

In The  
**Supreme Court of the United States**

—◆—  
ELECTRONIC ARTS, INC.,

*Petitioner,*

v.

MICHAEL E. DAVIS, ET AL.,

*Respondents.*

—◆—  
**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

—◆—  
**BRIEF OF RESPONDENTS  
MICHAEL E. DAVIS, ET AL.  
IN OPPOSITION**

—◆—  
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**REVISED QUESTION PRESENTED**

Whether the retired professional football players whose likenesses were depicted, without their consent, in Electronic Arts' *Madden NFL* video game, established a sufficient "probability" of prevailing on the merits of their California right-of-publicity claim to be allowed, under California's anti-SLAPP statute, to conduct discovery and to pursue adjudication of those claims, notwithstanding Electronic Arts' assertion of state law and federal constitutional defenses.

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## STATEMENT OF THE CASE

Petitioner Electronic Arts, Inc. (“EA”) asks the Court to grant certiorari to decide an issue that is not fairly raised, on a preliminary record that includes no factual findings and almost no evidence concerning the scope or strength of the parties’ competing rights, and that arises under the unique procedural requirements of a California anti-SLAPP statute that arguably does not even apply in federal court.

Petitioner and its amici mistakenly characterize the issue before this Court as whether the Ninth Circuit erred in concluding that the First Amendment protects only “fanciful” but not “realistic” depictions of celebrities. *See, e.g.*, Pet. i, 4, 13, 23, 28; Amicus Br. of 31 Constitutional Law and Intellectual Property Professors (“CLIPP”) at 6-7; Amicus Br. of Elec. Frontier Foundation et al. (“EFF”) at 11-12, 15; Amicus Br. of Thomas Jefferson Ctr. for the Protection of Free Expression at 11. That inaccurate caricature of the Ninth Circuit’s holding ignores the panel’s extended discussion of the First Amendment and state law, which adopted the careful analysis conducted: 1) by the Third Circuit and a different Ninth Circuit panel in two earlier right-of-publicity cases involving similar Electronic Arts video games (*Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), and *Keller v. Electronic Arts (In re NCAA Student-Athlete Name &*



*Likeness Litig.*), 724 F.3d 1268 (9th Cir. 2013));<sup>1</sup> and 2) by the California Supreme Court and Courts of Appeal in the cases that provided the analytical foundation for the Third and Ninth Circuit’s rulings (including *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387 (2001); *Winter v. DC Comics*, 30 Cal.4th 881 (2003); and *No Doubt v. Activision Publishing, Inc.*, 192 Cal.App.4th 1018 (2011)).

The Ninth Circuit, after affirming the district court’s denial of Electronic Art’s anti-SLAPP motion, remanded this case for discovery, pre-trial motions, and eventually, trial. Plaintiffs are confident that the facts, once developed, will establish that EA’s non-consensual appropriation of their likenesses in *Madden NFL* violated their California state law rights of publicity, and that EA’s various defenses, including state law defenses that the lower courts found inadequate to support EA’s anti-SLAPP motion, will eventually be rejected on their merits. But regardless of the ultimate merits or the correctness of the Ninth Circuit’s interlocutory ruling, this case is not appropriate for certiorari review because the procedural posture, sparse factual record, and lack of any judicial factfinding precludes any definitive pronouncement about the proper interplay between California’s right of publicity and the First Amendment – an essential

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<sup>1</sup> Petitioner erroneously identifies former college quarterback Samuel Keller as a “Part[y] to the Proceedings” here, Pet. ii, but Keller was the lead plaintiff in *Keller* and he has no connection to this case.

component of the case-by-case balancing required by *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977), and by every other right-of-publicity/First Amendment case cited by petitioner and the lower courts.

This Court should deny EA's petition for these reasons, and for the additional reasons that: 1) there is no circuit conflict; 2) EA's state law defenses (including the defense that *Madden NFL* did not actually violate anyone's right of publicity) should be adjudicated before any First Amendment issues are considered, under the constitutional "avoidance" doctrine; and 3) there is no evidence that this, or any other, right-of-publicity decision has chilled the exercise of expressive rights.

#### **A. Statement of Facts**

This case concerns Electronic Arts' unauthorized use of former professional football players' likenesses and identities in its *Madden NFL* video games.<sup>2</sup>

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<sup>2</sup> New versions of *Madden NFL* are published annually, on a series of device platforms. The parties dispute which versions are at issue in this case. Pet.App. 12a. EA contends this case is limited to the 2009 version of *Madden NFL* and limited its evidence and argument to the 2009 PlayStation2 and Xbox platform editions only. ER 75. In Opposition to EA's anti-SLAPP motion, plaintiffs presented screen shots of their likenesses from 46 different annual and platform editions of *Madden NFL* (from 2001-2009) including five separate platform editions in 2009 – PlayStation2, PlayStation Portable, Xbox, Nintendo Wii, and Nintendo DS. SER 191-199, SER 483-945.

*Madden NFL* is a video game series that allows consumers to “simulate” NFL football games “using Real NFL Players.” Pet.App. 14a (internal quotations omitted). Between 2001 and 2009, most editions of *Madden NFL* allowed users to choose between teams composed of video avatars depicting the likenesses of current NFL players and those depicting the likenesses of retired NFL players. These games’ video avatars shared their real-life counterparts’ personal identifying information, including each player’s “position, years in the NFL, height, weight, skin tone and relative skill level in different aspects of the sport.” Pet.App. 3a; Pet. 7.

EA paid license fees of at least \$35 million per year for permission to use the likenesses of *active* National Football League players in *Madden NFL* (and additional license fees to the NFL for permission to use depictions of its team logos, uniforms, stadiums and other identifying features), Pet.App. 19a, ER 84, SER 3, 4, 5, 2162, 2168-69, but it did not pay license fees to any of the retired NFL plaintiffs featured in the games’ “historic” teams – and the record contains no indication that it ever sought to obtain such licenses.

Perhaps because of its failure to obtain these licenses, EA chose not to use the actual names of the historic players depicted in *Madden NFL*, but instead decided to refer to those players only by position and

uniform number. Nonetheless, EA included a feature that enabled game users to input the players' actual names, and it advertised the historic teams in its "Official Guide" as follows:

Historic Rosters are back again. You play All-Star Teams for each franchise, or dip into some of the greatest teams of all time . . . they allow you to play 'what-if' type games. Just select the teams and away you go back in time to play the game. The players do not have their actual names but you can edit them if you want optimum realism.

Pet.App. 15a, n.6.

EA stipulated, for purposes of its anti-SLAPP motion and subsequent appeal, that its use of plaintiffs' likenesses and identifying information violated California's right-of-publicity protections. Pet.App. 41a-42a ("EA has conceded for purposes of these motions that *Madden NFL* uses plaintiffs' likenesses without authorization"); Pet.App. 3a, n.1 ("for purposes of this appeal, EA concedes the *Madden NFL* series uses the plaintiffs' likenesses"). However, Electronic Arts has made clear that it seeks to prove on remand that *Madden NFL* does not, as a factual matter, appropriate plaintiffs' or any class member's likeness in violation of California's statutory or common law right of publicity. *See, e.g.*, D.Ct. Dkt. 152 p.4 (EA's case management conference statement, filed after remand from the Ninth Circuit, identifying as

still unresolved issues “whether EA’s games used any protectable aspect of Plaintiffs’ likenesses” and “whether the purported class members are sufficiently readily identifiable in EA’s games so as to constitute use of their likenesses”).

## **B. Proceedings Below**

Retired NFL plaintiffs Michael Davis, Vince Ferragamo, and Billy Joe Dupree, each of whom have been featured in *Madden NFL* as a member of an “historic team,” brought this class action in the U.S. District Court for the Northern District for California to challenge EA’s commercial appropriation of their personas by its unauthorized use of video game avatars bearing their likenesses. Specifically, plaintiffs pleaded claims for relief based on EA’s violation of their rights of publicity under California statute (Cal. Civ. Code §3344) and common law, and claims for conversion, trespass to chattels, and unjust enrichment. ER 77-97. Electronic Arts responded with two motions seeking dismissal: a Rule 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure, and a motion to strike plaintiffs’ complaint under California’s anti-SLAPP statute, California Code of Civil Procedure §425.16.<sup>3</sup>

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<sup>3</sup> SLAPP stands for “strategic lawsuit against public participation.” The California statute provides a procedural mechanism that allows defendants sued for conduct that arguably constitutes constitutionally protected speech to obtain a dismissal on

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The district court (Seeborg, J.) denied both motions in a single order. Pet.App. 17a-42a. Because the court's denial of EA's Rule 12(b)(6) motion to dismiss was not itself an appealable order, *see Caitlin v. United States*, 324 U.S. 229, 236 (1945), EA appealed the court's anti-SLAPP ruling only.<sup>4</sup>

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the merits (and an award of attorneys' fees) unless plaintiffs can present admissible evidence establishing a probability of success on the merits. The statute provides, in relevant part:

(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

Cal. Civ. Proc. Code §425.16(b).

<sup>4</sup> California Code of Civil Procedure §425.16(i) authorizes an interlocutory appeal as of right from the denial of an anti-SLAPP motion. In federal court, such a ruling would be appealable, if at all, only under the collateral order doctrine. *See Batzel*

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The Ninth Circuit panel unanimously affirmed the district court's denial of EA's anti-SLAPP motion. The panel adopted the same analysis a different Ninth Circuit panel had applied in *Keller*, 724 F.3d 1268, and that the Third Circuit had applied in *Hart*, 717 F.3d 141, cases involving similar right-of-publicity challenges to EA's unauthorized use of well-known college athletes' likenesses in its *NCAA Football* and *NCAA Basketball* video games. *See* Pet.App. 1a-16a.

EA sought rehearing *en banc*, which the Ninth Circuit denied, Pet.App. 43a-44a, just as the Third Circuit had denied *en banc* review in *Hart*, *see* 6/25/13 Order, Case No. 11-3750 (3d Cir.). EA's Petitions for Certiorari in *Keller* and *Hart* were both dismissed after those cases settled. *See Electronic Arts Inc. v.*

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*v. Smith*, 333 F.3d 1018, 1024-25 (9th Cir. 2003). Although plaintiffs have not previously contended that the district court, sitting in diversity, lacked jurisdiction to adjudicate Electronic Art's anti-SLAPP motion or that the Ninth Circuit lacked jurisdiction to permit an interlocutory appeal, plaintiffs may assert that lack of jurisdiction now as an alternative ground for affirmance and as a prudential ground for opposing certiorari. *See United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) ("prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted"). Besides, raising that defense below would have been futile, given the Ninth Circuit's prior ruling that federal courts sitting in diversity *do* have jurisdiction to adjudicate anti-SLAPP motions. *See, e.g. Batzel*, 333 F.3d at 1026.

*Keller*, 135 S.Ct. 42 (2014); *Electronic Arts Inc. v. Hart*, 135 S.Ct. 43 (2014).



## **REASONS WHY CERTIORARI SHOULD NOT BE GRANTED**

### **I. The Interlocutory Posture of the Case Weighs Against Granting Certiorari**

The unique procedural context in which this case arises weighs heavily against granting plenary review. The actual issue presented is whether the lower courts erred in denying EA's motion to strike plaintiffs' complaint (with respect to two 2009 platform editions, *see supra* at 3, n.2) under California's anti-SLAPP statute. That statute, which is without parallel under the federal rules, enables a defendant to seek an early dismissal, plus statutory attorneys' fees, if plaintiffs cannot show a sufficient likelihood of success at the outset of their case, based on then-known and available evidence. Specifically, California Code of Civil Procedure §425.16 provides:

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.



Cal. Code of Civ. Proc. §425.16(b)(1). “The required probability that [plaintiffs] will prevail need not be high” under the governing anti-SLAPP case law. Pet.App. 6a (quoting *Hilton v. Hallmark Cards*, 599 F.3d 894, 908 (9th Cir. 2010)) (alterations omitted). Courts applying California’s anti-SLAPP law will generally strike only suits “that lack even minimal merit.” *Hilton*, 599 F.3d at 908.

Absent extraordinary circumstances, this Court generally awaits a final judgment before granting a petition for certiorari. See *Va. Military Inst. v. United States*, 508 U.S. 946, 113 S.Ct. 2431, 2432 (1993) (Scalia, J., concurring) (“We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.”); *Mount Soledad Mem’l Ass’n v. Trunk*, 132 S.Ct. 2535, 2536 (2012) (Alito, J., concurring) (“Because no final judgment has been rendered . . . I agree with the Court’s decision to deny the petitions for certiorari.”). Here, there has been almost no discovery, and the factual record is composed almost solely of the affidavits of the parties and their counsel. ER 73-76; SER 1-7, 185-201.

EA filed its Rule 12(b)(6) and anti-SLAPP motion on January 6, 2011, within two months after plaintiffs’ operative complaint, in compliance with California law providing that anti-SLAPP motions – which automatically stay discovery absent a court order to the contrary – are presumptively timely if filed within 60 days of the service of the complaint. Cal. Code of Civ. Proc. §416.15(f). The California Legislature intended anti-SLAPP motions to be decided on the

pleadings and supporting affidavits. Cal. Code Civ. Proc. §425.16(b)(2). While the lower courts ruled that plaintiffs' *preliminary* factual showing was sufficient to allow the case to proceed, the actual merits of plaintiffs' claims and EA's defenses have yet to be litigated.

EA stipulated for purposes of its anti-SLAPP motion that it had violated California's statutory and common law right-of-publicity protections by its appropriation of plaintiffs' commercially valuable personae. *See* ER 72:20-22. Because of that stipulation, there has been no discovery and no judicial fact-finding as to the nature or scope of plaintiffs' rights of publicity. Now that the Ninth Circuit has affirmed the district court's interlocutory denial of EA's anti-SLAPP motion and denied *en banc* review, the entire case has been remanded to district court for further proceedings. The district court has lifted the prior stay of discovery and the parties are now in the process of conducting discovery and developing the factual record. *See* D.Ct. Dkt. #152 (joint case management conference statement).

EA is therefore asking this Court to decide the substantive merits of its First Amendment defense (which is only one of several defenses EA is asserting) before any court has actually considered whether plaintiffs have established their predicate right-of-publicity claim or what the scope of that claim might be. *See* Pet.App. 9a-16a (noting EA's still-pending state law defenses, including a statutory "public affairs" exemption and common law public interest

and incidental use defenses); D.Ct. Dkt. #152 (EA case management conference statement announcing plan to move for summary judgment as to all issues); D.Ct. Dkt. #157 (court order setting briefing and hearing schedule for plaintiffs' upcoming motion for class certification).

Because of the procedural status of the case and the extremely limited factual record, the Court should decline EA's invitation to reach out to resolve the merits of EA's First Amendment defense at this threshold stage, as doing so runs counter to the doctrine of constitutional avoidance. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.") (quotation marks and citation omitted). Adjudicating EA's constitutional defense is particularly inappropriate in this case because the lack of a developed factual record prevents the fact-specific constitutional balancing required.

As an additional and independent ground for denying review, this Court's recent holding in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), makes it unclear at best whether the district court and Ninth Circuit even had jurisdiction to decide EA's anti-SLAPP motion. See *Abbas v. Foreign Policy Group, Inc.*, 783 F.3d 1328, 1334 (D.C. Cir. 2015) (applying *Shady Grove* in holding that a federal court sitting in diversity may not enforce the District of Columbia's anti-SLAPP

statute because that statute established different criteria for dismissal than the two most similar federal rules, Rules 12 and 56); *see also United Healthcare, Inc. v. County of Hennepin*, 308 F.R.D. 537 (D. Minn. 2015) (Minnesota anti-SLAPP inapplicable because it conflicts with Rule 56); *Englert v. MacDonnell*, 551 F.3d 1099, 1102 (9th Cir. 2009) (Oregon anti-SLAPP statute’s probability-of-success requirement “imposes a potentially much heavier [burden on a plaintiff] than merely establishing the existence of a disputed issue of fact”) (quotation marks and citation omitted; alteration in original); *but see Batzel*, 333 F.3d at 1026 (Ninth Circuit ruling that federal courts sitting in diversity *do* have jurisdiction to adjudicate anti-SLAPP motions).

EA asserts in a footnote that the District of Columbia’s anti-SLAPP statute is materially different from California’s because it is more similar to Rules 12 and 56. But the District’s statute and California’s are almost identical. The difference is simply that the District uses a “likely to succeed on the merits” standard while California uses a “probability that the plaintiff will prevail” standard, neither of which parallels Rule 12 or 56.<sup>5</sup> As former Chief Judge Kozinski of the

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<sup>5</sup> *See* D.C. Code §16-5502(2) (“If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.”).

Ninth Circuit has explained, California’s anti-SLAPP statute (like the District’s) cuts an “ugly gash” through the “orderly process” established by the Federal Rules of Civil Procedure, because

it enables [defendants] to test the factual sufficiency of a plaintiff’s case prior to any discovery; it changes the standard for surviving summary judgment by requiring a plaintiff to show a “reasonable probability” that he will prevail, rather than merely a triable issue of fact; it authorizes attorneys’ fees against a plaintiff who loses the special motion by a standard far different from that applicable under Federal Rule of Civil Procedure 11; and it gives a defendant who loses the motion to strike the right to an interlocutory appeal, in clear contravention of Supreme Court admonitions that such appeals are to be entertained only very sparingly because they are so disruptive of the litigation process.

*Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, J., concurring); *see also id.* (“key aspects of [California’s anti-SLAPP] scheme can’t possibly coexist with the Federal Rules of Civil Procedure”); *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188-89 (9th Cir. 2013) (Watford, J., dissenting from denial of rehearing *en banc*) (“California’s anti-SLAPP statute conflicts with Federal Rules 12 and 56,” including by establishing a “probability of success” standard that conflicts with Rule 12’s

plausibility standard and Rule 56's genuine-issue-of-material-fact requirement).

The California statute expressly states that once an anti-SLAPP motion is denied, the fact of its filing and its disposition become irrelevant for all future proceedings. Cal. Code of Civ. Proc. §425.16(b)(3). Thus, while discovery and other pre-trial matters were needlessly delayed by EA's appeal,<sup>6</sup> this case is currently proceeding in the district court just as if EA had never filed its anti-SLAPP motion. *See* D.Ct. Dkt. #145 (lifting stay after Ninth Circuit's decision became final).

## **II. Electronic Arts and its Amici Mischaracterize the “Transformative Use” Test Applied Below.**

Even if this case were being presented in an appropriate procedural posture, plenary review would not be warranted. For over 50 years, courts have recognized the right of athletes, celebrities, and others to control the commercial use of their names and likeness, including through the marketing and sale of merchandise that seeks to profit from their celebrity. *See, e.g., Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *see also Hart*, 717 F.3d at 150-51. One of the theories

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<sup>6</sup> *See* D.Ct. Dkt. #116 (staying proceedings pending appeal).

underlying most right-of-publicity laws is that “[a] famous individual’s name, likeness, and endorsement carry value and an unauthorized use harms the person both by diluting the value of the name and depriving that individual of compensation.” *McFarland v. Miller*, 14 F.3d 912, 919 (3d Cir. 1994) (citation omitted). As this Court recognized more than 40 years ago when upholding the right of publicity against a First Amendment challenge in *Zacchini*, the right of publicity reflects the judgment that “[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.” *Zacchini*, 433 U.S. at 576.

Although creative expression that depicts the likenesses of real individuals is entitled to First Amendment protection, that protection is “not absolute, and states may recognize the right of publicity to a degree consistent with the First Amendment.” *Keller*, 724 F.3d at 1271. Determining where to draw the line in a particular case requires a balancing of competing interests and an inquiry into the precise impacts of those interests, *Zacchini*, 433 U.S. at 574-78, and courts throughout the country have consistently required such balancing in the years since *Zacchini* was decided.<sup>7</sup> Indeed, the Ninth Circuit in

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<sup>7</sup> See, e.g., *Keller*, 724 F.3d at 1271 (“we must balance the right of publicity of a former college football player against the asserted First Amendment right of a video game developer to use his likeness”); *Hart*, 717 F.3d at 167 (“the balancing inquiry

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this case and *Keller* and Third Circuit in *Hart* rely on the very cases that EA and its amici now contend are in supposed conflict. *Compare* Pet. 5 (asserting that *ETW*, 332 F.3d 915, is “irreconcilable” with the Third and Ninth Circuits’ approach) *with Hart*, 717 F.3d at 166 (applying *ETW*).

In *Zacchini*, this Court considered an Ohio right-of-publicity lawsuit arising from an evening news broadcast (which was, of course, core First Amendment activity) that showed a videotape of plaintiffs’ 15-second “human cannonball” act. 433 U.S. at 563-64. This Court identified several important state interests asserted by plaintiff, including the need to “protect[] the proprietary interest of the individual in his act” and to “prevent[] unjust enrichment by the theft of good will,” and concluded that the First Amendment posed no bar to the plaintiff’s right-of-publicity claim. *Id.* at 573, 576-77. Petitioner and its amici seek to distinguish *Zacchini* on the ground that the Ohio television station broadcast the plaintiff’s entire stunt. But for purposes of this Court’s analysis, whether the broadcast included all or only part of the act was irrelevant. Nothing in the Court’s opinion

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looks to see whether the interests protected by the right of publicity are sufficient to *surmount* the already-existing First Amendment protections”); *ETW Corp. v. Jireh Pub. Co.*, 332 F.3d 915, 937 (6th Cir. 2003) (“we balance the magnitude of the speech restriction against the interest in protecting Woods’s intellectual property right”); *Comedy III Prods.*, 25 Cal.4th at 391 (“We formulate instead what is essentially a balancing test between the First Amendment and the right of publicity. . .”).



suggested that its analysis would have been different had the news broadcast been limited to a five- or ten-second excerpt, or if it had only shown his ejection from the cannon or only his landing. In each circumstance, the broadcast would still have exploited without compensation the valuable commercial nature of the performer's identity, and the outcome should have been the same.

Further, although the facts of this case have yet to be developed in detail, the preliminary record leaves little doubt that EA appropriated the commercial value of the retired NFL stars' likenesses, without paying them for it, for no purpose but to "get free some aspect of the plaintiff[s, *i.e.*, their likenesses] that would have market value and for which [EA] would normally pay." *See Zacchini*, 433 U.S. at 576. EA's *Madden NFL* game allowed users to choose between playing current teams populated with likenesses of current NFL players or historic teams populated with the retired NFL plaintiffs' likenesses. SER 189-199, 319-945. EA paid guaranteed royalties of \$35 million per year for the use of active players' likenesses but did not pay anything for the retired players' likenesses. ER 84 (FAC ¶ 36); SER 2162, 2168-2169. As the Ninth Circuit noted, "[h]aving acknowledged the likenesses of current NFL players carry a substantial commercial value, EA does not offer a persuasive reason to conclude otherwise as to the former players." Pet.App. 14a.

Following *Zacchini*, the California Supreme Court in *Comedy III*, 25 Cal.4th 387, used the phrase

“transformative use test” as a shorthand description for its analytical approach. *Comedy III* involved the sale of t-shirts featuring an unlicensed reproduction of a drawing of the Three Stooges comedy group. Although it was undisputed that the t-shirt portrait was an “expressive work” protected by the First Amendment, *id.* at 396, the California Supreme Court recognized that “a celebrity’s heirs and assigns have a . . . protectable interest in exploiting the value to be obtained from merchandising the celebrity’s image, whether that interest be conceived as a kind of natural property right or as an incentive for encouraging creative work.” *Id.* at 400.

In weighing the competing interests, the California Supreme Court explained:

Th[e] inquiry into whether a work is “transformative” appears to us to be necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment. . . . When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.

On the other hand, when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less

likely to interfere with the economic interest protected by the right of publicity. . . . Accordingly, First Amendment protection of such works outweighs whatever interest the state may have in enforcing the right of publicity. The right-of-publicity holder continues to enforce the right to monopolize the production of conventional, more or less fungible, images of the celebrity.

*Id.* at 405 (citations and footnote omitted).

Applying this test, the Court concluded that plaintiffs' right-of-publicity challenge was not barred by the First Amendment. The t-shirts' "marketability and economic value . . . derive[d] primarily from the fame of the celebrities depicted," and the Court could "discern no significant transformative or creative contribution." *Id.* at 409. Instead, the artist's "skill [wa]s manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame." *Id.*

The transformative use test has been applied in the specific context of video games many times since *Comedy III*. In *No Doubt v. Activision Publishing, Inc.*, 192 Cal.App.4th 1018 (2011), for example, the rock band No Doubt brought right-of-publicity claims under California law based upon Activision's unauthorized use of its members' likenesses in the *Band Hero* video game. Like *Madden NFL*, *Band Hero* allowed users "to 'be' the No Doubt rock stars." *Id.* at 1033. The game allowed users to perform "any of the songs included in the game, including songs that No

Doubt maintains it never would have performed.” *Id.* at 1024. The game also permitted users to manipulate the avatar depicting female lead singer Gwen Stefani, to “sing in a male voice,” and to make members of the band “perform solo . . . , as well as with members of other groups.” *Id.* at 1024-25. In addition, players could change the venues to settings such as “outer space.” *Id.* at 1034.

Activision asserted that its use of characters modeled on Stefani and other band members was “transformative because the video game shows the No Doubt avatars surrounded by unique, creative elements in fanciful venues such as outer space . . . and performing songs that No Doubt would never perform in real life.” *No Doubt*, 192 Cal.App.4th at 1035. The court disagreed: “[T]hat the avatars appear in the context of a videogame that contains many other creative elements does not transform the avatars into anything other than exact depictions of No Doubt’s members doing exactly what they do as celebrities.” *Id.* The Court held that the “graphics and other background content of the game are secondary, and the expressive elements of the game remain manifestly subordinated to the overall goal of creating a conventional portrait of No Doubt so as to commercially exploit its fame.” *Id.*

In *Keller*, the Ninth Circuit applied the same transformative use analysis to “balance the right of publicity of a former college football player against the asserted First Amendment right of a video game developer [EA] to use his likeness in an expressive

work.” *Keller*, 724 F.3d at 1271. The Court noted that as in *No Doubt*, EA’s *NCAA Football* allows “users [to] manipulate the characters in the performance of the same activity for which they are known in real life – playing football . . . and the game’s setting is identical to where the public found [Keller] during his collegiate career on the football field.” *Id.* at 1276. Accordingly, the court in *Keller* held: “Given that *NCAA Football* realistically portrays college football players in the context of college football games, the district court was correct in concluding that EA cannot prevail as a matter of law based on the transformative use defense at the anti-SLAPP stage.” *Id.* at 1279. The court in *Keller* also noted that the Third Circuit in *Hart*, 717 F.3d 141, had “c[o]me to the same conclusions” in a “materially identical challenge under new Jersey right of publicity law brought by former Rutgers quarterback Ryan Hart [regarding EA’s same *NCAA Football* video game].” *Id.*, citing *Hart*, 717 F.3d at 163 n.28 (“*Keller* is simply [Hart] incarnated in California”).

Despite the consistent application of this analytical approach by state and federal courts throughout the country, EA insists that the transformative use test is “constitutionally perverse” because “it affords First Amendment protection only to fanciful or distorted portrayals, not accurate ones.” Pet. 4; *see also* Pet. 13 (“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’”); Pet. 28

(decision below “assumes that the state has a *stronger* interest in penalizing *accurate* speech than in penalizing speech that is fanciful or ‘transformative’”).

EA’s argument mischaracterizes the transformative use test and how it has been applied by the courts. Indeed, as Judge Seeborg noted in denying EA’s anti-SLAPP motion, the California Supreme Court in *Comedy III*, the first case to use the phrase “transformative use test” in the right-of-publicity context, expressly stated (contrary to EA’s current assertion) that “[p]rotected transformations of celebrity likenesses ‘are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism.’” Pet.App. 26a. (quoting *Comedy III*, 25 Cal.4th at 407).

In this case, the district court applied the same analysis that courts in earlier cases had developed to address similar right-of-publicity cases arising in this context, concluding that plaintiffs’ allegations and supporting affidavits were “sufficient to ‘state and substantiate a legally sufficient complaint’” under the California anti-SLAPP statute. Pet.App. 42a. The district court further explained:

As in *Keller*, plaintiffs here appear in *Mad-den NFL* in their conventional role as football players, playing football. If there is any expressive significance inhering in EA’s depiction of plaintiffs, defendant has failed to articulate it. Although EA appears to claim that its mere projection of plaintiffs’

likenesses into avatar figures, capable of manipulation by gamers, is sufficient to confer constitutional protection, another way to see this supposed transformation is as a relatively literal, if skilled, translation of plaintiffs' conventional images into the medium of the video game. In this sense, EA's use of plaintiffs' likenesses, though highly sophisticated, is the digital equivalent of transferring the Three Stooges' images onto a t-shirt.

Pet.App. 29a-30a.

Based on the same preliminary evidence, the Ninth Circuit affirmed the district court's denial of EA's anti-SLAPP motion, concluding that "the expressive elements of the game remain manifestly subordinated to the overall goal of creating a conventional portrait of [the players] so as to commercially exploit [their] fame." Pet.App. 8a (quoting *No Doubt*, 192 Cal.App.4th at 1035).

As these courts recognized, the First Amendment does not establish an absolute shield against California right-of-publicity liability when a company uses a person's commercially valuable likeness without permission in a game that would operate in the identical manner and have the same functionality if it were stocked with anonymous characters rather than avatars depicting well-known players whose likeness have commercial value. The courts' rulings did not merely turn on whether the players were depicted in a realistic rather than a fanciful manner. Rather, the

courts focused on whether the expressive significance, if any, of EA's depiction of plaintiffs was subordinated to EA's goal of commercially exploiting the players' celebrity.

Whether the lower courts continue to reach the same conclusions after the facts are developed through discovery and trial remains to be seen. But the underlying distinction itself is fully consistent with *Zacchini* and does not depend solely on whether the plaintiffs' likenesses were appropriated in a "distorted" or "fanciful" rather than "realistic" manner. The Ninth Circuit's ruling would have been the same even if plaintiffs' *Madden NFL* avatars breathed fireballs and played barefoot – as long as their likenesses remained identifiably their own and the expressive elements remained subordinated to the goal of seeking to exploit their fame in the activity that made them famous.

### **III. There is No Meaningful Circuit Split**

Electronic Arts and its amici also claim that plenary review is needed to resolve a circuit split regarding the proper test to use in cases involving the First Amendment and the right of publicity. As an initial matter, the controlling case law regarding the specific issue in this case – whether the First Amendment protects the unauthorized use of celebrities' likenesses in a simulation video game – is entirely consistent, and neither EA nor its amici can identify any conflicting authority. Two separate Ninth



Circuit panels, the Third Circuit, two Northern District of California judges, and the California Court of Appeal have all issued decisions on this precise issue, applied the same tests, and reached identical conclusions. *See* Pet.App. 1a-16a; *Keller v. Electronic Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013); *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *Davis v. Electronic Arts*, 2012 WL 3860819 (N.D. Cal., March 29, 2012); *Keller v. Electronic Arts Inc.*, 2010 WL 530108 (N.D. Cal., February 8, 2010); *No Doubt v. Activision Publishing, Inc.*, 192 Cal.App.4th 1018 (2011). Further, the Ninth and Third Circuits both denied EA's requests for *en banc* review. Pet.App. 43a-44a; *see also* 6/25/13 Order, Case No. 11-3750 (3d Cir.). EA's citation to cases with different facts and applying different tests 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 (which is why the current state of the record is not adequate to issue a definitive ruling) and that different facts lead to different results.

A clear-eyed assessment of the leading case law demonstrates that, with the possible exception of the Second Circuit's *Rogers* test, which serves an entirely different purpose in cases alleging false and misleading celebrity endorsement, each of the courts' tests applies essentially the same type of balancing analysis that the Ninth Circuit applied here.

In *Rogers v. Grimaldi*, *MGM/UA Entertainment Co.*, 875 F.2d 994 (2d Cir. 1989), Ginger Rogers sued the producers and distributors of "Ginger and Fred,"

alleging that the film's *title* violated her federal Lanham Act rights and her Oregon state law right of publicity. *Id.* at 996-97. She did not contend that the content of the film was actionable, only that its title misled prospective movie-goers into believing it was about her and Fred Astaire. *Id.* The Second Circuit affirmed the dismissal of her lawsuit, concluding that, in order to prevent the "overextension of Lanham Act restrictions in the area of titles" in a manner that "might intrude on First Amendment values," the Lanham Act should be construed to apply "only where the public interest in avoiding consumer confusion outweighs the public interest in free expression." *Id.* at 998-99. The court explained that, "[i]n the context of allegedly misleading titles using a celebrity's name, that balance will normally not support application of the Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work." *Id.* at 999 (emphases added). Applying this "relatedness" test, the court rejected Rogers' Lanham Act claim because the film's title was "artistically relevant though ambiguous." *Id.* at 1001.

The Second Circuit also rejected Rogers' right-of-publicity claim, but as a matter of Oregon state law, not the First Amendment. The Court explained that Oregon common law "permit[s] the right of publicity to bar the use of a celebrity's name in a movie title [only if] the title was 'wholly unrelated' to the movie or was simply a disguised commercial advertisement

for the sale of goods or services.” *Id.* at 1004. Because neither of those circumstances existed, the court had no need, and expressly declined, to consider whether the First Amendment independently barred Rogers’ claim. *Id.* at 1005 n.13 (“As in our ruling on the Lanham Act claim, we need not, and do not, reach the issue of whether the First Amendment would preclude a state from giving broader application to the right of publicity.”).

By its own terms, *Rogers*’ “relatedness” test is limited to its federal Lanham Act and Oregon common law context. The Lanham Act addresses “the danger of consumer deception” when a work is depicted as something it is not. The “relatedness” test was designed to address “likelihood of confusion” concerns arising in cases that have nothing to do with the issues presented here. *Rogers*, 875 F.2d at 997; *see also id.* (“The purchaser of a book . . . has a right not to be misled as to the source of the product.”). The Second Circuit’s “relatedness” test addresses that possibility-of-confusion problem by requiring that the titles of works be related to their content and “not explicitly misleading as to the content of the work.” *Id.* at 1000. The court applied that same requirement as a matter of Oregon common law to plaintiffs’ allegation that the film’s title was intended to misleadingly appropriate her name. *Id.* at 1004 (holding that Oregon common law 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’”) (emphasis added).

As this Court made clear in *Zacchini*, the interests underlying the right of publicity – “preventing unjust enrichment by the theft of good will” and ensuring that defendants not “get free some aspect of the plaintiff that would have market value and for which he would normally pay,” 433 U.S. at 576 – are largely unrelated to the “false advertising” concerns that gave rise to the Lanham Act and *Rogers*’ “relatedness” test. The right of publicity “provides an economic incentive” for the “production of works of benefit to the public.” *Id.* at 576-77. Nothing in the “relatedness” test permits any consideration of those interests, because that test focuses exclusively on concerns about potential consumer deception. The “relatedness” test thus cannot be used to “balance” a defendant’s First Amendment rights against a plaintiff’s rights of publicity, and it has never been applied in that context. Notably, *none* of the nine judges on the panels in *Davis*, *Keller*, and *Hart* – even the two dissenters – endorsed using the *Rogers* test to balance First Amendment interests against the right of publicity. *See, e.g., Davis*, 775 F.3d at 1179 (because it is intended to address consumer confusion, “the *Rogers* tests does not apply to the plaintiffs’ right-of-publicity claims”); *Keller*, 724 F.3d at 1281 (“we disagree that the *Rogers* test should be imported wholesale for right-of-publicity claims”); *Hart*, 717 F.3d at 158 (“We . . . reject the *Rogers* test as inapplicable.”); *Keller*, 724 at 1284 n.1 (Thomas, J., dissenting) (“I agree

with the majority that the test articulated in [*Rogers*] should not be employed in this context.”).

Other than in the *Rogers* context, EA’s claimed distinctions among the other courts’ tests are at most minor variations on the same basic inquiry. The basis for EA’s assertion of an alleged circuit split is its mischaracterization of the transformative use test as protecting distortions of likenesses but not realistic depictions. Once that misconception is dispelled, *see supra* at 15-25, little difference remains between the analyses employed by courts, regardless of the label used.<sup>8</sup>

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<sup>8</sup> Petitioner and its *amici* also contend that the California Supreme Court formulated an alternative, “transformative work” test in *Comedy III*. The “transformative work” test supposedly “asks whether the speaker has added material beyond just the likeness of the celebrity” to the work as a whole, not whether the celebrity’s identity is itself “distorted.” There is no such separate test. EA’s confusion arises from the fact that in *Comedy III* the depiction of the Three Stooges was the entire work – there was no distinction between the work and the depiction. As later cases have clarified, when the court in *Comedy III* required that the author “add[ ] significant creative elements so as to . . . transform[ the work] into something more than a mere celebrity likeness or imitation,” 25 Cal.4th at 391, it did not mean that simply adding *any* creative content beyond the celebrities’ identities would automatically make their use protected, but that incorporating the celebrities’ identities as a component of the work’s creative elements may render that use protected. *See, e.g., Hart*, 717 F.3d at 169 (*Comedy III* “focused on elements or techniques that affect the celebrity identity”; “*other* creative elements” that do not affect likeness are irrelevant; “To the extent that [*Comedy III*, among others] considered the broader context of the work (e.g., whether events took place

(Continued on following page)

Each of the remaining tests cited by Electronic Arts and its amici have the same central concerns as the “transformative use” test, namely, whether the expressive significance of the use of the likeness is manifestly subordinated to the goal of commercial exploitation. *See, e.g., Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (en banc) (“predominant purpose” test: “the use of a person’s identity in news, entertainment, and creative works *for the purpose of communicating information or expressive ideas* about that person is protected ‘expressive’ speech,” while “the use of a person’s identity for purely commercial purposes . . . is rarely protected”; use of identity not protected where it was “a ploy to sell comic books and related products rather than an artistic or literary expression”) (quotation marks and citation omitted; emphasis added); *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2003) (“ad hoc” balancing test: use of identities is protected as an integral part of expressive fantasy sports product); *Cardtoons v. Major League Baseball Players Ass’n*, 95 F.3d 959

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in a ‘fanciful setting’), this inquiry was aimed at determining whether this context acted upon the celebrity identity in a way that transformed it or imbued it with some added creativity beyond providing a ‘merely trivial variation.’”); *Keller*, 724 F.3d at 1278 (rejecting argument that *Comedy III* requires focus on “the work in its entirety” as opposed to “individual depictions” within the work) (quotation marks and citation omitted).

(10th Cir. 1996) (“ad hoc” balancing test: parody trading cards protected where use of baseball players’ identities was a necessary element of their social commentary); *ETW*, 332 F.3d at 936 (transformative use test: author’s depiction of Tiger Woods protected where it was part of a message that “Woods himself will someday join” “the pantheon of golf’s greats,” and the work does not “capitalize solely on a literal depiction of Woods”). In sum, because the *substance* of the courts’ overall approaches is essentially the same in this regard, there is no circuit split.

It is impossible to establish a one-size-fits-all solution for right-of-publicity cases, as is often true in cases having potential First Amendment implications. *See Comedy III*, 25 Cal.4th at 409 (“Although the distinction between protected and unprotected expression will sometimes be subtle, it is no more so than other distinctions triers of fact are called on to make in First Amendment jurisprudence.”). Thus, while Electronic Arts and its amici lament the alleged uncertainty in the law in this area, no ruling by the Court in this, or any other, right-of-publicity case will yield a bright-line rule dictating the outcome of all future cases, in all states.

#### **IV. There Is No Evidence That the Decision Below Has Chilled the Exercise of First Amendment Rights.**

EA and its amici further contend that, absent a grant of certiorari followed by reversal and adoption of an entirely new standard, artistic expression in this country will be chilled because content creators will be uncertain whether they may be found liable for appropriating the likeness of public figures without obtaining their subject's consent. As an initial matter, the right of publicity has been recognized for well over 50 years; this Court permitted right-of-publicity claims involving certain forms of expression almost 40 years ago in *Zacchini*; and *Comedy III's* "transformative use" test has been applied in California for almost 15 years. Notwithstanding this longstanding right-of-publicity jurisprudence, there is no evidence of any chill. Indeed, EA and its amici cite numerous examples of recent films, novels, video games, and other works of expression utilizing depictions of public figures that provide living proof that content creators have *not* been chilled. *See, e.g.*, CLIPP Amicus Br. at 19. While Electronic Arts is correct that there have been a dozen fairly high profile right-of-publicity cases, it is equally true that defendants prevailed in many of those cases (*see, e.g.*, *C.B.C.*, 505 F.3d 818; *ETW*, 332 F.3d 915; *Cardtoons*, 95 F.3d 959; *Valentine v. C.B.S., Inc.*, 698 F.2d 430 (11th Cir. 1983); *Lohan v. Perez*, 924 F.Supp.2d 447 (E.D.N.Y. 2013); *Winter*, 30 Cal.4th 881); and in many of the cases where plaintiffs prevailed, the facts



surely support the ultimate outcome, no matter which test was applied (*see, e.g., Comedy III*, 25 Cal.4th 387 (bare use of “literal, conventional depictions of The Three Stooges so as to exploit their fame” not protected)).

In the highly profitable video game business, companies like EA can easily protect themselves from right-of-publicity liability simply by obtaining a license to use public figures’ likenesses, as EA does in *Madden NFL* itself with respect to *all* of the non-“historical” team players. *See* Pet.App. 3a (“EA has paid National Football Players Inc. – the licensing arm of the National Football League Players Association – annual licensing fees in the millions of dollars to use current players’ likenesses.”); *see also Zacchini*, 433 U.S. at 578 (“Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it.”). Where, as here, a party desires to exploit a public figure’s persona solely for purposes of increasing the marketability of its product, requiring it to obtain that public figure’s consent (and to pay a reasonable fee for that use) is both appropriate and legally required in jurisdictions like California that have a right of publicity.



**CONCLUSION**

The petition for writ of certiorari should be denied.

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