

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment protects a speaker against a state-law right-of-publicity claim that challenges the realistic portrayal of a person in an expressive work.

PARTIES TO THE PROCEEDING

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

The Plaintiffs-Appellees below, who are the Respondents before this Court, are Michael E. Davis (a/k/a Tony Davis), Vince Ferragamo, Billy Joe Dupree, and Samuel Michael Keller.

CORPORATE DISCLOSURE STATEMENT

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

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OPINIONS BELOW

The opinion of the Ninth Circuit affirming the decision of the United States District Court for the Northern District of California is reported at 775 F.3d 1172 (9th Cir. 2015) and reproduced at Appendix to the Petition (“Pet. App.”) 1a. The order of the Ninth Circuit denying Petitioner’s petition for rehearing *en banc* is unreported and is reproduced at Pet. App. 43a. The opinion of the District Court is unreported and reproduced at Pet. App. 17a.

JURISDICTION

The Ninth Circuit issued its opinion on January 6, 2015. Petitioner timely filed its petition for rehearing *en banc* on January 20, 2015, which the Ninth Circuit denied on July 10, 2015. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the First Amendment to the United States Constitution, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend I.

STATEMENT OF THE CASE

This case involves the collision of the First Amendment and the state-law “right-of-publicity” tort, an issue that has engendered conflict and disarray among the lower courts to the detriment of free expression. The right of publicity is a modern tort, first

recognized in 1953.¹ Generally used by celebrities, it accords persons an economic right in their names and likenesses, so they may “profit from the full commercial value of their identities.” *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 968 (10th Cir. 1996).

Over time, right-of-publicity suits have proliferated, targeting a variety of speech and speakers, including musicians who named famous people in their lyrics; filmmakers who produced movies documenting the lives of celebrities and historical figures; authors who wrote “unauthorized biographies”; magazines and greeting-card manufacturers who used celebrity images; video-game makers who used celebrity images in constructing virtual worlds; and artists who depicted celebrities in their artworks.²

¹ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

² See, e.g., *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268 (9th Cir. 2013) (college sports players portrayed in video games), *cert. dismissed*, 135 S. Ct. 42 (2014); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (same), *cert. dismissed*, 135 S. Ct. 43 (2014); *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2011) (sketch of the Three Stooges); *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (OutKast song lyrics); *Valentine v. C.B.S., Inc.*, 698 F.2d 430 (11th Cir. 1983) (Bob Dylan song lyrics); *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (feature movie and book about the Black Panther Party); *Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d 723 (E.D. Mich. 2000), *aff’d*, 267 F.3d 457 (6th Cir. 2001) (television miniseries about the Temptations); *Tyne v. Time Warner Entm’t Co., L.P.*, 901 So. 2d 802 (Fla. 2005) (movie about a shipwreck); *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (book about a police officer); *Hoffman v. Capital Cities/ABC*,

Courts have struggled to reconcile this new tort with the protections afforded by the First Amendment. “The Supreme Court has not addressed the question, and decisions from the lower courts are a conflicting mix of balancing tests and frameworks borrowed from other areas of free-speech doctrine.” *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 514 (7th Cir. 2014). This Court’s only contribution came nearly forty years ago in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), in which the Court held that the First Amendment did not bar a right-of-publicity claim against a television station that broadcast an entertainer’s entire human-cannonball act. According to the Court, broadcasting Zacchini’s entire act posed a “substantial threat to the economic value of that performance,” and the Court contrasted the use of a performer’s “entire act” with the broadcast of a person’s name or picture in media. *Id.* at 574-76. Thus, *Zacchini* offers little or no guidance in cases involving mere *depictions* of individuals, as opposed to appropriation of their actual performances in full. Indeed, the Court was careful to cabin its decision: “[w]herever the line in particular situations is to be

Inc., 255 F.3d 1180 (9th Cir. 2001) (magazine using image of Dustin Hoffman); *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010) (greeting card using image of Paris Hilton); *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47 (2006) (video game); *No Doubt v. Activision Publ’g, Inc.*, 192 Cal. App. 4th 1018 (2011) (video game); *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982) (bust of Martin Luther King, Jr.); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (lithograph of Tiger Woods); John Broder, *Schwarzenegger Files Suit Against Bobblehead Maker*, N.Y. Times, May 18, 2004, <http://www.nytimes.com/2004/05/18/national/18arnold.html>.

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

The expressive work at issue in this case is Petitioner’s professional football video game, *Madden NFL*, which was alleged to include realistic depictions of Respondents, former NFL players.³ The Ninth Circuit held that the First Amendment offered no defense to Respondents’ right-of-publicity claim, because the game’s depiction of Respondents was *too realistic*: it showed Respondents engaged in the same activity—professional football—in which they had gained their fame.

The Ninth Circuit recognized that Petitioner’s video game was an expressive work, under this Court’s holding in *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729 (2011). Nonetheless, it held that the game’s depiction of the plaintiffs did not enjoy First Amendment protection. According to the Ninth Circuit, the depiction of a person’s image or likeness in an expressive work enjoys First Amendment protection against a right-of-publicity claim only if the depiction sufficiently alters or “transforms” the plaintiff’s image or likeness. That rule is constitutionally perverse: it affords First Amendment protection only to fanciful or distorted portrayals, not accurate or realistic ones. The rule also chills

³ The Court of Appeals assumed that this allegation was true for purposes of its analysis. Pet. App. 3a.

expression, both because it is hard to predict what a court will decide is sufficiently “transformative,” and because such an inquiry inevitably requires a court to make a subjective judgment about whether a depiction is “artistic,” thus warranting protection, or “literal,” and thus subject to liability.

The test applied by the Ninth Circuit, which also was adopted by the Third Circuit, *see Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), conflicts with various other tests adopted by other circuits and state supreme courts, which do not focus on transformation at all. Some of these courts engage in case-by-case balancing of First Amendment interests and right-of-publicity interests—an approach that raises its own constitutional problems. Others give appropriate respect to the First Amendment by confining the right-of-publicity tort to circumstances in which the challenged depiction falsely claims a celebrity commercial endorsement or is unrelated to any other expression and thus gratuitous.

The lower courts’ various and conflicting constitutional tests have resulted in numerous irreconcilable outcomes. For example, the Sixth Circuit has held that the First Amendment protects the inclusion of a professional golfer’s realistic image, prominently displayed in a painted montage including other golfers, *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003), but the Ninth and Third Circuits have held that the First Amendment does *not* protect an accurate digital depiction of former college and professional football players in a video game. As the judicial confusion has mounted, scholars, writers,

and artists have recognized a major threat to free expression.⁴ This Court's guidance is urgently needed.

I. Factual Background

Petitioner Electronic Arts' enormously popular *Madden NFL* video game series, first unveiled in 1993, artistically creates a fictional interactive gaming experience involving National Football League ("NFL") teams. Pet. App. 2a. Users control virtual players, or "avatars," in games that occur in virtual stadiums, with coaches, referees, fans, and other audio and visual elements meticulously created by Electronic Arts' graphic artists and programmers. Pet. App. 2a-3a.

Madden NFL is released annually and includes current players from all 32 NFL teams. Pet. App. 3a. From 2001 through 2009, *Madden NFL* also included

⁴ See, e.g., Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 Stan. L. Rev. 1161 (2006); F. Jay Dougherty, *All the World's Not a Stooge: The 'Transformativeness' Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 Colum. J.L. & Arts 1 (2003); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903 (2003); Diane Leenheer Zimmerman, *Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C. L. Rev. 1503 (2009); Thomas E. Kadri, *Fumbling the First Amendment: The Right of Publicity Goes 2-0 Against Freedom of Expression*, 112 Mich. L. Rev. 1519 (2014); Adam Liptak, *When it May Not Pay To be Famous*, N.Y. Times, June 1, 2013, <http://www.nytimes.com/2013/06/02/sunday-review/between-the-first-amendment-and-right-of-publicity.html>; Andrea Peterson, *U.S. Court Limits How Art Can Imitate Life*, Wash. Post, Aug. 2, 2013, <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/02/us-court-limits-how-art-can-imitate-life/>.

popular historic teams, such as the 1979 Los Angeles Rams. Pet. App. 3a. The unnamed avatars for these historic teams are identified only by position and a jersey number (*e.g.*, QB #12) but allegedly are meant to evoke real players who played on those teams. Pet. App. 3a-4a. Thus, for example, an avatar may have an appearance (height, weight, skin-tone, and throwing arm) and age that match those of a player on a historical team. Pet. App. 3a-4a.

Within this realistic setting, the game fosters the user's creativity and interactivity. Users control the avatars in invented games and seasons, directly influencing the outcome through their play-calling (*e.g.*, whether to run, pass, or kick, and which defensive scheme to use) and through their skill in manipulating the avatars on the field. Users can alter the abilities, appearances, and biographical information for players, or even create custom virtual players from scratch. Because of the numerous variables and creative input from the users, the game experience changes each time it is played.

II. Procedural Background

In 2010, Respondents filed a putative class-action against Electronic Arts in the United States District Court for the Northern District of California. Respondents alleged, on behalf of themselves and other former NFL players whose likenesses appear on the historic teams in *Madden NFL*, that Electronic Arts' use of their likenesses violated California's common-law and statutory rights of publicity and also amounted to conversion, trespass to chattels, and unjust enrichment. Pet. App. 20a.

Electronic Arts moved to strike the complaint as a strategic lawsuit against public participation (“SLAPP”) under California’s anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16. Pet. App. 17a. The district court denied the motion, finding that Respondents had established a reasonable probability of prevailing on the merits of their claims. Pet. App. 40a-42a.⁵

⁵ California’s anti-SLAPP statute was enacted to discourage tort suits intended to chill First Amendment-protected activities. See Cal. Civ. Proc. Code § 425.16. To further that goal, it permits a defendant to file a special motion to strike a complaint at the outset of the lawsuit. *Id.* § 425.16(b). The Ninth Circuit has long held that federal courts sitting in diversity have jurisdiction to entertain an anti-SLAPP motion to strike under California law, as there is no “direct collision” between the California statute and the Federal Rules of Civil Procedure. *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980)). That is because the California courts have interpreted the anti-SLAPP statute as akin to an early summary judgment motion consistent with Fed. R. Civ. P. 56. Thus, to survive an anti-SLAPP motion, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733, 739 (Cal. 2002) (quotation mark omitted); see also *Taus v. Loftus*, 151 P.3d 1185, 1205 (Cal. 2007) (“the Legislature did not intend that a court . . . would weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim, but rather intended to establish a summary-judgment-like procedure available at an early stage of litigation that poses a potential chilling effect on speech-related activities.”); *Vargas v. City of Salinas*, 205 P.3d 207, 218 (Cal. 2009) (same).

Petitioner notes that, in a recent decision, the D.C. Circuit held that the District of Columbia anti-SLAPP statute may not be applied in federal court. *Abbas v. Foreign Policy Group, LLC*, 783

Electronic Arts appealed the district court's denial of the motion to the Ninth Circuit. *See Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

In January 2015, the Ninth Circuit affirmed the district court's denial of Electronic Arts' anti-SLAPP motion to strike. Pet. App. 16a. The Ninth Circuit acknowledged that, under this Court's holding in *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), video games are expression that enjoy the "full protections of the First Amendment." Pet. App. 5a (internal quotations omitted). Nevertheless, the court decided that Electronic Arts had no First Amendment defense to Respondents' right-of-publicity claims. Pet. App. 4a-7a, 16a.

In reaching that conclusion, the court relied extensively on its prior decision in *Keller v. Electronic Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litigation)*, 724 F.3d 1268 (9th Cir. 2013). In *Keller*, the Ninth Circuit held that the First Amendment did not protect Electronic Arts' use of college football players' likenesses in a similar video game. *Id.* at 1284. The *Keller* majority adopted a version of the transformative-use test derived from *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001). That test protects expression

F.3d 1328 (D.C. Cir. 2015). However, the D.C. law differs from the California law in an important respect: the D.C. law requires a plaintiff to demonstrate that "the claim is likely to succeed on the merits" in order to overcome a special motion to strike. D.C. Code § 16-5502(b). As the D.C. Circuit emphasized, "the D.C. Court of Appeals has never interpreted the D.C. Anti-SLAPP Act's likelihood of success standard to simply mirror the standards imposed by Federal Rules 12 and 56." *Abbas*, 783 F.3d at 1335.

depicting celebrities *only* if “the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” *Keller*, 724 F.3d at 1273 (quoting *Comedy III*, 21 P.3d at 799).

The majority in *Keller* concluded that Electronic Arts’ use of college football players’ likenesses was not sufficiently transformative to warrant First Amendment protection, because the video game’s representations accurately and “literally recreate[d]” the players “in the very setting in which [they have] achieved renown.” *Id.* at 1271.⁶ Dissenting in *Keller*, Judge Thomas warned that the majority’s view necessarily meant that “all realistic depictions of actual persons, no matter how incidental, are protected by a state law right of publicity regardless of the creative context. This logic jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings.” *Id.* at 1290 (Thomas, J., dissenting).⁷

Finding *Keller* to be dispositive of this case, the Ninth Circuit concluded here that the use of

⁶ The *Keller* rule was the linchpin for the Ninth Circuit’s recent holding that the NCAA’s amateurism rules cause an antitrust injury to college players, because they prevent college athletes from enforcing their right of publicity when their likenesses are used in sports-oriented video games. See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. 14-16601, __ F.3d __, 2015 WL 5712106, at *16, 17 n.13 (9th Cir. Sept. 30, 2015).

⁷ Electronic Arts filed a petition for certiorari in *Keller*, but the petition was dismissed pursuant to S. Ct. R. 46. See Petition for a Writ of Certiorari, *Electronic Arts Inc. v. Keller*, 82 U.S.L.W. 3137 (U.S. Sept. 23, 2013) (No. 13-377), 2013 WL 5324721.

Respondents' likenesses did not qualify for First Amendment protection because Electronic Arts did not sufficiently "transform" those likenesses. Pet. App. 7a-9a. *Madden NFL* "replicates players' physical characteristics and allows users to manipulate them in the performance of the same activity for which they are known in real life – playing football for an NFL team." Pet. App. 8a-9a. In other words, Electronic Arts was not entitled to First Amendment protection because its presentation was too accurate.

Electronic Arts argued that the court should focus on whether the work as a whole was transformative, rather than whether the individual avatars were transformed. But *Keller* had rejected that same argument, and the Ninth Circuit concluded that it was bound by *Keller* until there was "intervening higher authority." Pet. App. 9a (quotation marks omitted).

Electronic Arts also argued that the court should reject the transformative-use test in favor of the approach adopted by the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). Under the Second Circuit's rule, an expressive work is accorded First Amendment protection against right-of-publicity claims unless the celebrity's likeness is unrelated to the work or is used in a manner that falsely indicates that the celebrity has endorsed the product. Pet. App. 11a-12a. Electronic Arts argued that this approach appropriately respects First Amendment rights, by limiting liability to situations involving commercial speech. The Ninth Circuit rejected that argument, again relying on its decision in *Keller*. Pet. App. 11a-12a. The court reasoned that the *Rogers* test was developed to accommodate First Amendment interests

in the context of trademark law, which focuses on the risk of consumer confusion. Pet. App. 12a. By contrast, it held, the right of publicity “does not primarily seek to prevent consumer confusion,” but instead seeks to “protect a form of intellectual property” owned by a celebrity. Pet. App. 12a (quoting *Keller*, 724 F.3d at 1280).⁸

Finally, the court rejected three additional defenses: (1) the public interest exception, (2) the public affairs exception, and (3) the incidental-use doctrine. Pet. App. 9a-11a, 12a-16a.

Electronic Arts sought rehearing *en banc*, which was denied on July 10, 2015. Pet. App. 43a-44a.

REASONS FOR GRANTING THE PETITION

This Court’s review is urgently needed to resolve conflicting authority concerning First Amendment protection against right-of-publicity claims. Since its invention in the second half of the twentieth century,⁹

⁸ The Ninth Circuit noted that, because it was bound by *Keller*, it did not need to reach Electronic Arts’ argument that right-of-publicity claims are subject to strict scrutiny on the grounds that they are content-based. Pet. App. 9a n.4.

⁹ The precise formulation of the tort varies from state to state. See 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 6.6-6.133 (2014 ed.) (describing varying state-law formulations). California has both a statutory and a common law cause of action. See Pet. App. 20a, 23a-24a. Some other states follow the *Restatement (Second) of Torts* (1977), which provides that “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy.” *Id.* § 652C. Still other states follow the more narrow formulation of the *Restatement (Third) of Unfair Competition* (1995), under which “[o]ne who appropriates the commercial value of a person’s

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

These conflicting legal rules have real-world consequences: without this Court’s guidance, artists, musicians, and other content creators will remain unsure what standards apply to their expression and, in particular, whether the realistic depiction of real individuals is tortious. If the realistic portrayal of a person in an expressive work can strip the work of First Amendment protection, then countless creative

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

works are at risk of suit, including films about historical figures or events; unauthorized biographies; works of historical fiction; dramatic renderings of historical figures; works of cultural or political satire; and fantasy sports games. All of these works realistically portray actual individuals in the contexts that made them famous and use their biographical details. The effect of this uncertainty is to chill protected expression, all in the name of a tort with questionable underlying purposes. This Court should grant review to resolve the conflicts and provide clear direction.

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

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

The Ninth and Third Circuits have held that the First Amendment protects the use of a person's image or likeness in expressive speech only if the image or likeness is sufficiently "transformed," and does not protect "realistic[] portray[als]." *Keller*, 724 F.3d at 1279; *Hart*, 717 F.3d at 165.

The transformative-use test was first articulated in 2001, when the California Supreme Court addressed a right-of-publicity claim based on a charcoal drawing of The Three Stooges. *Comedy III*, 21 P.3d at 799. That court borrowed from copyright fair-use doctrine and adopted what it described as "essentially a balancing test . . . based on whether the work in question adds significant creative elements so as to be transformed

into something more than a mere celebrity likeness or imitation.” *Id.* Applying that test to the facts at hand, the court found the Three Stooges drawing, sold as a lithograph and on t-shirts, to be insufficiently transformative. *Id.* at 811. It explained that the artist’s “undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame.” *Id.*

In so holding, the California Supreme Court distinguished the drawing at issue from Andy Warhol’s portraits of celebrities such as Marilyn Monroe, Elizabeth Taylor, and Elvis Presley. It explained: “Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself.” *Id.* Underscoring the unpredictability of its test, the court acknowledged that the difference between works that enjoy constitutional protections (like Warhol’s depictions of Marilyn Monroe) and those that do not (like the Three Stooges sketch) will “sometimes be subtle.” *Id.*¹⁰

¹⁰ Compare Museum of Modern Art, Andy Warhol, *Gold Marilyn Monroe*, 1962, <http://www.moma.org/collection/works/79737> (last visited Oct. 4, 2015) with *Comedy III*, 21 P.3d at 812, Appendix (showing Three Stooges sketch).

B. The Constitutional Test Adopted Below Is Inconsistent with Tests Applied by Other Courts.

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

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

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

In *Rogers*, the Second Circuit considered a federal Lanham Act claim and a state right-of-publicity claim brought by Ginger Rogers against the makers of a Federico Fellini film entitled “Ginger and Fred”—a film not about Ginger Rogers and Fred Astaire, but instead about a fictional Italian duo who imitated them, becoming known in Italy as “Ginger and Fred.” 875 F.2d at 996-97. The Second Circuit ruled in favor of the filmmaker, holding first that the First Amendment protects the use of a person's name in a film title from a Lanham Act claim unless the use was “wholly

unrelated’ to the movie or was ‘simply a disguised commercial advertisement for the sale of goods or services.’” *Id.* at 1004; *see id.* at 998-1000. The court then applied essentially the same standard in rejecting Rogers’ right-of-publicity claim under Oregon law. *Id.* at 1004-05.

Other courts have applied the *Rogers* standard or a similar test in describing the First Amendment limits to right-of-publicity claims. For example, in *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994), the Fifth Circuit cited *Rogers* in concluding that the First Amendment barred a right-of-publicity claim based on a fictionalized but essentially accurate account of an undercover police officer’s experiences. Similarly, in *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003), the Sixth Circuit adopted *Rogers* and remanded for a factual determination concerning whether the use of the plaintiff’s name in a song title was a “disguised commercial advertisement,” *id.* (quotation marks omitted), that would remove it from First Amendment protection.¹¹ And in *Valentine v. C.B.S., Inc.*, 698 F.2d

¹¹ Shortly after *Parks*, the Sixth Circuit decided *ETW*, which involved a right-of-publicity claim challenging an artist’s use of Tiger Woods’ image in a painting celebrating Woods’ golfing achievements. 332 F.3d at 918-19. The Ninth Circuit in *Keller* stated that, in view of *ETW*, the Sixth Circuit had been “inconsistent[.]” in its use of the *Rogers* test for right-of-publicity claims. 724 F.3d at 1281-82. In fact, *ETW* confirmed that, in *Parks*, the Sixth Circuit had “applied the *Rogers* test to . . . right-of-publicity claims,” *ETW*, 332 F.3d at 936 n.17. After applying that test to the facts before it, *ETW* went on to analyze the case under a case-specific balancing of interests, *id.* at 937-38 (citing *Cardtoons*, 95 F.3d at 972), and the transformative-use test, *id.* at 938, as well.

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

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

The *Restatement (Third) of Unfair Competition* (1995) encourages the adoption of this test as well, explaining that the right of publicity is "fundamentally constrained by the public and constitutional interest in freedom of expression," and the First Amendment

ought to provide a defense against a right-of-publicity claim unless “[o]ne . . . appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity *for purposes of trade*,” *id.* § 46 (emphasis added)—that is, “the name or likeness is used solely to attract attention to a work [in advertising] that is not related to the identified person,” *id.*, § 47 cmt. c.

2. Other Courts Engage in Case-Specific Balancing.

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

In *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, LP*, 505 F.3d 818 (8th Cir. 2007), the Eighth Circuit held that the First Amendment protected fantasy baseball products that used the names of real players, their biographical data, and their performance statistics. In reaching that conclusion, the court emphasized “the public value of information about the game of baseball and its players,” noted that “the information used in CBC’s fantasy baseball games is all readily available in the public domain,” and reasoned that “it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone.” *Id.* at 823. By contrast, it continued, “the facts in this case barely, if at all, implicate the interests that states

typically intend to vindicate by providing rights of publicity to individuals.” *Id.* at 824. Specifically, the court reasoned that publicity rights to one’s name and performance statistics were not needed to encourage baseball players to play the sport, and that there was little risk of consumer confusion, because the defendant’s game included all players. *Id.*

The Ninth Circuit in *Keller* attempted to harmonize its outcome with *C.B.C.* on the ground that *C.B.C.* did not involve the “use[] [of] virtual likenesses of actual college football players,” 724 F.3d at 1283 n.12, but instead “merely incorporate[d] the names along with performance and biographical data of actual major league baseball players,” *id.* (internal quotation marks omitted; bracket in original). That distinction is not persuasive: if the First Amendment protects the use of someone’s name and publicly available performance and biographical data, then it also protects the creation of an avatar reflecting publicly available information about a player’s appearance and playing style. Indeed, the Eighth Circuit itself made clear that *C.B.C.*’s expressive interests would have been no different had it used actual photos of the players, *see* 505 F.3d at 823; nor would the use of photos have changed the court’s balancing of interests.

The Tenth Circuit in *Cardtoons* likewise applied a case-specific balancing test to reject a right-of-publicity claim against the creator of parody baseball cards featuring recognizable caricatures of real baseball players. 95 F.3d at 962-63. The court held that the trading cards were expressive speech “subject to full First Amendment protection,” *id.* at 970, and emphasized that “[c]elebrities . . . are an important

element of the shared communicative resources of our cultural domain,” and that “[r]estricting the use of celebrity identities restricts the communication of ideas,” *id.* at 972. It further held that these interests outweighed any purported justification for the right of publicity. *See id.* at 973-76.

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

As the Seventh Circuit has noted, because this Court has not intervened yet, the “decisions from the lower courts are a conflicting mix of balancing tests and frameworks borrowed from other areas of free-speech doctrine.” *Jordan*, 743 F.3d at 514. This Court’s review is badly needed.

¹² Other courts, applying state common law or statutory exceptions designed to accommodate constitutional concerns, have drawn the line between protected and unprotected celebrity depictions by focusing on whether the publication is “newsworthy” or in the “public interest.” *See, e.g., Toffoloni v. LFP Publ’g Grp., LLC*, 572 F.3d 1201, 1208 (11th Cir. 2009) (applying Georgia law).

II. This Case Presents an Ideal Vehicle to Address the Constitutional Question.

Plainly, the lower courts need guidance from this Court delineating the scope of First Amendment protection against a right-of-publicity claim. This case presents an excellent vehicle for providing such guidance. The Ninth Circuit has acknowledged the wide-ranging circuit conflict on the issue. *See Keller*, 724 F.3d at 1279-82 (noting that the Second and Sixth Circuits have applied the *Rogers* test to right-of-publicity claims and that the Tenth and Eighth Circuits had applied “a flexible case-by-case approach”). And the court found this case to be on all fours with the facts of *Keller*, in which the Ninth Circuit recognized that its decision to apply the transformative-use test, as opposed to the more speech-protective *Rogers* test, was outcome-determinative. The court acknowledged that *Keller* “would be hard-pressed to support” a claim under the *Rogers* test “absent evidence that EA explicitly misled consumers” into “believing that he is endorsing EA or its products.” 724 F.3d at 1281.

The Ninth Circuit’s decision in *Brown v. Electronic Arts, Inc.*, 724 F.3d 1235 (9th Cir. 2013), issued by the same panel as *Keller* on the same day, confirmed that the choice between the Ninth Circuit’s transformative-use test and the *Rogers* test was outcome-determinative. *Brown* concerned a Lanham Act claim brought by a former NFL player complaining about the use of his likeness in Petitioner’s *Madden NFL* game. *See Brown* 724 F.3d at 1238-39. The court applied the *Rogers* test and concluded that the First Amendment barred the Lanham Act claim, because “Brown’s likeness is artistically relevant to the games and there

are no alleged facts to support the claim that [Electronic Arts] explicitly misled consumers as to Brown’s involvement with the games.” *Id.* at 1248. In such circumstances, the court held, “the public interest in free expression outweighs the public interest in avoiding consumer confusion.” *Id.* Had the court applied that same test to the right-of-publicity claim in this case, Electronic Arts would have prevailed.

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

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

A. The Ninth Circuit’s Transformative-Use Test Does Not Adequately Respect First Amendment Rights.

The Ninth and Third Circuits’ transformative-use test does not properly limit the right of publicity to be consistent with the First Amendment.

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

Vopper, 532 U.S. 514, 526 (2001).¹³ This Court repeatedly has held, however, that “[c]ontent-based regulations” of speech “are presumptively invalid” and must be subjected to strict constitutional scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); accord, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (“[A]s a general matter . . . government has no power to restrict expression because of . . . its content.” (quotation marks omitted; bracket in original)); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (holding unconstitutional a statute prohibiting accurate depictions of U.S. currency unless for educational, historic, or newsworthy purposes because those determinations “cannot help but be based on the content of the photograph and the message it delivers”).

The limited exceptions to this rule consist of a few “historic and traditional categories” of expression, *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (quotation marks omitted), which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *R.A.V.*, 505 U.S. at 383 (quoting *Chaplinsky v. New Hampshire*, 315

¹³ See also Volokh, 40 Hous. L. Rev. at 912 n.35 (“The right of publicity is clearly content-based: It prohibits the unlicensed use of particular content (people’s name or likenesses).”).

U.S. 568, 572 (1942)). These include obscenity, defamation, fraud, fighting words, true threats, and speech integral to criminal conduct, *see United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (collecting cases), and “represent ‘well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,” *Brown*, 131 S. Ct. at 2733 (quoting *Chaplinsky*, 315 U.S. at 571-72). This Court repeatedly has refused to expand these well-defined and historical categories or to add new categories of speech that the government may proscribe. *See, e.g., Alvarez*, 132 S. Ct. at 2544; *Stevens*, 559 U.S. at 482; *Brown*, 131 S. Ct. at 2741.

An expressive work does not fall into any of these traditional exceptions merely because it includes a realistic portrayal of an actual person. To the contrary, the right-of-publicity tort penalizing such speech is a modern innovation, not recognized in California itself until 1979. *See Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979). As a leading commentator has put it, the right of publicity is “still a relatively raw and brash newcomer,” 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* preface (2014 ed.).

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

(explaining that content-based regulations of speech are impermissible unless they can survive strict scrutiny). The transformative-use test applied here does not sufficiently limit the tort's application.

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

A transformative-use test also does not sufficiently limit the right of publicity to circumstances where its application can survive strict scrutiny. There is no compelling state interest in stamping out realistic portrayals of people. According to the Ninth Circuit, the right of publicity serves to “protect[] a form of intellectual property [in one’s person] that society deems to have some social utility.” *Keller*, 724 F.3d at 1280 (quoting *Comedy III*, 21 P.3d at 804) (second alteration in original); *id.* at 2181 (“Keller’s claim is that EA has appropriated, without permission and without providing compensation, his talent and years of hard work on the football field.”). That economic interest, however, is not sufficiently compelling to justify penalizing non-commercial expression, whether in the

form of a biography, motion picture, painting, or videogame.¹⁴

Furthermore, a person's appearance and biography—here, for example, Davis's height, weight, throwing arm, and visor—are facts in the public domain. Indeed, the Ninth Circuit has acknowledged as much. *See Keller*, 724 F.3d at 1283 n.12 (“It is seemingly true that each likeness is generated largely from publicly available data . . .”). It concluded, however, that the First Amendment should not protect the use of publicly available data to create a realistic likeness because the right of publicity would otherwise be “neuter[ed] . . . in our digital world.” *Id.* The court stated: “If EA creates a virtual likeness of Tom Brady using only publicly available data . . . does EA have free reign [sic] to use that likeness in commercials without violating Brady's right of publicity? We think not, and thus must reject [the] point about the public availability of much of the data used . . .” *Id.*

But no one claims that one may use publicly available data to insert a celebrity image in a commercial. That is precisely what the *Rogers* test addresses by withholding First Amendment protection from false claims of celebrity endorsement. The question here is whether a speaker may use publicly available data to create a likeness for use in non-commercial expression. The Ninth Circuit offers no

¹⁴ Many question the validity of the justifications for the right of publicity altogether. *See, e.g.*, Dogan & Lemley, 58 Stan. L. Rev. at 1188; Michael Madow, *Private Ownership of Public Image: Popular Culture & Publicity Rights*, 81 Cal. L. Rev. 127, 238 (1993); Volokh, 40 Hous. L. Rev. at 911.

reason why the First Amendment should not protect such use. See *C.B.C.*, 505 F.3d at 823 (“[T]he information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone.”).

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

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

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

This Court repeatedly has emphasized the importance of ensuring that restrictions on the content of speech are "well-defined." *Stevens*, 559 U.S. at 468. Predictability is important because speakers otherwise will "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked," *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)), thereby causing an "obvious chilling effect on free speech," *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997).

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

Indeed, a key element of the artistry in these works is the realism or accuracy of the portrayal. For example, the genius of Daniel Day-Lewis' portrayal of Abraham Lincoln was his ability to imitate, with great realism, the likeness, mannerisms, and attributes of the president doing what Lincoln actually did. It would be disturbing if the artistic success of such a portrayal were precisely what would make it actionable. *Cf. Estate of Presley v. Russen*, 513 F. Supp. 1339, 1359 (D.N.J. 1981) (rejecting Elvis impersonator's First Amendment defense to a right-of-publicity claim brought by Presley's estate; "entertainment that is merely a copy or imitation, even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant value as pure entertainment" (cited with approval by the Third Circuit in *Hart*, 717 F.3d at 164)).

To avoid absurd and dangerous outcomes, courts applying the transformative-use test will have little choice but to draw distinctions among expressive works reflecting their own subjective judgments about whether a particular work is sufficiently "artistic" or "creative" that it warrants protection. Thus, the California Supreme Court in *Comedy III* determined that a sketch of The Three Stooges was not creative enough to receive First Amendment protection, but an Andy Warhol portrait of Marilyn Monroe did deserve such protection because it presented "a form of ironic social comment on the dehumanization of celebrity itself." 21 P.3d at 811. Courts should not place themselves in the role of art critic and make First Amendment freedoms turn on subjective judgments of this kind. *Cf. Bleistein v. Donaldson Lithographing*

Co., 188 U.S. 239, 251 (1903) (Holmes, J.) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

A legal regime turning on such “subtle” distinctions among expressive works, *Comedy III*, 21 P.3d at 811, is inherently unpredictable and will chill expression. *Hart* presents a good example of such unpredictability. The Third Circuit concluded that an avatar portraying a college football player in an animated and interactive fictional college football game was actionable because the player’s image was not sufficiently transformed; yet, in the same decision, the court held that placement, in a later edition of the same video game, of an actual photograph of the player in a montage of other photographs of Rutgers football players was not actionable, because the context made the depiction transformative. *Hart*, 717 F.3d at 169-70 (citing *ETW*, 332 F.3d at 938).

It is hard rationally to reconcile these two rulings.¹⁵ According to the dissent in *Hart*, the majority simply

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

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

Similarly, Judge Thomas warned in his dissent in *Keller* that the Ninth Circuit’s holding “jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings.” *Keller*, 724 F.3d at 1290 (Thomas, J., dissenting). The majority responded that its holding was not so broad, because its transformative-use test allows a court to consider “whether a likely purchaser’s *primary motivation* is to buy a reproduction of the celebrity, or to buy the expressive work of that artist. Certainly this leaves room for distinguishing this case . . . and cases involving *other kinds of expressive works*.” *Id.* at 1279 n.10 (majority opinion) (internal quotation marks omitted; citations omitted) (emphasis added). This reasoning bears no relation to this Court’s First Amendment jurisprudence. First, it implies the type of medium-specific metric this Court rejected in *Brown*, 131 S. Ct. at 2733. Second, it requires speakers to *guess* what a court might *guess* to be “a likely *purchaser’s* primary motivation,” *Keller*, 724 F.3d at 1279 n.10, in buying an expressive work. Such a standard might “leave[] room

for [courts to] distinguish[]” cases, *id.*, but it leaves *no* “breathing room for protected speech,” *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 620 (2003). Speakers’ potential liability cannot possibly depend upon whether they guess correctly about the motivations of people they do not know and cannot control.

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

C. Case-Specific Balancing Is Equally Problematic.

Decisions calling for ad hoc balancing of First Amendment interests and the interests protected by the right of publicity present just as many constitutional problems. *See, e.g., Cardtoons*, 95 F.3d at 973-76; *C.B.C.*, 505 F.3d at 824. This Court has rejected any notion of a “free-floating test for First Amendment coverage.” *Stevens*, 559 U.S. at 470; *see also Brown*, 131 S. Ct. at 2734. As this Court has explained,

[t]he First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

Stevens, 559 U.S. at 470.

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

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

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

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

protection altogether. Thus confined, the right-of-publicity tort raises little constitutional concern.

* * *

This Court's review is sorely needed. Because so many expressive works are distributed nationwide, the rule created by the Ninth and Third Circuits effectively has set the constitutional rule for the rest of the country. But that rule makes no sense constitutionally. Moreover, the rule is so vague and unpredictable in its application that speakers will not know whether their speech is constitutionally protected or tortious. Given the potentially ruinous financial consequences of guessing wrong (here, Respondent seeks hundreds of millions of dollars on behalf of a class that could have thousands of members), speakers will go too far in their self-censorship. Unless and until this Court intervenes, a great deal of valuable and protected expression will be chilled.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL E. DAVIS, AKA
Tony Davis; VINCE
FERRAGAMO; BILLY JOE
DUPREE; SAMUEL
MICHAEL KELLER,

Plaintiffs – Appellees,

v.

ELECTRONIC ARTS INC.,

Defendant – Appellant.

No. 12-15737

D.C. No. 3:10-cv-
03328-RS

OPINION

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

Argued and Submitted
September 11, 2014—San Francisco, California

Filed January 6, 2015.

Before: Stephen Reinhardt, Raymond C. Fisher and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Fisher

OPINION

We are called upon to balance the right of publicity of former professional football players against Electronic Arts' (EA) First Amendment right to use their likenesses in its *Madden NFL* series of video games. We previously held EA's unauthorized use of a former college football player's likeness in the *NCAA Football* series of video games was not, as a matter of law, protected by the First Amendment. See *Keller v. Elec. Arts (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268 (9th Cir. 2013). In *Keller*, we rejected several of the First Amendment defenses EA raises here on materially indistinguishable grounds. EA advances one additional argument in this appeal—its use of former players' likenesses is protected under the First Amendment as “incidental use.” We disagree. We hold EA's use of the former players' likenesses is not incidental, because it is central to EA's main commercial purpose—to create a realistic virtual simulation of football games involving current and former NFL teams.

I. Background

EA is a developer and publisher of video games, including *Madden NFL*, which EA publishes annually. *Madden NFL* allows users to play virtual football games between National Football League (NFL) teams by controlling virtual players, or avatars. EA's graphic artists and programmers create the avatars, as well as virtual stadiums, coaches, referees, fans and other audio and visual elements that allow users to experience a realistic simulation of an NFL game.

Users control the movements of the avatars and the outcome of the game through the users' inputs to the game system.

Each annual version of *Madden NFL* includes all current players for all 32 NFL teams, along with accurate player names, team logos, colors and uniforms. 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.

From 2001 through 2009, *Madden NFL* also included certain particularly successful or popular "historic teams." EA did not obtain a license to use the likenesses of the former players on these historic teams. Although the players on the historic teams are not identified by name or photograph, each is described by his position, years in the NFL, height, weight, skin tone and relative skill level in different aspects of the sport.¹ For example, *Madden NFL* includes as a historic team the 1979 Los Angeles Rams that played in that year's Super Bowl. Vince Ferragamo, a plaintiff in this action, was a quarterback on the 1979 Rams. He is Caucasian and was listed in the 1979 Rams media guide as a 26 year-old, six-foot three-inch, 207-pound third-year NFL player. *Madden NFL* depicts an avatar who is a quarterback for the 1979 Rams and has identical physical characteristics. *Madden NFL* also includes the 1984 Los Angeles Rams, for which Ferragamo was again a quarterback. The 1984 Rams

¹ For purposes of this appeal, EA concedes the *Madden NFL* series uses the plaintiffs' likenesses.

media guide lists Ferragamo as a 30-year-old, six-foot three-inch, 212-pound seventh-year NFL player. *Madden NFL* depicts an avatar on the 1984 Rams with identical physical characteristics.

The plaintiffs alleged that *Madden NFL* similarly includes, without authorization, accurate likenesses of plaintiffs Michael Davis and Billy Joe Dupree, as well as roughly 6,000 other former NFL players who appear on more than 100 historic teams in various editions of *Madden NFL*. The plaintiffs asserted claims for right of publicity under California Civil Code § 3344 and California common law, conversion, trespass to chattels and unjust enrichment on behalf of themselves and all former NFL players depicted in *Madden NFL*. EA moved to strike the complaint as a strategic lawsuit against public participation (SLAPP) under California's anti-SLAPP statute, California Code of Civil Procedure § 425.16. The district court denied the motion. We have jurisdiction over EA's appeal pursuant to 28 U.S.C. § 1291. We affirm.

II. Standard of Review

We review de novo the denial of a motion to strike under California's anti-SLAPP statute. *See Keller*, 724 F.3d at 1272 n.3.

III. Discussion

A. Anti-SLAPP motion

California's anti-SLAPP statute is "designed to allow courts 'to promptly expose and dismiss meritless and harassing claims seeking to chill protected expression.'" *Mindys Cosmetics, Inc. v. Dakar*, 611

F.3d 590, 595 (9th Cir. 2010) (quoting *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 682 (9th Cir. 2005)). Under the statute, “a party may file a motion to strike a cause of action against it if the complaint ‘aris[es] 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.’” *Id.* (alteration in original) (quoting Cal. Civ. Proc. Code § 425.16(b)(1)). To defeat a motion to strike, a plaintiff must “establish[] that there is a probability that the plaintiff will prevail on the claim.” Cal. Civ. Proc. Code § 425.16(b)(1).

The plaintiffs concede that their suit arises from an act by EA in furtherance of its right of free speech under the First Amendment. Indeed, “[v]ideo games are entitled to the full protections of the First Amendment, because ‘[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages.’” *Keller*, 724 F.3d at 1270–71 (quoting *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011)).

The district court denied EA’s motion, however, concluding that the plaintiffs established a reasonable probability they will prevail on their claims. “‘Reasonable probability’ ... requires only a ‘minimum level of legal sufficiency and triability.’” *Mindys Cosmetics*, 611 F.3d at 598 (quoting *Linder v. Thrifty Oil Co.*, 2 P.3d 27, 33 n.5 (Cal. 2000)). A plaintiff must “state and substantiate a legally sufficient claim,” *id.* at 598–99, based on “the pleadings, and supporting and opposing affidavits stating the facts upon which the

liability or defense is based,” Cal. Civ. Proc. Code § 425.16(b)(2). “Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” *Mindys Cosmetics*, 611 F.3d at 599 (quoting *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733, 739 (Cal. 2002)). “[T]he required probability that [the plaintiffs] will prevail need not be high.” *Hilton v. Hallmark Cards*, 599 F.3d 894, 908 (9th Cir. 2010).

EA does not challenge the plaintiffs’ ability to state or support any substantive element of their claims. Instead, EA argues it is not reasonably probable the plaintiffs will prevail, because their claims are barred by five affirmative defenses under the First Amendment—the transformative use defense, the public interest defense, the public affairs exemption of California Civil Code § 3344(d), the *Rogers* test and the incidental use defense. Although the anti-SLAPP statute “places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense.” *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 35 Cal. Rptr. 3d 31, 44 (Ct. App. 2005). EA has the burden of establishing the transformative use defense as a matter of law. *See Keller*, 724 F.3d at 1274. On its other affirmative defenses, EA has the burden of establishing “a probability of prevailing.” *Premier Med. Mgmt. Sys., Inc. v. Cal. Ins. Guarantee Ass’n*, 39 Cal. Rptr. 3d 43, 53 (Ct. App. 2006). For the reasons

set forth below, EA has not shown a probability of prevailing on its incidental use defense, and its other defenses are effectively precluded by our decision in *Keller*.² Because EA has not met its burden as to any of its affirmative defenses, the district court properly denied EA's motion to strike.

B. Transformative use

EA contends the plaintiffs' claims are barred by the transformative use defense formulated by the California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001). "The defense is 'a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.'" *Keller*, 724 F.3d at 1273 (quoting *Comedy III*, 21 P.3d at 799).

In *Keller*, we rejected EA's transformative use defense. We held the use of college athletes' likenesses in the *NCAA Football* video game series was not, as a matter of law, transformative use. *See id.* at 1277–79. We relied primarily on *No Doubt v. Activision Publishing, Inc.*, 122 Cal. Rptr. 3d. 397, 411 (Ct. App. 2011), in which the California Court of Appeal rejected a video game maker's transformative use defense because its video game contained "literal recreations" of members of the band "No Doubt" doing

² EA does not seek to distinguish this case from *Keller*. Instead, EA states it "raises these arguments here to preserve them for *en banc* review in this Circuit and/or United States Supreme Court review."

“the same activity by which the band achieved and maintains its fame.” In *No Doubt*, the court of appeal held, “that 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 concluded 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.* (alterations and internal quotation marks omitted).

Keller concluded *No Doubt* “offers a persuasive precedent that cannot be materially distinguished from *Keller*’s case.” 724 F.3d at 1277. As in *No Doubt*, the *NCAA Football* game “replicated *Keller*’s physical characteristics” and allowed “users [to] manipulate [him] in the performance of the same activity for which [he is] known in real life” in “[t]he context in which the activity occurs.” *Id.* at 1276. Consequently, “[g]iven 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 same is true here. Like *NCAA Football*, *Madden NFL* replicates players’ physical characteristics and allows users to manipulate them in the performance of the same activity for which they are

known in real life—playing football for an NFL team. Neither the individual players’ likenesses nor the graphics and other background content are transformed more in *Madden NFL* than they were in *NCAA Football*. Indeed, EA does not attempt to distinguish *Madden NFL* from *NCAA Football*. Instead, EA contends the court erred in *Keller* by focusing on whether the individual avatars were transformed, rather than whether the work as a whole was transformative. Absent “intervening higher authority,” however, we are bound by the factually indistinguishable holding in *Keller*. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).³ Thus, EA has not shown that the transformative use defense applies to the plaintiffs’ claims.⁴

C. The public interest defense

EA next contends the plaintiffs’ common law right of publicity claim is barred by the public interest defense, and their statutory right of publicity claim is barred by the “public affairs” exemption of California Civil Code § 3344(d). Under the common law public interest defense, “no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom

³ Further, the court expressly stated in *Keller* that, like the Third Circuit in *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), it “considered the potentially transformative nature of the game as a whole.” 724 F.3d at 1278.

⁴ Because we are bound by *Keller*, we do not reach EA’s argument that *Keller* improperly failed to apply strict constitutional scrutiny to the plaintiffs’ right-of-publicity claims.

of the press to tell it.” *Hilton*, 599 F.3d at 912 (quoting *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 640 (Ct. App. 1995)). Under the statutory “public affairs” exemption, the right of publicity recognized in California Civil Code § 3344(a) does not apply to the “use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account.” Cal. Civ. Code § 3344(d).

Although California courts typically analyze the statutory and common law defenses separately, both defenses “protect only the act of publishing or reporting.” *Keller*, 724 F.3d at 1282. In *Keller*, we rejected EA’s reliance on these defenses, explaining that, unlike the cases on which EA relied, involving a documentary, a newspaper photograph and a game program, EA was “not publishing or reporting factual data.” *Id.* at 1283. See *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 791–92 (Ct. App. 1993) (holding a documentary on surfing featuring a well-known surfer was “a fair comment on real life events”); *Montana*, 40 Cal. Rptr. 2d at 640–41 (holding posters containing previously published newspaper images portraying Joe Montana’s football victories were “a form of public interest presentation to which [First Amendment] protection must be extended”); *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 314–15 (Ct. App. 2001) (holding “factual data concerning the players, their performance statistics ... and video depictions” were a “recitation and discussion of factual data” protected by the First Amendment). “Put simply, EA’s interactive game is not a publication of

facts about college football; it is a game, not a reference source.” *Keller*, 724 F.3d at 1283. It “is a means by which users can play their own virtual football games, not a means for obtaining information about real-world football games.” *Id.*

Madden NFL is indistinguishable in this regard from *NCAA Football*. Like *NCAA Football*, although *Madden NFL* contains some factual data about current and former NFL teams and players, it is “a game, not a reference source” or a “publication of facts” about professional football. *Id.* Again, in the absence of intervening higher authority, our holding in *Keller* controls. See *Miller*, 335 F.3d at 899. Thus, EA has not established a probability of prevailing on either the common law public interest defense or the “public affairs” exemption of California Civil Code § 3344(d).

D. The *Rogers* test

EA next contends *Madden NFL* is entitled to First Amendment protection under the test formulated by the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). *Rogers* held that a literary title does not violate the Lanham 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. In *Keller*, we rejected EA’s argument that the *Rogers* test should be extended to right-of-publicity claims. See 724 F.3d at 1279–82. We explained that the *Rogers* test “was designed to protect consumers from the risk of consumer confusion—the hallmark element of a Lanham Act claim.” *Id.* at 1280. In contrast, the right of publicity

“does not primarily seek to prevent consumer confusion.” *Id.* “Rather, it primarily ‘protects a form of intellectual property [in one’s person] that society deems to have some social utility.’” *Id.* (alteration in original) (quoting *Comedy III*, 21 P.3d at 804). Thus, the *Rogers* test does not apply to the plaintiffs’ right-of-publicity claims.

E. The incidental use defense

Finally, EA contends the plaintiffs’ claims are barred by the incidental use defense. EA did not assert this defense in the district court. “We apply a general rule against entertaining arguments on appeal that were not presented or developed before the district court.” *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) (internal quotation marks omitted). That rule, however, is “discretionary, not jurisdictional.” *Id.* We have recognized three circumstances in which we have discretion to reach waived issues, including “when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.” *Id.* (quoting *Bolker v. Comm’r*, 760 F.2d 1039, 1042 (9th Cir. 1985)). Under the circumstances of this case, whether EA has established a probability of prevailing on its incidental use defense is a question of law that we can address on the existing record. We therefore exercise our discretion to address the issue.

The parties agree that the incidental use defense exists under California law. We therefore assume, for

purposes of this opinion, that it does.⁵ The parties also rely on the same cases and treatises to define the scope of the defense. Under those authorities, “[a] number of factors are relevant,” such as “(1) whether the use has a unique quality or value that would result in commercial profit to the defendant; (2) whether the use contributes something of significance; (3) the relationship between the reference to the plaintiff and the purpose and subject of the work; and (4) the duration, prominence or repetition of the name or likeness relative to the rest of the publication.” *Aligo v. Time-Life Books, Inc.*, No. C 94–20707 JW, 1994 WL 715605, at *3 (N.D. Cal. Dec. 19, 1994) (internal citations omitted). See also 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 28:7.50 (4th ed. 2014) (“The mere trivial or fleeting use of a person’s name or image in an advertisement will not trigger liability when such a usage will have only a de minimis commercial implication.”); *Stayart*,

⁵ Although California courts have not yet held that the incidental use defense applies to right-of-publicity claims, the defense is widely recognized. See 1 J. Thomas McCarthy, *Rights of Publicity and Privacy* § 6:31 (2d ed. 2014) (citing “the general rule that an insignificant or fleeting use of plaintiff’s identity is not an infringement”); *Stayart v. Google Inc.*, 710 F.3d 719, 723 (7th Cir. 2013) (recognizing the incidental use as a defense to right-of-publicity claims under Wisconsin common law and statute); *Lohan v. Perez*, 924 F. Supp. 2d 447, 455 (E.D.N.Y. 2013) (applying the incidental use defense to a right-of-publicity claim under New York law); *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 648 n.6 (1994) (en banc) (citing favorably the Restatement Second of Torts for the proposition that “mere incidental use [is] not actionable” as “appropriation of [the] commercial or other value of [a] name or likeness”).

710 F.3d at 723 (“For use of a person’s name for advertising or trade purposes to be actionable ... there must be a substantial rather than an incidental connection between the use and the defendant’s commercial purpose.” (internal quotation marks omitted)); *Yeager v. Cingular Wireless, LLC*, 673 F. Supp. 2d 1089, 1100 (E.D. Cal. 2009) (“The rationale underlying this doctrine is that an incidental use has no commercial value.”); *Preston v. Martin Bregman Prods., Inc.*, 765 F.Supp. 116, 119 (S.D.N.Y. 1991) (“Whether a use falls within this exception to liability is determined by the role that the use of the plaintiff’s name or likeness plays in the main purpose and subject of the work at issue.”). These factors support the plaintiffs’ position here.

Under the first and second factors, the former players’ likenesses have unique value and contribute to the commercial value of *Madden NFL*. EA goes to substantial lengths to incorporate accurate likenesses of current and former players, including paying millions of dollars to license the likenesses of current players. EA has acknowledged, “[t]he Madden titles are successful in part because they allow consumers to simulate play involving any of the 32 NFL teams, using real NFL players.”

Having acknowledged the likenesses of current NFL players carry substantial commercial value, EA does not offer a persuasive reason to conclude otherwise as to the former players. EA argues that, because there are several thousand players depicted in *Madden NFL*, any individual player’s likeness has only a de minimis commercial value. There is no basis for

such a sweeping statement. EA includes only a small number of particularly successful or popular historic teams. EA also advertises the inclusion of those historic teams in its promotional materials.⁶ Indeed, we rejected EA's similar reasoning in *Keller*: "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. Having chosen to use the players' likenesses, EA cannot now hide behind the numerosity of its potential offenses or the alleged unimportance of any one individual player." 724 F.3d at 1276 n.7.

Under the third and fourth factors, the former players' likenesses are featured prominently in a manner that is substantially related to the main purpose and subject of *Madden NFL*—to create an accurate virtual simulation of an NFL game. See *Preston*, 765 F. Supp. at 119; *Ladany v. William Morrow & Co., Inc.*, 465 F. Supp. 870, 881 (S.D.N.Y. 1978). EA has stated publicly it is dedicated to "creating the most true-to life NFL simulation experience as possible ... We want to accurately deliver an amazing NFL experience in our game." Accurate depictions of the players on the field are central to the creation of an accurate virtual simulation of an NFL

⁶ For example, the Official Game Guide for the 2006 edition of *Madden NFL* states: "Historic Rosters are back again. They allow you to play 'what if'-type games. For instance, you can replay the '78 Dallas Cowboys vs the '78 Steelers in Super Bowl XIII. 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."

game. *Cf. Lohan*, 924 F. Supp. 2d at 455–56 (holding the incidental use defense applied when the plaintiff’s name was mentioned once in 104 lines of a song and the mention was “entirely incidental to the theme of the Song”). Therefore, EA has not established a probability of prevailing on its incidental use defense.

IV. Conclusion

EA has not shown that its unauthorized use of former players’ likenesses in the *Madden NFL* video game series qualifies for First Amendment protection under the transformative use defense, the public interest defense, the *Rogers* test or the incidental use defense. Accordingly, we affirm the district court’s denial of EA’s motion to strike.⁷

AFFIRMED.

⁷ Because EA may preserve issues for en banc or Supreme Court review, *see Singh v. Gonzales*, 502 F.3d 1128, 1129 (9th Cir. 2007), its appeal of issues foreclosed by *Keller* was not frivolous, and we deny the plaintiffs’ request for costs and attorneys’ fees pursuant to California’s anti-SLAPP statute and Federal Rule of Appellate Procedure 38.

17a

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
SAN FRANCISCO DIVISION

MICHAEL E. DAVIS,
aka TONY DAVIS,
VINCE FERGAMMO,
and BILLY JOE
DUPREE, on behalf of
themselves and all
other similarly situated,

Plaintiffs,

v.

ELECTRONIC ARTS INC.,

Defendant.

No. 10-03328 RS

**ORDER DENYING
DEFENDANT'S
MOTIONS TO
DISMISS AND TO
STRIKE UNDER
CCP § 425.16**

I. INTRODUCTION

Former National Football League (“NFL”) players Michael Davis, Vince Ferragamo, and Billy Joe Dupree bring this putative class action against videogame developer Electronic Arts Inc. (“EA”), alleging their likenesses were used without authorization in the EA video game, *Madden NFL*. Defendants move to

dismiss the first amended complaint (“FAC”) under Federal Rule of Civil Procedure 12(b)(6) and, separately, move to strike the complaint pursuant to California’s Anti-SLAPP law. Upon consideration of the briefs, oral argument, and for the reasons explained below, both of defendant’s motions must be denied.

II. FACTUAL & PROCEDURAL BACKGROUND

EA is a leading developer and publisher of video games. Plaintiffs, three retired NFL players, contend EA used their likenesses in its video game *Madden NFL*. According to plaintiffs, EA’s *Madden NFL* franchise is the best-selling sports video game of all time, with sales of more than 85 million copies and revenues in excess of \$4 billion. The company has released a new version of *Madden NFL* each year for approximately twenty years, including editions tailored to different gaming systems. The FAC alleges that at least five editions of *Madden NFL*, designed for distinct gaming consoles, and released over a number of years, use plaintiffs’ likenesses without authorization.¹ FAC ¶ 75.

Madden NFL permits users to simulate an NFL football game. The game is elaborate and entails many creative and expressive features, including

¹ According to EA, only the editions designed for the Sony Playstation 2 and the Microsoft Xbox gaming consoles feature the “historic” players at issue in this action. For purposes of defendant’s motion to dismiss, however, the Court must accept plaintiffs’ allegations as true. See also *infra* note 4 (addressing cross-motions for judicial notice).

extensive audiovisual effects. EA itself represents *Madden NFL* as highly realistic. It features depictions of actual stadiums, as well as current teams, with accurate rosters, colors, logos, and uniforms. FAC ¶¶ 25–27. According to the FAC, many of these game elements are covered by licensing deals. For example, EA has licensed the rights to use active players’ likenesses and biographical information, and holds similar licenses covering coaches, announcers, and select retired players. According to the FAC, it was publicly reported that EA paid the licensing division of the NFL Players Association approximately \$35 million for the use of active players’ likenesses.

Significantly, for purposes of this action, those playing *Madden NFL* may select specific teams to compete against each other. Plaintiffs allege that some recent versions of the game even permit gamers to choose famous “historical” teams, with rosters populated by players closely resembling NFL retirees, including plaintiffs Davis, Ferragammo, and Dupree. At least in the most recent versions of the game, the avatars allegedly representing former players are not identified by name or jersey number.² According to the FAC, however, the representative avatars are

² According to plaintiffs, in older versions of *Madden NFL*, EA accurately listed most retired players’ jersey numbers. It stopped that practice in 2004, listed different numbers, and added functionality permitting gamers to change the historic players’ numbers themselves. Players’ names may now also be edited. See Henri Decl. in Supp. of Pls.’ Opp’n, Ex. 7 (*Madden NFL* official guide for the 2007 to 2008 versions noted, with respect to historical players, “[t]he players do not have their actual names but you can edit them if you want optimum realism.”).

preprogrammed by EA to reflect accurately a variety of individual, physical and biographical characteristics that precisely correspond to the plaintiffs' own profiles as active players—including height, weight, skin tone, position, team, years in the league, and athletic ability (speed, agility, etc.). Notably, for purposes of its present motions, EA accepts plaintiffs' allegations that it used some protectable element of plaintiffs' likenesses in *Madden NFL*.

Plaintiffs filed this putative class action on behalf of themselves and approximately 6,000 other former NFL players whose likenesses, they claim, appear in certain editions of *Madden NFL*. The FAC advances five claims for relief: (1) violations of California's statutory right of publicity, California Civil Code § 3344, (2) violations of California's common law right of publicity, (3) conversion, (4) trespass to chattels, and (5) unjust enrichment. Discovery is ongoing. Defendants now move to dismiss with prejudice, and separately, to strike under California's Anti-SLAPP law³ which plaintiffs oppose.⁴

³ In support of its motions, EA requests judicial notice of: (1) the content of the Playstation 2 and Xbox editions of *Madden NFL*, (2) ¶¶ 7-13 of the Frazier Declaration, (3) and district court orders disposing of motions to dismiss in *Kent v. Universal Studios, Inc., et al.*, No. C08-2704, *Brown v. Elec. Arts Inc.*, No. C09-1598, and *Stewart Surfboards, Inc. v. Disney Book group*, No. C10-2982. Although the Court is ordinarily limited to considering the pleadings and any attached exhibits upon a motion to dismiss, here, taking judicial notice of *Madden NFL*'s content is appropriate because the authenticity of the material submitted by EA is not subject to dispute. *Keller v. Electronic Arts, Inc.*, 2010 WL 530108, at *5 n.2. The Court may also take judicial notice of

the district court opinions, since they are matters of public record. *See* Fed. R. Evid. 201(b), and *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). The Frazier Declaration simply describes *Madden NFL* in terms favorable to EA. Plaintiffs oppose judicial notice of the Frazier Declaration because it also contains statements that the FAC specifically contradicts. Having reviewed *Madden NFL*, there is no reason to take judicial notice of the contents of the Frazier Declaration, and EA's request is denied to that extent.

⁴ Plaintiffs have also filed a motion requesting judicial notice of: (1) briefs, declarations, and expert reports and testimony offered by EA in a number of other cases, (2) two licensing agreements between EA and NFL-related entities, (3) official media guides from several NFL teams, (4) numerous screen shots from *Madden NFL*, (5) various printouts from EA's website, and (6) the official EA user guides for *Madden NFL* from 2001 to 2009. EA opposes notice of all but the screen shots, which are hereby noticed by the Court because their authenticity is not disputed. The court filings plaintiffs submit are all matters of public record and are therefore also amenable to judicial notice. Fed. R. Evid. 201(b). The FAC alleges, and the Court accepts for purposes of the instant motions, that EA has entered into various licensing agreements with the NFL Players Association and other NFL entities. It is not necessary to take notice of their contents. The same is true for the NFL team media guides; plaintiffs have alleged, and it is undisputed for purposes of this motion, that *Madden NFL* misappropriated plaintiffs' likenesses. While accepting statements by EA alleged in the complaint, the Court need not take judicial notice of other statements made on EA's website or in the game user guides to resolve the instant motions because how the *Madden NFL* was marketed is legally irrelevant. *See Winter v. DC Comics*, 30 Cal. 4th 881, 891 (2003). As for these materials, the motion is denied.

III. LEGAL STANDARD

A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal under Rule 12(b)(6) may be based on either the “lack of a cognizable legal theory” or on “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). When evaluating such a motion, the court must accept all material allegations in the complaint as true, even if doubtful, and construe them in the light most favorable to the non-moving party. *Twombly*, 550 U.S. at 570. “[C]onclusory allegations of law and unwarranted inferences,” however, “are insufficient to defeat a motion to dismiss for failure to state a claim.” *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *see also Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555) (“threadbare recitals of the elements of the claim for relief, supported by mere conclusory statements,” are not taken as true). In dismissing a complaint, leave to amend must be granted unless it is clear that the complaint’s deficiencies cannot be cured by amendment. *Lucas v. Dep’t of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995). When amendment would be futile, however, dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

IV. DISCUSSION

A. Motion to Dismiss

1. *California Rights of Publicity*

The FAC's first and second claims for relief articulate violations of plaintiffs' California statutory and common law rights of publicity. To state a right of publicity claim under California common law, plaintiffs must allege: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Hilton v. Hallmark Cards*, 580 F.3d 874, 889 (9th Cir. 2009) (quoting *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001)). The statutory right is created by Civil Code § 3344(a), which provides, in relevant part:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof.

To establish the statutory right, plaintiff must show, in addition to the common law elements, a knowing use of the plaintiff's name or likeness. *Kirby*, 144 Cal. App. 4th at 55. For purposes of these motions, however, neither party argues that there is any material distinction between plaintiffs' statutory and

common law claims, and as a result, they rise or fall together. Rather than challenge the sufficiency of the pleadings, EA contends that plaintiffs' claims must fail as a matter of law because they are barred by the First Amendment.⁵ Alternatively, EA contends plaintiff's claims are barred by California's public interest exception or by the public affairs exception to California's statutory right of publicity.

a. Transformative Use Test

Faced with a right of publicity claim based on an expressive work, EA raises the "affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 407 (2001). The California Supreme Court first articulated the "transformative" use test in *Comedy III*. As the Court explained, under applicable California law, this "transformative" use test "is essentially a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." *Id.* at 391.

⁵ Although reaching a constitutional issue or argument is generally disfavored, it is appropriate to consider the question where, as here, defendant contends that merely proceeding with this litigation would chill its speech rights. *Winter v. D.C. Comics*, 30 Cal. 4th 881, 891 (2003).

In *Comedy III*, the Court recognized that because “celebrities take on personal meanings to many individuals in the society, the creative appropriation of celebrity images can be an important avenue of individual expression.” *Id.* at 397. For example, a fictional film based on the life of a celebrity is afforded First Amendment protection, as against the subject’s right of publicity claim. See *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 868 (1979) (barring publicity claims brought by putative heirs of Rudolph Valentino based on fictionalized film portraying Valentino’s life). Nonetheless, the Court in *Comedy III* went on to hold, “depictions of celebrities amounting to little more than the appropriation of the celebrity’s economic value are not protected expression under the First Amendment.” *Id.* at 400. It further explained, “when an artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist’s right of free expression is outweighed by the right of publicity.” *Id.* at 408. In such cases, “[t]he right-of-publicity holder [may still] enforce the right to monopolize the production of conventional, more or less fungible, images of the celebrity.” *Id.* at 405; see also *id.* at 402 (“[The] strongest case for a ‘right of publicity’” claim arises where plaintiff’s work constitutes “the appropriation of the very activity by which the entertainer acquired his reputation in the first place” (citation omitted)).

The essence of the “transformative” use test is: “An artist depicting a celebrity must contribute something

more than a merely trivial variation, but create something recognizably his own, in order to qualify for legal protection.” *Id.* at 408. Although courts consistently require some transformation to confer First Amendment protection, the case law makes clear the analysis does not turn on the quality of the accused work, or the message conveyed. *Id.* at 407 (“[I]n determining whether the work is transformative, courts are not to be concerned with the quality of the artistic contribution—vulgar forms of expression fully qualify for First Amendment protection.”). Protected 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.” *Id.* at 406 (citations omitted).

Consistent with this rubric, in *Comedy III*, the Court permitted the Three Stooges to proceed with claims against defendant for selling lithographs and t-shirts which bore “literal, conventional depictions” of the famous comedians, drawn in charcoal. Although defendant maintained that his portraiture necessarily involved some creative decisions, and thus could not be considered a literal reproduction of plaintiffs’ likenesses, the Court rejected that categorical position. *Id.* at 408–409. Purportedly without judging the quality of the work, it found that defendant was engaged in merely merchandising plaintiffs’ images, and distinguished the works from more expressive reproductions of celebrity portraits, such as Andy Warhol’s silkscreen portraits of celebrities. *Id.* Noting that the value of the accused works in *Comedy*

III derived primarily from plaintiffs' fame, and appeared to be merely "conventional celebrity images," the Court perceived no other transformative element, and as a result, permitted plaintiffs to proceed on their claims. *Id.* at 409–410.

On the other hand, in *Winter*, the Supreme Court barred claims brought by country musicians Johnny and Edgar Winter against DC Comics for sale of a comic book featuring "brothers Johnny and Edgar Autumn, depicted as villainous half-worm, half-human offspring born from the rape of their mother by a supernatural worm creature that had escaped from a hole in the ground." *Winter v. DC Comics*, 30 Cal. 4th 881, 886 (2003). According to plaintiffs, they were represented as "vile, depraved, stupid, cowardly, subhuman individuals who engage in wanton acts of violence, murder and bestiality for pleasure and who should be killed." *Id.* The Court easily found that these depictions, though "less than subtle evocations" of the plaintiffs, did not depict them literally and instead were "distorted" caricatures appearing "in a larger story, which is itself quite expressive." *Id.* at 890. While noting that the comic would not impair plaintiffs' ability to market their likenesses, the Court also held it irrelevant that "defendants were trading on plaintiffs' likenesses and reputations to generate interest in the comic book series and increase sales." *Id.* at 891.

While the facts in the instant action present a closer case than does either *Comedy III* or *Winter*, a growing number of authorities have now addressed the issue in the context of video games, in circumstances that are

materially indistinguishable from the case at bar. In a recent case also before the Northern District of California, the quarterback of Arizona State University sued EA for using his likeness in its *NCAA Football* videogame. *Keller v. Elec. Arts, Inc.*, No. 09-1967, 2010 WL 530108, at *5 (N.D. Cal. Feb. 8, 2010). There, as here, plaintiff was represented realistically by EA in both physical and biographical respects. *Id.* As the court noted, “EA does not depict Plaintiff in a different form; he is represented as what he was: the starting quarterback for Arizona State University.” *Id.* In addition, “the game’s setting is identical to where the public found Plaintiff during his collegiate career: on the football field.” EA has not attempted to explain how that case differs from this one, and instead merely notes that the *Keller* decision is on appeal.⁶

EA argues here, as it did in *Keller*, that the videogame, taken as a whole, contains transformative elements. Relying heavily on *Comedy III*, EA characterizes plaintiffs’ likenesses merely as the “raw materials” from which *Madden NFL* is fashioned. While there is no question that video games qualify for First Amendment protection, *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 958 (9th Cir. 2009), and *Madden NFL* certainly encompasses significant expressive elements, this basic proposition

⁶ EA’s appeal was argued and submitted to the Ninth Circuit in February of 2011. A decision by the governing Circuit Court in that case will no doubt provide important guidance for the pending action and, indeed, perhaps for this motion in particular. That said, it would not be fair to the litigants in this case to defer a determination on the pending motions indefinitely.

does not end the inquiry. *Id.* at 408-09. A review of the applicable authority indicates that the “transformative” use test focuses on the reproduction of plaintiff’s likenesses, rather than on a canvassing of the larger work. *See Winter*, 30 Cal. 4th at 886, and *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 59 (2006) (plaintiff’s likeness was adequately transformed by dissimilar physique, different costumes, and portrayal as a space-age news reporter in the 25th century). It would make little sense for the rule to be otherwise: if, as EA urges, any expressive elements within the larger work were somehow to “transform” an otherwise conventional use of a celebrity’s likeness, the right of publicity would effectively be eviscerated. This conclusion is not inconsistent with judicial decisions protecting fictionalized portrayals of celebrities’ life stories in film or other media. *See, e.g., Guglielmi*, 25 Cal. 3d at 868. In *Guglielmi*, for example, Rudolph Valentino’s likeness was not used within the film for conventional merchandising purposes, but only for the transformative purpose of representing a fictionalized version of Valentino’s storied life.

It follows that the weight of authority rests with plaintiffs. As in *Keller*, plaintiffs here appear in *Madden 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. *See generally Comedy III*, 25 Cal. 4th at 408-10. *Guglielmi* does not compel a different result. 25 Cal. 3d at 868. There, the accused work was a fictionalized film account of Valentino's life story. Although the opinion does not expressly state as much, had the film at issue instead been an "appropriation of the very activity by which the entertainer acquired his reputation in the first place," such as an uninflected reproduction of some of Valentino's famous performances on screen, there likely would have been a stronger case for plaintiff's publicity claims. *Cf. Comedy III*, 25 Cal. 4th at 402 (quoting *Estate of Presley v. Russen* 513 F. Supp. 1339, 1361 (D. N.J. 1981)). Here, as noted, plaintiffs' likenesses are shown engaged in the activity—playing football—which earned them fame. Although it is true that plaintiffs' likenesses, as they appear in *Madden NFL*, may be controlled by gamers playing the video game, this fact, without more, does not change the analysis.

Prior cases agree. As the California Court of Appeal recently explained, addressing the use of celebrity likenesses in the popular video game *Band Hero*:

That the avatars can be manipulated to perform at fanciful venues including outer space or to

sing songs the real band would object to singing, or that 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 [band] members doing exactly what they do as celebrities.

No Doubt v. Activision Pub., Inc., 192 Cal. App. 4th 1018, 1034 (2011). The holding in *No Doubt* thus went well beyond what is required here. There, the court deemed even fairly significant “distortions” to plaintiffs’ likenesses to be non-transformative. In *Madden NFL*, the depiction of plaintiffs is not altered to nearly the same degree, and in fact, the realistic depiction of plaintiffs achieved by EA appears to be restricted chiefly by the inherent limitations of the medium. The logic of *No Doubt* applies easily and squarely to the facts at bar. EA’s claim that its alleged use of plaintiffs’ likeness is transformative, and thus protected, fails.

b. Rogers Test

Alternatively, EA invites adoption of the Second Circuit’s *Rogers* test.⁷ *Rogers v. Grimaldi*, 875 F.2d 994, 996-97 (2d Cir. 1989). Under *Rogers*, the first step is to determine whether the use of plaintiffs’ image is minimally relevant to the underlying work. *Id.* at 1100. If so, the use is permitted so long as it poses no

⁷ EA notes that the Ninth Circuit has expressly reserved the question of whether First Amendment protection may be broader than the California Supreme Court recognized in *Comedy III. Hilton*, 599 F.3d at 909 n.11.

risk of confusion to consumers. *Id.* As the substance of the *Rogers* test makes clear, it was primarily formulated in the context of evaluating a Lanham Act claim, and only secondarily, for application to the right of publicity. Although EA invokes several California federal district court cases that have applied *Rogers*' analysis to the use of trademarks, *see, e.g., Brown v. Elec. Arts, Inc.*, No. 09-1598 (E.D. Cal. Sept. 23, 2009) (slip op.), no California federal courts have extended its application to California's statutory right of publicity. It would be fairly extraordinary to do so here. EA's invitation must be declined.

c. Public Interest Test

Unable to meet the transformative use or *Rogers* tests, defendant argues that its use of plaintiffs' likenesses in *Madden NFL* is protected because it concerns a matter of public interest. "Under California law, 'no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.'" *Hilton*, 580 F.3d at 892 (quoting *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793 (1995)).

It is true that the reporting and discussion of factual information about professional sports implicates the public interest. In *Gionfriddio v. Major League Baseball*, a declaratory action brought by four former professional baseball players against the league itself, the court considered plaintiff's right of publicity claims, as applied to the league's website, which "provides historical information about major league baseball including rosters, box scores, game summaries, lists of

award winners, and video clips of historic moments from past games.” 94 Cal. App. 4th 400, 405 (2001). The *Gionfriddio* court held that “[t]he recitation and discussion of factual data concerning the athletic performance of these plaintiffs commands a substantial public interest, and therefore [are] a form of expression due substantial constitutional protection.” *Id.* at 411 (citation omitted). See also *Montana*, 34 Cal. App. 4th at 796 (discussing a poster of the front page of a newspaper which featured the Superbowl-winning quarterback).

Here, *Madden NFL* indeed includes some historical facts concerning plaintiffs’ biographical information and performance statistics. The alleged use of plaintiffs’ likenesses in the game, however, goes well beyond simply reporting or republishing “statements of historical fact, descriptions of these facts or video depictions of them,” and there is very little in the game that resembles any kind of traditional reporting. *Gionfriddio*, 94 Cal. App. 4th at 415. Notably, this is not necessarily fatal, even though some courts have assumed the public interest doctrine applies only to reporting. See, e.g., *Hilton*, 599 F.3d at 912 (public interest defense is limited to “publication of newsworthy items”); *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 543 (applying exemption to surf documentary). Defendant accurately states that *Gionfriddio* and other courts have recognized “[e]ntertainment features receive the same constitutional protection as factual news reports.” 94 Cal. App. 4th at 410. See also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977)

(applying public interest analysis to circus performer). It is not difficult to conclude that the free speech protections encompass entertainment, and EA argues, persuasively, that videogames are interactive “entertainment.” Yet, “these protections are not absolute” and *Madden NFL* simply does not appear to fulfill the traditional informative role recognized as deserving protection by the court. *Keller*, 2010 WL 530108, at *6; *see generally Dora*, 15 Cal. App. 4th at 543, (“[M]atters in the public interest are not ‘restricted to current events; magazines and books, radio and television may legitimately inform and entertain the public with the reproduction of past events, travelogues and biographies.’”).

While EA’s publication of plaintiffs’ biographical facts and performance statistics might warrant protection under the reporting criterion, the game play of *Madden NFL*, for all its realism, does not “report,” or even recreate, recent or historical games. Rather, as EA itself emphasizes, each game in *Madden NFL* lies within the gamers’ control, and is unique and new. When a gamer selects one of *Madden NFL*’s “historic teams,” the only historical aspect of the game that ensues are plaintiffs’ likenesses. Everything else is simply play.

In an attempt to address this reality, EA invokes *C.B.C. Distributing & Marketing, Inc. v. Major League Baseball Advanced Media L.P.*, in which the Eighth Circuit held that defendants’ “fantasy” league products were protected under Missouri law. In fantasy leagues, sports enthusiasts, acting as owners, assemble rosters of professional players and then compete

statistically “on paper,” based on their players’ actual performances. The accused fantasy system employed the real names, statistics, and other biographical information, of professional baseball players to facilitate competition. 505 F.3d 818, 823–24 (8th Cir. 2007).

Although there are some compelling similarities between fantasy league products and *Madden NFL*, unlike the latter, competition in fantasy leagues actually turns on the players’ reported performance, and for this reason much more easily fits as a kind of discourse concerning statistical facts. In addition, as the *C.B.C.* court held:

... the facts in this case barely, if at all, implicate the interests that states typically intend to vindicate by providing rights of publicity to individuals. Economic interests that states seek to promote include the right of an individual to reap the rewards of his or her endeavors and an individual’s right to earn a living. ... major league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements.

505 F.3d at 824. Here, by contrast, EA’s decision to use plaintiffs’ likenesses in *Madden NFL* clearly implicates recognized economic interests, as evidenced by the case law discussing the use of celebrities in video games, and EA’s other licensing agreements that cover the game. *Keller*, which is again directly on point, comes to the same conclusion: *Madden NFL* does not

pass the public interest test under California courts' jurisprudence. *Keller*, 2010 WL 530108, at *5-6 (distinguishing *C.B.C.* because the video game did not "depend on updated report of the real-life players' progress during the college football season").

d. Section 3344(d)

Finally, EA contends that its use of plaintiffs' likenesses is exempt from liability under California Civil Code § 3344(d). That section provides immunity for the "use of a name ... or likeness in connection with any news, public affairs, or sports broadcast or account...." Cal. Civ. Code § 3344(d). The Ninth Circuit has suggested that § 3344(d) immunity is intended to sweep more broadly than the First Amendment. *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 310 n. 10 (9th Cir. 1992) (citing *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 421 (1983)) ("[The provision] is designed to avoid First Amendment questions in the area of misappropriation by providing extra breathing space for the use of a person's name in connection with matters of public interest"). Again, there is little room for debate as to whether the use of photographs and videos of professional athletes, as well as statistics summarizing their performance, concern "public affairs" within the meaning of § 3344(d). See *Gionfriddo*, 94 Cal. App. 4th at 319; *Dora*, 15 Cal. App. 4th at 545 ("public affairs" was intended to mean something less important than news"); accord *Keller*, 2010 WL 530108, at *7 (college athletics, including NCAA football, qualify as "public affairs"). Plaintiffs, however, contend § 3344(d) immunizes only reporting on, or informative uses of,

celebrity likenesses, as under the First Amendment's public interest test.⁸

In *Dora*, the California Court of Appeal held that although the term “public affairs” reaches matters less significant than the news, nonetheless, “[p]ublic affairs must be related to real-life occurrences. As has been established in the cases involving common law privacy and appropriation, the public is interested in and constitutionally entitled to know about things, people, and events that affect it.” Cal. App. 4th at 545–46. Although EA argues *Madden NFL* relates to “public affairs,” broadly understood, under *Dora*'s logic it is difficult to see how EA can prevail under § 3344(d). Other than a minimal amount of preprogrammed statistical information concerning each player, game play does not report or relate “real-life occurrences.” It is, rather, entirely fictional. In *Keller*, this Court reached the same conclusion: “Although NCAA Football is based on subject matter considered ‘public affairs,’ EA is not entitled to the statutory defense because its use of Plaintiff’s image and likeness extends beyond reporting information about him.” 2010 WL 530108, at *7. As a result, EA’s motion to dismiss must be denied on this reasoning as well.

⁸ Section 3344(d) remains distinct from the public interest doctrine because the former specifically enumerates certain immunized activities for particular contexts. *New Kids on the Block*, 971 F.2d at 310 n.10.

2. *Conversion & Trespass to Chattels*

Given that plaintiffs' first two claims survive, EA's only remaining challenge to the third and fourth claims, for conversion and trespass to chattels, respectively, is that plaintiffs have failed to plead that EA dispossessed them of an interest in tangible personal property. Such an allegation is required, EA claims, to satisfy the merger requirement, which mandates that the intermeddled interest be merged with some tangible property. *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559, 1565 (1996) ("Courts have traditionally refused to recognize as conversion the unauthorized taking of intangible interests that are not merged with, or reflected in, something tangible"). As plaintiffs properly point out, however, California courts no longer apply the merger requirement, and have instead indicated a willingness to entertain conversion and trespass to chattels claims, even where the alleged interference is to an intangible interest. For example, in *Kremen v. Cohen*, plaintiff asserted a conversion claim with respect to his intangible interest in a domain name. 337 F.3d 1024, 1034 (9th Cir. 2003). Reversing the district court's dismissal based on the absence of a showing of merger, the Ninth Circuit held: "We conclude that California does not follow the *Restatement's* strict merger requirement. Indeed, the leading California Supreme Court case rejects the tangibility requirement altogether." *Id.* (citing *Payne v. Elliot*, 54 Cal. 339 (1880)); see also *A&M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 570 (1977) (holding, without applying merger rule, that

“misappropriation and sale of the intangible property of another without authority from the owner is conversion”). Accordingly, the merger requirement does not provide a basis to dismiss plaintiffs’ ancillary claims.

3. *Unjust Enrichment*

Finally, EA contends that plaintiffs’ fifth claim for relief for unjust enrichment is not recognized under California law absent independent grounds for imposing a constructive trust. Importantly, plaintiffs’ FAC does allege that “EA is an involuntary trustee holding all such sums in its possession under a constructive trust for the benefit of Plaintiffs and the Class” FAC ¶ 82. Thus, EA’s contention that plaintiffs have not alleged the propriety of a constructive trust is simply incorrect. EA further argues the unjust enrichment claim must be dismissed because California courts do not recognize a standalone cause of action for unjust enrichment without an independent basis for relief. Here, however, plaintiffs have adequately pled an independent basis in stating that EA was unjustly enriched by virtue of its unauthorized use of their likenesses. *See generally Monet v. Chase Home Fin., LLC*, No. C 10-0135 RS, 2010 WL 2486376, at *3 (N.D. Cal. June 16, 2010) (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) and justifying a standalone unjust enrichment claim where property “identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendants’ possession”); *Keller*, 2010

WL 530108, at *7. Accordingly, EA's motion to dismiss the fifth claim for relief must be denied.

B. Anti-SLAPP

EA's Anti-SLAPP motion employs exactly the same analytical framework and arguments to attack plaintiffs' various claims, albeit under a different legal standard. California's Anti-SLAPP statute provides for early dismissal of any claims for relief that are primarily based on defendants' activities taken in furtherance of their right to free speech or petition relating to an issue of public concern. *Vess v. CIBA-GEIGY Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003). Specifically, the law provides that a party may file a motion to strike a cause of action under § 425.16 if the complaint "aris[es] 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." Cal. Code Civ. Proc. § 425.16(b)(1). The first step in evaluating an anti-SLAPP motion is to determine whether the defendant has carried its burden in demonstrating that the challenged cause of action is "arising from" activity taken "in furtherance" of the right to petition or free speech. *Mindys*, 611 F.3d at 595-96. "In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." *Id.* at 597 (quoting *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002)) (emphasis in original). The statute expressly recognizes four categories of protected speech and petitioning activity, including, in relevant part, any "conduct in furtherance of the

exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” Cal. Code Civ. Proc. § 425.16(e).

If a defendant succeeds in making a *prima facie* showing, the burden then shifts to plaintiff to demonstrate “a ‘reasonable probability’ of prevailing on the challenged claims.” *Mindys*, 611 F.3d at 595. This “minimal merit” standard requires only that plaintiff “state and substantiate a legally sufficient claim.” *Id.* at 598-99, (quoting *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728 (2003)). This entails a “sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” *Id.* at 599 (quoting *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 821 (2002)). In evaluating the parties’ positions, the court is to consider “the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” Cal. Code Civ. Proc. § 425.16(b)(2).

As applied here, there is no question that “[v]ideo games are expressive works entitled to as much First Amendment as the most profound literature,” *Kirby*, 144 Cal. App. 4th at 58, and although, as the foregoing discussion clearly indicates, there remain serious doubts as to whether EA’s use of plaintiffs’ likenesses is affirmatively immunized by the First Amendment, it may be assumed for purposes of this motion that the challenged conduct “aris[es] from” activity taken “in furtherance” of the right to petition or free speech,” within the meaning of the statute. Cal. Code Civ. Proc. § 425.16(b)(1). Nonetheless, given that EA has

conceded for purposes of these motions that *Madden NFL* uses plaintiffs' likenesses without authorization, and has not otherwise attacked the adequacy of the FAC's allegations, for the reasons explained above, plaintiffs have satisfied their burden under step two of the relevant analysis. The FAC, in conjunction with the evidence presented in the form of the game itself, is sufficient to "state and substantiate a legally sufficient claim." *Mindys*, 611 F.3d at 599-99. Accordingly, EA's motion to strike must be denied.

V. CONCLUSION

For the reasons stated above, defendant's motion to dismiss and motion to strike under § 425.16 are denied.

IT IS SO ORDERED.

Dated: 3/29/12

/s/ Richard Seeborg
RICHARD SEEBORG
UNITED STATES
DISTRICT JUDGE

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL E. DAVIS, AKA
Tony Davis; VINCE
FERRAGAMO; BILLY JOE
DUPREE; SAMUEL
MICHAEL KELLER,

Plaintiffs - Appellees,

v.

ELECTRONIC ARTS INC.,

Defendant - Appellant.

No. 12-15737

D.C. No. 3:10-cv-
03328-RS

Northern District
of California
San Francisco

Filed July 10, 2015

ORDER

Before: REINHARDT, FISHER and BERZON,
Circuit Judges.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. *See* Fed. R. App. P. 35.

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Appellant's petition for rehearing en banc, filed January 20, 2015, is denied.