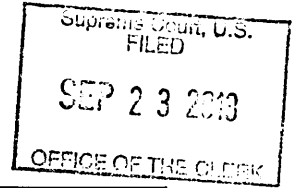


13-377

No. ____



IN THE
Supreme Court of the United States

ELECTRONIC ARTS INC.,

Petitioner,

v.

SAMUEL MICHAEL KELLER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment protects a speaker against a state-law right-of-publicity claim that challenges the realistic use of a person's name or likeness in an expressive work.

PARTIES TO THE PROCEEDING

The Defendant-Appellant below, who is the Petitioner before this Court, is Electronic Arts Inc.

The Plaintiffs-Appellees below, who are the Respondents before this Court, are Samuel Michael Keller; Edward C. O'Bannon, Jr.; Byron Bishop; Michael Anderson; Danny Wimprine; Ishmael Thrower; Craig Newsome; Damien Rhodes; and Samuel Jacobson.

Respondents sued two additional Defendants, the National Collegiate Athletic Association and Collegiate Licensing Company, but they were not parties in the Ninth Circuit proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states that it has no parent corporation and no publicly held corporation owns ten percent or more of Petitioner's stock.

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OPINIONS BELOW

The opinion of the Ninth Circuit affirming the denial by the United States District Court for the Northern District of California of Petitioner's special motion to strike pursuant to California's anti-SLAPP statute is reported at 724 F.3d 1268 (9th Cir. 2013) and reproduced at Appendix to the Petition ("Pet. App.") 1a. The order of the Ninth Circuit granting Petitioner's subsequent motion to stay the mandate pending proceedings in this Court is unreported and reproduced at Pet. App. 71a.

An opinion of the District Court denying Petitioner's motion to dismiss and anti-SLAPP special motion to strike is unreported and reproduced at Pet. App. 45a.

JURISDICTION

The Ninth Circuit issued its opinion on July 31, 2013.¹ The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or

¹ The Ninth Circuit applied its rule that a denial of an anti-SLAPP special motion to strike is reviewable under the collateral order doctrine. Pet. App. 5a n. 3 (citing *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010)).

of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend I.

STATEMENT OF THE CASE

This case involves the collision of the First Amendment and the state-law “right-of-publicity” tort, an issue that has engendered conflict and disarray among the lower courts. The right of publicity is a modern tort, first recognized in 1953.² Generally used by celebrities, it accords persons an economic right in their names and likenesses, so they may “profit from the full commercial value of their identities.” *Cardtoons L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 968 (10th Cir. 1996).

In recent years, right-of-publicity suits have proliferated, targeting a variety of speech and speakers, including musicians who named famous people in their lyrics; filmmakers who produced movies documenting the lives of celebrities and historical figures; authors who wrote “unauthorized biographies”; magazines and greeting-card manufacturers who used celebrity images; video-game makers who used celebrity images in constructing virtual worlds; and artists who depicted celebrities in their artworks.³

² *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

³ See, e.g., *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (OutKast song lyrics); *Valentine v. C.B.S., Inc.*, 698 F.2d 430 (11th Cir. 1983) (Bob Dylan song lyrics); *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (feature movie and book about the Black Panther Party); *Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d

Courts have struggled to reconcile this new tort with the protections afforded by the First Amendment. This Court's only contribution came nearly forty years ago in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), in which the Court held that the First Amendment did not bar a right-of-publicity claim against a television station that broadcast an entertainer's entire human-cannonball act. According to the Court, broadcasting Zacchini's entire act posed a "substantial threat to the economic value of that performance," and the Court contrasted the use of a performer's "entire act" with the broadcast of a person's name or picture in media. *Id.* at 574-76. Thus, *Zacchini* offers little or no guidance in cases involving mere *depictions* of individuals, as opposed to appropriation of their actual performances in full. Indeed, the Court was careful to cabin its decision: "[w]herever the line in particular situations is to be drawn between media reports that are protected and

723 (E.D. Mich. 2000), *aff'd*, 267 F.3d 457 (6th Cir. 2001) (television miniseries about the Temptations); *Tyne v. Time Warner Entm't Co., L.P.*, 901 So. 2d 802 (Fla. 2005) (movie about a shipwreck); *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (book about a police officer); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (magazine using image of Dustin Hoffman); *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010) (greeting card using image of Paris Hilton); *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47 (2006) (video game); *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018 (2011) (video game); *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982) (bust of Martin Luther King, Jr.); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (lithograph of Tiger Woods); John Broder, *Schwarzenegger Files Suit Against Bobblehead Maker*, N.Y. Times, May 18, 2004, at <http://www.nytimes.com/2004/05/18/national/18arnold.html>.

those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent." *Id.* at 574-75.

The expressive work at issue in this case is Petitioner's college football video game, which was alleged to include a realistic depiction of former college football player Respondent Samuel Keller.⁴ The Ninth Circuit (and the Third Circuit, in an essentially identical case also before this Court on petition for writ of certiorari)⁵ held that the First Amendment offered no defense to Keller's right-of-publicity claim, because the game's depiction of Keller was *too realistic* and showed him engaged in the same activity—college football—in which he had gained his fame.

The Ninth and Third Circuits recognized that Petitioner's video game was an expressive work, under this Court's holding in *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011). Nonetheless, they held that the game's depiction of the plaintiffs did not enjoy First Amendment protection. According to the Ninth and Third Circuits, the depiction of a person's image or likeness in an expressive work enjoys First Amendment protection against a right-of-

⁴ The consolidated action actually was brought by Keller and eight other named plaintiffs, some of whom are former college football players and some of whom are former college basketball players who allege they were portrayed in Petitioner's *NCAA Basketball* video game. Because they were all identically situated, the Ninth Circuit treated the case as one brought by Keller and we do so here as well.

⁵ *Hart v. Elec. Arts Inc.*, 717 F.3d 141 (3d Cir. 2013).

publicity claim only if the depiction sufficiently alters or “transforms” the plaintiff’s image or likeness. That rule is constitutionally perverse: it affords First Amendment protection only to fanciful or distorted portrayals, not accurate or realistic ones. The rule also chills expression, both because it is hard to predict what a court will decide is sufficiently “transformative,” and because such an inquiry inevitably requires a court to make a subjective judgment about whether a depiction is “artistic,” thus warranting protection, or “literal,” and thus subject to liability.

The test adopted by these two circuits, moreover, conflicts with various other tests adopted by other circuits and state supreme courts, which do not focus on transformation at all. Some of these courts engage in case-by-case balancing of First Amendment interests and right-of-publicity interests—an approach that raises its own constitutional problems. Others give appropriate respect to the First Amendment by confining the right-of-publicity tort to circumstances in which the challenged depiction falsely claims a celebrity commercial endorsement or is unrelated to any other expression and thus gratuitous.

The lower courts’ various and conflicting constitutional tests have resulted in numerous irreconcilable outcomes. For example, the Sixth Circuit has held that the First Amendment protects the inclusion of a professional golfer’s realistic image, prominently displayed in a painted montage including other golfers, *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003), but the Ninth and Third Circuits now have held that the First Amendment does

not protect an accurate digital depiction of a former college football player in a video game. As the judicial confusion has mounted, scholars, writers, and artists have begun to recognize a major threat to free expression.⁶ This Court's guidance is urgently needed.

A. Factual Background

Petitioner Electronic Arts' enormously popular *NCAA Football* video game series, first unveiled in 1993, artistically creates a fictional interactive college football gaming experience. In each annual edition of *NCAA Football*, users can play individual games or entire seasons, selecting from unnamed virtual players from each college's teams. Pet. App. 3a. The virtual football games occur in virtual stadiums filled with virtual fans, coaches, cheerleaders, mascots, and referees, all meticulously crafted by Electronic Arts' video game designers. *Id.* at 4a.

⁶ See, e.g., Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 Stan. L. Rev. 1161 (2006); F. Jay Dougherty, *All the World's Not a Stooge: The 'Transformativeness' Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 Colum. J.L. & Arts 1 (2003); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903 (2003); Diane Leenheer Zimmerman, *Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C. L. Rev. 1503 (2009); Adam Liptak, *When it May Not Pay To be Famous*, N.Y. Times, June 1, 2013, available at <http://www.nytimes.com/2013/06/02/sunday-review/between-the-first-amendment-and-right-of-publicity.html>; Andrea Peterson, *U.S. Court Limits How Art Can Imitate Life*, Wash. Post, Aug. 2, 2013, available at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/02/us-court-limits-how-art-can-imitate-life/>.

The virtual players (“avatars”) are clothed in their teams’ uniforms and logos. The unnamed avatars are identified only by position and jersey number (*e.g.*, QB #7) but are meant to evoke real players. Thus, for example, an avatar may have an appearance (*e.g.*, height, weight, skin-tone, and throwing arm) and biographical information (*e.g.*, class year) that match those of a real player. *Id.* at 3a-4a.

Within this realistic setting, the game fosters the user’s creativity and interactivity. Users control the avatars in invented games and seasons. The game also includes a mode in which the user “coaches” a college team for up to thirty seasons to develop a school’s football program over time. *Id.* at 4a. Another mode allows users to control a single virtual player from high school through college, directing the virtual player’s choices regarding practices, academics, and social life—all of which affect the virtual player’s performance in a game. *Id.* As Judge Thomas put it in his dissent, “At its essence, EA’s *NCAA Football* is a work of interactive historical fiction.” *Id.* at 34a.

B. Procedural Background

1. Respondent Samuel Keller played as quarterback for Arizona State University in 2005, after which he transferred to the University of Nebraska, where he played football during the 2007 season. *Id.* at 3a. In May 2009, Keller filed this putative class action lawsuit in the United States District Court for the Northern District of California against Electronic Arts, the National Collegiate Athletic Association (“NCAA”), and the Collegiate Licensing Company; the district court had jurisdiction pursuant to 28 U.S.C. § 1332.

Keller alleged that Petitioner violated his California statutory and common law right of publicity, among other claims, and sought hundreds of millions of dollars in damages on behalf of the putative class and an injunction prohibiting the use of players' identities in the future and mandating the seizure and destruction of all copies of *NCAA Football* in Electronic Arts' possession. C.A. App. 147-48. The district court granted motions to consolidate Keller's case with those of eight other college athletes.

Keller's right-of-publicity claim was based on the alleged use of his biographical information and likeness in the 2005 and 2008 editions of *NCAA Football*. Pet. App. 4a-5a. He claimed the game included an animated avatar of a quarterback wearing Arizona State University and University of Nebraska uniforms with his physical and biographical attributes and career statistics, though not his name or photographic image.

Petitioner moved to dismiss and also filed a special motion to strike the lawsuit as a strategic lawsuit against public participation, pursuant to California's anti-SLAPP statute. The District Court denied both motions. *Id.* at 69a.

2. In July 2013, the Ninth Circuit affirmed the District Court's denial of Electronic Arts' anti-SLAPP motion to strike. Pet. App. 30a. The court acknowledged that, under this Court's holding in *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), video games are expression that enjoy "the full protections of the First Amendment." Pet. App. 2a. Nevertheless, the court decided that Electronic Arts

had no First Amendment defense to Keller's right-of-publicity claim. *Id.* at 30a.

In reaching that conclusion, the Ninth Circuit adopted a version of the transformative-use test, which it derived from *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001). The test it adopted is essentially identical to the one adopted by the Third Circuit in *Hart v. Electronic Arts Inc.*, 717 F.3d 141 (3d Cir. 2013), the other case currently pending on a petition for certiorari. That test protects expression depicting celebrities *only* if "the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." Pet. App. 8a (quoting *Comedy III*, 21 P.3d at 799).

Here, the Ninth Circuit held Electronic Arts' alleged use of Keller's likeness "does not qualify for First Amendment protection as a matter of law because it literally recreates Keller in the very setting in which he has achieved renown." *Id.* at 3a; *see id.* at 14a (holding that the video game did not sufficiently transform Keller's likeness because it portrayed Keller "as what he was: the starting quarterback for Arizona State and Nebraska, and the game's setting is identical to where the public found Keller during his collegiate career: on the football field" (internal quotation marks and alteration omitted)).

Petitioner argued that the court should adopt the test announced in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), contending that this test appropriately protected First Amendment rights. Under that test, an expressive work is accorded First Amendment

protection against right-of-publicity claims unless the celebrity's likeness is unrelated to the work or is used in a manner that falsely indicates that the celebrity has endorsed the product. *See* Pet. App. 21a.

The Ninth Circuit rejected that argument. *Id.* at 26a. The court reasoned that the *Rogers* test was developed to accommodate First Amendment interests in the context of trademark law, which focuses on the risk of consumer confusion. *Id.* at 23a. However, the court continued, “[t]he right of publicity protects the *celebrity*, not the *consumer*.” *Id.* (emphasis in original). Thus, the court concluded, “[t]he reasoning of . . . *Rogers* . . . that artistic and literary works should be protected unless they explicitly mislead consumers[] is simply not responsive to Keller’s asserted interests here.” *Id.* at 24a.

Notably, the same Ninth Circuit panel, in an opinion released the same day as *Keller*, held that the First Amendment provided Electronic Arts with a defense to a Lanham Act claim brought by a former NFL player in connection with another of its video games, *Madden NFL Football*. *See Brown v. Elec. Arts Inc.*, 724 F.3d 1235, No. 09-56675, 2013 U.S. App. LEXIS 15647 (9th Cir. July 31, 2013). Applying the *Rogers* test, the court concluded the video game was “entitled to the same First Amendment protection as great literature, plays, or books. . . . The *Rogers* test tells us that, in this case, the public interest in free expression outweighs the public interest in avoiding consumer confusion.” *Id.* at *32. *Keller* cited the decision in *Brown*, and acknowledged that Keller would have been “hard-pressed” to succeed on his right-of-publicity claim if the

court had applied the *Rogers* test to that claim. Pet. App. 23a-24a.

Finally, the court rejected two additional defenses, the public interest exception and the statutory public affairs exception. *Id.* at 29a.⁷

Judge Thomas forcefully dissented, warning that the Court had engaged in a “potentially dangerous and out-of-context interpretation of the transformative use test.” *Id.* at 44a (Thomas, J., dissenting). Judge Thomas noted that he “agree[s] fully with Judge Ambro’s excellent dissent in *Hart*,” *id.* at 34a n.2, and criticized the majority for “confin[ing] its inquiry to how a single athlete’s likeness is represented in the video game, rather than examining the transformative and creative elements in the video game as a whole[,] . . . contradict[ing] the holistic analysis required by the transformative use test,” *id.* at 33a. In particular, Judge Thomas highlighted that

The gamers can . . . change [the virtual players’] abilities, appearances, and physical characteristics at will. Keller’s impressive physical likeness can be morphed by the gamer into an overweight and slow virtual athlete, with anemic passing ability. And the gamer can create new virtual players out of whole cloth. Players can change teams. The gamer could pit Sam Keller against himself, or a stronger or weaker version of himself, on a different team.

⁷ California’s right-of-publicity statute exempts from liability uses “in connection with any news, public affairs, sports broadcast or account, or any political campaign.” Cal. Civ. Code § 3344(d).

Or the gamer could play the game endlessly without ever encountering Keller's avatar. In the simulated games, the gamer controls not only the conduct of the game, but the weather, crowd noise, mascots, and other environmental factors. Of course, one may play the game leaving the players unaltered, pitting team against team. But, in this context as well, the work is one of historic fiction. The gamer controls the teams, players, and games.

Id. at 35a. Judge Thomas concluded that, "unlike the majority, [he] would not punish EA for the realism of its games and for the skill of the artists who created realistic settings for the football games." *Id.* at 37a.

Judge Thomas also emphasized that "the essence of *NCAA Football* is founded on publicly available data, which is not protected by any individual publicity rights," *id.* at 39a, that the players names are not used in the game, *id.* at 40a, and that, under the NCAA's amateurism rules, "an individual college athlete's right of publicity is extraordinarily circumscribed and, in practical reality, non-existent," *id.* at 41a-42a. In conclusion, Judge Thomas addressed the potential scope of the majority's opinion:

The logical consequence of the majority view is that all realistic depictions of actual persons, no matter how incidental, are protected by a state law right of publicity regardless of the creative context. This logic jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings. Absent the use of actual footage, the motion picture *Forrest Gump* might

as well be just a box of chocolates. Without its historical characters, *Midnight in Paris* would be reduced to a pedestrian domestic squabble.

Id. at 43a.

The majority rejected Judge Thomas' warning that its opinion jeopardized a broad swath of valuable expression on the theory that later courts could examine the "primary motivation" of those who are likely to *purchase* (rather than create) the expressive work. It posited that First Amendment protection would turn on whether the primary motivation of the buyer is to acquire the "expressive work of [an] artist" or to acquire a "reproduction of the celebrity." *Id.* at 19a n.10.

On August 21, 2013, the Court of Appeals granted Electronic Arts' motion to stay the mandate pending the outcome of proceedings before this Court. *Id.* at 72a.

REASONS FOR GRANTING THE PETITION

This Court's review is urgently needed to resolve conflicting authority concerning First Amendment protection against right-of-publicity claims. Since its invention in the second half of the twentieth century,⁸

⁸ The precise formulation of the tort varies from state to state. See J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 6.6-6.133 (2d ed. 2000) (describing varying state-law formulations). California has both a statutory and a common law cause of action. See Pet. App. 5a. Some other states follow the *Restatement (Second) of Torts* (1977), which provides that "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy." *Id.* § 652C. Still other states follow the more narrow formulation

the right of publicity increasingly has been used in litigation against creators of expressive works—including filmmakers, authors, musicians, and others—whose expression includes the depiction of a real person. In this case, the Ninth Circuit applied a transformative-use test that makes First Amendment protection depend upon whether the depiction distorts reality enough to be deemed “transformative.” The more accurate and realistic the depiction, the greater the likelihood of liability. Other courts use a different legal test, extending First Amendment protection to expressive depictions of people regardless of whether they are realistic or “transformed,” unless those uses amount to commercial endorsements. Still other courts engage in case-by-case balancing of First Amendment interests against the economic interests protected by the right of publicity.

This disarray and conflict has real-world consequences: without this Court’s guidance, artists, musicians, and other content creators will be unsure what standards apply to their expression and, in particular, whether the realistic depiction of real individuals is tortious. If the realistic portrayal of a

of the *Restatement (Third) of Unfair Competition* (1995), under which “[o]ne who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability.” See *id.* § 46 (emphasis added). The phrase “for purposes of trade” means “used in advertising the user’s goods or services, or . . . placed on merchandise marketed by the user,” and “does not ordinarily include the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.” *Id.* § 47.

person in an expressive work can strip the work of First Amendment protection, then countless creative works are at risk of suit, including films like *The Social Network*, *42*, *A Beautiful Mind*, and *All the President's Men*; documentaries like Ken Burns' *Baseball* and *Jazz*; works of historical fiction like E.L. Doctorow's *Ragtime* and Thomas Pynchon's *Gravity's Rainbow*; and "unauthorized biographies" like those by Kitty Kelley. All of these works realistically portray actual individuals in the contexts that made them famous and use their biographical details. The effect of this uncertainty is to chill protected expression, all in the name of a tort with questionable underlying purposes. This Court should grant review to resolve the conflicts and provide clear direction.

I. The Lower Courts Are In Disarray Concerning the First Amendment Limits on Right-of-Publicity Claims.

A. The Ninth and Third Circuits' Transformative-Use Test Protects an Expressive Work Only if the Plaintiff's Likeness Is "Transformed."

This case is the first time the Ninth Circuit has held that the First Amendment protects the use of a person's image or likeness in expressive speech only if the image or likeness is sufficiently "transformed,"⁹ and does not protect "realistic[] portray[als]." Pet. App.

⁹ The Ninth Circuit previously applied the transformative-use test as a state-law defense in *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010), but it did not decide in that case whether the transformative-use test defines the scope of First Amendment protection. See *id.* at 909 n.11.

19a. In so holding, the Ninth Circuit followed the Third Circuit's formulation of the transformative-use test in *Hart*, 717 F.3d at 165.

The transformative-use test was first articulated in 2001, when the California Supreme Court addressed a right-of-publicity claim based on a charcoal drawing of The Three Stooges. *Comedy III*, 21 P.3d at 799. That court borrowed from copyright fair-use doctrine and adopted what it described as “essentially a balancing test . . . based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” *Id.* Applying that test to the facts at hand, the court found the Three Stooges drawing, sold as a lithograph and on t-shirts, to be insufficiently transformative. *Id.* at 811. It explained that the artist’s “undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame.” *Id.*

In so holding, the California Supreme Court distinguished the drawing at issue from Andy Warhol’s portraits of celebrities such as Marilyn Monroe, Elizabeth Taylor, and Elvis Presley. It explained: “Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself.” *Id.* Underscoring the unpredictability of its test, the court acknowledged that the difference between works that enjoy constitutional protections (like Warhol’s depictions of Marilyn Monroe) and those that do not

(like the Three Stooges sketch) will “sometimes be subtle.” *Id.*¹⁰

B. The Constitutional Test Adopted Below Is Inconsistent With Tests Applied By Other Courts.

Other circuits and state supreme courts have adopted a different constitutional approach, applying different First Amendment tests that do not depend on a depiction’s transformative character—albeit tests that themselves conflict with one another.

1. Four Circuits and Two State Supreme Courts Have Held that the First Amendment Protects Non-Commercial Speech Depicting Well-Known People, Even if the Depiction Is Not “Transformed.”

The Second, Fifth, Sixth, and Eleventh Circuits, along with the Florida and Kentucky Supreme Courts, all have held that the First Amendment protects the depiction of an individual within an expressive work, unless the depiction amounts to an unauthorized commercial endorsement or is unrelated to any other expression and thus gratuitous.

In *Rogers*, the Second Circuit considered a federal Lanham Act claim and a state right-of-publicity claim brought by Ginger Rogers against the makers of a Federico Fellini film entitled “Ginger and Fred”—a

¹⁰ See Aaron Moss, *When It Comes to the Right of Publicity, Yes, Doubt* (February 18, 2011) http://www.lawlawlandblog.com/2011/02/when_it_comes_to_the_right_of.html (displaying the Marilyn Monroe painting and the Three Stooges sketch side by side).

film not about Ginger Rogers and Fred Astaire, but instead about a fictional Italian duo who imitated them, becoming known in Italy as “Ginger and Fred.” 875 F.2d at 996-97. The Second Circuit ruled in favor of the filmmaker, holding first that the First Amendment protects the use of a person’s name in a film title from a Lanham Act claim unless the use was “‘wholly unrelated’ to the movie or was ‘simply a disguised commercial advertisement for the sale of goods or services.’” *Id.* at 1004; *see id.* at 998-1000. The court then applied essentially the same standard in rejecting Rogers’ right-of-publicity claim under Oregon law. *Id.* at 1004-05.

Other courts have applied the *Rogers* standard or a similar test in describing the First Amendment limits to right-of-publicity claims. For example, in *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994), the Fifth Circuit cited *Rogers* in concluding that the First Amendment barred a right-of-publicity claim based on a fictionalized, but accurate, account of an undercover police officer’s experiences. Similarly, in *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003), the Sixth Circuit adopted *Rogers* and remanded for a factual determination concerning whether the use of the plaintiff’s name in a song title was a “disguised commercial advertisement” that would remove it from First Amendment protection.¹¹ And in *Valentine v.*

¹¹ Shortly after *Parks*, the Sixth Circuit decided *ETW*, which involved a right-of-publicity claim challenging an artist’s use of Tiger Woods’ image in a painting celebrating Woods’ golfing achievements. 322 F.3d at 918-19. The Ninth Circuit below stated that, in view of *ETW*, the Sixth Circuit had been “inconsistent[]” in its use of the *Rogers* test for right-of-publicity claims. Pet. App.

C.B.S., Inc., 698 F.2d 430 (11th Cir. 1983), the Eleventh Circuit construed the Florida right-of-publicity statute to allow the use of a person's name except "to directly promote a product or service," in order to avoid "grave questions" about the constitutionality of any broader interpretation. *Id.* at 433.

The Kentucky Supreme Court also has adopted this constitutional line, holding that a right-of-publicity claim may proceed only if the "use of a person's name or likeness or other interest[s]" "is not sufficiently related to the underlying work, or, if the otherwise constitutionally-protected work is simply disguised commercial advertisement for the sale of goods or services." *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001) (footnote omitted; internal quotation marks omitted). And the Florida Supreme Court recently adopted a similar rule, stating that, in light of First Amendment constraints, the state's right of publicity does not bar the use of a name or likeness except to "directly promote a product or service." *Tyne v. Time Warner Entm't Co. L.P.*, 901 So. 2d 802, 810 (Fla. 2005); *see also Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 627 (Ga. 2013) (holding that the use of the plaintiff's image on the cover of a *College Girls Gone Wild* video was actionable under Georgia's right of publicity, and did not violate the defendant's

25a. In fact, *ETW* confirmed that, in *Parks*, the Sixth Circuit had "applied the *Rogers* test to . . . right-of-publicity claims," *ETW*, 332 F.3d at 936 n.17. After applying that test to the facts before it, *ETW* went on to analyze the case under a case-specific balancing of interests, *id.* at 937-38 (citing *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996)), and the transformative-use test, *id.* at 938, as well.

“freedoms of speech and press” because the image was used “as a part of an advertisement”) (quotation marks omitted).

The *Restatement (Third) of Unfair Competition* encourages the adoption of this test as well, explaining that the right of publicity is “fundamentally constrained by the public and constitutional interest in freedom of expression,” and the First Amendment ought to provide a defense against a right-of-publicity claim unless “the name or likeness is used solely to attract attention to a work that is not related to the identified person.” *Restatement (Third) of Unfair Competition*, § 47 cmt. c (1995).

2. Other Courts Engage in Case-Specific Balancing.

Still other courts engage in various forms of balancing, weighing the expressive interests protected by the First Amendment against the economic interests protected by the right of publicity based on the particular facts of the case before them. In so doing, none of these courts has focused on whether a likeness has been sufficiently “transformed.”

Thus, in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, LP*, 505 F.3d 818 (8th Cir. 2007), the Eighth Circuit held that the First Amendment protected fantasy baseball products that used the names of real players, their biographical data, and their performance statistics. In reaching that conclusion, the court emphasized “the public value of information about the game of baseball and its players,” noted that “the information used in CBC’s fantasy baseball games is all readily available in the public

domain,” and reasoned that “it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone.” *Id.* at 823. By contrast, it continued, “the facts in this case barely, if at all implicate the interests that states typically intend to vindicate by providing rights of publicity to individuals.” *Id.* at 824. Specifically, the court reasoned that publicity rights to one’s name and performance statistics were not needed to encourage baseball players to play the sport, and that there was little risk of consumer confusion, because the defendant’s game included all players. *Id.*

The Ninth Circuit below attempted to harmonize its outcome with *C.B.C.* on the ground that *C.B.C.* did not involve the “use[] [of] virtual likenesses of actual college football players,” Pet. App. 29a-30a n.12, but instead “merely incorporated the names along with performance and biographical data of actual major league baseball players.” *Id.* (internal quotation marks omitted). That distinction is not persuasive: if the First Amendment protects the use of someone’s name and publicly available performance and biographical data, then it also protects the creation of an avatar reflecting publicly available information about a player’s appearance and playing style. Indeed, the Eighth Circuit itself made clear that *C.B.C.*’s expressive interests would have been no different had it used actual photos of the players, *see* 505 F.3d at 823; nor would the use of photos have changed the court’s balancing of interests.

The Tenth Circuit in *Cardtoons* likewise applied a case-specific balancing test to reject a right-of-publicity claim against the creator of parody baseball cards

featuring recognizable caricatures of real baseball players. 955 F.3d at 962-63. The court held that the trading cards were expressive speech “subject to full First Amendment protection,” *id.* at 970, and emphasized that “[c]elebrities . . . are an important element of the shared communicative resources of our cultural domain,” and that “[r]estricting the use of celebrity identities restricts the communication of ideas,” *id.* at 972. It further held that these interests outweighed any purported justification for the right of publicity. *See id.* at 973-76.

In *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003), the Missouri Supreme Court took a markedly different approach, holding that speech receives First Amendment protection against a right-of-publicity claim only if its “*predominant* purpose . . . is to make an expressive comment on or about a celebrity.” *Id.* at 374 (quotation marks omitted) (emphasis added). If, on the other hand, the speech “predominantly exploits the commercial value of an individual’s identity,” it is subject to liability under the right of publicity, “even if there is some ‘expressive’ content in it.” *Id.* (quotation marks omitted). In devising that test, the court specifically rejected the transformative-use test. *Id.*¹²

¹² Other courts, applying state common law or statutory exceptions designed to accommodate constitutional concerns, have drawn the line between protected and unprotected celebrity depictions by focusing on whether the publication is “newsworthy” or in the “public interest.” *See, e.g., Toffoloni v. LFP Publ’g Group, LLC*, 572 F.3d 1201, 1208 (11th Cir. 2009) (applying Georgia law); *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793-94 (1995) (applying California law).

II. This Case Presents an Ideal Vehicle For Addressing the Constitutional Question.

Plainly, the lower courts need guidance from this Court delineating the scope of First Amendment protection against a right-of-publicity claim. This case presents an excellent vehicle for providing such guidance. The Ninth Circuit acknowledged the wide-ranging circuit conflict on the issue—*see* Pet. App. 24a-26a (noting that the Second and Sixth Circuits have applied the *Rogers* test to right-of-publicity claims and that the Tenth and Eighth Circuits had applied “a flexible case-by-case approach”). And it also recognized that its decision to apply the transformative-use test, as opposed to the more speech-protective *Rogers* test, was outcome-determinative. The court acknowledged that Keller “would be hard-pressed to support” a claim under the *Rogers* test “absent evidence that EA explicitly misled consumers” into “believing that he is endorsing EA or its products.” Pet. App. 23a.

The Ninth Circuit’s decision in *Brown*—issued by the same panel on the same day—confirmed that the court’s decision to apply the transformative-use test to right-of-publicity claims, rather than the *Rogers* test, determined the outcome in this case. *Brown* concerned a Lanham Act claim brought by a former NFL player complaining about the use of his likeness in Petitioner’s *Madden NFL* game. *See Brown* 724 F.3d at ___, 2013 U.S. App. LEXIS 15647, at *3. The court applied the *Rogers* test and concluded that the First Amendment barred the Lanham Act claim, because “Brown’s likeness is artistically relevant to the games and there are no alleged facts to support the claim that

[Electronic Arts] explicitly misled consumers as to Brown's involvement with the games." *Id.* at *32. In such circumstances, the court held, "the public interest in free expression outweighs the public interest in avoiding consumer confusion." *Id.* Had the court applied that same test to the right-of-publicity claim in *Keller*, Electronic Arts would have prevailed, just as it did in *Brown*.

III. The Ninth Circuit's Holding Is Wrong and Conflicts with This Court's First Amendment Jurisprudence.

This Court's review also is warranted because the Ninth Circuit's decision—which allows a state to impose tort liability for non-commercial expression that portrays a person realistically—is both wrong and dangerous. The decision cannot be squared with this Court's precedents, and it threatens to chill the exercise of First Amendment rights.

A. The Adopted Transformative-Use Test Does Not Adequately Respect First Amendment Rights.

The Ninth and Third Circuits' transformative-use test does not properly limit the right of publicity so that it becomes consistent with the First Amendment.

The right of publicity penalizes fully protected and valuable speech based on its content: the tort proscribes expression because it includes another's name or likeness within its content. *Bartnicki v.*

Vopper, 532 U.S. 514, 521 (2001).¹³ This Court repeatedly has held, however, that “[c]ontent-based regulations” of speech “are presumptively invalid” and must be subjected to strict constitutional scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); accord, e.g., *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (“[A]s a general matter . . . government has no power to restrict expression because of . . . its content.”) (quotation marks omitted; bracket in original); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (holding unconstitutional a statute prohibiting accurate depictions of U.S. currency unless for educational, historic, or newsworthy purposes because those determinations “cannot help but be based on the content of the photograph and the message it delivers”).

The limited exceptions to this rule consist of a few “historic and traditional categories” of expression, *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (quotation marks omitted), which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *R.A.V.*, 505 U.S. at 383 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). These include obscenity, defamation, fraud, fighting words, true threats, and speech integral to criminal conduct, see *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (collecting cases), and “represent ‘well-defined and narrowly limited

¹³ See also Volokh, *supra* note 6 at 912 n.35 (2003) (“The right of publicity is clearly content-based: It prohibits the unlicensed use of particular content (people’s name or likenesses).”).

classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,” *Brown*, 131 S. Ct. at 2733 (quoting *Chaplinsky*, 315 U.S. at 571-72). This Court repeatedly has refused to expand these well-defined and historical categories or to add new categories of speech that the government may proscribe. *See, e.g., Alvarez*, 132 S. Ct. at 2544; *Stevens*, 559 U.S. at 482; *Brown*, 131 S. Ct. at 2741.

An expressive work does not fall into any of these traditional exceptions merely because it includes a portrayal of an actual person. To the contrary, the right-of-publicity tort penalizing such speech is a modern innovation, not recognized in California itself until 1979. *See Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979). As a leading commentator has put it, the right of publicity is “still a relatively raw and brash newcomer,” 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* (2d ed. 2000).

Because the right of publicity penalizes speech based on its content and does not fall into one of the recognized exceptions to full First Amendment protection, it is invalid, unless its application can be limited so as to avoid unconstitutional applications of the tort. *Brown*, 131 S. Ct. at 2738 (“It is rare that a regulation restricting speech because of its content will ever be permissible.” (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000))); *id.* (explaining that content-based regulations of speech are impermissible unless they can survive strict scrutiny). The transformative-use test applied here does not do that.

To the contrary, a test that protects fanciful depictions of a person but imposes liability for realistic depictions cannot be a suitable First Amendment standard. Realistic depictions within expressive works do not constitute a category of speech, like defamation or obscenity, that warrants anything less than full First Amendment protection against content-based restrictions. Indeed, many valuable works, including biographies, documentaries, and historical fiction, include realistic portrayals or references to real people.

A transformative-use test also does not sufficiently limit the right of publicity to circumstances where its application can survive strict scrutiny. There is no compelling state interest in stamping out realistic portrayals of people. According to the Ninth Circuit, the right of publicity serves to “protect[] a form of intellectual property [in one’s person] that society deems to have some social utility.” Pet. App. 23a (quoting *Comedy III*, 21 P.3d at 804) (second alteration in original); *id.* at 24a (“Keller’s claim is that EA has appropriated, without permission and without providing compensation, his talent and years of hard work on the football field.”). That economic interest, however, is not sufficiently compelling to justify penalizing non-commercial expression.¹⁴

Furthermore, a person’s appearance and biography—here, for example, Keller’s height, weight,

¹⁴ Many question the validity of the justifications for the right of publicity altogether. See, e.g., Dogan & Lemley, *supra* note 6, at 1188; Michael Madow, *Private Ownership of Public Image: Popular Culture & Publicity Rights*, 81 Cal. L. Rev. 127, 238 (1993); Volokh, *supra* note 6, at 911.

throwing arm, and visor—are facts in the public domain. Indeed, the Ninth Circuit acknowledged as much. *See* Pet. App. 30a n.12 (“It is seemingly true that each likeness is generated largely from publicly available data . . .”). It concluded, however, that the First Amendment should not protect the use of publicly available data to create a realistic likeness because the right of publicity would otherwise be “neuter[ed] . . . in our digital world.” Pet. App. 30a n.12. The court stated: “If EA creates a virtual likeness of Tom Brady using only publicly available data . . . does EA have free reign to use that likeness in commercials without violating Brady’s right of publicity? We think not, and thus must reject [the] point about the public availability of much of the data used . . .” *Id.*

But no one claims that one may use publicly available data to insert a celebrity image in a commercial. That is precisely what the *Rogers* test addresses by withholding First Amendment protection from false claims of celebrity endorsement. The question here is whether a speaker may use publicly available data to create a likeness for use in non-commercial expression. The Ninth Circuit offers no reason why the First Amendment should not protect such use. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *C.B.C.*, 505 F.3d at 823 (“[T]he 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 [F]irst [A]mendment right to use information that is available to everyone.”).

Indeed, the transformative-use test as applied here is particularly perverse, because it assumes that the state has a *stronger* interest in penalizing *accurate*

speech than in penalizing speech that is “transformative.” That has things backwards: this Court has repeatedly held that truthful and accurate expression warrants maximum First Amendment protection. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.”); *The Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (criticizing a Florida law making it unlawful to publicize the name of the victim of a sexual offense because it “punish[ed] truthful publication”); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (prohibiting false light liability even for false speech on “matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth”).

B. The Transformative-Use Test Will Chill Protected Speech Because It Is Overbroad and Unpredictable.

The Ninth Circuit’s decision is not only wrong but also dangerous. Its transformative-use test is too vague and unpredictable, and too susceptible to a court’s subjective artistic judgments, to be a workable First Amendment standard.

This Court repeatedly has emphasized the importance of ensuring that restrictions on the content of speech are “well-defined.” *Stevens*, 559 U.S. at 468. Predictability is important because speakers otherwise will “steer far wider of the unlawful zone’ . . . than if

the boundaries of the forbidden areas were clearly marked," *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)), thereby causing an "obvious chilling effect on free speech," *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997).

The Ninth Circuit's transformative-use test fails these requirements. If taken literally, the transformative-use test would allow states to subject biographers, filmmakers, singers, photographers, and other artists to tort liability whenever they include realistic images of, or references to, famous people. Yet many expressive works routinely use a real person's actual name or likeness, including, for example, films like *The Social Network*, *Moneyball*, 42, and *The King's Speech*; documentaries like Ken Burns' critically acclaimed series on the history of baseball; and best-selling biographies, like those by Kitty Kelley.

Indeed, a key element of the artistry in these works is the realism or accuracy of the portrayal. For example, the genius of Daniel Day-Lewis' portrayal of Abraham Lincoln was his ability to imitate, with great realism, the likeness, mannerisms, and attributes of the president doing what Lincoln actually did. It would be disturbing if the artistic success of such a portrayal were precisely what would make it actionable. Cf. *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1359 (D.N.J. 1981) (rejecting Elvis impersonator's First Amendment defense to a right-of-publicity claim brought by Presley's estate; "entertainment that is merely a copy or imitation, even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant

value as pure entertainment” (cited with approval by the Third Circuit in *Hart*, 717 F.3d at 164)).

To avoid absurd and dangerous outcomes, courts applying the transformative-use test will have little choice but to draw distinctions among expressive works reflecting their own subjective judgments about whether a particular work is sufficiently “artistic” or “creative” that it warrants protection. Thus, the California Supreme Court in *Comedy III* determined that a sketch of The Three Stooges was not creative enough to receive First Amendment protection, but an Andy Warhol portrait of Marilyn Monroe did deserve such protection because it presented “a form of ironic social comment on the dehumanization of celebrity itself.” 21 P.3d at 811. Courts should not place themselves in the role of art critic and make First Amendment freedoms turn on subjective judgments of this kind. Cf. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

A legal regime turning on such “subtle” distinctions among expressive works, *Comedy III*, 21 P.3d at 812, is inherently unpredictable and will chill expression. *Hart* presents a good example of such unpredictability. The Third Circuit concluded that an avatar portraying a college football player in an animated and interactive fictional college football game was actionable because the player’s image was not sufficiently transformed; yet, in the same decision, the court held that placement, in a later edition of the same video game, of an actual

photograph of the player in a montage of other photographs of Rutgers football players was not actionable, because the context made the depiction transformative. *Hart*, 717 F.3d at 169-70 (citing *ETW*, 332 F.3d at 938).

It is hard rationally to reconcile these two rulings.¹⁵ According to the dissent in *Hart*, the majority simply treated video games as less worthy of constitutional protection than other types of expressive works, such as photomontages—despite this Court’s clear preclusion of such a First Amendment double standard in *Brown*. *Id.* at 174 (Ambro, J., dissenting) (expressing concern about “a medium-specific metric that provides less protection to video games than other expressive works”). The majority did not respond to Judge Ambro’s concerns at all, except to claim that it faithfully followed *Brown*’s admonition that video games “enjoy the full force of First Amendment protections.” *Id.* at 148 (majority opinion).

Similarly, Judge Thomas warned that the Ninth Circuit’s holding “jeopardizes the creative use of

¹⁵ The Ninth Circuit’s applications of the transformative-use test prior to the case also demonstrate the test’s unpredictability. In *Hilton*, the court held that the use of Paris Hilton’s face superimposed over a cartoon body in a greeting card parody of the television show *The Simple Life* was not transformative because “the basic setting is the same [as in the show]: we see Paris Hilton, born to privilege, working as a waitress.” 599 F.3d at 911. Yet in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001), the Ninth Circuit stated in dicta that a magazine’s use of an image of Dustin Hoffman from “*Tootsie*” was transformative because “Hoffman’s body was eliminated and a new, differently clothed body was substituted in its place.” *Id.* at 1184 n.2.

historic figures in motion pictures, books, and sound recordings.” Pet. App. 43a (Thomas, J., dissenting). The majority responded that its holding was not so broad, because its transformative-use test allows a court to consider “whether a likely purchaser’s primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist. Certainly this leaves room for distinguishing this case . . . and cases involving *other kinds of expressive works*.” *Id.* at 19a-20a n.10 (majority opinion) (internal quotation marks omitted; citations omitted) (emphasis added). This reasoning bears no relation to this Court’s First Amendment jurisprudence. First, it implies the type of medium-specific metric this Court rejected in *Brown*, 131 S. Ct. at 2733. Second, it requires speakers to *guess* what a court might *guess* to be “a likely purchaser’s primary motivation,” Pet. App. 19a n.10, in buying an expressive work. Such a standard might “leave[] room for [courts to] distinguish[]” cases, *id.* at 20a n.10, but it leaves *no* “breathing room for protected speech,” *Illinois ex. rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). Speakers’ potential liability cannot possibly depend upon whether they guess correctly about the motivations of people they do not know and cannot control.

Speakers need certainty about whether their speech will subject them to liability, or they will self-censor. The transformative-use test cannot provide that predictability.

C. Case-Specific Balancing Is Equally Problematic.

Decisions calling for ad hoc balancing of First Amendment interests and the interests protected by the right of publicity present just as many constitutional problems. *See, e.g., Cardtoons*, 95 F.3d at 973-76; *C.B.C.*, 505 F.3d at 824. This Court has rejected any notion of a “free-floating test for First Amendment coverage.” *Stevens*, 559 U.S. at 470; *see also Brown*, 131 S. Ct. at 2734. As this Court has explained, “[t]he First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.” *Stevens*, 559 U.S. at 470.

Moreover, here, ad hoc balancing requires a court to weigh apples against oranges. There is no principled way to determine, case by case, whether the *economic* interest of a person in preventing a given portrayal outweighs the *social* value of a given expressive work. The two interests being compared are too different to enable judges to reach consistent and predictable results.

D. The *Rogers* Test Confines the Right of Publicity to Circumstances Where Its Application Does Not Violate the First Amendment.

Unlike the transformative-use test and case-by-case balancing, the *Rogers* test confines the right-of-publicity tort to situations in which speakers have used a depiction of, or reference to, a celebrity to sell something—either by falsely claiming a celebrity commercial endorsement or by including a celebrity image in a publication gratuitously, just to attract attention.

Confined to these circumstances, the right of publicity does not raise constitutional concerns. Speech that falsely claims a commercial endorsement is akin to the category of fraudulent speech that the government has long regulated without any First Amendment concerns. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (noting that fraudulent speech generally falls outside the protections of the First Amendment). And the gratuitous use of a celebrity's image to attract attention, unrelated to any expressive content in the work, likewise falls outside First Amendment protection altogether. Thus confined, the right-of-publicity tort raises little constitutional concern.

* * *

This Court's review is sorely needed. Because so many expressive works are distributed nationwide, the rule created by the Ninth and Third Circuits effectively has set the constitutional rule for the rest of the country. But that rule makes no sense constitutionally.

Moreover, the rule is so vague and unpredictable in its application that speakers will not know whether their speech is constitutionally protected or tortious. Given the potentially ruinous financial consequences of guessing wrong (here, Respondent seeks hundreds of millions of dollars on behalf of a class that could have thousands of members), speakers will go too far in their self-censorship. Unless and until this Court intervenes, a great deal of valuable and protected expression will be chilled.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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