

No. 15-1388

In the Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION,

Petitioner,

v.

EDWARD C. O'BANNON, *et al.*,

Respondents

*On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals*

**BRIEF OF 28 CONSTITUTIONAL LAW AND
INTELLECTUAL PROPERTY LAW
PROFESSORS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that NCAA rules defining “the eligibility of participants” in NCAA-sponsored athletic contests, *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984), violated the Sherman Act.

2. The question discussed in this brief: Whether the First Amendment protects a speaker against a state-law right-of-publicity claim based on the realistic portrayal of a person in an expressive work (here, a student-athlete in a college sports videogame).

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INTEREST OF *AMICI CURIAE*¹

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¹ No counsel for a party authored this brief in whole or part. No person or entity, other than counsel and the law schools that employ them, financially contributed to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. All parties have consented to this filing.

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Amici are concerned about the danger posed by unduly limited readings of the First Amendment defense to state right of publicity laws, such as the Ninth Circuit approach used in this case.

SUMMARY OF ARGUMENT

The right of publicity affects a vast range of fully constitutionally protected speech. Right of publicity lawsuits are routinely brought over books,² films,³ songs,⁴ paintings and prints (in traditional media or

² See, e.g., *Bates v. Cast*, 316 P.3d 246 (Okla. Ct. Civ. App. 2013); *infra* p. 3 (discussing claims based on comic books).

³ See, e.g., *Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc.*, 953 F. Supp. 2d 701, 713 (N.D. Miss. 2013) (Midnight in Paris); *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016) (Hurt Locker); *Tyne v. Time Warner Entm't Co., L.P.*, 901 So. 2d 802 (Fla. 2005) (The Perfect Storm).

⁴ See, e.g., *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003); *Lohan v. Perez*, 924 F. Supp. 2d 447 (E.D.N.Y. 2013); *Valentine v. CBS, Inc.*, 698 F.2d 430 (11th Cir. 1983).

on T-shirts or cards),⁵ and video games⁶ that mention someone’s name, likeness, or other “attributes” “of identity.”⁷ The First Amendment must often protect such references to people, whether in news, entertainment, or art. Courts throughout the country have therefore recognized First Amendment defenses in many right of publicity cases involving expressive works.

Unfortunately, lower courts now use five different First Amendment tests in right of publicity cases (setting aside cases involving commercial advertising, which is less constitutionally protected than other speech⁸). These different tests often lead to inconsistent results, which leave creators and publishers uncertain about what they may say.

For instance, say you are writing a comic book, and want to name a fictional character after a real person.⁹ *Winter v. D.C. Comics*, 69 P.3d 473 (Cal.

⁵ *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2009) (greeting card mentioning Paris Hilton); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003) (print depicting Tiger Woods); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001) (prints and T-shirts depicting Three Stooges).

⁶ *See, e.g., In re NCAA* (also known as *Keller v. Electronic Arts, Inc.*), 724 F.3d 1268 (9th Cir. 2013); *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

⁷ *See, e.g., Ala. Code* §§ 6-5-771, -772 (West 2015).

⁸ *Amici* express no opinion on how courts should deal with such uses of identity in commercial advertising.

⁹ This is a common literary device. *See, e.g., Avenue Q* (Broadway premiere 2003) (character named Gary Coleman, referring to actor); Aldous Huxley, *Brave New World* (1932) (char-

2003), states you are free to do so. But *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003), allowed a right of publicity claim against an author who did so. *Doe* eventually led to a \$15 million verdict against the author. *Doe v. McFarlane*, 207 S.W.3d 52, 56 (Mo. Ct. App. 2006).

Or say you want to create a computer sports game that includes players based on real athletes. The Eighth Circuit said this is constitutionally protected, when athletes' names and statistics were used in an online fantasy sports game. *C.B.C. Dist. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007). The Third and Ninth Circuits said no, when athletes' general body types, team affiliations, and player numbers are used in sports video games.¹⁰ See cases cited *supra* note 6. But the First Amendment draws no distinctions between fantasy sports games and video sports games.

Or say you want to make cards or prints containing a famous person's picture, coupled with additional material. The Sixth Circuit said this was protected by the First Amendment, when an artist sold prints depicting Tiger Woods, with some other golfers in the

acters named Bernard Marx, Lenina Crowne, and Benito Hoover); *Major League* (Paramount 1989) (baseball-playing character named Willie Mays Hayes); *Star Wars: The Phantom Menace* (Twentieth Century Fox 1999) (character named Nute Gunray, referring to Newt Gingrich and Ronald Reagan); *Willow* (MGM/UA 1988) (monster named Ebersisk, referring to critics Roger Ebert and Gene Siskel).

¹⁰ *Amici* take no position on whether the athletes' identities were in fact used, given that neither their images nor names were used. The Third and Ninth Circuits assumed the athletes' identities were used; this brief accepts that assumption.

background. *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003). The Ninth Circuit took a different view when a card company sold greeting cards depicting Paris Hilton with a joke playing off her television persona. *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2009). Yet there is no First Amendment distinction between cards and prints, or between juxtaposing sports celebrities with each other and juxtaposing a TV celebrity with jokes about her.

Such uncertainty leads speakers to “steer far wide[] of the unlawful zone” and change their speech to avoid risking ruinous litigation—even when most courts would see their speech as constitutionally protected. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). And this case offers an opportunity for this Court to resolve this uncertainty.

First, the NCAA argues that antitrust standing in this case depends on whether college players’ right of publicity entitles them to control the use of their identities in video games. Pet. 28-29. If this Court agrees with that argument, then a decision about the First Amendment defense to the right of publicity could dispose of this case.

Second, this case is a better vehicle than *Electronic Arts, Inc. v. Davis*, No. 15-424 (cert. denied Mar. 21, 2016), which presented the same substantive question, but arose on interlocutory review and turned partly on whether state anti-SLAPP statutes are applicable in federal court—both reasons given by the *Davis* respondents for denying certiorari. See Brief in Opposition, *Electronic Arts, Inc. v. Davis*, No. 15-424, at 9-15 (“The Interlocutory Posture of the Case Weighs Against Granting Certiorari”); *id.* at 12-15 (“As an additional . . . ground for denying review, . . .

[it is] unclear at best whether the . . . Ninth Circuit even had jurisdiction to decide EA’s anti-SLAPP motion.”).¹¹ This petition seeks to review a final judgment, with no anti-SLAPP motion involved.

Indeed, this is the rare right of publicity case that comes all the way up to this Court, and does so after a final judgment. Usually, the incentives to settle—especially if a motion to dismiss is denied—are too great for the case to go forward. (For instance, the earlier Third and Ninth Circuit video game cases, *Keller* and *Hart*, settled while petitions for certiorari were pending.¹²) This Court should therefore agree to hear this case and resolve the split among lower courts.

ARGUMENT

I. Courts Take Five Different Approaches to Applying the First Amendment to Right of Publicity Claims

This Court has considered the right of publicity only once, in *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (1977). That decision concluded that state law could make actionable the broadcast of a performer’s “entire act”—there, a “human cannonball” act—on a television news broadcast. *Id.* at 563-64.

The *Zacchini* opinion noted that the case was “more limited than the broad category of lawsuits that may arise under the heading of ‘appropriation.’” *Id.* at 573 n.10. (“Appropriation” and “misappropriation” are

¹¹ Available at http://www.scotusblog.com/wp-content/uploads/2015/12/respondents_brief_davis_v_ea.pdf.

¹² Docket, *Electronic Arts, Inc. v. Hart*, No. 13-376; Docket, *Electronic Arts, Inc. v. Keller*, No. 13-377.

common terms for infringement of right of publicity. *See, e.g., id.* at 574.) “Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform.” *Id.* at 573 n.10. This Court thus did not decide when a person may stop speakers from using the person’s name, likeness, or other attributes of identity in the speakers’ fully constitutionally protected speech.

Despite *Zacchini*’s express limitations, some courts have cited *Zacchini* as mandating rejection of First Amendment defenses for expressive works that depict real people. *See, e.g., Hart*, 717 F.3d at 167; *Toffoloni v. LFP Publ’g Grp.*, 572 F.3d 1201, 1207 (11th Cir. 2009); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985). Even courts that have not so misinterpreted *Zacchini* have been left with little guidance in charting the First Amendment boundaries of the right of publicity. As a result, different courts have adopted (at least) five different approaches.

A. The Transformative Use Test

The Third and Ninth Circuits have held that the First Amendment protects only those uses of a person’s identity that “transform” that aspect of that identity, for instance by parodying it. *See Keller*, 724 F.3d at 1273-79; *Hart*, 717 F.3d at 165. When speech “distort[s]” or “transmogrifie[s]” a person’s likeness or life story “for purposes of lampoon, parody, or caricature,” that is protected by the First Amendment. *Hilton*, 599 F.3d at 910-11. Likewise, speech is constitu-

tionally protected when a character built on a real person is “more of a ‘fanciful, creative character’ than an ‘imitative character.’” *Id.* at 911 (citations omitted).

But when a celebrity likeness is used in “the same” “basic setting” in which the celebrity usually appears—even when the speech jokes about that setting—the “transformative use” test concludes that the use is not protected by the First Amendment. *Id.* Likewise, when a game “realistically portray[s]” an athlete, that too is seen as constitutionally unprotected under the transformative use test. *Keller*, 724 F.3d at 1276; *see also Hart*, 717 F.3d at 168.

B. The Transformative Work Test

Other courts also talk about “transformation,” but focus on whether the name or likeness is combined with other materials—thus transforming the name or likeness into a new work—rather than on whether the name or likeness is itself altered (the focus of the “transformative use” test).

As the California Supreme Court stated, if “the work in question adds significant creative elements so as to be transformed into *something more than a mere celebrity likeness or imitation*,” *Comedy III*, 21 P.3d at 799 (emphasis added), then the “transformative work” approach treats the work as protected by the First Amendment. A T-shirt containing just a celebrity’s picture would be constitutionally unprotected against a right of publicity claim, but works that add something beyond the identity would be protected:

Another way of stating the inquiry is whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized, or whether the depiction or imitation of

the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness.

Id. at 809. And “the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms,” including “factual reporting” and “fictionalized portrayal.” *Id.* at 809.

Though the Third and Ninth Circuits have read *Comedy III* as supporting the “transformative use” view (discussed *supra* Part I.A), the language of *Comedy III* supports the “transformative work” approach. That approach asks whether the speaker has added material beyond just the “likeness of the celebrity,” 21 P.3d at 809—not whether the speaker has necessarily “distort[ed]” the celebrity’s identity “for purposes of lampoon, parody, or caricature,” *Hilton*, 599 F.3d at 910.

The California Supreme Court has reaffirmed this broader “transformative work” approach, treating the *Comedy III* test as cutting in favor of First Amendment protection whenever speech “contain[s] significant expressive content other than plaintiffs’ mere likenesses.” *Winter*, 69 P.3d at 479. “What matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary or any other specific form of expression.” *Id.*

The Sixth Circuit’s decision in *ETW*, 332 F.3d at 937-38, similarly uses this “transformative work” approach. (It also concludes that the same result would flow from the balancing approach of *Cardtoons*, *L.C.*

v. *Major League Baseball Players Assoc.*, 95 F.3d 959 (10th Cir. 1996), discussed *infra* p. 17.) In *ETW*, Jireh Publishing sold prints that depicted Tiger Woods' historic Masters Tournament victory. The prints showed Woods in the foreground, with famous past golfers in the background. Woods' company (ETW Corp.) claimed this infringed Woods' right of publicity, but the Sixth Circuit disagreed.

“[A]pplying the transformative effects test adopted . . . in *Comedy III*,” the Sixth Circuit concluded that, “[u]nlike the unadorned, nearly photographic reproduction of the faces of The Three Stooges in *Comedy III*,” the prints did “not capitalize solely on a literal depiction of Woods.” *ETW*, 332 F.3d at 938. Instead, the Sixth Circuit emphasized that the prints “consist[ed] of a collage of images in addition to Woods’ image which are combined to describe, in artistic form, a historic event in sports history and to convey a message about the significance of Woods’s achievement.” *Id.* This additional material, the Sixth Circuit concluded, meant that the work had “substantial transformative elements,” and thus that “Woods’s right of publicity must yield to the First Amendment.” *Id.*

Under this approach, biographies and other factual accounts—which seek to accurately portray a person—do not lose First Amendment protection merely because they avoid distorting a person’s name, likeness, or biographical details. Movies, books, and songs that include real historical characters in fictional settings, such as *Forrest Gump*, *Midnight in Paris*, or *Mrs. Robinson* (which includes the line “Where have you gone, Joe DiMaggio?”), are constitutionally protected. And jokes based on real people are constitu-

tionally protected, whether appearing in a card containing a Paris Hilton joke or a comedian's routine that mentions Paris Hilton.

Contrary to the decision below, and to *Keller*, on which the decision below relied, the transformative work test would protect video games that refer to real athletes. Such games “add[] significant creative elements” and consist of “something more than a mere celebrity likeness or imitation,” *Comedy III*, 21 P.3d at 799:

The athletic likenesses are but one of the raw materials from which the broader game is constructed. . . . The marketability and economic value of the game comes from the creative elements within, not from the pure commercial exploitation of a celebrity image. The game is not a conventional portrait of a celebrity, but a work consisting of many creative and transformative elements.

Id. at 1286 (Thomas, J., dissenting). That was the approach taken by the Sixth Circuit in *ETW*, and the one endorsed by the California Supreme Court in *Comedy III* and *Winter*. It is inconsistent with the Third and Ninth Circuit's approach. *See, e.g., Hart*, 717 F.3d at 169 (rejecting the view that “*other* creative elements of *NCAA Football*, which do not affect Appellant's digital avatar, are so numerous that the videogames should be considered transformative”).

C. The Relatedness Test

The Second, Fifth, and Sixth Circuits have adopted a still more speech-protective approach, the “relatedness test.” *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). Under that test, using a person's name

or other indicia of identity in an expressive work is protected by the First Amendment unless the underlying work is (1) “wholly unrelated’ to the individual” or (2) a “disguised advertisement for the sale of goods or services or a collateral commercial product.” *Id.* at 1004-05. In *Rogers*, Ginger Rogers sued over a Federico Fellini movie called *Ginger and Fred*, a fictional work about two entertainers who imitate Rogers and Fred Astaire. Though the movie used Rogers’ name without distortion or parody, the Second Circuit held that neither the movie nor its title infringed the right of publicity.

“[C]ourts delineating the right of publicity,” the Second Circuit held, “have recognized the need to limit the right to accommodate First Amendment concerns.” *Id.* at 1004. The Second Circuit therefore predicted that Oregon courts would read the right of publicity narrowly in light of the First Amendment. (Oregon law governed because Rogers was living in Oregon. *Id.* at 1004-05.) Other courts have expressly adopted the *Rogers* test as a matter of First Amendment law. *See, e.g., Parks v. LaFace Records, Inc.*, 329 F.3d 437, 460-61 (6th Cir. 2003);¹³ *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994). The Restatement of Unfair Competition has also endorsed this test. *See* Restatement (Third) Unfair Comp. § 47 cmt. c (1995) (concluding that “creative works” should be exempted from liability unless they are “not related to the identified person”).

¹³ A few months after *Parks*, the Sixth Circuit *ETW* decision applied both a balancing test and the transformative work test. 332 F.3d at 937-38.

Under the relatedness test, using players' identities in video games would have been fully protected by the First Amendment. Rogers' identity played a much larger role in *Ginger and Fred* than any particular player's identity usually plays in video games that depict team sports; even so, the Second Circuit held that using Rogers' identity was allowed. Indeed, the Third Circuit's video game opinion expressly refused to follow *Rogers*. *Hart*, 717 F.3d at 158.

The *Keller* majority, on which the decision below relied, Pet. App. 36a n.13, distinguished *Rogers* as merely predicting state law "in the absence of clear state-law precedent." *Keller*, 724 F.3d at 1281. But the *Rogers* discussion of the right of publicity expressly stressed that courts must "recogniz[e] the need to limit the right" to accommodate "First Amendment concerns" and a "concern for free expression." *Rogers*, 875 F.2d at 1004. And, as noted above, the Fifth and Sixth Circuits applied the *Rogers* test as a matter of First Amendment law.

D. The Predominant Purpose Test

The Supreme Court of Missouri has taken a different approach, focusing on whether a work "predominantly exploits the commercial value of an individual's identity" as opposed to having the "predominant purpose" of "expressive comment . . . about a celebrity." *Doe v. TCI*, 110 S.W.3d at 374 (citations omitted).

In *Doe*, noted comic book author Todd McFarlane named a character, Tony Twistelli, after a professional hockey player, Anthony Twist. (The character looked nothing like Twist.) The Missouri Supreme Court concluded that McFarlane's work could be

found to infringe Twist’s right of publicity, as “predominantly a ploy to sell comic books and related products rather than an artistic or literary expression.” *Id.* at 374. A jury later awarded Twist \$15 million, which forced McFarlane’s company into bankruptcy. *Doe v. McFarlane*, 207 S.W.3d at 56; AP, Jury Award Pushes Comic Book Company into Bankruptcy Court, USA Today, Dec. 18, 2004.

The predominant purpose test is inconsistent with the other tests. First, *Doe v. TCI* directly conflicts with the California Supreme Court’s holding (under the transformative work test) in *Winter*, 69 P.3d 473. In *Winter*, a comic book author named two characters (Johnny and Edgar Autumn) after two famous musician brothers (Johnny and Edgar Winter); the characters, like the musicians, had “long white hair and albino features similar to plaintiffs’.” *Id.* at 476. Nonetheless, the California Supreme Court held that the comic book was protected by the First Amendment against the right of publicity claim. The Missouri Supreme Court in *Doe* expressly declined to apply *Winter*, which it acknowledged involved “a remarkably similar fact situation.” 110 S.W.3d at 374.

Second, the predominant purpose test requires juries to consider a factor—the defendant’s purpose—on which none of the other tests focus. And this factor will usually be ambiguous. Most successful creators intend *both* to obtain a commercial advantage *and* to express themselves. Indeed, copyright law relies on authors’ having commercial motivations as well as expressive ones.

It thus may be almost impossible for an author—who makes a living by producing creative works—to

be confident that a jury will find that the purpose behind a particular use was “predominantly” expressive, rather than commercial. Nearly all the cases in which the First Amendment argument was accepted (e.g., *ETW*, 332 F.3d at 938, and *Rogers*, 875 F.2d at 996) could have come out the other way under the predominant purpose test. Indeed, even the Third Circuit in *Hart*, which rejected a First Amendment defense in a video game case, expressly rejected the *Doe* approach as “subjective at best, arbitrary at worst,” and “antithetical to [the Third Circuit’s] First Amendment precedent.” *Hart*, 717 F.3d at 154.

E. The Balancing Test

Three Circuits have adopted an ad hoc balancing approach to evaluating First Amendment defenses in right of publicity cases.

1. Eighth Circuit

In *C.B.C.*—which involved online fantasy baseball games that used players’ names and statistics—the Eighth Circuit viewed *Zacchini* as “direct[ing] that state law rights of publicity must be balanced against First Amendment considerations.” 505 F.3d at 823. Using player information, the court held, was constitutionally valuable because “the information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone.” *Id.* And the court concluded that using player identities this way was not unduly harmful, because—unlike in *Zacchini*—it would not materially undermine baseball players’ “incentives” to engage in “productive activities.” *Id.* at 824.

Even in the absence of revenue from fantasy baseball games, the Eighth Circuit reasoned, “major league baseball players are rewarded . . . for their participation in [real baseball] games and . . . endorsements and sponsorship arrangements.” *Id.* The court therefore held that using player identities in fantasy sports games was protected by the First Amendment. *Id.* at 827.

Though *C.B.C.* involved a First Amendment defense to a right of publicity case arising under Missouri law, the Missouri Supreme Court’s predominant purpose test would likely have led to the opposite result. Using player identities in the fantasy baseball game would likely have been seen as having a “commercial” rather than an “expressive” purpose. *See supra* Part I.D.

Likewise, the sports video game cases—this case, *Keller*, and *Hart*, see *supra* Part I.A—would also have come out differently under the *C.B.C.* test. If using athletes’ names and statistics in a fantasy baseball game is protected under the First Amendment against the right of publicity, then using athletes’ numbers, team names, and general appearances in video games should be protected as well.

The facts about the players used in the sports video game cases are as “readily available” and “in the public domain” as were the names and statistics in *C.B.C.* Using athletes’ identities in video games is no more likely to weaken athletes’ incentives to perform than would using those identities in the online fantasy games.

The Ninth Circuit tried to distinguish *C.B.C.* in *Keller*, arguing that the games in *C.B.C.* “merely ‘incorporate[d] . . . names along with performance and

biographical data,” while the game in *Keller* “uses virtual likenesses” of players. *Keller*, 724 F.3d at 1283 n.12 (citation omitted). The Third Circuit took a similar view. *Hart*, 717 F.3d at 165 n.37.

But the right of publicity equally covers names, likenesses, and other attributes of identity. Likewise, the First Amendment equally protects the use of each of these attributes of identity. *See, e.g., Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307 (Ct. App. 2001) (holding that the First Amendment protects using baseball players’ likenesses as well as names in baseball videos).

Indeed, the proposed name/likeness distinction in *Keller* and *Hart* would disfavor not just video games, but also films, television programs, illustrated books, and graphic novels—which visually depict real people—relative to unillustrated books, traditional novels, and songs, which use people’s names and factual details about their lives. Such a distinction has no basis in right of publicity law or in First Amendment law.

2. Tenth Circuit

The Tenth Circuit opinion in *Cardtoons*, 95 F.3d at 972, likewise “balance[d] the magnitude of the speech restriction against the asserted governmental interest in protecting the intellectual property right.” *Cardtoons* upheld, against a right of publicity claim, the First Amendment right to produce parody baseball cards. Such parodies, the Tenth Circuit held, were constitutionally valuable because they “comment[ed] on the state of major league baseball by turning images of our sports heroes into modern-day personifica-

tions of avarice.” *Id.* The cards did not materially undermine the baseball players’ economic incentives. Because of this, the cards were protected by the First Amendment. *Id.* at 974-75.

The Tenth Circuit did not offer a clear test to guide such balancing, and the Ninth Circuit in *Keller* characterized *Cardtoons* as calling for “a flexible case-by-case approach that takes into account the celebrity’s interest in retaining his or her publicity and the public’s interest in free expression.” 724 F.3d at 1282. It is hard to tell how *Cardtoons*’ ad hoc balancing approach would have come out in the video games cases, though the public interest in being able to recreate historic sports teams would have favored First Amendment protection.

3. Eleventh Circuit

The Eleventh Circuit opinion in *Toffoloni*, 572 F.3d at 1208, also called for “fact-sensitive balancing, with an eye toward that which is reasonable and that which resonates with our community morals,” between free speech rights and the right of publicity (as well as, in that case, the right to privacy). Using such balancing, the court concluded that *Hustler* magazine lacked the right to publish “twenty year old nude photographs” of a professional wrestler who had just been murdered by her husband. *Id.* at 1204, 1207-13; see also *Douglass*, 769 F.2d at 1138-39 (reaching similar result in nude photograph case).

The Eleventh Circuit considered, as part of its balancing, the late wrestler’s economic interests, as well as the weak connection between the photograph and any matter of public concern. Again, it is hard to guess how this analysis would have come out in other cases,

especially absent the special concerns raised by unwanted publication of nude photographs.

II. The Ninth Circuit Approach Jeopardizes Books, Films, and Other Works

Though this case involves video games, the logic of the Ninth Circuit precedents on which it relies equally applies to other media, such as books and movies. Indeed, *Doe v. TCI* shows that the right of publicity jeopardizes books. (There is no First Amendment distinction between comic books and novels.) Plaintiffs routinely sue over the use of their names, likenesses, and biographical details in books and films.¹⁴ And the Ninth Circuit's *Keller* precedent begins by saying that “[v]ideo games are entitled to the full protections of the First Amendment,” because they are analogous to “protected books, plays, and movies.” 724 F.3d at 1271 (quoting *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2733 (2011)).

One need only review the 2015 Academy Award nominees to see the vast array of real-life stories with depictions of real people: Martin Luther King Jr., Coretta Scott King, and J. Edgar Hoover (*Selma*); Stephen Hawking (*The Theory of Everything*); Alan Turing (*The Imitation Game*).¹⁵ Many purely fictional

¹⁴ See *supra* notes 2 & 3.

¹⁵ Some right of publicity statutes expressly exclude expressive works, but many states have more limited exceptions. See, e.g., Cal. Civ. Code § 3344(d) (excluding, as to living people, news, sports, and political uses, but not entertainment or creative works). Other state statutes and common-law rules contain no explicit exceptions.

works also incorporate real people as characters, or at least use their names: *Forrest Gump*, *Midnight in Paris*, *Ginger and Fred*, *Ragtime*, and more.¹⁶ Yet the logic of the Ninth Circuit’s approach “jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings,” *Keller*, 724 F.3d at 1290 (Thomas, J., dissenting).

The *Keller* majority dismissed Judge Thomas’ concerns by saying that its test “requires an examination of whether a likely purchaser’s primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist.” *Id.* at 1274. Such an examination, according to the *Keller* majority, “leaves room for distinguishing between this case—where we have emphasized [Electronic Arts’] primary emphasis on reproducing reality—and cases involving other kinds of expressive works.” *Id.* at 1279 n.10.

But consumers of video games are indeed likely to value the video game manufacturer’s “expressive work”—the interactive entertainment quality of the game—more than “a reproduction of the celebrity.” *See, e.g.*, Jeff Haynes, *NCAA Football 08 Review*, IGN (formerly Imagine Game Network) (July 17, 2007), <http://www.ign.com/articles/2007/07/18/ncaa-football-08-review-2> (reviewing game without mentioning any specific player’s identity). Conversely, consumers of

¹⁶ *Forrest Gump* (Paramount 1994) (Elvis Presley, Richard Nixon, John Lennon, and Abbie Hoffman); *Midnight in Paris* (Gravier Productions 2011) (F. Scott Fitzgerald, Zelda Fitzgerald, Ernest Hemingway, Gertrude Stein, Pablo Picasso, and Cole Porter); *Ginger and Fred* (Produzione Europee Associati 1986) (Ginger Rogers and Fred Astaire); *E.L. Doctorow, Ragtime* (1975) (Harry Houdini, Emma Goldman, Evelyn Nesbit, and Jacob Riis).

unauthorized biographies of celebrities may well seek a “primary emphasis on reproducing reality,” and may be much more interested in “the celebrity” whose story is being told than in any “artist[ic]” quality of the work. The same holds true for readers of popular magazines like *People* or *US*, which trade almost entirely on photographs and gossip about celebrities.

Of course, maybe *Keller* would not really be extended to books or films, because courts would treat those media as favored under the First Amendment, while other media—video games, comic books, humorous cards, prints, T-shirts—would be treated as disfavored. Perhaps even the Missouri Supreme Court would not extend *Doe v. TCI* from comic books to “real” books.

Perhaps the Third and Ninth Circuits would find some way of categorically protecting films, books, and comedy routines even if video games and humorous greeting cards are not protected. *See, e.g., Hart*, 717 F.3d at 174 (Ambro, J., dissenting) (concluding that the majority opinion in *Hart* “provides less protection to video games than other expressive works,” contrary to this Court’s decision in *Brown*). Perhaps the California Supreme Court’s explanation of how Andy Warhol’s use of images of “Marilyn Monroe, Elizabeth Taylor, and Elvis Presley” were “transformative” and protected by the First Amendment, 21 P.3d at 811, while Gary Saderup’s use of images of the Three Stooges was not, really rests on a distinction between high art (however commercial) and low art.

But if this is the real rationale for the sports video game cases, and for the other decisions restricting speech in the name of the right of publicity, that itself warrants the Court’s review. First, such a distinction

between “high” and “low” media conflicts with this Court’s holdings that video games and short messages on clothing are fully protected by the First Amendment. *Brown*, 131 S. Ct. at 2733; *Cohen v. California*, 403 U.S. 15 (1971).

Second, such a medium-based distinction necessarily creates uncertainty for lower courts and for speakers. Precisely because this Court’s cases offer no basis for any such distinction, lower courts understandably reach conflicting results when trying to draw such a line.

The Sixth Circuit in *ETW*, the Eighth Circuit in *C.B.C.*, and the California Supreme Court in *Winter* treated prints, fantasy baseball games, and comic books as fully protected by the First Amendment. The Ninth Circuit in *Hilton*, the Third and Ninth Circuits in *Hart*, *Keller*, and this case, and the Missouri Supreme Court in *Doe* apparently treated cards, video games, and comic books as less constitutionally protected. (Of course, if those latter cases treated those media as fully protected, that would be even worse; as noted above, that would jeopardize traditional books and films.) Such uncertainty is inevitable unless this Court steps in to resolve it.

III. The First Amendment Analysis in Lanham Act and Right of Publicity Cases Should Be Harmonized

The Ninth Circuit’s approach also treats the First Amendment defense to the right of publicity as weaker than the First Amendment defense to trademark law. This too merits this Court’s review.

In *Brown v. Electronic Arts*, 724 F.3d 1235 (9th Cir. 2013), the same panel that decided *Keller* held

that the First Amendment protects football video games—including the game involved in this case—against trademark liability for using the players’ identities in allegedly confusing ways. The Lanham Act “protects the public’s interest in being free from consumer confusion about affiliations and endorsements,” *Brown* held, “but this protection is limited by the First Amendment, particularly if the product involved is an expressive work.” *Id.* at 1239. The *Brown* panel then applied the same *Rogers* any-expressive-relevance analysis to trademark law that the *Keller* majority rejected for right of publicity law.¹⁷

Yet the right of publicity should be no less constitutionally constrained than trademark law, at least for speech outside the special context of commercial advertising. Indeed, the right of publicity, because it does not require likelihood of confusion, is “potentially more expansive than the Lanham Act.” *Rogers*, 875 F.2d at 1004. The interests furthered by the right of publicity (often the private interests of celebrities) are no more significant than those furthered by trademark law (the interests of the consuming public as well as of trademark holders).

Moreover, harmonizing the First Amendment defenses to trademark law and to right of publicity law—as the Second and Sixth Circuits have done, *Rogers*, 875 F.2d at 1001, 1004-05; *Parks*, 329 F.3d at 453, 461—is practically valuable, because the same use of

¹⁷ The *Rogers* test considers, for both Lanham Act and right of publicity claims, whether the use is “artistically relevant.” It then considers for Lanham Act cases whether the use is “explicitly misleading” and for right of publicity cases whether the use is really a “disguised commercial advertisement.” 875 F.2d at 1000, 1004.

a person's identity will often lead to claims under both bodies of law. Indeed, Lanham Act claims in such cases can often easily be reframed as right of publicity claims. Adopting a consistent approach can clarify the law for the benefit of creators, publishers, and the broader public. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53-57 (1988) (harmonizing First Amendment analysis in intentional infliction of emotional distress cases and libel cases).

CONCLUSION

This case involves a First Amendment question that reaches this Court rarely, but arises often, for many kinds of works. Lower courts are all over the map on this question. Such lack of uniformity endangers free speech, and the creative industries that depend on the First Amendment's guarantees.

This uncertainty is especially dangerous for smaller authors and publishers that lack the money to litigate such cases (even when their First Amendment defense is very strong). Many such small speakers are likely to be chilled into following the most restrictive standards, and the most restrictive interpretations of those (often vague) standards. If this situation is left uncorrected by this Court, a wide range of expression in movies, plays, novels, songs, video games, documentaries and more will be deterred.

Respectfully submitted,

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