

**Appeal No. 19-14894-AA
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

VIRGINIA VALLEJO,
Plaintiff-Appellant,
v.
NARCOS PRODUCTIONS, LLC, et al,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
Case No. 1:18-23462-RS
(Hon. Rodney Smith)

**BRIEF OF *AMICI CURIAE* PROFS. MARK LEMLEY,
MARK MCKENNA, JOSEPH SCOTT MILLER, JENNIFER
ROTHMAN, REBECCA TUSHNET, AND EUGENE VOLOKH
IN SUPPORT OF DEFENDANTS-APPELLEES**

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* Counsel would like to thank Tanner Laiche, Rachel Levin, and Aaron Schroeder, UCLA School of Law students who worked on the brief.

**Rule 26.1 Disclosure Statement and
Certificate of Interested Persons**

Amici Curiae certify that, to the best of their knowledge, information, and belief, the only persons who have an interest in the outcome of this appeal, besides the ones identified in the appellees' brief, are the *amici* themselves (all individuals):

1. Lemley, Mark A.
2. McKenna, Mark.
3. Miller, Joseph Scott.
4. Rothman, Jennifer.
5. Tushnet, Rebecca.
6. Volokh, Eugene (as *amicus* and counsel for *amici*).

Defendants-appellees have consented to the filing of this *amicus* brief, but plaintiff-appellant has not.

DATED: May 20, 2020

Respectfully submitted,

s/ Eugene Volokh

Eugene Volokh

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Interest of the *Amici Curiae*¹

Amici are all law professors who have extensively taught and written about intellectual property law. They are:

1. Mark A. Lemley, Stanford Law School.
2. Mark McKenna, Notre Dame Law School.
3. Joseph Scott Miller, University of Georgia School of Law.
4. Jennifer E. Rothman, LMU Loyola Law School, Los Angeles.
5. Rebecca Tushnet, Harvard Law School.
6. Eugene Volokh, UCLA School of Law.

Statement of the Issues

Whether the District Court was correct in concluding that no reasonable trier of fact can find substantial similarity in copyrightable expression between Vallejo's memoir and Season 1 of *Narcos*?

¹ No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel (or counsel's employer, UCLA School of Law), make a monetary contribution to the preparation or submission of this brief.

Summary of Argument

“The most fundamental axiom of copyright law is that no author may copyright his ideas or the facts he narrates.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-45, (1991) (internal citation and quotation omitted). “One who discovers an otherwise unknown fact may well have performed a socially useful function, but the discovery as such does not render him an ‘author’ in either the constitutional or statutory sense for copyright.” *Thompson v. Looney’s Tavern Productions, Inc.*, 204 F. App’x 844, 849 (11th Cir. Nov. 7, 2006) (quoting 1 *Nimmer on Copyright* § 2.11[A] (2019)).

Virginia Vallejo alleges that the TV show *Narcos* infringed the copyright in her memoir *Loving Pablo, Hating Escobar*. But Vallejo’s memoir has been presented as a factual account of her relationship with Colombian narcotrafficker Pablo Escobar. Vallejo may not copyright the facts contained in her biographical memoir—and this principle is not altered when dealing with personal, rather than historical, facts.

And though Vallejo does have a copyright in the protectible expression of those facts, *Narcos* is not substantially similar to Vallejo’s memoir with respect to such expression. Vallejo alleges that two scenes in *Narcos*—the *Revolver Scene* and the *Palace in Flames*

scene—infringe her memoir, but expressive elements from Vallejo’s memoir are not present in either scene in *Narcos*. Rather, *Narcos* only used the underlying facts contained in the memoir and presented those facts in a new and original arrangement.

The District Court thus properly granted summary judgment in favor of *Narcos*.

Argument

I. A finding of substantial similarity requires similarities between the two works’ protected expression, not just in the uncopyrightable facts

A. Facts contained in an autobiographical work are uncopyrightable

It is “universally understood” that there can be no copyright in facts. *Feist Publications*, 499 U.S. at 344. “No author may copyright his ideas or the facts he narrates.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985). Thus, if a work contains factual information, copyright law protects only the author’s original expression: “Everything else in the work, the history it describes, the facts it mentions, and the ideas it embraces, are in the public domain free for others to draw upon.” *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102 (2d Cir. 2014). Even when a plaintiff’s work is based on personal accounts of what really happened, “Plaintiffs cannot claim to have the exclusive right to exploit these facts for dramatic purposes, *even if* Defendants only learned of the alleged events . . . by reading Plaintiffs’ works.” *Idema v. Dreamworks, Inc.*, 162 F.

Supp. 2d 1129, 1183 (C.D. Cal. 2001) (finding no infringement when defendant used only the facts from plaintiff’s autobiographical works for their film), *aff’d in relevant part, appeal dismissed in part*, 90 F. App’x 496 (9th Cir. 2003).

Vallejo makes three separate arguments for why the facts in her memoir nonetheless warrant copyright protection, but all three lack merit.

First, Vallejo claims that the district court erred because it “failed to recognize a legal distinction between historical and non-historical facts.” Appellant Br. 36. But facts are uncopyrightable even when they are not “newsworthy fact[s] or historical event[s],” Appellant Br. 37. Local telephone numbers, horse racing statistics, and components of the jellyfish physiology are all uncopyrightable, for example. *Feist*, 499 U.S. at 361; *Victor Lalli Enterprises, Inc. v. Big Red Apple, Inc.*, 936 F.2d 671, 673 (2d Cir. 1991); *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003). “No one may claim originality as to facts . . . [and] [t]he same is true of all facts—scientific, historical, biographical, and news of the day.” *Feist*, 499 U.S. at 347-48 (internal citation and quotation omitted). The personal facts contained in Vallejo’s autobiographical work, whether or not viewed as “history,” are still unprotected facts. *See Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d

Cir. 1966) (finding that the facts about Howard Hughes taken from a biographical magazine article were not copyrightable because biographies constitute “fundamentally personal histories”).

Second, Vallejo claims that her memoir is not entirely factual because it is a “reconstruction of memories from over 20 years ago,” written “through the lens of her unique perspective.” Appellant Br. 26-28, 38. But “recollections of real places where real events are alleged to have occurred, are still claims of historical fact, not creative elements.” *Corbello v. Devito*, 2015 WL 5768531, at *12 n.13 (D. Nev. Sept. 30, 2015). Even if Vallejo’s reconstruction consisted of a “subjective interpretation and expression” of past events, Appellant Br. 53, “an historical interpretation, even if it originated with the plaintiff, is not protected by copyright,” *Comins v. Discovery Commc’ns, Inc.*, 200 F. Supp. 2d 512, 519 (D. Md. 2002) (internal quotations omitted), and interpretations of one’s memories are a form of historical interpretation. *See also Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d Cir. 1980) (holding that plaintiff’s interpretation of the possible causes of the destruction of the Hindenburg was not protected by copyright); *Nash v. CBS, Inc.*, 899 F.2d 1537, 1541 (7th Cir. 1990) (holding that plaintiff’s historical interpretation of the

life of infamous gangster John Dillinger, and that he survived and retired to the west coast, was not copyrightable expression).

Third, Vallejo claims that her memoir should not be treated as being entirely factual, citing *Nimmer on Copyright* as saying that “there is some indication that courts will *not* imply a representation that a work is entirely factual . . . in the absence of an express representation that the entire work is factual.” Appellant Br. 28. But the memoir has indeed been represented as factual. Vallejo states on her website that the memoir is “a historical document about the corruption of political Colombian dynasties,” and the “only truly intimate biography of the head of the Medellín cartel.” *Amando a Pablo, Odiando a Escobar 2007 & 2017*, Virginia Vallejo (last visited Apr. 2, 2020), <https://virginiavallejo.com/en/libros/>. The front cover of the 2018 edition holds itself out as being a “shocking true story.” Virginia Vallejo, *Loving Pablo, Hating Escobar* (2018).

Given that the memoir has been held out as factual, Vallejo cannot for the purpose of litigation “subsequently claim[] that [her] . . . factual work was actually fictitious, and hence contains protectible expression.” 4 *Nimmer on Copyright* § 13.07 (2019). Rather, the “express representations that [her] work is factual” cause her to be “estopped from claiming

fictionalization and therefore a higher level of protection.” *Thompson v. Looney’s Tavern Prods., Inc.*, 204 F. App’x 844, 849 (11th Cir. 2006).

B. Vallejo must prove substantial similarity in the protected expression between her memoir and *Narcos* for copyright infringement, not “modified substantial similarity”

“Copyright protects original *expression* only; it does not extend to any underlying ideas,” *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enterprises*, 533 F.3d 1287, 1302 (11th Cir. 2008), or, as the preceding discussion noted, facts. To establish copyright infringement, therefore, Vallejo must prove that (1) *Narcos*, “as a factual matter, copied portions of the plaintiff’s [work],” and (2) “those elements of the [copyrighted work] that have been copied are protected expression.” *Id.* at 1300 (quoting *MiTek Holdings, Inc. v. Arce Eng’g Co., Inc.*, 89 F.3d 1548, 1554 (11th Cir. 1996)).

Because *Narcos* has conceded the first prong—factual copying—for purposes of the summary judgment motion, the analysis turns on the second prong. The second prong focuses on the question of substantial similarity: whether “an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.” *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1224 (11th Cir. 2008). The average observer “must take into account that the copyright laws preclude appropriation of

only those elements of the work that are protected by the copyright,” and appropriation of unprotected elements is not infringement. *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982) (emphasis added). “Crucially, because only substantial similarity in protectible expression may constitute actionable copying that results in infringement liability, ‘it is essential to distinguish between the protected and unprotected material in a plaintiff’s work.’” *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc).

Vallejo urges this court to use a “modified substantial similarity standard” because “there will be differences in the works due to constraints inherent in utilizing differing media.” Appellant Br. 41. But the cases Vallejo cites do not actually support anything other than the existing standard, which focuses on whether the defendant took the expression and not just the idea or the facts. *See Kustoff v. Chaplin*, 120 F.2d 551, 559 (9th Cir. 1941) (finding no infringement because there was “not a substantial copying . . . [of] any copyrighted features of the plaintiff’s said book”); *Stonesifer v. Twentieth Century-Fox Film Corp.*, 48 F. Supp. 196, 199 (S.D. Cal. 1942) (finding infringement only because of similarities of protected expression—“the story or the theme, central idea or plot, treatment and development”), *aff’d*, 140 F.2d 579 (9th Cir. 1944); *Atari, Inc.*, 672 F.2d at 614 (asking

“whether the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectible expression”).

As this Court’s cases makes clear, even when an “ordinary observer is led to believe that the film is a picturization of the story,” Appellant Br. 41-42, the ordinary observer must focus only “on similarity of expression, *i.e.*, material susceptible of copyright protection.” *Oravec*, 527 F.3d at 1224. And for factual and historical works, like Vallejo’s memoir, courts must be “more discerning” than the average lay observer by “extract[ing] the unprotectible elements . . . and ask whether the protectible elements, standing alone, are substantially similar.” *Lil’ Joe Wein Music, Inc. v. Jackson*, 245 F. App’x 873, 877 (11th Cir. 2007) (citing *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995)). Without such extra discernment, many works that are based on the same factual account will seem similar at first glance; but stopping at that first glance would allow the first teller of a factual account to monopolize it—and will deter others from using it—contrary to the copyright law principle that only expression is protected by copyright, and facts are not.

II. The only similarities between *Narcos* and Vallejo’s memoir are uncopyrightable facts

Narcos copied only facts from Vallejo’s Memoir, and not any “aspects of the work—termed ‘expression’—that display the stamp of the author’s originality.” *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547 (1985). Vallejo specifically claimed that *Narcos* infringed the *Caress of a Revolver* chapter and *That Palace in Flames* chapter. Yet, reviewing the memoir and *Narcos* together show that the alleged similarities are uncopyrightable facts.

A. The alleged similarities in the *Revolver Scene* are uncopyrightable facts

In her brief, Vallejo lists these allegedly appropriated similarities between the *Revolver Scene* in *Narcos* and her memoir:

- (1) “[P]ortrayal of a Colombian Television Journalist with ‘V.V.’ initials,”
- (2) “Escobar and V.V., are portrayed alone in an elegant bedroom,”
- (3) “V.V. is bound voluntarily to bedroom furniture,”
- (4) “Escobar approaching V.V. with a handgun and grabbing her hair,”
- (5) “Escobar . . . touching V.V.’s bare skin with the handgun in an act of sexual foreplay . . . trac[ing] the revolver in “the near exact [same] trajectory,” and
- (6) “Escobar . . . engaging in aggressive banter with V.V. in a threatening tone”

- (7) “Escobar . . . exert[ing] his dominance over her,”
- (8) “V.V. [being] not afraid of Escobar”
- (9) “[V.V.] play[ing] along, responding in a submissive manner,” and
- (10) “V.V. . . . throwing her head back and moaning in pleasure.”

Appellant Br. 47-48.

As to similarity 1, even assuming the name V.V. in *Narcos* refers to Virginia Vallejo, “names . . . are uncopyrightable facts.” *Feist Publications*, 499 U.S. at 361.

Similarities 2-10 are facts reported by Vallejo, from “an experience in which she was bound and blindfolded” by Pablo Escobar. Appellant Br. 39. Facts from a personal memory are still facts, as the court in *Harper & Row* noted. 471 U.S. at 557 (respondent “possessed an unfettered right to use any factual information revealed in [President Ford’s memoirs] for the purpose of enlightening its audience”); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1179 (C.D. Cal. 2001) (emphasis in original) (“if events in ‘The Peacemaker’ bear some passing resemblance to events that happened in Plaintiff Idema’s *real life*, there is no infringement of copyright”). Personal factual details of the event, like Vallejo being tied to a chair by a dominating Escobar, “do[] not originate with the author of a book.” *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. July 23, 1981).

B. The similarities in the *Revolver Scene* are in any event *scenes a faire*

Even if these details are not deemed to be facts (and, for the reasons given above, they should be), they are barred from protection as *scenes a faire*—“[i]ncidents, characters, or settings that are indispensable or standard in the treatment of a given topic” and are thus not protected by copyright, *Herzog v. Castle Rock Entm’t*, 193 F.3d 1241, 1248 (11th Cir. 1999).

Here, there are few ways to depict a consensual sex scene involving a gun. The details that two people are portrayed as being alone in a room, that one person approaches the other with a gun, and that a person moans in pleasure would be “standard, stock, or common” details of such a scene. *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003). And the detail that Escobar’s demeanor was dominant and threatening is “indispensable,” *Herzog*, 193 F.3d at 1248, in the depiction of a man holding a gun as foreplay. It would have been hard to realistically portray his demeanor as submissive or even neutral—holding a gun to another inherently comes across as aggressive. Likewise, the use of a weapon during a sexual encounter, even if consensual, logically reflects an unbalanced power dynamic depicted through the dominating and threatening demeanor of the person holding the weapon. V.V. appearing to be unafraid, submissive, and enjoying the encounter also “necessarily

follow[s],” *Herzog*, 193 F.3d at 1248, in order for the scene to depict the fact that this encounter was consensual.

Vallejo also alleges that *Narcos*, in the *Revolver Scene*, appropriated the theme of “[u]nderstanding of the manipulation and power dynamics that defined Vallejo’s romantic relationship with Escobar.” Appellant Br. 50. But the notion that there can be “manipulation” and “power dynamics” in intimate relationships, especially relationships involving violent men, was doubtless old when Homer was young; no author can monopolize it through copyright. The expression of romantic partners exhibiting manipulative or dominant behavior is a standard *scenes a faire* trope, from ancient classics to mob movies and film noir.

And *Narcos*’s expression of these tropes of manipulation and power dynamics materially differs from that in Vallejo’s memoir. For example, in Vallejo’s memoir, the gun traces circles around Vallejo’s neck, and moves down her abdomen until Vallejo affirmatively and aggressively objects to it moving down any further, at which point the gun is put away. Opinion, Doc. 120, at 4. Vallejo alleges that this scene shows her influence over Escobar—that it is actually she “who holds the power and manipulates him.” Appellant Br. 50. But in *Narcos*, the gun moves from Vallejo’s chin, around her breasts, and then towards her

genitals. Mot. for Summary Judgment, Doc. 77, at 11. V.V. does not object or try to assert her dominance over Escobar. Instead, the power seems to be held entirely by Escobar, with V.V. completely at his mercy. Opinion, Doc. 120, at 4. The idea of manipulation and power dynamics are thus “expressed very differently in the two works and could not prove infringement even if it were protectible.” *Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 312 n.20 (S.D.N.Y. 2012). Any other details present in Vallejo’s work that go beyond *scenes a faire* are not present in *Narcos*:

| Vallejo’s Memoir | <i>Narcos Revolver Scene</i> |
|---|---|
| <ul style="list-style-type: none"> • Vallejo is bound to the chair • Vallejo is not bound at first, and resists being handcuffed • Escobar retrieves a revolver from a safe • Escobar and V.V. do not discuss her assisting him | <ul style="list-style-type: none"> • Vallejo is bound to the bed • The scene begins with V.V. already being bound • Escobar enters the scene already with a pistol in hand • Escobar says to V.V. that she is going to help him get into Congress |

- Escobar ceases to caress Vallejo with the revolver
- The scene ends with Vallejo taking the blindfold off, and seeing a dozen fake passports on the floor in front of her

- Escobar does not cease caressing V.V. with the pistol
- The scene ends with V.V. climaxing, and V.V. and Escobar laying down on the bed

Doc. 120, at 3-5.

C. The alleged similarities in the *Palace in Flames* scene are uncopyrightable facts

In her brief, Vallejo also lists the allegedly appropriated similarities between the *Palace in Flames* scene and her memoir:

- (1) The name *Palace in Flames* as both the chapter name in Vallejo’s memoir and the name of the *Narcos* episode,
- (2) “Escobar and M-19’s Ivan are portrayed as meeting in a hideout,”
- (3) “Ivan is depicted as having facial hair, being of medium build, having blunt features, and wearing civilian clothing,”
- (4) “Ivan discusses the risk of casualties and the possibility of danger,” and
- (5) “Escobar replies by offering two million dollars.”

Appellant Br. 53.

First, even if the *Narcos* copied the name of a chapter title from Vallejo’s memoir, *That Palace in Flames*, “[w]ords and short phrases such as names, titles, and slogans” are not copyrightable. 37 C.F.R. § 202.1. Here, *Narcos* only copied three words—“Palace in Flames.” This is a classic example of an unprotectible short phrase.

Second, for the same reasons as in the *Revolver Scene*, the event and depictions in the *Palace in Flames* scene are uncopyrightable facts. Vallejo’s perceptions of the event—the location, the characters’ attire, and the characters’ depictions—are recollections of actual events, and thus are not protected. *See e.g., Walker v. Time Life Films, Inc.*, 784 F.2d 44, 46, 49 (2d Cir. 1986) (“depict[ions of] the violence and urban decay of the 41st Precinct of the New York City Police Department” in plaintiff’s book, based on his own recollected experiences, are not protected).

For similar reasons, any statements that Ivan and Escobar really made are also unprotected. An “author of a factual work may not . . . claim copyright in statements made by others and reported in the work since the author may not claim originality as to those statements.” *Suid v. Newsweek Magazine*, 503 F. Supp. 146, 148 (D.D.C. 1980); *see also Harper & Row*, 471 U.S. at 544 (finding that “quoted remarks of third parties” are uncopyrightable material).

Nor does the *Palace in Flames* scene appropriate any of the original themes or characterizations present in the memoir. For the *Palace in Flames* scene, Vallejo also alleges that the same ideas of “manipulation and power dynamics” and “revolutionary overtones” exist in both her memoir and in the *Narcos* scene. Appellant Br. 54-55. But these are just unprotected ideas, which are expressed differently in the two works.

In Vallejo’s memoir, it is Vallejo who bonds with Ivan using revolutionary overtones, and not Escobar. Doc. 120, at 6. The power dynamic is between Escobar, Ivan, and Vallejo, who has earned Ivan’s respect and shares sympathy for the “fight for the rights of the weakest.” Doc. 77, at 14.

But in *Narcos*, there is no shared revolutionary goal. It is only Escobar who pleads with Ivan using revolutionary overtones—“fighting a revolution comes with sacrifice” and “it is our duty to fight to the very end.” Doc. 120, at 7. *Narcos* emphasizes the division in revolutionary goals when a female nurse enters the scene and condemns the deal made between Ivan and Escobar by stating, “I fight for the people, not for drug traffickers.” *Id.* at 8. The nurse then tells her American co-worker, “Pablo Escobar is planning something with a Communist group called the M-19. I don’t know what it is, but I know it’s going to be bad.” *Id.* These differences among the characters in *Narcos* highlight how the violent

means shared by Escobar and Ivan to further their goals differ from the revolutionary means sought by the nurse, who is representing the Colombian people.

III. Any protected arrangement and coordination of facts in Vallejo's memoir is not present in *Narcos*

Since “[n]o one may claim originality as to facts,” an author of a work that heavily relies on facts “can claim originality, if at all, only in the way the facts are presented.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347, 358 (1991). In a biographical work like Vallejo's, this means that she can claim copyright only through her writing style, presentation and “the creative arrangement of unprotectible historical facts . . . achieved through narrative devices (theme, characterization, and pace).” *Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 297 (S.D.N.Y. 2012).

But *Narcos* did not adopt Vallejo's original language or presentation of facts. Neither scene in *Narcos* appropriated Vallejo's “excerpted subjective descriptions and portraits of public figures,” *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563 (1985), and there was no literal copying from her work. And, while it may be true that Vallejo “vividly describes the setting, the sounds she hears, her thoughts and feelings at

the time,” Appellant Br. 51, as the District Court noted, Vallejo does not point to any “specific original, non-factual portions of her memoir that have been copied.” Doc. 120, at 13.

Vallejo also cannot claim protection of the retelling of historical events in chronological order in both the *Revolver Scene* and *Palace in Flames*. “[N]ot only are all the facts recorded in a history in the public domain, but, since the narration of history must proceed chronologically . . . the order in which the facts are reported must be the same in the case of a second supposed author.” *Myers v. Mail & Express Co.*, 36 C.O. Bull. 478, 479 (S.D.N.Y. 1919) (Learned Hand, J.) (quoted in *Norman v. Columbia Broad. Sys., Inc.*, 333 F. Supp. 788, 796-97 (S.D.N.Y. 1971)).

Conclusion

The only similarities between Vallejo’s memoir and *Narcos* are uncopyrightable facts that Vallejo chose to make public about her interactions with Escobar. Despite Vallejo’s attempt in litigation to recharacterize her biographical memoir as “expression,” the facts contained in the memoir are part of the public domain available to every person. The District Court thus did not err in granting summary judgment for *Narcos*.

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Respectfully submitted,

s/ Eugene Volokh

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because it contains 3,937 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus in 14-point Times New Roman.

s/ Eugene Volokh

Eugene Volokh

May 20, 2020

Certificate of Service

I certify that, on May 20, 2020, the Brief *Amici Curiae* of Profs. Mark Lemley, Mark McKenna, Joseph Scott Miller, Jennifer Rothman, Rebecca Tushnet, and Eugene Volokh was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

s/ Eugene Volokh

Eugene Volokh

May 20, 2020