

No. _____

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

AMICUS CURIAE BRIEF OF THE THOMAS
JEFFERSON CENTER FOR THE PROTECTION
OF FREE EXPRESSION IN SUPPORT OF
THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

SUMMARY OF ARGUMENT

This Court's decision to accept or deny the Petition will have an immediate and lasting impact on both the expressive practices of countless authors, filmmakers, and other content creators, and the individuals whose likenesses are appropriated by those creators. The disparate standards applied by courts across the country in right-of-publicity cases leave content creators guessing as to the scope of their First Amendment rights and threaten to chill an extraordinary amount of arguably protected expression. Regardless of how this Court might

¹ Pursuant to S. Ct. R. 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

ultimately decide the case, an unambiguous resolution of the current circuit split will eliminate the existing state of uncertainty, answer an open question of First Amendment law, and allay concerns regarding the potential for impermissible chilling of protected speech.

ARGUMENT

I. Depictions of Identifiable Individuals and Personalities are Essential Elements of a Broad Array of Expressive Works

While the present case involves digital representations of former professional football players in the context of a videogame, the underlying issues are highly relevant to practically all artists, authors, filmmakers, and other creators of expressive content. These speakers have a long and rich history of incorporating the names, likenesses, and characteristics of real people in works across a variety of media. The extent to which speakers rely on the creative appropriation of identity is staggering both in scope and diversity. Image appropriation is commonplace in works both “high” and “low,” in fiction and nonfiction, and in almost any genre imaginable. However, the current uncertainty regarding the permissible boundaries of this practice is likely to chill an alarming amount of expressive activity in the future.

A. Theatre

A great many of our most celebrated contemporary theatrical works rely heavily on image appropriation. Some, such as *Inherit the Wind*, *A Few Good Men*, *Six Degrees of Separation*, and *Dreamgirls*, feature fictionalized accounts of actual individuals. In these instances, even though a character is called by a different name, their real-life analog is either obvious to most viewers or can be easily determined by those inclined to do so. At other times, a playwright will place known individuals into more or less historically accurate settings. Recent highly acclaimed examples of this type include *Frost/Nixon* (featuring representations of David Frost and President Richard Nixon), *Master Class* (Maria Callas), *Thurgood* (Justice Thurgood Marshall), and the comic opera *Scalia/Ginsburg* (Justices Antonin Scalia and Ruth Bader Ginsburg). A third type of play takes neither a purely pseudonymous nor biographic approach, opting instead for a landscape in which real-world individuals exist alongside characters created from whole cloth. One well-known example of this style is Moisés Kaufman's *The Laramie Project*, the story of Matthew Shepard's 1998 murder as told by a cast of more than 60 characters. At various points throughout the production, actors portray themselves, fictionalized accounts of real-life individuals, anonymous composites of multiple individuals, and numerous real-world individuals including Fred Phelps of the Westboro Baptist

Church. This hybrid approach can also be seen in Tony Kushner's *Angels in America*. In addition to a large cast of purely fictional characters, a character named after and explicitly based upon the late attorney Roy Cohn plays a major role in the story.²

B. Literature

In literature, the use of image appropriation by authors is perhaps even more deeply entrenched. Certain genres are, in fact, built entirely around the practice. Authors of “alternative history” novels craft imagined accounts of world events using a cast of real-life individuals. In *The Plot Against America*, for example, author Phillip Roth describes a United States in which Charles Lindbergh ascends to the presidency in 1940, altering the course of U.S. involvement with German and Japanese forces and ultimately leading to the widespread domestic persecution of Jewish-American families. The *roman*

² Roy Cohn is an example of the extent to which individuals may become unintentional—and perhaps unwitting—fixtures of popular culture. In addition to his role in *Angels in America*, Cohn has appeared by name and/or image in numerous works including at least three feature films, an episode of *The X-Files* television program, the song “We Didn’t Start the Fire” by Billy Joel, and books such as Kurt Vonnegut’s *Jailbird*, Michael Chabon’s *The Amazing Adventures of Kavalier and Clay*, and Tom Carson’s *Gilligan’s Wake*. For yet another seemingly unlikely pop culture personality, see Nina Totenberg, *Notorious RBG: The Supreme Court Justice Turned Cultural Icon*, Nat’l Pub. Radio, Oct. 26, 2015 (available at <http://www.npr.org/sections/itsallpolitics/2015/10/26/450547606/notorious-rbg-the-supreme-court-justice-turned-cultural-icon>).

à clef is similarly dependent upon the appropriation of real-life personalities. The current uncertainty among the courts places authors of these novels in a precarious position. Without clarification, the atmosphere of expressive freedom that gave rise to such popular and influential works as *The Ugly American*, *All the King's Men*, *The Carpetbaggers*, and *Primary Colors* could be chilled entirely out of existence.

C. Film and Television

Filmmakers and those writing for television are similarly at risk of having their speech chilled, as both fields regularly incorporate the images of real-life individuals into new expressive works. Certain creators rely on the practice so extensively that their entire catalog might not exist without it. Aaron Sorkin's television and film projects, including *The Social Network*, *The West Wing*, *Sports Night*, and *The Newsroom* all feature either real-life individuals or thinly veiled analogs as central characters. David Simon, creator of *Homicide: Life on the Street* and *The Wire*, is also well known for characters that are closely based on actual people. In years past, the clarity of the law permitted artists such as Orson Wells the freedom to create new characters from existing personalities. Perhaps an author today could still bring his generation's Charles Foster Kane to contemporary audiences, but he would certainly do so at much greater personal and financial risk than in Welles' day.

D. Fine Arts

Image appropriation has long been instrumental to the world of fine art. Contemporary artists, in particular, have built entire careers upon the likenesses of well-known individuals. From Andy Warhol's silkscreen portraits of Marilyn Monroe and Jackie Kennedy to Jeff Koons' life-sized sculptures of Michael Jackson, artists have frequently found inspiration in the image of others.

E. Comics and Graphic Novels

Authors and illustrators of comic books and graphic novels are yet another group at risk of seeing their speech chilled due to the existing uncertainty. Building on groundbreaking and critically acclaimed books such as *The Dark Knight* and *Watchmen*, in which Frank Miller famously used real-world political figures including Presidents Reagan and Nixon to deconstruct classic superhero archetypes, contemporary writers and artists are increasingly using comics to tell new types of stories, often relying heavily on characters drawn from real life. In one such example, *Hip Hop Family Tree*, author and illustrator Ed Piskor employs a cast of hundreds of real-world individuals to document the rise of hip hop culture in New York City. Civil rights activist and Congressman John Lewis adopted a similar approach while writing *March*, a trilogy of graphic novels about the Civil Rights Movement.

II. The Status Quo Strongly Discourages Content Creators from Defending Potentially Protected Expressive Works

Costs incidental to defending oneself are unavoidable and an inherent component of litigation. However, the uncertainty concerning the First Amendment limits on right-of-publicity claims exacerbates these costs, creating a heightened threshold for litigation that few content creators are willing or able to pass. This forces creators to choose between the lesser of two evils: they can either acquiesce to any and all cease and desist letters, regardless of merit, or they can pursue a protracted and expensive defense in court. The first option chills expressive works that are arguably protected under the First Amendment, while the second exposes creators to extraordinary levels of uncertainty and the very real risk of financial ruin. *See, e.g., Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (rejecting comic creator Todd McFarlane’s First Amendment defense to a right-of-publicity claim); *Doe v. McFarlane*, 207 S.W.3d 52, 56 (Mo. Ct. App. 2006) (affirming a \$15 million jury award against McFarlane). The time and money expended in litigation may be burdensome to all parties, but the prospect of seeing one’s livelihood destroyed due—at least in part—to inconsistencies among the courts strongly disincentives most content creators from defending even the most dubious right-of-publicity claims.

Because the cost and risk associated with contemporary right-of-publicity litigation effectively bars the average content creator from defending their creative work in court, the burden of defending against these claims (and the underlying legal uncertainty that make them such a threat to protected expression) shifts to an increasingly small pool of large, resource-rich creators. The burdens incurred by these few remaining players are still quite significant, as evidenced in the Petition. It has now been five years since Respondents initiated their action against Petitioner, Electronic Arts (EA). Over that period, EA has incurred significant litigation costs as the case proceeded from discovery to the lower courts, and now, to the petition at bar. Although Petitioner has already expended significant time and resources in this case, the merits of Respondents' claims have yet to be litigated. EA's expenses to date are likely to increase dramatically before the case is ultimately resolved.

For Petitioner and similarly situated content creators, the extraordinary cost of defending their work is only half of the equation. Creators still risk catastrophic damage awards if found liable. Respondents in this case, for example, are seeking punitive damages, attorney's fees, disgorgement of all profit attributable to respondent's likenesses over a five-year period, and interest on monetary relief. Complaint at 11, *Davis v. Electronic Arts*, No. 10-03328 RS, 2012 WL 3860819 (N.D. Cal. 2012). If Respondents are ultimately successful, the final

damage award against EA could be astronomical, and such awards are far from unrealistic. *See, e.g., Toffoloni v. LFP Pub. Group, LLC*, 483 Fed.Appx. 561, 562 (11th Cir. 2012) (noting the jury’s award of punitive damages in excess of \$19.6 million in a right-of-publicity case). Furthermore, because the applicable standards vary from state-to-state and court-to-court, content creators must consistently operate under an information deficit—until a case is filed in a particular jurisdiction, there is simply no reliable way for creators to predict or mitigate their potential liability. This inability to predict liability, together with the extraordinary cost of litigation and the potential for catastrophic damage awards, further discourage even deep-pocketed content creators from mounting First Amendment defenses in right-of-publicity cases.

III. Denial of the Petition is Likely to Compound the Chilling Effect on Arguably Protected Expression

Should this Court dismiss the Petition, the damage presently occurring as a result of the existing circuit split is likely to persist for the foreseeable future, and may in fact expand. The general state of uncertainty that content creators operate under directly chills speech that is arguably protected by the First Amendment and it may be many years before this Court has another opportunity to remedy the problem.

A. This Court has Expressed a Commitment to Preventing the Impermissible Chilling of Protected Expression

This Court’s concern with preventing the chilling of protected speech has led it to reject a “wait-and-see” approach—choosing instead “to assess *ex ante* the risk that a standard will have an impermissible chilling effect on First Amendment protected speech.” *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 497 n.5 (2007) (Scalia, J., concurring in part and concurring in the judgment). Numerous decisions have reaffirmed this commitment. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 329 (2010) (campaign finance); *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (criminal trespass); *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 620 (2003) (fraud); *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 531 (2002) (ULP claims); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (libel); *Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (obscenity). Its importance as a background principle in First Amendment law is undeniable.

Not only has this Court evinced in its First Amendment cases a general concern with chilling speech, it has also recognized that this concern is heightened with regard to overbreadth claims, *see Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973), and where the law at issue is content-based. *See*

Reno v. ACLU, 521 U.S. 844, 871–72 (1997). Both conditions are present in the case at hand.

B. The Chilling Effect on Protected Speech is Especially Powerful in This Case

“Today, all states recognize some aspect of the right of privacy, either at common law or by statute.” J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 1.2 (2d ed. 2015). As a result, any content creator who engages in unlicensed image appropriation risks being hauled into court essentially anywhere in the country. This risk might be acceptable if creators were able to conform their conduct to known boundaries, but they are not. The First Amendment limits on this conduct are not merely vague—in different parts of the country they directly contradict each other. As Petitioner notes, the Third and Ninth Circuits will find an artist liable where their work too closely resembles the appropriated individual. Pet. at 14–15. By contrast, the Second, Fifth, Sixth, and Eleventh Circuits (and two states) look to commerciality, paying no mind to how closely the content resembles the person’s likeness. *Id.* at 16–19. And the Eighth, Ninth, and Tenth Circuits have engaged in case-by-case balancing—an approach which may amount to impermissible vagueness. *See Citizens United v. FEC*, 558 U.S. 310, 329 (2010) (declining case-by-case determinations where “archetypical political speech would be chilled in the meantime”); *John Doe No. 1 v.*

Reed, 561 U.S. 186, 245 (2010) (Thomas, J., dissenting) (expanding this principle to archetypical First Amendment rights generally). This case, then, implicates a conflict among the circuits that well exceeds a mere circuit split. An artist in Chicago who creates a lifelike portrait of a celebrity for a noncommercial purpose may be liable in California or Philadelphia; if the same portrait is sold, she may be liable in New York or Miami; and in either case she may be liable in Salt Lake City.

C. It May be Many Years Before This Court has Another Opportunity to Remedy the Problem

Should this Court deny the Petition, it will likely deter those few content creators who currently shoulder the burden of litigating these types of cases from doing so in the future. The relatively few right-of-publicity claims that end up before the federal appellate courts almost always involve large corporate defendants such as Petitioner. *See, e.g., O'Bannon v. NCAA*, Nos. 14-16601, 14-17068, 2015 WL 5712106 (9th Cir. Sept. 30, 2015); *Marshall v. NFL*, 787 F.3d 502 (8th Cir. 2015); *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015); *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2009).³ Should this Court deny the Petition, Electronic Arts may find it futile to defend right-of-publicity suits in the

³ Of these cases, only *O'Bannon* is still within the ninety-day limit to file a petition for certiorari. No petition was filed in the other cases.

future—as may the NCAA, the NFL, Google, and others entities who can actually afford to defend these cases and who countless smaller creators rely on to defend these cases on their behalf. Instead, these creators may opt for other means of placating potential litigants. Rather than continuing to assert its First Amendment interests, EA might, for example, elect to pay Respondents for a license to use their likenesses, Pet. App. 19a, or they could simply stop engaging in this arguably protected form of expression altogether.

The deterrence effect from such a denial would be not only horizontal among EA’s peers but also vertical, down the chain from well-funded corporate creators to the tiny Chicago artist described above. Future defendants may see that EA—a company worth nearly \$4.5 billion⁴—was unable to navigate these murky waters and decline to do so themselves. The result would be a lack of litigation on First Amendment’s contours in this area, propagating the conflicting patchwork of standards that currently blankets the country.

⁴ Newzoo, Top 25 Companies by Game Revenues, Apr. 13, 2015, <http://www.newzoo.com/free/rankings/top-25-companies-by-game-revenues/>, *archived at* <https://archive.is/LXN80> (last visited Nov. 1, 2015).

CONCLUSION

For the reasons discussed above, *amicus curiae* respectfully request that the Court grant the Petition of a Writ of Certiorari.

Respectfully submitted,

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