of action for libel or slander and alleges a claim for false light invasion of privacy based on the publication of the same false facts, the false light invasion of privacy action is barred by the two-year statute of limitations"). Under Appellants' construction of Section 540.08, a commercial misappropriation claim based upon the publication of false statements of fact conceivably could be brought within four years after publication and up to forty years after the person's death.[11]

[11] Of course, false light and defamation claims cannot be brought on behalf of dead people.

B. Reaffirming Loft Avoids Creating A Conflict with the First Amendment and Avoids the Necessity for Judicially Redrafting Section 540.08.

Section 540.08 prohibits the use of a person's name, portrait, photograph or other likeness, without permission, "for the purposes of trade or for any commercial or advertising purpose." Fla. Stat. §540.08(1) (2000). In an unbroken line of cases since Loft was decided in 1981, this language has been interpreted to mean that the statute proscribes the unauthorized use of an individual's name "to directly promote the product or service of the publisher." Loft, 408 So. 2d at 622-623. See also Valentine v. C.B.S., Inc., 698 F.2d 430, 433 (11th Cir. 1983); Lane v. MRA Holdings, LLC, 242 F. Supp. 2d 1205, 1212 (M.D. Fla. 2002); Cox v. E. & J. Gallo Winery, Case No. 6:99-cv-735-Orl-22C (M.D. Fla. June 28, 2000) at 11, aff'd sub nom. 265 F.3d 1064 (11th Cir. 2001) (unpublished opinion); Epic Metals Corp. v. CONDEC, Inc., 867 F. Supp. 1009, 1016 (M.D. Fla. 1994); National Football League v. The Alley, Inc., 624 F. Supp. 6, 10 (S.D. Fla. 1983). The Loft court, and every Florida court considering this issue thereafter, reached this decision because any other interpretation would "result in a substantial confrontation between this statute and the First Amendment of the United States Constitution guaranteeing freedom of the press and of speech." Loft, 408 So. 2d at 623.

By contrast, under Appellants' redrafting of the statute, Section 540.08 analysis closely resembles analysis of a defamation claim impermissibly brought on behalf of a dead plaintiff and stripped of the constitutional safeguards that defamation law has developed to incorporate. Neither the fictionalization itself, nor

the culpability for it that is central to Appellants' theory of a Section 540.08 claim, would be analyzed by statutorily-articulated or constitutionally-mandated standards.

Appellants' formulation raises significant and difficult constitutional questions. The courts would have to act as legislators and literary critics to answer these questions. Accordingly, the judicial branch would no longer be neutral in the marketplace of ideas. But the statute does not require this result, and the First Amendment does not allow it. The Loft construction of Section 540.08 – that the statute prohibits only the unauthorized use of a person's name or likeness directly to promote the product or service of the publisher – rightly avoids unnecessary conflict between the statute and the First Amendment.

CONCLUSION

For the foregoing reasons, the Florida Media Organizations respectfully request that this Court adopt the position of Warner Bros. and hold that Section 540.08 does not apply to the motion picture *The Perfect Storm*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Counsel for Florida Media Organizations certifies that this Brief complies with the font and other requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

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