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

BRIEF OF *AMICI CURIAE* OF ELECTRONIC FRONTIER FOUNDATION, ORGANIZATION FOR TRANSFORMATIVE WORKS, AND COMIC BOOK LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Cited Authorities

Page

STATUTES

Page

OTHER AUTHORITIES

Cited Authorities

Page

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amicus Electronic Frontier Foundation ("EFF") is a member-supported, non-profit public interest organization dedicated to protecting digital civil liberties and free expression. Founded in 1990, EFF represents more than 22,000 contributing members. EFF has a strong interest in ensuring the First Amendment provides consistent and reliable protection to would-be speakers by placing a clear constitutional limit on the types of speech and expression subject to publicity rights claims.

Amicus Organization for Transformative Works ("OTW") is a 501(c)(3) nonprofit dedicated to protecting and preserving noncommercial works created by fans based on existing works, including popular television shows, books, and movies (often described as "fanworks"). OTW's nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 600,000 registered users and receives upwards of 90 million page views per week. The OTW and its many users have a strong interest in a reliable First Amendment right to create and appreciate fanworks without interference from overreaching publicity rights.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. Pursuant to Supreme Court Rule 37.2(a), *amici* provided at least ten days' notice of its intent to file this brief, to counsel of record for all parties. The parties have consented to the filing of this brief and such consents are being submitted. Web sites cited in this brief were last visited on November 3, 2015.

Amicus Comic Book Legal Defense Fund ("CBLDF") is a non-profit organization dedicated to the protection of the First Amendment rights of the comics art form and its community of retailers, creators, publishers, librarians, and readers. The CBLDF is concerned about how overly broad publicity rights can chill comics that are inspired by, or comment on, real events and people.

INTRODUCTION AND SUMMARY OF ARGUMENT

At a recent concert in New York City, Madonna performed a song while a montage of fan art played on a giant screen behind her.[2] The montage included charcoal drawings of Madonna, paintings in the style of Andy Warhol, paintings reminiscent of Frida Kahlo's work, and dozens of other unique portraits. While these artists found themselves celebrated by their subject, they might instead have been dragged into court to face a right of publicity claim. Had Madonna sued her fans, it is almost impossible to predict how a court would rule. If the court had followed the reasoning of the Ninth Circuit in this case, fans that created realistic portraits—and thereby failed to "transform" Madonna's likeness—might find themselves liable. If the court instead followed the reasoning of *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915 (6th Cir. 2003), where the Sixth Circuit found that the First Amendment protected a realistic portrait of Tiger Woods, the fans would likely prevail. These inconsistent

2. A video of a September 19, 2015 performance is available on YouTube: *Madonna RebelHeart with Fan Art (Song Only)*, YouTube (Sept. 21, 2015), https://www.youtube.com/watch?v=6dLI2obclxg&sns=fb

approaches result in dangerous uncertainty for visual artists, filmmakers, and other creators.

The right of publicity, and the uncertainty over its allowable scope, casts a shadow over a staggering range of expression. Originally construed as a limit on images in advertising, it has been asserted against biographies, comic books, songs, computer games, movies, and magazines, and has come to encompass virtually anything that "evokes" a specific person. Moreover, in some states, claims can be made decades after the subject has died. In light of this broad reach, finding the right balance between the right of publicity and the First Amendment is critical.

Lower courts have failed in this task. Indeed, state and federal courts have failed to settle on *any* predicable First Amendment test for right of publicity claims, let alone the correct one. Instead, they have applied a grab bag of legal tests including ad hoc balancing, doctrines adapted from trademark law, and standards borrowed from copyright law. In this case, the Ninth Circuit embraced the transformative use test. This standard, which borrows from copyright's fair use doctrine, asks whether the challenged work adds creative elements to a given likeness such that it becomes "something more" than a mere imitation or replica. But in many contexts, such as documentaries or biographies, the speaker is striving to depict the subject as accurately as possible. There is no logical reason to penalize artists for making this choice. So, in addition to being vague and difficult to apply, the transformative use test wrongly punishes realistic expression.

Amici fear that the uncertainty surrounding the right of publicity is most likely to chill disfavored speakers and new mediums of expression. This Court has roundly rejected the view that new media like computer games are less deserving of First Amendment protection. *See Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011). Yet movies and books have generally survived right of publicity challenges while less conventional media like computer games and comic books have more often been found liable. *Compare Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (biographical film protected by First Amendment), *with Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (comic book publisher liable for character loosely based on professional hockey player). Vague standards—like the transformative use test favored by the Ninth Circuit—fuel this discrimination between formats. When the law requires judges to act as cultural critics, new and challenging speech may be penalized.

Because lower courts have failed to apply a consistent First Amendment standard to the right of publicity, because the "transformative use" test applied the Ninth Circuit is vague and wrongly discriminates against realistic depictions, and because this case cleanly presents the issue for review, this Court should grant certiorari.

ARGUMENT

I. The Application of the First Amendment to the Right of Publicity Is an Issue of Exceptional Importance that Warrants Attention from this Court.

It has been nearly forty years since this Court last considered the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). Since that time, approximately 20 states have enacted statutes codifying some form of the right of publicity.[3] Many other states recognize a common law cause of action. The right of publicity has expanded in substantive scope as well as geographic reach. Any form of expression that mentions, depicts, or even merely evokes, a living person might be challenged. *See White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (reversing dismissal of publicity rights claim because robot in dress and wig turning letters "evoke[d]" Vanna White's identity); *Virag, S.R.L. v. Sony Computer Entm't Am. LLC*, No. 3:15-cv-

3. The following statutes have been enacted since *Zacchini* (year is date of enactment): Ala. Code §§ 6-5-770 et seq. (2015); Ariz. Rev. Stat. § 12-761 (2007) (creating a statutory cause of action for soldiers only); Haw. Rev. Stat § 482P (2009); 765 Ill. Comp. Stat. 1075/10 (1999); Ind. Code §§ 32-36-1-1 et seq. (2002); Ky. Rev. Stat. Ann. § 391.170 (1984); La. Stat. Ann. § 14:102.21 (2006) (for soldiers only); Neb. Rev. Stat. §§ 20-201 et seq. (1979); Nev. Rev. Stat. Ann. §§ 597.770 et seq. (2015); Ohio Rev. Code Ann. §§ 2741.01 et seq. (1989); Okla. Stat. tit. 12 §§ 1448-49 (1985); 9 R.I. Gen. Laws Ann. § 9-1-28.1 (1980); S.D. Codified Laws §§ 21-64 et seq. (2015); Tenn. Code Ann. §§ 47-25-1101 et seq. (1984); Tex. Prop. Code Ann. §§ 26.001 et seq. (1987); Utah Code Ann. §§ 45-3-1 et seq. (1981); Wash. Stat. §§ 63.60.010 et seq. (1998); Wis. Stat. § 995.50 (1977).

01729 (N.D. Cal. Aug. 21, 2015) (allowing publicity rights claim to proceed based on video game's use of a company name because company was allegedly a "personification" of one of its owners). Despite its growing importance, the question of how the right of publicity is limited by the First Amendment remains essentially unaddressed by this Court.

In *Zacchini*, this Court held that the First Amendment did not bar a publicity rights claim against a television broadcaster that had screened the plaintiff's entire human cannonball act in a television news program. The majority emphasized that its ruling was closely tied to the fact that the defendant had appropriated the plaintiff's "entire performance." *Zacchini*, 433 U.S. at 576. But most right of publicity cases do not follow this pattern. Instead, the vast majority of right of publicity disputes involve the *depiction* of a celebrity in a broader work, like a book or a film.[4] Lower courts have recognized that *Zacchini* provides little guidance for such cases. *See, e.g.*, *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 973 (10th Cir. 1996); *see also* J. Thomas McCarthy, The Rights Of Publicity And Privacy § 8:27 (2d

4. *See, e.g.*, *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (digitally-altered photograph); *Browne v. McCain*, 611 F. Supp. 2d 1062 (C.D. Cal. 2009) (presidential campaign commercial); *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (book and film); *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860 (1979) (depiction in film); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664 (2010) (magazine feature); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (2001) (documentary); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (comic books); *Rosemont Enters. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144 (N.Y. Sup. Ct. 1973) (board game).

ed. 2015) (recognizing that, "while the *Zacchini* majority and dissenting opinions have been picked apart word by word by the commentators, no clear message emerges and no general rule is discernible by which to predict the result of conflicts between the right of publicity and the First Amendment"). Because *Zachinni* only addressed the rare instance where an entire performance is appropriated, the broader question of how the First Amendment limits the right of publicity remains unsettled.

II. Lower Courts Have Taken Inconsistent Approaches to Balancing the First Amendment and the Right of Publicity.

Absence guidance from this Court, courts have taken vastly different approaches to how the First Amendment applies to right of publicity claims. Courts overwhelmingly agree that the First Amendment places *some* limits on the right of publicity. *See, e.g.*, *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 396-97 (2001) (noting the "tension between the right of publicity and the First Amendment"). But courts diverge wildly on the crucial question of where the limit lies. To get a handle on the jurisprudential chaos, it is helpful to group the most common approaches into three broad camps.[5]

5. A handful of decisions fall outside even these broad categories. For example, some courts have invoked a "newsworthiness" standard. *See Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201, 1208 (11th Cir. 2009) (noting that "the Georgia courts have adopted a 'newsworthiness' exception to the right of publicity").

Ad hoc balancing

Some courts have applied the First Amendment by attempting to balance the free expression interest of the speaker against the purported injury suffered by the defendant. For example, the Tenth Circuit has applied a test that weighs the defendant's "right to free expression and the consequences of limiting that right" against "the effect of infringing" the other party's publicity rights. *Cardtoons*, 95 F.3d at 972-76; *see also C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (suggesting that "state law rights of publicity must be balanced against first amendment considerations"). In *Cardtoons*, the court ultimately found that the parody trading cards were protected by the First Amendment. *See* 95 F.3d at 976. But the court's ad hoc balancing provided few clues as to how it might rule when faced with different facts.

The Supreme Court of Missouri has also applied a kind of balancing test. It asks whether "a product is being sold that predominantly exploits the commercial value of an individual's identity," in which case "that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some 'expressive' content in it that might qualify as 'speech' in other circumstances." *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (citation omitted). This test, which requires judges to divine the 'predominant purpose' of a work, is perhaps even more amorphous than the test applied by the Tenth Circuit. Moreover, it effectively ignores the expressive value of works. Indeed, in *TCI*, the Court ultimately held the publisher of a comic book liable for a character loosely based on a professional

hockey player. *See* 110 S.W.3d at 374 (concluding that "the metaphorical reference to Twist, though a literary device, has very little literary value compared to its commercial value"). Balancing tests like these have an obvious, and very serious, flaw: they are unpredictable and provide speakers with almost no notice about what speech is permitted and what will give rise to liability.

The *Rogers*/Restatement test

Other courts have adopted the so-called "*Rogers* test," which asks whether the defendant's use is "wholly unrelated" to the content of the accused work or was "simply a disguised commercial advertisement for the sale of goods or services." *See Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003) (citing *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989)). The Restatement (Third) Of Unfair Competition § 47 (1995) applies a similar standard. The Restatement limits the application of publicity rights to only those uses made "for purposes of trade"—that is, uses that appear "in advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user." It further explains that "for purposes of trade" does not ordinarily include "news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses." *Id.*

The *Rogers*/Restatement approach tends to be more protective of speech than other First Amendment tests applied to the right of publicity. Under this test, the right of publicity trumps a speaker's First Amendment right when the speaker falsely represents that a celebrity

has endorsed a product or service. *See* Restatement § 47 cmt. a; *see also Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1032 (3d Cir. 2008) (the right of publicity "is meant to protect is a citizen's prerogative *not* to have his or her name, likeness, voice, or identity used in a commercial advertisement"). Importantly, although the Restatement allows right of publicity claims to reach some merchandizing, it recognizes that "creative works" require First Amendment protection. Restatement § 47 cmt c. Many items sold for profit—be they posters, trading cards or t-shirts—include expressive content and thus are protected as creative works. *See, e.g.*, *ETW Corp. v. Jireh Publ'g, Inc.*, 99 F. Supp. 2d 829, 836 (N.D. Ohio 2000), *aff'd* 332 F.3d 915 (6th Cir. 2003) (the "print at issue herein is an artistic creation").

The transformative use test

The Ninth Circuit and the Third Circuit apply the transformative use test. *See Davis v. Elec. Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015); *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013). This test originates with the California Supreme Court's decision in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001). In that case, the court considered whether a t-shirt bearing a charcoal drawing depicting The Three Stooges infringed the Stooges' right of publicity. *See* 25 Cal. 4th at 393. In considering how the First Amendment might apply, the court suggested that the right of publicity was an "intellectual property right" similar to copyright and, therefore, copyright's fair use doctrine should inform the analysis. *Id.* at 399. In particular, the court

reasoned that while it did not make sense to import fair use "wholesale" into right of publicity law, it nonetheless could apply the first fair use factor and ask whether the use is "transformative." *Id.* at 404. Thus, the central inquiry became whether or not the "artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain." *Id.* at 405.

In light of these different approaches, an artist creating a work about a real person has little idea how a court might evaluate liability for use of that person's likeness, particularly if she cannot be certain which jurisdiction's rules might govern the analysis. *See, e.g.*, *Bi-Rite Enters, Inc. v. Bruce Miner Co.*, 757 F.2d 440, 443-44 (1st Cir. 1985) (applying complex multi-factor choice of law analysis to determine which state's right of publicity law applied).

Decades of erratic rulings show that only this Court can establish a consistent First Amendment standard for right of publicity claims.

III. This Court Should Grant Certiorari to Reject the Transformative Use Test Applied by the Ninth Circuit.

This case squarely presents the question of whether the transformative use test is the appropriate standard. The answer to that question is no. *First*, the copyright concept of transformativeness, while facially appealing, cannot be easily adapted to the very different context of publicity rights. *Second*, and relatedly, the transformative use test has had the unintended consequence of creating collateral damage for all kinds of creative works. Fairly

interpreted, a "transformation" requirement could mean literal depictions of celebrities (and other persons) may be subject to liability, no matter how necessary that literal quality may be to the purpose of the work, while parodic or otherwise fanciful depictions will likely be protected. *Compare No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018, 1034-35 (2011) (realistic depiction of musicians not protected by First Amendment) *with Winter v. DC Comics*, 30 Cal. 4th 881, 890 (2003) (depiction of musicians as half-man/half-worm creatures was transformative and thus protected). Such an arbitrary distinction puts a vast swath of legitimate speech at risk. Finally, the Ninth Circuit compounded its error by considering transformation very narrowly and not considering the broader expressive purpose and content of EA's computer game.

A. The Transformative Use Test Is a Bad Fit for Publicity Rights.

The rule announced in *Comedy III* is founded on an analogy between copyright and the right of publicity. But fundamental differences between these legal interests suggest that copyright was the wrong place to look. First, the right of publicity lacks copyright's constitutional pedigree. In considering free speech limits to copyright, this Court has emphasized that the First Amendment and the Copyright Clause were adopted "close in time." *Golan v. Holder*, 132 S. Ct. 873, 889 (2012) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)). In contrast, the right of publicity is a relatively recent offshoot of state privacy torts. *See* Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 Stan. L. Rev. 1161, 1168-75 (2006); Rebecca Tushnet,

A Mask that Eats into the Face: Images and the Right of Publicity, 38 Colum. J.L. & Arts 157, 159-61 (2015). So while this Court has treated copyright as broadly "compatible with free speech principles," *Eldred*, 537 U.S. at 219, there is no reason to make the same assumption for the right of publicity.

Second, unlike the right of publicity, copyright's fair use doctrine balances *competing* free speech interests. Copyright provides an incentive to create speech. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (describing copyright as an "engine of free expression"). At the same time, without appropriate limitations, exclusive rights can impede the creation and dissemination of new works. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1109 (1990). The fair use doctrine allows copyright to balance this tension between competing speech interests. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575-76 (1994) (the need to protect authors while allowing others to build on their work is an "inherent tension" as old as copyright itself).

While copyrights reward the creation of new speech and expression, publicity rights serve no such function. To the extent the right of publicity provides an incentive for speech, or even an incentive to become a celebrity, any inducement is weak and attenuated. *See* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 Duke L.J. 1, 43-44 (2004) Applying a test that is designed to help balance competing speech interests to a situation where one side has no speech interest makes very little sense.

Finally, an emphasis on "transformativeness" makes very little sense in the right of publicity context given that there is no *original work* to be "transformed." Not surprisingly, when applied the test tends to turn on the court's evaluation of artistic or social merit—precisely the kind of artistic judgment that this Court has counseled against in the copyright context. *See, e.g.*, *Campbell*, 510 U.S. at 582-83; *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

Indeed, the utter incoherence of the test is seen in the *Comedy III* decision that first applied it. There, the California Supreme Court attempted to distinguish Saderup's charcoal drawing of The Three Stooges from Andy Warhol's famous silkscreens of Marilyn Monroe. *See* 25 Cal. 4th at 408-09. The court suggested that Warhol's work was transformative because "through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond . . . commercial exploitation." *Id.* But, as many commentators have noted, there is "little difference between Warhol's depictions and Saderup's, except that Warhol is already a recognized artist." Dogan & Lemley, *supra*, 58 Stan. L. Rev. at 1178 n.77; *see also* Tushnet, *supra*, 38 Colum. J.L. & Arts at 169-70; Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903, 913-25 (2003). Since "transformative use" cannot distinguish Warhol from Saderup, the judges' artistic judgment does all the work.

Ultimately, there are no sensible reasons for applying the transformative use test in the right of publicity context.

B. The Transformative Use Test Penalizes Realistic Speech.

Since it imports its test from such a different context, it is hardly surprising that the transformative use test fails to adequately protect free expression, in particular largely factual expression that depends on realistic depictions or real people. Indeed, an enormous range of expression derives its value from realism. Should a documentary be less protected because it is accurate? Should a biopic be less protected because the actors and makeup artists do an uncannily good job of imitating the movie's real-life inspiration? If qualifying for free speech protection requires an artist to turn her subject into a half-man/half-worm creature, as was the case in *Winter*, then First Amendment doctrine has gone very seriously wrong.

In fact, to the extent the First Amendment distinguishes between accurate speech and distortions of reality, it provides less protection for inaccurate speech. *See generally United States v. Alvarez*, 132 S. Ct. 2537, 2553-55 (2012) (Breyer, J., concurring). Even then, this Court has made it clear that falsehoods can be regulated only in narrow circumstances—such as perjury, fraud, and defamation. *See id.* (noting that laws prohibiting false statements impose strict *mens rea* requirements and require proof of harm). The rule applied in *Comedy III, Keller*, and *Davis*, which instead penalizes realistic portrayals, upends fundamental free speech jurisprudence. *See* Tushnet, *supra*, 38 Colum. J.L. & Arts at 188 (right of publicity jurisprudence has become "a body of law out of step with the rest of First Amendment doctrine" because it "discriminates against visual realism for no articulated reason").

C. The Ninth Circuit Compounded Its Error by Applying the Transformative Use Test in an Inflexible Manner.

For the reasons given above, the transformative use test is poorly suited to the right of publicity context. The test becomes even more problematic if courts fail to analyze a work as a whole. The majority decision in *Keller* illustrates this problem. The court wrote, "EA's use 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." 724 F.3d at 1271. The court focused narrowly on the specific depiction of Keller. *See id.* at 1276 n.7 (suggesting that Electronic Arts cannot "hide behind the numerosity of its potential offenses or the alleged unimportance of any one individual player"); *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1178 (9th Cir. 2015) (same). This effectively ignores EA's broader creative enterprise, such as the recreation of dozens of locations, hundreds of players, and the complex programing that allows players to create entirely new narratives. It is very difficult to imagine that a feature film that featured a realistic portrayal of a person—say Mark Zuckerberg—would be found liable because "it literally recreates Zuckerberg in the very setting in which he has achieved renown." *See* The Social Network (Columbia Pictures 2010). Instead, the court would consider the work as a whole to avoid such an absurd result. Yet, when considering a computer game, the Ninth Circuit focused narrowly on the portrayal of the plaintiff. The vague contours of the transformative use test enable this discrimination between formats.

Ultimately, cases applying the transformative test tend to be outcome-motivated. The courts' discussion

of transformativeness tends to closely track the judges' views of the merit of the creative work. *Davis, Keller*, and *Hart* provide excellent examples. The judges who found the works protected by the First Amendment all lauded the creative elements of EA's games. *See Keller*, 724 F.3d at 1286 (Thomas, J. dissenting) (suggesting the "work is one of historic fiction" where the "gamer controls the teams, players, and games"); *Hart*, 717 F.3d at 175 (Ambro, J. dissenting) (noting that the *NCAA Football* game "involves myriad original graphics, videos, sound effects, and game scenarios"); *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 784 (D.N.J. 2011) rev'd, 717 F.3d 141 (3d Cir. 2013) (finding that "the game includes several creative elements apart from Hart's image"). In contrast, the judges who ruled the other way questioned whether EA's creative decisions had expressive worth beyond their commercial motivation. *See Keller*, 724 F.3d at 1276 n.7 ("If EA did not think there was value in having an avatar designed to mimic each individual player, it would not go to the lengths it does to achieve realism in this regard.").

Whether a work is protected by the Constitution should not depend on whether judges appreciate the creative worth of the format.

IV. Many Speakers Will Be Silenced if the Ninth Circuit's Transformative Use Test Is Allowed to Stand.

The stakes of this case go far beyond its effect on one gaming company's bottom line. EA is a corporation with a market capitalization in the billions. It can afford to litigate this case all the way to this Court and, even if it loses, might still be able to afford to produce the *Madden*

NFL series of games. But very few speakers have these kinds of resources. For most individuals, even most companies, just the threat of a lawsuit can be enough to chill speech.

These concerns are not hypothetical. In *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003), *cert. denied*, 540 U.S. 1106 (2004), mentioned above, the Missouri Supreme Court upheld a right of publicity claim against a comic book that used hockey player's nickname as the name of a fictional character. The much-criticized judgment in that case drove the publisher out of business, providing a dramatic example of the speech-silencing power of the right of publicity. *See* Diane L. Zimmerman, *Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C. L. Rev. 1503, 1507 (2009).

The transformative use test applied in this case is likely to chill a wide range of protected expression. This could include Hollywood biopics that seek to portray large numbers of actual persons realistically, such as *Hoffa* (1992), *The Insider* (1999), or *Casino* (1995). It could also include the speech of less wealthy speakers such as documentary producers or independent journalists. In fact, that concern is not hypothetical; the right of publicity was recently used to suppress the exhibition of a documentary at a film festival. Order on Plaintiff Aretha Franklin's Emergency Motion for Temporary Restraining Order/Preliminary Injunction at 2, *Franklin v. National Film Preserve, Ltd.*, No. 15-cv-1921 (D. Co. Sept. 4, 2015) (granting injunction against Telluride Film Festival because "Ms. Franklin has a strong interest in her rights of publicity, and to the use of her likeness

and image"); *see also* Eriq Gardner, *Aretha Franklin Judge Shows No R.E.S.P.E.C.T. for First Amendment (Analysis)*, The Hollywood Reporter (Sept. 8, 2015), http://www.hollywoodreporter.com/thr-esq/aretha-franklin-judge-shows-no-820975 ("[The film's producer] wasn't the defendant, after all. Instead, film festivals (and distributors and news organizations) now have to worry about prior restraints on use of a celebrity's likeness and name. And sorry, Aretha, but this is hardly good news for artists who often use the names and likenesses of other artists in their creative endeavors. . . . Here, she's attempting to ride the same vehicle that Lindsay Lohan attempted to use to stop a Pitbull song."). The danger to speech is amplified by the unpredictability of the transformative use test. This Court has long warned that unpredictable or unclear restrictions are an acute danger to speech. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

CONCLUSION

For the above reasons, *amici* urge this Court to grant the petition for certiorari.

November 5, 2015 Respectfully submitted,

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