

No. 15-424

IN THE
Supreme Court of the United States

ELECTRONIC ARTS INC.,
Petitioner,

v.

MICHAEL E. DAVIS, *ET AL.*,
Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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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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INTRODUCTION

This case presents an important issue of First Amendment law on which the lower courts sorely need guidance: whether expressive, non-commercial speech can be actionable under a state-law right of publicity, which is a content-based regulation of speech that should be subject to strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015). Respondents' brief ignores one side of a deep and entrenched circuit split on this issue. They try to explain away the Second Circuit's decision in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), as one of state law, but they do not cite, let alone grapple with, the numerous cases decided by other circuit courts and state Supreme Courts that apply *Rogers* as the constitutional test. *See, e.g., Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994); *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003); *Valentine v. C.B.S., Inc.*, 698 F.2d 430, 433 (11th Cir. 1983); *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001); *Tyne v. Time Warner Entm't Co. L.P.*, 901 So. 2d 802, 810 (Fla. 2005) (all cited by Pet. 17-18). And in *Rogers* itself, the Second Circuit marked the bounds of state law in light of the protections that it believed the First Amendment required. 875 F.2d at 1004.

Respondents also do not (and cannot) dispute that the Ninth Circuit's use of the transformative-use test instead of the *Rogers* test was outcome-determinative in this case. Indeed, in *Brown v. Electronic Arts, Inc.*, 724 F.3d 1235 (9th Cir. 2013), the Ninth Circuit applied the *Rogers* test to a retired professional football player's Lanham Act claim involving the same video game at issue here, and concluded that the claim was

barred by the First Amendment. *Id.* at 1241-42, 1248. There is no apparent reason why the same video game's alleged portrayal of a retired professional football player should enjoy First Amendment protection against a trademark claim but not against a right-of-publicity claim.

Respondents characterize the conflicting legal tests applied by the Circuits as merely different ways of engaging in the same fact-intensive balancing of interests. Resp. Br. 26, 29-30. Not only is that characterization inaccurate, but a fact-intensive balancing test cannot be squared with this Court's holdings that content-based regulations are subject to strict scrutiny. The First Amendment has already struck the balance of interests in favor of speech. *See, e.g., United States v. Stevens*, 559 U.S. 460, 470-71 (2010).

The fact that this petition is interlocutory should not dissuade this Court from granting certiorari. The transformative-use test is highly unpredictable and turns on subjective artistic judgments. It thereby risks chilling valuable expressive speech. Indeed, it has chilled Petitioner's own expression. And, contrary to Respondents' assertions, no further factual development is necessary for the Court to decide the *legal* question regarding what standard should be applied.

Respondents also suggest that review should be denied because this Court may lack jurisdiction over this case, which arises from an anti-SLAPP motion filed in federal court. That suggestion is incorrect. But to the extent there is any genuine question of jurisdiction,

that is an additional reason to *grant certiorari*. Four circuits have allowed anti-SLAPP motions to be heard in district court, *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999); *Godin v. Schencks*, 629 F.3d 79, 91 (1st Cir. 2010); *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 168-69 (5th Cir. 2009), while one circuit has held that the district court lacks authority to hear such a motion. *See Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015). Thus, to the extent the Court believes jurisdictional issues are presented, this case would be a vehicle to resolve *two* circuit conflicts.

ARGUMENT

I. This Court Should Decide the Scope of First Amendment Protection Against a Right-of-Publicity Claim.

A. The Circuits Are In Conflict.

In addressing the interplay between the First Amendment and the right of publicity, the lower courts have adopted a “conflicting mix of balancing tests and frameworks borrowed from other areas of free-speech doctrine,” *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 514 (7th Cir. 2014). Respondents contend that these differing approaches “merely demonstrate that the balancing inquiry between the First Amendment and a claim raised under a state’s right of publicity law is fact-intensive....” Resp. Br. 26. That is incorrect. Courts have adopted differing *legal* standards. Indeed, Respondents fail to address the bulk of the authorities cited in the Petition.

Thus, for example, Respondents try to explain away *Rogers* as based on Oregon state law. Resp. Br. 25-30. But the Second Circuit made clear that its application of the Oregon right of publicity was intended to avoid serious constitutional questions that would otherwise arise. Thus, the Second Circuit began its analysis by observing that “courts delineating the right of publicity, more frequently than in applying the Lanham Act, have recognized the need to limit the right to accommodate First Amendment concerns.” *Rogers*, 875 F.2d at 1004. And it concluded that, given Oregon courts’ “concern for the protection of free expression,” Oregon would not “permit the right of publicity to bar the use of a celebrity’s name in a movie title unless the title was ‘wholly unrelated’ to the movie or was ‘simply a disguised commercial advertisement for the sale of goods or services.’” *Id.*

Numerous other courts have expressly adopted *Rogers* as providing the relevant constitutional test. Petitioner cited these cases, *see* Pet. 17-18, and Respondents do not even acknowledge them. Their silence is telling. For example:

In *Matthews*, the Fifth Circuit held that a fictionalized account of an undercover police officer’s experiences “falls within the protection of the First Amendment” against a right-of-publicity claim. 15 F.3d at 440. It reasoned, “It is immaterial whether [the book] is viewed as an historical or a fictional work, so long as it is not ‘simply a disguised commercial advertisement for the sale of goods or services.’” *Id.* (quoting *Rogers*, 875 F.2d at 1004) (internal quotation marks, citations omitted)).

In *Parks*, the Sixth Circuit considered whether a song title referencing Rosa Parks enjoyed constitutional protection. The court held: “In *Rogers*, the Second Circuit held that movie titles are protected from right of publicity actions unless the title is ‘wholly unrelated’ to the content of the work or was ‘simply a disguised commercial advertisement for the sale of goods or services.’... We ... apply *Rogers* to the instant case.” 329 F.3d at 461 (quoting *Rogers*, 875 F.2d at 1004).

In *Valentine*, decided before *Rogers*, the Eleventh Circuit adopted essentially the same approach: in holding that the use of a person’s name in a song was not actionable under Florida law, it reasoned that “the defendants did not use her name to directly promote a product or service,” and that any broader liability “would raise grave questions as to constitutionality.” 698 F.3d at 433.

State Supreme Courts likewise have adopted *Rogers* as the relevant constitutional test. In *Montgomery*, the Kentucky Supreme Court adopted the *Rogers* test in reconciling its state right of publicity with the First Amendment and discussed *Parks* at length, 60 S.W.3d 528-30; and in *Tyne*, the Florida Supreme Court construed the Florida right-of-publicity statute “not [to] apply to publications, including motion pictures, which do not directly promote a product or service,” in order to avoid unconstitutionality. 901 So. 2d at 810.

Respondents simply have no answer to these cases that clearly conflict with the Ninth Circuit’s rule. Respondents’ notion that the different outcomes can be

explained by different facts rather than different legal standards, Resp. Br. 26, is absurd. There is no better proof than the Ninth Circuit's own decision in *Brown*, which concerned the exact same game at issue in this case, *Madden NFL*; was brought by a similarly situated plaintiff, a retired NFL player, see *Brown*, 724 F.3d at 1240-41; and was decided on the same day and by the same panel as *Keller v. Electronic Arts, Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268 (9th Cir. 2013), cert. dismissed, 135 S. Ct. 42 (2014), on which the Court of Appeals relied in this case in rejecting Petitioner's First Amendment defense. Pet. App. 2a, 11a-12a. *Brown* concerned a Lanham Act claim. The Ninth Circuit held that *Madden NFL* was "an expressive work," *id.*, and it applied *Rogers* to the Lanham Act claim to hold that the game was protected by the First Amendment. *Id.* at 1241-47.

Thus, the Ninth Circuit's decision to apply a different *legal standard* to the right-of-publicity claim in this case was self-evidently outcome-determinative. Respondents cannot explain why it makes sense for the use of a name, likeness, or biographical details to enjoy robust First Amendment protection against a Lanham Act claim, but for the same expression to be unprotected from a right-of-publicity claim. See Law Professors Amicus Br. 32-34.

Equally misguided is Respondents' argument that the balancing test employed by the Eighth and Tenth Circuits has the "same central concerns" as the transformative-use test applied by the Ninth Circuit. Resp. Br. 31. The Eighth Circuit's decision in *C.B.C. Distribution & Marketing, Inc. v. Major League*

Baseball Advanced Media, LP, 505 F.3d 818 (8th Cir. 2007), did not so much as mention the concept of “transformation.” Indeed, the use of baseball players’ actual names, likenesses, playing records, and biographical data in that case—which the Eighth Circuit found to enjoy First Amendment protection, *id.* at 823-24—necessarily did not transform or alter the players’ identities. Transformation likewise had nothing to do with the Tenth Circuit’s decision in *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996), that parody baseball cards enjoyed constitutional protection, *id.* at 972-76.

Moreover, even if the diverse array of lower court decisions could somehow all be harmonized as involving a fact-intensive balancing of interests, Resp. Br. 16-21, 32, this Court’s review would still be warranted. The strict scrutiny given to content-based regulations of speech does not allow for a case-specific balancing of interests. *See* Pet. 23-28. Instead, “[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.” *Stevens*, 559 U.S. at 470-71. Therefore, this Court has repeatedly rejected content-based regulations of speech, except for certain limited “historic and traditional categories” of expression. *Id.* at 468-69 (quotation marks omitted); *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012).

Finally, contrary to Respondents’ contention, Resp. Br. 16-17, this Court’s decision nearly 40 years ago in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), does not speak at all to the issue presented in this case. That case involved the broadcast of a performer’s “entire *act*,” *id.* at 574-75

(emphasis added)—not the use of a performer’s image, likeness, or biographical details as a component of another expressive work. The lower courts urgently need guidance regarding the proper legal standard.

B. The Court Should Grant Certiorari Notwithstanding the Interlocutory Posture, Because the Ninth Circuit’s Rule Chills Valuable Expression.

Respondents note the interlocutory posture of this case. Resp. Br. 9-12. However, that posture should not dissuade the Court from granting the petition. This Court frequently grants certiorari on interlocutory appeals that present important First Amendment issues. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 517 (2001); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 56 (1989); *Herbert v. Lando*, 441 U.S. 153, 158 & n.3 (1979); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485-86 (1975). An important First Amendment issue “should not remain in doubt,” *Fort Wayne Books*, 489 U.S. at 56, because speakers will be chilled by the fear of litigation. *See Cox Broad.*, 420 U.S. at 485-86 (“a failure to decide the question now will leave the press ... operating in the shadow of the civil and criminal sanctions of a ... statute the constitutionality of which is in serious doubt”).

That rationale fully applies here. Contrary to Respondents’ assertions, Resp. Br. 33-34, the uncertainty engendered both by the conflicting judicial authority discussed above, *supra* at 3-8, and by the unpredictability of much of that case law, *see* Pet. 29-33, significantly chills free expression.

Petitioner itself, for example, no longer makes its *NCAA Football* and *NCAA Basketball* video games, and no longer includes historical teams in its *Madden NFL* game. Thus, valuable creative expression—expression that would be constitutionally protected in much of the country—has been squelched.

Nor is Petitioner alone. As Amicus Entertainment Software Association recounts (Br. 15), “other reality-based video games already have come under legal assault as a result of these decisions,” including a game simulating the military operation against Panamanian dictator Manuel Noriega and the military operations overseen by General George Patton. Any game designer whose game addresses historical events and includes historical persons now proceeds at his peril.

Filmmakers similarly have been enjoined from screening unauthorized documentaries. *See* Electronic Frontier Foundation Amicus Br. 18-19. Many documentary filmmakers, working on shoestring budgets, will simply not wish to risk substantial legal liability, and will choose safer topics. After all, the number of right-of-publicity suits has increased dramatically in recent years. *See* Pet. 2-3 n.2.

In sum, the “logical consequence of the [Ninth Circuit’s ruling] is that all realistic depictions of actual persons ... 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.” *Keller*, 724 F.3d at 1290 (Thomas, J., dissenting).

Respondents also repeatedly suggest that the proper balance of interests can only be struck based

upon a detailed factual record. Resp. Br. 1, 2, 10. But the question presented to the Court is what legal standard should apply. There is no undeveloped fact relevant to that question, and Respondents identify none. In short, there is nothing left to do at the district court that would impact the merits of this petition.

II. The Jurisdictional Issues Raised by Respondents Provides an Additional Reason to Grant Certiorari.

Respondents contend the Court should deny certiorari because the circuits are divided on whether the district court had authority even to entertain Petitioner's anti-SLAPP motion in the first place. Resp. Br. 12-15. However, Respondents' jurisdictional argument amounts to an additional reason in favor of *granting* certiorari—not denying it.¹

States that have enacted anti-SLAPP statutes designed to protect First Amendment activity against meritless tort suits typically allow a defendant to file a special motion to strike a complaint at the outset of a case. *E.g.*, Cal. Civ. Proc. Code § 425.16. Such an anti-SLAPP motion usually differs from a motion to dismiss under Fed. R. Civ. P. 12(b)(6) in that it allows the submission of evidence.

The First, Second, Fifth, and Ninth Circuits have all affirmed the federal courts' ability to decide such a motion. *See Godin*, 629 F.3d at 91; *Adelson*, 774 F.3d at 809; *Henry*, 566 F.3d at 168-69; *Newsham*, 190 F.3d at

¹ Petitioner notes that another petition raising this issue has also been distributed for the January 8, 2016 conference. *See MEBO Int'l, Inc. v. Shinya Yamanaka*, No. 15-527.

973. The D.C. Circuit has disagreed. *See Abbas*, 783 F.3d at 1337; *see also Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1362 (11th Cir. 2014) (holding that a Georgia anti-SLAPP law requiring a verified complaint cannot be applied in federal court, but distinguishing *Newsham*, *Godin*, and *Henry*).

Anti-SLAPP statutes differ from state to state, and the circuits' divergent outcomes could potentially be explained by these differences. *See* Pet. 8-9 n.5 (reconciling *Newsham* and *Abbas* based on differences between California and D.C. law). Nevertheless, in *Abbas*, the D.C. Circuit made no effort to distinguish cases from other circuits, instead flatly rejecting them as “ultimately not persuasive.” 783 F.3d at 1336. As Judge Easterbrook has noted, the federal courts' authority to hear an anti-SLAPP motion is “a subject that has produced disagreement among appellate judges.” *Intercon Solutions, Inc. v. Basel Action Network*, 791 F.3d 729, 731 (7th Cir. 2015).

That disagreement could provide an additional reason to grant certiorari in this case. To the extent the Court believes this case presents a genuine issue of jurisdiction, it will have an opportunity to provide needed guidance to the lower courts about the circumstances under which an anti-SLAPP motion to strike can or cannot be heard in federal court.²

² With respect to appellate jurisdiction, the Ninth Circuit has held that the denial of an anti-SLAPP motion is appealable when the state anti-SLAPP statute provides for an interlocutory appeal in order to further the statute's substantive aims (as California's does). *Compare Batzel v. Smith*, 333 F.3d 1018, 1024–26 (9th Cir. 2003) and *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015

CONCLUSION

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

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(9th Cir. 2013) (denial of motion appealable when state statute allows for interlocutory appeal), *with Englert v. MacDonell*, 551 F.3d 1099, 1105-06 (9th Cir. 2009) (distinguishing *Batzel* and holding that denial of anti-SLAPP motion under Oregon law is not appealable because state statute does not provide for interlocutory appeal). The Fifth Circuit has agreed that a denial of an anti-SLAPP motion is appealable. *See NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 748-52 (5th Cir. 2014); *see also Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 146-51 (2d Cir. 2013) (holding that denial of anti-SLAPP motion on choice-of-law ground was immediately appealable). Petitioner is not aware of circuits holding to the contrary.