

May 15, 2014

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
437 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

I have reviewed the questionnaire submitted to the Senate Judiciary Committee in connection with my nomination to the United States District Court for the District of Columbia on April 3, 2014. Since the submission of my questionnaire, I discovered that some pages were inadvertently omitted from the copy of one item I provided to the Committee, and I have located additional information that I had inadvertently overlooked in my previous search of my records and the Internet. Incorporating the additional information listed below, I certify that the information contained in these documents is, to the best of my knowledge, true and accurate.

Question 12(b):

In reviewing my materials earlier this week, I discovered that a number of pages of the following document were inadvertently omitted: *Testimony Concerning S. 1668, Whistleblower Protection for Classified Disclosure*, Permanent Select Committee on Intelligence, United States House of Representatives, May 20, 1998. A complete copy of this written statement is supplied herewith.

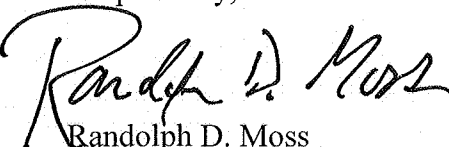
Question 16(e):

I inadvertently omitted a Motion for Leave to Intervene to File a Petition for a Writ of Certiorari and a proposed Petition for a Writ of Certiorari in *National Collegiate Athletic Association v. Keller*, a copy of which is supplied herewith. Unfortunately, because this filing was not reported on Westlaw or Lexis, and because the Supreme Court website only lists counsel of record, I missed this filing when I submitted my questionnaire.

Page Two

I sincerely appreciate the Committee's consideration of my nomination and apologize for any inconvenience I may have caused.

Respectfully,



Handwritten signature of Randolph D. Moss in black ink. The signature is written in a cursive style with a large initial 'R' and 'M'.

Randolph D. Moss

Enclosures

Whistleblower Protections for Classified Disclosures

A Senate bill addressing the disclosure to Congress of classified "whistleblower" information concerning the intelligence community is unconstitutional because it would deprive the President of the opportunity to determine how, when and under what circumstances certain classified information should be disclosed to Members of Congress.

A House bill addressing the same subject is constitutional because it contains provisions that allow for the exercise of the President's constitutional authority.

May 20, 1998

STATEMENT BEFORE THE
PERMANENT SELECT COMMITTEE ON INTELLIGENCE
U.S. HOUSE OF REPRESENTATIVES

I am pleased to be here to present the analysis of the Department of Justice concerning the constitutionality of S. 1668 and H.R. 3829, two bills that address disclosure to Congress of classified "whistleblower" information concerning the intelligence community.

As the Department has previously indicated, it is our conclusion that S. 1668, like the Senate passed version of section 306 of last year's Intelligence Authorization bill, is unconstitutional.¹ It is unconstitutional because it would deprive the President of the opportunity to determine how, when and under what circumstances certain classified information should be disclosed to Members of Congress—no matter how such a disclosure might affect his ability to perform his constitutionally assigned duties. In contrast, H.R. 3829 is constitutional because it contains provisions that allow for the exercise of that authority.

I begin by briefly summarizing the principal provisions of S. 1668 and H.R. 3829. I then review the relevant constitutional history and doctrine. I conclude by applying the relevant constitutional principles to the two bills. Because other witnesses at the hearing today can best address the practical concerns posed by legislation in this area, my remarks are limited to the relevant constitutional considerations.

I.

A.

S. 1668 would require the President to inform employees of covered federal agencies (and employees of federal contractors) that their disclosure to Congress

¹ In addition, the Department of Justice took a similar position with respect to comparable legislation in a brief that it filed in the Supreme Court in 1989. See Brief for Appellees, *American Foreign Serv Ass'n v. Garfinkel*, 488 U.S. 923 (1988) (No. 87-2127).

of classified information that the employee (or contractor) reasonably believes provides direct and specific evidence of misconduct "is not prohibited by law, executive order, or regulation or otherwise contrary to public policy."² The misconduct covered by the bill includes not only violations of law, but also violations of "any . . . rule[] or regulation," and it encompasses, among other things, "gross mismanagement, a gross waste of funds, [or] a flagrant abuse of authority."³

S. 1668 would thus vest any covered federal employee having access to classified information with a unilateral right to circumvent the process by which the executive and legislative branches accommodate each other's interests in sensitive information. Under S. 1668, any covered federal employee with access to classified information that—in the employee's opinion—indicated misconduct could determine how, when and under what circumstances that information would be shared with Congress. Moreover, the bill would authorize this no matter what the effect on the President's ability to accomplish his constitutionally assigned functions. As discussed below, such a rule would violate the separation of powers.⁴

B.

H.R. 3829 would amend the Central Intelligence Agency Act and the Inspector General Act of 1978 to provide a means for covered executive branch employees and contractors to report to the Intelligence Committees certain serious abuses or violations of law or false statements to Congress that relate to "the administration or operation of an intelligence activity," as well as any reprisal or threat of reprisal relating to such a report. Under H.R. 3829, any employee or contractor who wishes to report such information to Congress would first make a report to the inspector general for the Central Intelligence Agency or their agency, as appropriate. If the complaint appears credible, the relevant inspector general would be required to forward the complaint to the head of his or her agency, and the head of the agency would generally be required to forward the report to the Intelligence Committees. Moreover, if the inspector general does not transmit the complaint to the head of the agency, the employee or contractor would generally be

²Section 1(a)(1)(A)

³*Id.* 1(a)(2)(A), (C)

⁴The Supreme Court has employed three principles in resolving separation of powers disputes. First, where "[e]xplicit and unambiguous provisions of the Constitution prescribe and define . . . just how [governmental] powers are to be exercised," *INS v. Chadha*, 462 U.S. 919, 945 (1983), the constitutional procedures must be followed with precision. Second, where the effect of legislation is to vest Congress itself, its members, or its agents with "either executive power or judicial power," the statute is unconstitutional. *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (citation omitted). Finally, legislation that affects the functioning of the Executive may be unconstitutional if it either "'impermissibly undermin[es] the powers of the Executive Branch'" or "'disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.'" *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (citations omitted). Because we conclude that S. 1668 would violate separation of powers under even the most lenient of these tests, there is no need to resolve whether one of the more stringent standards applies.

permitted to submit the complaint—under defined conditions—to the Committees directly.

Significantly, unlike S. 1668, H.R. 3829 provides that the head of the agency or the Director of Central Intelligence may determine “in the exceptional case and in order to protect vital law enforcement, foreign affairs, or national security interests” not to transmit the inspector general’s report to the Intelligence Committees and not to permit the employee or contractor directly to contact the Intelligence Committees.⁵ Whenever this authority is exercised, the head of the agency or the Director of Central Intelligence must promptly provide the Intelligence Committees with his or her reasons for precluding the disclosure. In this manner, H.R. 3829 would provide a mechanism for congressional oversight while protecting the executive interest in maintaining the strict confidentiality of classified information when necessary to the discharge of the President’s constitutional authority. As a result, unlike S. 1668, H.R. 3829 is consistent with the constitutional separation of powers.

II.

A host of precedents, beginning at the founding of the Republic, support the view that the President has unique constitutional responsibilities with respect to national defense and foreign affairs.⁶ As was recognized in the *Federalist Papers* and by the first Congresses, secrecy is at times essential to the executive branch’s discharge of its responsibilities in these core areas. Indeed, Presidents since George Washington have determined on occasion, albeit very rarely, that it was

⁵ See *id.* § 2(a), proposed new paragraph (5)(E) to be added to subsection (d) of section 17 of the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403q (1994 & Supp. II 1996), H.R. 3829, at § 2(b)(1), proposed new section 8H(c) to be added to the Inspector General Act of 1978, 5 U.S.C. app. § 8 (1994 & Supp. II 1996).

⁶ The President’s national security and foreign affairs powers flow, in large part, from his position as Chief Executive, U.S. Const. art. II, § 1, cl. 1, and as Commander in Chief, *id.* art. II, § 2, cl. 1. They also derive from the President’s more specific powers to “make Treaties,” *id.* art. II, § 2, cl. 2, to “appoint Ambassadors . . . and Consuls,” *id.*, and to “receive Ambassadors and other public Ministers,” *id.* art. II, § 3. See *The Federalist No. 64*, at 392–94 (John Jay) (Clinton Rossiter ed., 1961). The Supreme Court has repeatedly recognized the President’s authority with respect to foreign policy. See, e.g., *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (the Supreme Court has “recognized ‘the generally accepted view that foreign policy was the province and responsibility of the Executive’”) (quoting *Hait v. Agee*, 453 U.S. 280, 293–94 (1981)); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705 n.18 (1976) (“[T]he conduct of [foreign policy] is committed primarily to the Executive Branch”), *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is “the constitutional representative of the United States in its dealings with foreign nations”); *New York Times Co. v. United States*, 403 U.S. 713, 741 (1971) (Marshall, J., concurring) (“it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief”), *id.* at 761 (Blackmun, J., dissenting) (“Article II . . . vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation’s safety”), see also *United States v. Kim-Hong*, 110 F.3d 103, 110 (1st Cir. 1997) (“[O]ur constitutional structure . . . places primary responsibility for foreign affairs in the executive branch . . .”), *Ward v. Skinner*, 943 F.2d 157, 160 (1st Cir. 1991) (Breyer, J.) (“[T]he Constitution makes the Executive Branch . . . primarily responsible” for the exercise of “the foreign affairs power”), *cert. denied*, 503 U.S. 959 (1992), *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (Scalia, J.) (“[B]road leeway” is “traditionally accorded the Executive in matters of foreign affairs”).

necessary to withhold from Congress, if only for a limited period of time, extremely sensitive information with respect to national defense or foreign affairs.⁷

Perhaps the most famous of the Founders' statements on the need for secrecy is John Jay's discussion in the *Federalist Papers*. Jay observed:

There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.⁸

Our early history confirmed the right of the President to decide to withhold national security information from Congress under extraordinary circumstances. In the course of investigating the failure of General St. Clair's military expedition of 1791, the House of Representatives in 1792 requested relevant documents from the executive branch.⁹ President Washington asked the Cabinet's advice as to his proper response "because [the request] was the first example, and he wished that so far as it should become a precedent, it should be rightly conducted."¹⁰ Washington's own view was that "he could readily conceive there might be papers of so secret a nature, as that they ought not to be given up."¹¹

A few days later a unanimous Cabinet—including Secretary of State Thomas Jefferson, Secretary of the Treasury Alexander Hamilton, and Attorney General

⁷ See *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op O.L.C. 751 (1982) (compiling historical examples of cases in which the President withheld from Congress information the release of which he determined could jeopardize national security).

⁸ *The Federalist No. 64*, at 392-93 (John Jay) (Clinton Rossiter ed., 1961).

⁹ For recent scholarly discussions of this episode and its significance for the development of separation of powers, see Gerhard Casper, *Separating Power* 28-31 (1997); David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, at 163-64 (1997).

An earlier episode had occurred in 1790 when, in response to a request from the House of Representatives, Secretary of State Thomas Jefferson furnished that body with a report on Mediterranean trade. The report also touched on advice provided by a confidential European source on the possibility of buying peace with Algiers, which was endangering that trade. Jefferson relayed the source's advice to the House, but stated that his or her "name is not free to be mentioned here." Report of Secretary of State Jefferson, Submitted to the House of Representatives (Dec. 30, 1790) and Senate (Jan. 3, 1791), in 1 *American State Papers. Foreign Relations* 105 (1791). Jefferson also submitted the report with a request that the Speaker treat it as a secret document; and when the report was received, the House's galleries were cleared. See Casper, *supra* at 47-50. The executive branch continues the practice of redacting identifying information on confidential sources when providing secret information to Congress.

¹⁰ 1 *Writings of Thomas Jefferson* 303 (Andrew Lipscomb ed. 1903) (The Anas).

¹¹ *Id.*

Edmund Randolph—concurred. The Cabinet advised the President that, although the House “might call for papers generally,” “the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public.”¹² The Executive “consequently w[as] to exercise a discretion” in responding to the House request.¹³ The Cabinet subsequently advised the President that the documents in question could all be disclosed consistently with the public interest.¹⁴

Although President Washington ultimately decided to produce the requested documents, they were actually produced only after the House, on April 4, 1792, substituted a new request apparently recognizing the President’s discretion by asking only for papers “of a public nature.”¹⁵

Two years later, President Washington adhered to his conclusion regarding the respective authorities of the executive and legislative branches. Acting upon the advice of Attorney General William Bradford and other Cabinet officers, Washington responded to an unqualified request from the Senate for correspondence between the Republic of France and the United States minister for France by providing the relevant correspondence, except for “those particulars which, in [his] judgment, for public considerations, ought not to be communicated.”¹⁶

In 1796, when a controversy arose regarding whether President Washington could be required to provide the House of Representatives with records relating to the negotiation of the Jay Treaty, James Madison—who was then a Member of the House—conceded that even where Congress had a legitimate purpose for requesting information the President had authority “to withhold information, when of a nature that did not permit a disclosure of it at the time.”¹⁷

¹² *Id.* at 304.

¹³ *Id.*

¹⁴ *Id.* at 305.

¹⁵ 3 *Annals of Cong.* 536 (1792); see also Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power* 82–83 (1976), Casper, *supra* at 29.

¹⁶ 4 *Annals of Cong.* 56 (1794), see Sofaer, *supra* at 83–85. The Cabinet officers whom Washington consulted and who all agreed that he could withhold at least part of the material from the Senate were Hamilton, Randolph and Knox. *Id.* at 83. Randolph also informed Washington that he had met privately with Madison and with Justice James Wilson (another influential Framer), who provided similar advice. *Id.* at 83–84 n*. “[N]o further Senate action was taken to obtain the material withheld.” *Id.* at 85.

¹⁷ 5 *Annals of Cong.* 773 (1796). As President Washington observed in declining the House’s request:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even, when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic: for this might have a pernicious influence on future negotiations; or produce immediate inconveniences, perhaps danger and mischief, in relation to other Powers.

Id. at 760. Washington had previously sought and received advice from Alexander Hamilton, then in private practice in New York. Hamilton provided Washington with a draft answer to the House, which had stated in part: “A discretion in the Executive Department how far and where to comply in such cases is essential to the due conduct of foreign negotiations.” Letter from Alexander Hamilton to George Washington (Mar. 7, 1796), in 20 *The Papers of Alexander Hamilton* at 68 (Harold C. Syrett ed., 1974).

Although the Executive’s concerns with the confidentiality of diplomatic materials certainly loomed large in the 1796 dispute, it would overstate the point to view the entire controversy as turning exclusively on the issue of “executive privilege.” Washington rested his position partly on the alternative ground that the Constitution gave the House no role in the treaty-making process. Moreover, it appears that the controversy “had a somewhat ‘aca-

Congressional recognition of this power in the President extends well into recent times.¹⁸ Moreover, since the Washington Administration, Presidents and their senior advisers have repeatedly concluded that our constitutional system grants the executive branch authority to control the disposition of secret information. Thus, then-Attorney General Robert Jackson declined, upon the direction of President Franklin Roosevelt, a request from the House Committee on Naval Affairs for sensitive FBI records on war-time labor unrest, citing (among other grounds) the national security.¹⁹ Similarly, then- Assistant Attorney General William Rehnquist concluded almost thirty years ago that "the President has the power to withhold from [Congress] information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest."²⁰

The Supreme Court has similarly recognized the importance of the President's ability to control the disclosure of classified information. In considering the statutory question whether the Merit Systems Protection Board could review the revocation of an executive branch employee's security clearance, the Court in *Department of the Navy v. Egan* also addressed the President's constitutional authority to control the disclosure of classified information:

The President . . . is the "Commander in Chief of the Army and Navy of the United States." U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. . . . This Court has recognized the Government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.²¹

Similarly, in discussing executive privilege in *United States v. Nixon*, a unanimous Supreme Court emphasized the heightened status of the President's privilege

democratic character because the Senate had received all the papers, and the House members apparently could inspect them at the Senate." Casper, *supra* at 65

¹⁸ See, e.g., S. Rep. No. 86-1761, at 22 (1960) (the Senate Committee on Foreign Relations, after failing to persuade President Kennedy to abandon his claim of executive privilege with respect to information relating to the U-2 incident in May, 1960, criticized the President for his refusal to make the information available but acknowledged his legal right to do so: "The committee recognizes that the administration has the legal right to refuse the information under the doctrine of executive privilege.").

¹⁹ See *Position of the Executive Department Regarding Investigative Reports*, 40 Op. Att'y Gen. 45, 46 (1941)

²⁰ Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: *The President's Executive Privilege to Withhold Foreign Policy and National Security Information* at 7 (Dec. 8, 1969).

²¹ *Department of the Navy v. Egan*, 484 U.S. at 527 (citations omitted)

in the context of "military, diplomatic, or sensitive national security secrets."²² Although declining in the context of that criminal case to sustain President Nixon's claim of privilege as to tape recordings and documents sought by subpoena, the Supreme Court specifically observed that the President had not "place[d] his claim of privilege on the ground that they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities."²³

Other statements by individual Justices and the lower courts reflect a similar understanding of the President's power to protect national security by maintaining the confidentiality of classified information.²⁴ Justice Stewart, for example, discussed this authority in his concurring opinion in *New York Times Co. v. United States* (the "Pentagon Papers" case):

[I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. . . . In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. . . . [I]t is clear to me that it is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its respon-

²² *United States v. Nixon*, 418 U.S. 683, 706 (1974), see also *id.* at 710, 712 n.19.

²³ *Id.* at 710, see also *United States v. Reynolds*, 345 U.S. 1 (1953) (recognizing privilege in judicial proceedings for "state secrets" based on determination by senior Executive officials).

²⁴ See, e.g., *Webster v. Doe*, 486 U.S. 592, 605-06 (1988) (O'Connor, J., concurring in part and dissenting in part) ("The functions performed by the Central Intelligence Agency and the Director of Central Intelligence lie at the core of 'the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations' . . . The authority of the Director of Central Intelligence to control access to sensitive national security information by discharging employees deemed to be untrustworthy flows primarily from this constitutional power of the President . . .") (citation omitted); *New York Times Co. v. United States*, 403 U.S. at 741 (Marshall, J., concurring) (case presented no issue "regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks"); *Greene v. McElroy*, 360 U.S. 474, 513 (1959) (Clark, J., dissenting) (it is "basic" that "no person, save the President, has a constitutional right to access to governmental secrets"); *Gaillot v. Garrett*, 970 F.2d 1320, 1324 (4th Cir. 1992) (President has "exclusive constitutional authority over access to national security information"); *Dorfmont v. Brown*, 913 F.2d 1399, 1405 (9th Cir. 1990) (Kozinski, J., concurring) ("Under the Constitution, the President has unreviewable discretion over security decisions made pursuant to his powers as chief executive and Commander-in-Chief"), *cert. denied*, 499 U.S. 905 (1991).

sibilities in the fields of international relations and national defense.²⁵

III.

In applying these constitutional principles to S. 1668 and H.R. 3829, we take as a given that Congress has important oversight responsibilities and a corollary interest in receiving information that enables it to carry out those responsibilities.²⁶ Those interests obviously include Congress's ability to consider evidence of misconduct and abuse by the Executive's agents. H.R. 3829, however, demonstrates that it is possible to develop procedures for providing Congress information it needs to perform its oversight duties, while not interfering with the President's ability to control classified information when necessary to perform his constitutionally assigned duties.

A.

In analyzing S. 1668, there is no need to resolve the precise parameters of the President's authority to control access to classified diplomatic and national security information. Instead, we have focused on the specific problem presented by the bill, which, in defined circumstances, gives a unilateral right of disclosure to every executive branch employee with access to classified information.²⁷ The reach of S. 1668 is sweeping: it would authorize any covered federal employee to foreclose or circumvent a presidential determination that restricts congressional access to certain classified information in extraordinary circumstances.

S. 1668 is inconsistent with Congress's traditional approach to accommodating the executive branch's interests with respect to national security information. In the National Security Act, for example, Congress itself recognized the need for heightened secrecy in certain "extraordinary circumstances affecting vital interests of the United States," and authorized the President to sharply limit congressional access to information relating to covert actions in such cases.²⁸ An example of

²⁵ *New York Times Co. v. United States*, 403 U.S. at 728-30 (Stewart, J., concurring) (footnote omitted).

²⁶ See, e.g., *McGrain v. Daugherty*, 273 U.S. 135 (1927).

²⁷ We do not use the word "right" in the sense of a legally enforceable right. Rather, the term is intended to convey our understanding that the bill would purport to require the President to inform employees that they have standing authorization or permission to convey national security information directly to Congress without receiving specific authorization to convey the particular information in question. We have not analyzed the possible implications this legislation might have with respect to judicial enforcement of employee legal rights.

²⁸ See 50 U.S.C. § 413b(c)(2) (1994) ("If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President"). Even with this more protective standard, President Bush expressly reserved his constitutional authority to withhold disclosure for a period of time. See S. Rep. No. 102-85, at 40 (1991). See also 50 U.S.C. § 413b(c)(3) (1994) ("Whenever a finding is not reported pursuant

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accommodation between the branches that is even more directly applicable to the present context is the National Security Act's recognition that the intelligence agencies on occasion need to redact sources and methods and other exceptionally sensitive intelligence information from materials they provide to the Intelligence Committees.²⁹

In contrast, S. 1668 would deprive the President of his authority to decide, based on the national interest, how, when and under what circumstances particular classified information should be disclosed to Congress.³⁰ This is an impermissible encroachment on the President's ability to carry out core executive functions. In the congressional oversight context, as in all others, the decision whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President. The Constitution does not permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information—even to Members of Congress. Such a law would squarely conflict with the Framers' considered judgment, embodied in Article II of the Constitution, that, within the executive branch, all authority over matters of national defense and foreign affairs is vested in the President as Chief Executive and Commander in Chief.³¹

It has been suggested that S. 1668 (at least with modest revisions) would strike an acceptable balance between the competing executive and legislative interests relating to the control of classified information, and would thus survive review under ordinary separation of powers principles.³² That balance under S. 1668, however, would be based on an abstract notion of what information Congress might need to know relating to some future inquiry and what information the President might need to protect in light of some future set of world events. Such an abstract resolution of the competing interests at stake is simply not consistent with the President's constitutional responsibilities respecting national security and foreign affairs. He must be free to determine, based on particular—and perhaps

to paragraph (1) or (2) of this section, the President shall fully inform the intelligence committees in a timely fashion and shall provide a statement of the reasons for not giving prior notice."').

²⁹ See 50 U.S.C. § 413a (1994) ("To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall . . . keep the intelligence committees fully and currently informed of all intelligence activities . . .").

³⁰ *Cf. United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) ("When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure . . . the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious.").

³¹ This is not to suggest that Congress wholly lacks authority regarding the treatment of classified information, see *New York Times Co. v. United States*, 403 U.S. at 740 (White, J., concurring), but rather that Congress may not exercise that authority in a manner that undermines the President's ability to perform his constitutionally assigned duties.

³² See *Whistleblower Protections for Classified Disclosures: Hearings Before the Senate Select Comm. on Intelligence*, 105th Cong. 8 (1998) (statement of Prof. Peter Raven-Hansen).

currently unforeseeable—circumstances, that the security or foreign affairs interests of the Nation dictate a particular treatment of classified information.

Furthermore, S. 1668 also undermines the traditional, case-by-case process of accommodating the competing needs of the two branches—a process that reflects the facts and circumstances of particular situations. As one appellate court has observed, there exists “an implicit constitutional mandate to seek optimal accommodation [between the branches] through a realistic evaluation of the needs of the conflicting branches *in the particular fact situation*.”³³ Rather than enabling balances to be struck as the demands of specific situations require, S. 1668 would attempt to legislate a procedure that cannot possibly reflect what competing executive and legislative interests may emerge with respect to some future inquiry. It would displace the delicate process of arriving at appropriate accommodations between the branches with an overall legislated “solution” that paid no regard to unique—and potentially critical—national security and foreign affairs considerations that may arise. This approach contrasts with that of H.R. 3829, which would balance the competing legislative and executive interests at stake in a manner that would permit rational judgments to be made in response to real world events.

B.

H.R. 3829 does not present the constitutional infirmity posed by S. 1668. H.R. 3829 does not vest any executive branch employee who has access to classified information with a unilateral right to determine how, when and under what circumstances classified information will be disclosed to Members of Congress and without regard for how such a disclosure might affect the President’s ability to perform his constitutionally assigned duties.

Instead, H.R. 3829 would establish procedures under which employees who wish to report to Congress must first submit their complaint to an inspector general, who would review it for credibility and then submit the complaint to the agency head before it is forwarded to Congress. This process would allow for the executive branch review and clearance process that S. 1668 would foreclose. H.R. 3829 would further authorize heads of agencies and the Director of Central Intelligence, upon the completion of that process, to decide not to transmit an employee’s complaint to the Intelligence Committees, or allow the employee to contact the Committees directly, “in the exceptional case and in order to protect vital law enforcement, foreign affairs, or national security interests.”³⁴ If such

³³ *United States v. American Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) (emphasis added).

³⁴ In light of S. 1668’s focus on the intelligence community and classified information, the Department’s analysis of the bill’s constitutionality has focused on its interference with the President’s authority to protect confidential national security and foreign affairs information. Of course, other constitutionally-based confidentiality interests can be implicated by employee disclosures to Congress. H.R. 3829 appropriately recognizes that such disclosures also should not compromise vital law enforcement interests.

a decision were made, then the head of agency or Director of Central Intelligence would be required to provide the Committees with the reason for the determination.

Not only would H.R. 3829 thus avoid the constitutional infirmity of S. 1668 by allowing for review by the President or officials responsible to him, it would also allow for the operation of the accommodation process traditionally followed between the legislative and executive branches regarding disclosure of confidential information. Upon receipt of the explanation for a decision not to allow an employee complaint to go forward, the Intelligence Committees could contact the agency head or Director of Central Intelligence to begin the process of seeking to satisfy the Committees' oversight needs in ways that protect the executive branch's confidentiality interests. The bill's procedures are thus consistent with our constitutional system of separation of powers.

IV.

We recognize that Congress has significant interests in disclosure of evidence of wrongdoing or abuse. There is an inevitable tension, however, between preserving the secrecy necessary to permit the President to perform his constitutionally assigned duties and permitting the disclosures necessary to permit congressional oversight. Under relevant constitutional doctrine, Congress may not resolve this tension by vesting in individual federal employees the power to control disclosure of classified information. For this reason, we have concluded that S. 1668 is unconstitutional. H.R. 3829 does not contain this constitutional infirmity and is constitutional.

RANDOLPH D. MOSS
Deputy Assistant Attorney General
Office of Legal Counsel

No. M-

IN THE
Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

SAMUEL MICHAEL KELLER, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO INTERVENE TO FILE A
PETITION FOR A WRIT OF CERTIORARI AND
PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
DANIEL S. VOLCHOK
DANIEL T. DEACON
ARI HOLTZBLATT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

PARTIES TO THE PROCEEDING

This motion for leave to intervene to file a petition for a writ of certiorari and the accompanying petition are filed by the National Collegiate Athletic Association (NCAA), which is a defendant in the underlying district court litigation. The NCAA is an unincorporated, non-profit membership association composed of over 1,000 member schools and conferences operating in three divisions under a Constitution and Bylaws adopted by the members through representative processes. Over 400,000 student-athletes participate annually in 23 NCAA sports. The NCAA operates 89 national championships.

The plaintiffs-appellees below, who are respondents in this Court, are Samuel Michael Keller; Edward C. O'Bannon, Jr.; Byron Bishop; Michael Anderson; Danny Wimprine; Ishmael Thrower; Craig Newsome; Damien Rhodes; and Samuel Jacobson.

The defendant-appellant below is Electronic Arts, Inc. Additional defendants below included the NCAA and the Collegiate Licensing Company.

MOTION TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDING	i
TABLE OF AUTHORITIES	iv
STATEMENT	3
ARGUMENT.....	6
CONCLUSION	12

MOTION TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Applied Equipment Corp. v. Litton Saudi Arabia Ltd.</i> , 869 P.2d 454 (Cal. 1994)	9
<i>AT&T Mobility LLC v. Concepcion</i> , 131 S. Ct. 1740 (2011)	10
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	10
<i>Banks v. Chicago Grain Trimmers Ass'n</i> , 389 U.S. 813 (1967)	7
<i>Banks v. Chicago Grain Trimmers Ass'n</i> , 390 U.S. 459 (1968)	7
<i>Brown v. Entertainment Merchants Ass'n</i> , 131 S. Ct. 2729 (2011)	4
<i>Bryant v. Yellen</i> , 447 U.S. 352 (1980)	9
<i>Comedy III Productions, Inc. v. Gary Saderup, Inc.</i> , 21 P.3d 797 (Cal. 2001)	4
<i>Commonwealth Land Title Insurance Co. v. Corman Construction, Inc.</i> , 508 U.S. 958 (1993)	8
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965)	10
<i>Hart v. Electronic Arts, Inc.</i> , 717 F.3d 141 (3d Cir. 2013)	6
<i>Hunter v. Ohio ex rel. Miller</i> , 396 U.S. 879 (1969)	7, 8
<i>Keller v. Electronic Arts Inc.</i> , 724 F.3d 1268 (9th Cir. 2013)	1
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	10

MOTION TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Rogers v. Paul</i> , 382 U.S. 198 (1965)	8, 11
<i>Varian Medical Systems, Inc. v. Delfino</i> , 106 P.3d 958 (Cal. 2005)	10

DOCKETED CASES

<i>Banks v. Chicago Grain Trimmers Ass'n</i> , No. 66-59 (U.S.)	7
<i>Commonwealth Land Title Insurance Co. v.</i> <i>Corman Construction, Inc.</i> , No. 92-1871 (U.S.)	8
<i>Electronic Arts Inc. v. Keller</i> , No. 13-377 (U.S.)	6
<i>Hunter v. Ohio ex rel. Miller</i> , No. 654 (U.S. Oct. Term 1969)	7

STATUTES

26 U.S.C. § 1254(1)	6
Cal. Code Civ. P. § 425.16	4

OTHER AUTHORITIES

Eder, Steve, <i>Settlement in Athletes' Likeness Lawsuit</i> , N.Y. Times, Sept. 27, 2013, at B18, available at http://www.nytimes.com/ 2013/09/27/sports/ncaafball/ea-sports- wont-make-college-video-game-in-2014. html?_r=0	6
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IN THE
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO INTERVENE TO FILE A
PETITION FOR A WRIT OF CERTIORARI

The National Collegiate Athletic Association respectfully moves for leave to intervene in this Court so that it can file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Keller v. Electronic Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013); *see* Pet. App. 1a-39a. The petition is being filed together with this motion.

This case concerns the extent to which the First Amendment limits claims brought under state right-of-publicity laws. Those laws generally bar “appropriation of [a] plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise ... [without plaintiff’s] consent.” Pet. App. 6a n.4 (listing elements of a

right-of-publicity claim under California law). As shown in the NCAA's petition, the interplay between right-of-publicity claims and the First Amendment is an issue on which the lower courts are badly divided. It is also important, affecting the fundamental rights of a wide array of speakers—from movie and television producers (*e.g.*, *The Social Network*) to biographers and songwriters (Bob Dylan's *Hurricane*), to videogame makers, like one of the defendants here.

This case, in which a divided panel of the Ninth Circuit rejected a First Amendment defense to a right-of-publicity claim, presents an opportunity for the Court to provide much-needed guidance on the question presented. A petition to review the Ninth Circuit's judgment is already pending before the Court. That petition, however, may soon be dismissed because the defendant that filed it, Electronic Arts (which makes the videogames at issue), has since reached a settlement in principle with the plaintiffs. The NCAA, which is also a defendant in the district court but participated in the court of appeals as an *amicus curiae*, thus requests permission to intervene so that it can file its own timely petition.

That request should be granted because the NCAA's rights and interests are directly implicated by the Ninth Circuit's decision. One of the claims that Electronic Arts challenged below was that it and the NCAA conspired to violate the plaintiffs' publicity rights. Had the Ninth Circuit applied the correct test under the First Amendment, that claim would have been stricken; instead, it remains pending. Hence, unless the NCAA is permitted to intervene and file its own petition, it will be forced to litigate the conspiracy claim fully—and potentially as a class action—before this Court can pass on the correctness of the Ninth Cir-

cuit's First Amendment ruling. This Court has granted intervention under similar circumstances, and the same result is particularly warranted here given both the established disarray in the lower courts on the question presented and the chilling effect that even the threat of litigation can have on the fundamental freedom of expression.

STATEMENT

1. Electronic Arts, Inc. (EA) produces a videogame series called *NCAA Football*. This highly popular series allows users to control "avatars," i.e., animated characters, representing college football players as they play in simulated games. Pet. App. 3a. In 2009, respondent Samuel Keller brought a putative class action based on these games, seeking damages and injunctive relief. Pet. App. 4a, 43a. Keller, who played quarterback for Arizona State University and the University of Nebraska, alleged that EA violated his California statutory and common-law publicity rights by including his likeness, without permission, in the 2005 and 2008 versions of *NCAA Football*. Pet. App. 4a.

Keller's claims were not leveled against EA alone. He also charged the NCAA with violating his right of publicity under Indiana law. Pet. App. 42a-43a. (The NCAA is headquartered in Indianapolis.) And he alleged a conspiracy among all three defendants—EA, the NCAA, and the Collegiate Licensing Company (CLC)—to deprive him and other players of their publicity rights. *Id.* Keller also brought a breach-of-contract claim against the NCAA. *Id.*

After the district court consolidated Keller's case with similar cases brought by other former college football players, the defendants moved to dismiss. Pet.

App. 41a. EA also moved to strike the claims against it under California's "anti-SLAPP" statute, which requires a court to strike claims that arise from a defendant's exercise of free speech rights unless the plaintiff makes a preliminary showing of likely success. *See* Cal. Code Civ. P. § 425.16.

The district court granted the NCAA's motion to dismiss Keller's Indiana right-of-publicity claim. Pet. App. 45a. It declined, however, to dismiss or strike the California right-of-publicity claim against EA, ruling (as relevant here) that that claim was not barred by the First Amendment. Pet. App. 45a-54a. The court also held that Keller had adequately pled a conspiracy claim against all defendants arising from EA's alleged deprivation of Keller's California publicity rights. Pet. App. 56a-58a. The effect of these rulings is that the only publicity-related claim remaining against the NCAA is that the NCAA conspired with the other defendants to facilitate EA's violation of Keller's right of publicity under California law.

2. A divided panel of the Ninth Circuit affirmed the dismissal of the anti-SLAPP motion. *See* Pet. App. 1a-39a. Although acknowledging that videogames are core expressive works entitled to full First Amendment protection, *see Brown v. Entertainment Merchs. Ass'n*, 131 S. Ct. 2729 (2011), the court concluded that the First Amendment did not preclude Keller's right-of-publicity claims. The court reached that conclusion after applying a version of the so-called "transformative-use test," which 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." Pet. App. 7a (quoting *Comedy III Prods., Inc. v. Gary Saderup*,

Inc., 21 P.3d 797, 799 (Cal. 2001)). Applying that test, the court of appeals held that *NCAA Football* did not qualify for First Amendment protection because it “realistically portrays college football players in the context of college football games.” Pet. App. 17a; *see also* Pet. App. 2a (concluding that EA’s alleged use of Keller’s likeness “does not qualify for First Amendment protection as a matter of law because it literally recreates Keller in the very setting in which he has achieved renown”). In essence, the court held that the depictions in EA’s games did not deserve First Amendment protection because they were too *realistic*. In doing so, the court focused narrowly on the allegedly realistic avatars appearing in the game and not on the transformative elements of the work as a whole.

Judge Thomas dissented. In his view, “[b]ecause the creative and transformative elements of Electronic Arts’ *NCAA Football* video game series predominate over the commercial use of the athletes’ likenesses, the First Amendment protects EA from liability.” Pet. App. 28a.

Although the NCAA was and is a party in the district court, it was not a party in the Ninth Circuit. Because the NCAA’s only role in this aspect of the litigation was as an alleged co-conspirator, and EA—the party that purportedly violated the plaintiffs’ publicity rights—was robustly defending the underlying claim, the NCAA was prepared to leave it to EA to prosecute the appeal. It did, however, file a brief with the Ninth Circuit as *amicus curiae*. In that brief, the NCAA explained that Keller’s allegation that the avatars used in *NCAA Football* represent realistic depictions of actual players, while taken as true for purposes of the anti-SLAPP motion, is in fact contested. *See NCAA C.A. Br.* at 2-3.

3. EA filed a petition for certiorari asking this Court to review the Ninth Circuit's judgment (No. 13-377).¹ Soon thereafter, however, plaintiffs, EA, and CLC announced that they have reached a proposed settlement. *See* Stipulation & Proposed Order at 1, No. 09-cv-1967 (N.D. Cal. Sept. 26, 2013). In notifying the district court of the proposed settlement, the settling parties stated that "[t]his settlement does not affect Plaintiffs' claims against [NCAA]." *Id.* Because of this settlement, it is likely that EA's petitions will soon be dismissed. The conspiracy claims against the NCAA—and thus the merits of the dispute—however, will remain unresolved.²

ARGUMENT

The NCAA seeks to intervene in this Court so that it can seek review of the Ninth Circuit's judgment. *See* 28 U.S.C. § 1254(1). Intervention is warranted both because the NCAA's rights are directly implicated by the Ninth Circuit's decision and because that decision deepens severe doctrinal disarray in the lower courts regarding an issue of fundamental constitutional rights.

1. In circumstances similar to those here, this Court has granted motions to intervene so that a non-party below could file a petition for certiorari. For ex-

¹ EA simultaneously sought review of a very similar decision issued by a divided panel of the Third Circuit. *See Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), *petition for cert. filed*, No. 13-376 (U.S. Sept. 23, 2013).

² EA also recently announced that it will stop producing NCAA Football. *See, e.g., Eder, Settlement in Athletes' Likeness Lawsuit*, N.Y. Times, Sept. 27, 2013, at B18, *available at* http://www.nytimes.com/2013/09/27/sports/ncaafootball/ea-sports-wont-make-college-video-game-in-2014.html?_r=0.

ample, in both *Banks v. Chicago Grain Trimmers Ass'n*, 389 U.S. 813 (1967), and *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969), the Court allowed intervention where the would-be petitioner's interests had been represented by a different party below but that party had failed to file its own petition for certiorari following an adverse judgment.

As the Court explained in its later decision on the merits, *Banks* involved a widow who had been awarded benefits in an administrative action by the Labor Department. 390 U.S. 459, 460-461 (1968). When the party who had to pay the benefits subsequently sued the Labor Department to set aside the award, Mrs. Banks was not joined. See Pet. for Leave To Intervene & Pet. for Cert. at 9, No. 66-59 (U.S. Mar. 4, 1967). But when the government then declined to seek this Court's review of a Seventh Circuit decision setting aside the award, see *id.*, this Court granted Mrs. Banks' motion to intervene so that she could file her own petition and thereby protect her interest in the award, see 389 U.S. at 813. The Court ultimately granted that petition and reversed the Seventh Circuit's judgment. See *Banks*, 390 U.S. at 467.

Similarly, *Hunter* was a state-court lawsuit brought against Ohio election officials to strike the name of a judicial candidate from the ballot. See Pet. for Leave To Intervene & Pet. for Cert. at 6, No. 654 (U.S. Oct. Term 1969). The candidate himself was not named as a party; state officials litigated the case instead. *Id.* Following a ruling by the state court that the candidate was ineligible for office, those officials chose not to file a petition for certiorari. *Id.* at 6, 9. Following the same approach as in *Banks*, this Court allowed the candidate to intervene in order to seek re-

view here, although it then denied the petition. See *Hunter*, 396 U.S. 879.

More recently, in *Commonwealth Land Title Insurance Co. v. Corman Construction, Inc.*, 508 U.S. 958 (1993), this Court allowed intervention after it became clear that—as is also true here—a prior petition filed by a party to the decision below would be dismissed. In that case, the FDIC, acting as receiver for a bank, challenged a state statute as violating federal law. See Mot. To Intervene & Pet. for Cert. at 3-4, No. 92-1871 (U.S. May 24, 1993). The FDIC lost in the lower courts and filed a petition with this Court, but the Solicitor General, who had not authorized the filing, sought to have it dismissed. *Id.* at 5. This Court granted a motion to intervene by the bank's insurer, which was not a party below, so that the insurer could file its own (ultimately unsuccessful) petition. See *Corman*, 508 U.S. at 958.³

This Court has also allowed a non-party to join a case at the petition stage when doing so was necessary to avoid the case becoming moot. In *Rogers v. Paul*, 382 U.S. 198 (1965) (per curiam), two students brought a class action to desegregate the public high schools in their town. By the time the students sought review by this Court of an adverse Eighth Circuit judgment, one had graduated and the other had entered the last year of school. See *id.* at 199. The Court allowed two younger students, who had not been named parties below, to join the case in order to preserve a live controversy. *Id.* at 198-199. It then granted the petition and reversed the judgment below. *Id.*

³ The denials of certiorari following grants of intervention in *Hunter* and *Corman* indicate that a would-be petitioner need not show that the Court would likely decide to hear the case in order for intervention to be granted.

2a. The Court should allow the NCAA to intervene here, because the Ninth Circuit's judgment directly affects the NCAA's interests as a party in the district court. As discussed, one of the claims against the NCAA is that it conspired with EA to violate student-athletes' publicity rights. *See* Pet. App. 42a-43a; Third Am. Compl. ¶¶ 575-576, No. 09-cv-1967 (N.D. Cal. July 19, 2013). That claim is wholly derivative of the substantive right-of-publicity claim against EA at issue in the pending petition: If the First Amendment does not allow EA to be held liable for violating student-athletes' publicity rights, then the NCAA cannot be held liable for conspiring with EA to violate those rights. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 457 (Cal. 1994) ("Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort.").⁴ The NCAA thus has more than a "sufficient stake in the outcome of the controversy" to warrant allowing it to seek further review. *Bryant v. Yellen*, 447 U.S. 352, 368 (1980).

The prejudice to the NCAA from denying intervention would be substantial. The NCAA would be forced to litigate the conspiracy claim, potentially against a certified class, all the way to final judgment (and through another full appeal) before having the opportunity to bring the First Amendment issue to this Court. At both the district court and court of appeals level, moreover, that litigation—which would take

⁴ Indeed, EA moved the district court years ago to strike the conspiracy claim on this basis. *See* Mot. To Strike at 1, No. 09-cv-1967 (N.D. Cal. July 29, 2009); *see also* EA C.A. Br. at 8 n.16 ("If this Court determines that any of these constitutional defenses bar[s] Keller's right-of-publicity claims, then his ancillary claim[] for conspiracy ... also must be dismissed.").

years to complete—would proceed under an erroneous First Amendment test.

As this Court's precedent makes clear, imposing such delay and uncertainty is at odds with important free speech principles. The Court has long recognized that First Amendment "freedoms are delicate and vulnerable," and that "[t]he threat of sanctions may deter their exercise almost as potently as ... actual ... sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Thus, the mere fact of a lawsuit calling First Amendment rights into question may have a "chilling effect upon the exercise of [those] rights." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). This Court has therefore "avoided making vindication of freedom of expression await the outcome of protracted litigation," *id.*, lest potential speakers be pressured to "steer far wide[] of the unlawful zone," *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).⁵ That risk, of course, would be particularly acute in the context of a class action. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

Indeed, this case starkly illustrates the chilling effect that litigation can engender: EA, in addition to settling with the plaintiffs rather than pressing its First Amendment defense all the way to this Court, has decided to stop producing the expressive work at issue in the case. *See supra* n.2. That result will only dis-

⁵ The same concerns underlie California's anti-SLAPP statutes, and similar laws in other states. *See, e.g., Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 967 (Cal. 2005) ("[T]he point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights." (internal quotation marks omitted)).

courage others from exercising their own First Amendment freedoms.

Although the NCAA opted not to participate as a party in the court of appeals, that is not an appropriate basis to deny intervention. The NCAA had every reason to rely on EA—as the party alleged to have engaged in the unlawful primary conduct—to litigate the First Amendment issue vigorously. NCAA is therefore comparable to the intervenors in *Banks*, *Hunter*, and *Corman*, who reasonably relied on others to represent their interests on appeal. And like those intervenors, the NCAA is acting promptly to step in now that the litigant who previously pressed the cause is stepping aside.

b. Allowing intervention would permit the Court to answer an important First Amendment question and thereby provide clear guidance both to lower courts and to future speakers. *Cf. Rogers*, 382 U.S. at 199 (granting intervention by non-parties in order to preserve the question for Supreme Court review). As explained in the NCAA's petition, the question of how extensively the First Amendment limits state-law right-of-publicity laws has badly divided the lower courts. It is also a question that affects a wide variety of speakers, from movie producers and authors to videogame makers like EA. Yet the Court has rarely had occasion to address it.

There is no benefit to be gained by delaying consideration of the issue. The First Amendment question here concerns the *legal* standard that applies at the beginning of a case; it does not require further development of the *factual* record. Indeed, as explained above, by the time such a record is developed, most of the damage to the defendant's (and perhaps others') First

Amendment rights is already done. This Court's prompt review is therefore warranted.

CONCLUSION

The motion to intervene should be granted.

Respectfully submitted.

SETH P. WAXMAN

Counsel of Record

RANDOLPH D. MOSS

DANIEL S. VOLCHOK

DANIEL T. DEACON

ARI HOLTZBLATT

WILMER CUTLER PICKERING

HALE AND DORR LLP

1875 Pennsylvania Ave. N.W.

Washington, D.C. 20006

(202) 663-6000

seth.waxman@wilmerhale.com

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No. 13-

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SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
DANIEL S. VOLCHOK
DANIEL T. DEACON
ARI HOLTZBLATT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTION PRESENTED

Whether the First Amendment precludes a right-of-publicity claim that is based on the realistic, non-commercial, and non-misleading description or depiction of a person in an expressive work.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT	1
REASONS FOR GRANTING THE PETITION	11
I. THE LOWER COURTS HAVE SPLINTERED OVER HOW TO BALANCE FIRST AMEND- MENT FREEDOMS AGAINST RIGHT-OF- PUBLICITY CLAIMS.....	12
A. Some Court Use Some Version Of The Transformative-Use Test	12
B. Other Courts Follow The <i>Rogers</i> Test	13
C. Still Other Courts Employ A Variety Of Different Approaches.....	15
II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT, AND THIS IS A GOOD VEHICLE FOR DECIDING IT	17

TABLE OF AUTHORITIES—Continued

	Page
III. THE NINTH CIRCUIT'S HOLDING IS WRONG.....	19
A. The Transformative-Use Test Does Not Adequately Protect First Amendment Rights.....	19
1. The test perversely punishes speech for being truthful and accu- rate	21
2. The test chills protected speech	24
B. The Predominant-Use Test And Nebu- lous Balancing Approaches Used By Other Courts Are Equally Problematic	28
C. The <i>Rogers</i> Test Properly Confines The Right Of Publicity	29
CONCLUSION	32

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Agency for International Development v. Alliance for Open Society International, Inc.</i> , 133 S. Ct. 2321 (2013)	18
<i>Ashcroft v. ACLU</i> , 535 U.S. 564 (2002)	19
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	24
<i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2001)	19
<i>Bellotti v. Baird</i> , 443 U.S. 622 (1979)	18
<i>Bleistein v. Donaldson Lithographing Co.</i> , 188 U.S. 239 (1903)	24
<i>Brown v. Electronic Arts, Inc.</i> , 724 F.3d 1235 (9th Cir. 2013)	19
<i>Brown v. Entertainment Merchants Association</i> , 131 S. Ct. 2729 (2011)	<i>passim</i>
<i>Browne v. McCain</i> , 611 F. Supp. 2d 144 (C.D. Cal. 2009)	4
<i>CBC Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, LP</i> , 505 F.3d 818 (8th Cir. 2007)	4, 17, 22
<i>Cardtoons, LC v. Major League Baseball Players Ass'n</i> , 95 F.3d 959 (10th Cir. 1996)	4, 16
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010)	18
<i>Comedy III Productions, Inc. v. Gary Saderup, Inc.</i> , 21 P.3d 797 (Cal. 2001)	3, 12, 23, 25
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975)	2

TABLE OF AUTHORITIES—Continued

	Page
<i>Doe v. TCI Cablevision</i> , 110 S.W.3d 363 (Mo. 2003).....	4, 15, 28
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003).....	23
<i>Estate of Presley v. Russen</i> , 513 F. Supp. 1339 (D.N.J. 1981).....	22
<i>ETW Corp. v. Jireh Publishing, Inc.</i> , 332 F.3d 915 (6th Cir. 2003).....	2, 3, 13, 14
<i>Gould Estate v. Stoddart Publishing Co.</i> , [1996] 30 O.R.3d 520 (Can. Ont.)	31
<i>Guglielmi v. Spelling-Goldberg Productions</i> , 603 P.2d 454 (Cal. 1979)	3
<i>Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.</i> , 202 F.2d 866 (2d Cir. 1953).....	2
<i>Harper & Row, Publishers, Inc. v. Nation Enterprises</i> , 471 U.S. 539 (1985)	30
<i>Hart v. Electronic Arts, Inc.</i> , 717 F.3d 141 (3d Cir. 2013)	passim
<i>Hilton v. Hallmark Cards</i> , 599 F.3d 894 (9th Cir. 2010).....	3, 25
<i>Hoffman v. Capital Cities/ABC, Inc.</i> , 255 F.3d 1180 (9th Cir. 2001).....	4, 13, 26
<i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46 (1988)	21
<i>Lyngstad & Others v. Anabas Products Ltd.</i> , [1977] 1 FSR 62.....	31
<i>Matthews v. Wozencraft</i> , 15 F.3d 432 (5th Cir. 1994)	3, 14

TABLE OF AUTHORITIES—Continued

	Page
<i>Mindys Cosmetics, Inc. v. Dakar</i> , 611 F.3d 590 (9th Cir. 2010).....	1
<i>Montgomery v. Montgomery</i> , 60 S.W.3d 524 (Ky. 2001).....	15
<i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	21
<i>Parks v. LaFace Records</i> , 329 F.3d 432 (6th Cir. 2003).....	3, 14
<i>Pavesich v. New England Life Insurance Co.</i> , 50 S.E. 68 (Ga. 1905).....	30
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	19, 20, 21
<i>Regan v. Time, Inc.</i> , 468 U.S. 641 (1984)	19
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	24
<i>Rogers v. Grimaldi</i> , 875 F.2d 994 (2d Cir. 1989)	<i>passim</i>
<i>Rosemont Enterprises, Inc. v. Urban Systems,</i> <i>Inc.</i> , 340 N.Y.S. 2d 144 (N.Y. Sup. Ct. 1973)	4
<i>Seale v. Gramercy Pictures</i> , 949 F. Supp. 331 (E.D. Pa. 1996)	3
<i>Snyder v. Phelps</i> , 131 S. Ct. 1207 (2011)	18
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	24
<i>Stewart v. Rolling Stone LLC</i> , 105 Cal. Rptr. 3d 98 (Cal. Ct. App. 2010).....	3
<i>The Florida Star v. B.J.F.</i> , 491 U.S. 524 (1989)	21
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967).....	21
<i>Toffoloni v. LFB Publishing Group</i> , 572 F.3d 1201 (11th Cir. 2009).....	16

TABLE OF AUTHORITIES—Continued

	Page
<i>Tolley v. J.S. Fry & Sons, Ltd.</i> [1929] 1 K.B. 467.....	31
<i>Tyne v. Time Warner Entertainment Co.</i> , 901 So. 2d 802 (Fla. 2005)	15
<i>United States v. Alvarez</i> , 132 S. Ct. 2537 (2012)	18, 20
<i>United States v. Playboy Entertainment Group, Inc.</i> , 529 U.S. 803 (2000)	24
<i>United States v. Stevens</i> , 559 U.S. 460 (2010) ...	18, 20, 29
<i>United States v. Williams</i> , 504 U.S. 36 (1992)	18
<i>Valentine v. CBS, Inc.</i> , 698 F.2d 430 (11th Cir. 1983).....	3, 14, 15
<i>Verizon Communications, Inc. v. FCC</i> , 535 U.S. 467 (2002)	18
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976)	30
<i>Winter v. DC Comics</i> , 69 P.3d 473 (Cal. 2003)	4
<i>Zacchini v. Scripps-Howard Broadcasting Co.</i> , 433 U.S. 562 (1977)	4, 5, 30

STATUTES

28 U.S.C.	
§ 1254(1)	1
§ 1332.....	6
Cal. Code Civ. P. § 425.16.....	7

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Cornish, William, et al., <i>Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights</i> (7th ed. 2010)	31
Eder, <i>Settlement in Athletes' Likeness Lawsuit</i> , N.Y. Times, Sept. 27, 2013, at B18, available at http://www.nytimes.com/2013/09/27/sports/ncfaafootball/ea-sports-wont-make-college-video-game-in-2014.html?_r=0	10
Hoffman, Steven J. <i>Limitations on the Right of Publicity</i> , Bull Copyright Soc'y 111 (1980)	2
McCarthy, J. Thomas, <i>The Rights of Publicity and Privacy</i> (2d ed. 2000)	2
Nimmer, Melville B., <i>The Right of Publicity</i> , 19 Law & Contemp. Probs. 203 (1954)	2
<i>Report of the Committee on Privacy</i> , Cmnd. 5012 (1972)	31
<i>Restatement (Third) of Unfair Competition</i> (1995)	13
Volokh, Eugene, <i>Freedom of Speech and the Right of Publicity</i> , 40 Hous. L. Rev. 903 (2003)	19
Warren and Brandeis, <i>The Right to Privacy</i> , 4 Harv. L. Rev. 193 (1890)	2

The National Collegiate Athletic Association (NCAA) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-39a) is reported at 724 F.3d 1268 (9th Cir. 2013). The pertinent opinion of the district court (App. 41a-64a) is also unreported. The court's order staying its mandate pending proceedings in this Court (App. 65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2013. That court had jurisdiction under the collateral order doctrine. *See Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010), *cited in* App. 5a n.3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law ... abridging the freedom of speech."

STATEMENT

This case concerns an important constitutional question on which the lower courts are splintered: the extent to which the First Amendment permits a plaintiff to recover damages or to obtain injunctive relief, premised on a "right-of-publicity" tort, for the alleged use of the plaintiff's name or likeness in an expressive work like a movie, song, painting, biography or (as here) a videogame. A divided panel of the Ninth Cir-

cuit held in this case that the First Amendment does not bar right-of-publicity claims unless the plaintiff's image or likeness is sufficiently "transform[ed]." Applying this test, the court of appeals held that a former college football player's claim that his publicity rights were violated by a football videogame, which allegedly included a character resembling him, was not limited by the First Amendment. That holding conflicts with the First Amendment standard applied by numerous other federal courts of appeals and state courts of last resort. It also fails to provide meaningful First Amendment protection to a broad array of expressive works that actually or allegedly depict or reflect real events. Review is warranted to resolve the lower courts' sharply divergent views—and to ensure that broad swaths of protected speech are not chilled by the Ninth Circuit's flawed standard.

1. The right of publicity is "a relatively raw and brash newcomer." 1 McCarthy, *The Rights of Publicity and Privacy*, at v (2d ed. 2003). Although the privacy torts from which the right derives date to the turn of the twentieth century, see *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 487 (1975) (discussing Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)), the right of publicity itself did not emerge as a distinct tort until the 1950s, see Hoffman, *Limitations on the Right of Publicity*, 28 Bull. Copyright Soc'y 111 (1980) (discussing Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203 (1954)). More specifically, "[a] cause of action for violation of the right was first recognized in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2nd Cir. 1953)." *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 929 (6th Cir. 2003); see also *Haelan Labs.*, 202 F.2d at 868 ("We think that, in addition to and independent of th[e] right

of privacy ..., a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture.... This right might be called a 'right of publicity.'"). Today, right-of-publicity laws generally bar "appropriation of [a] plaintiff's name or likeness to defendant's advantage, commercially or otherwise ... [without the plaintiff's] consent." App. 6a n.4 (listing the elements of a right-of-publicity claim under California law).

Right-of-publicity claims have been made with increasing frequency in recent years. These claims have required courts to wrestle with how best to balance publicity rights against the First Amendment, because often—as here—the claim is based on an expressive work of some kind. For example, right-of-publicity claims have been raised based on:

- paintings, *see ETW Corp.*, 332 F.3d 915;
- movies, *see Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454 (Cal. 1979); *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996);
- books, *see Seale*, 949 F. Supp. 331; *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994);
- magazines, *see Stewart v. Rolling Stone LLC*, 105 Cal. Rptr. 3d 98 (Cal. Ct. App. 2010);
- drawings on t-shirts, *see Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001); song lyrics, *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003); *Valentine v. CBS, Inc.*, 698 F.2d 430 (11th Cir. 1983) (*per curiam*);
- greeting cards, *see Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010);

- board games, *see Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S. 2d 144 (N.Y. Sup. Ct. 1973);
- presidential campaign commercials, *see Browne v. McCain*, 611 F. Supp. 2d 1062 (C.D. Cal. 2009);
- digitally-altered photographs, *see Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001);
- comic books and comic book characters, *see Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003); *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003); trading cards, *see Cardtoons, LC v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996); and
- fantasy baseball products, *see CBC Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, LP*, 505 F.3d 818 (8th Cir. 2007).

This Court has decided only one case involving the interplay between the First Amendment and publicity rights. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), a closely divided Court held that the First Amendment did not preclude a right-of-publicity claim against a television station that broadcast an entertainer's entire "human cannonball" act. The Court made clear, however, that the extreme facts of the case limited the reach of its decision. It explained that "the case before us is more limited than the broad category of lawsuits that may arise under the heading of 'appropriation.' Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform." *Id.* at 573 n.10.

The Court also contrasted “the broadcast of petitioner’s entire performance” with “the unauthorized use of another’s name for purposes of trade,” noting that only the former impermissibly “goes to the heart of petitioner’s ability to earn a living as an entertainer.” *Id.* at 576. The Court did not provide additional guidance regarding cases that involved something less than the misappropriation of a performer’s entire act, such as simple depictions of individuals. *See Order Denying Mots. To Dismiss* at 19, No. 09-cv-1967 (N.D. Cal. Oct. 25, 2013) (“*Zacchini* does not provide a clear test for balancing the right of publicity against free speech concerns.”).

In the 35-plus years since *Zacchini* was decided, the lower courts, as detailed below, have adopted at least five different approaches for how to balance the constitutional freedom of expression against statutory or common-law rights of publicity.

2. Electronic Arts, Inc. (EA) produces a video-game series called *NCAA Football*. This popular series allows users to play simulated football games between colleges and universities, by controlling “avatars,” i.e., animated characters that represent college football players. App. 3a. Aspects of these games are—by design—highly realistic. For example, they use schools’ actual names, colors, and logos (with the schools’ permission). They also include “realistic virtual versions of actual stadiums; ... virtual athletes, coaches, cheerleaders, and fans realistically rendered by EA’s graphic artists; and ... realistic sounds.” *Id.* The games do not, however, include any names on the players’ jerseys or otherwise identify players by name. *See id.* Nor do they use actual images or realistic renderings of the

players; rather, the games use publicly available information to create virtual players.⁶

In 2009, respondent Samuel Keller brought a putative class action based on EA's videogames, seeking damages and injunctive relief. App. 4a, 43a. Keller, who played quarterback for Arizona State University and the University of Nebraska, alleged that EA violated his right of publicity under California law by including his likeness, without permission, in the 2005 and 2008 versions of *NCAA Football*. See App. 42a ("Plaintiff alleges that, to make the games realistic, EA designs the virtual football players to resemble real-life college football athletes, including himself.").

Keller's claims were not leveled against EA alone. He also charged the NCAA, petitioner here, with violating his right of publicity under Indiana law. App. 43a. (The NCAA is headquartered in Indianapolis.) And he alleged a conspiracy among all three defendants—EA, the NCAA, and the Collegiate Licensing Company (CLC)—to deprive him and other players of their publicity rights. *Id.*⁷

After the district court consolidated Keller's case with similar cases brought by other former college football players, the defendants moved to dismiss. App. 41a-42a. EA also moved to strike the claims against it under California's "anti-SLAPP" statute, which requires a court to strike claims that arise from a defendant's exercise of free speech rights unless the plaintiff

⁶ EA's game used the name and logo of the NCAA pursuant to a licensing agreement; that agreement will expire in June 2014.

⁷ The district court's jurisdiction over Keller's claims was premised on diversity of citizenship and satisfaction of the amount-in-controversy requirement. See 28 U.S.C. § 1332.

makes a preliminary showing of likely success. *See* Cal. Code Civ. P. § 425.16.

The district court granted the NCAA's motion to dismiss Keller's Indiana right-of-publicity claim, on the ground that Keller never alleged that the NCAA itself used his image or likeness. App. 44a-45a. It declined, however, to dismiss the claim that the NCAA had conspired with EA and CLC to violate Keller's right of publicity. App. 56a-58a. The court also declined to dismiss or strike the right-of-publicity claim against EA, ruling (as relevant here) that that claim was not barred by the First Amendment. App. 45a-51a. The court reached that conclusion by applying the so-called "transformative-use" test, which balances First Amendment rights and rights of publicity by looking to "whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." App. 7a. Applying that test, the district court concluded that the games were insufficiently transformative—i.e., too accurate and realistic—to enjoy First Amendment protection. *See* App. 50a ("EA does not depict Plaintiff in a different form; he is represented as he what he was: the starting quarterback for Arizona State University. Further, ... the game's setting is identical to where the public found Plaintiff during his collegiate career: on the football field.").⁸

⁸ The district court assumed that the allegations in the complaint were true for the purpose of deciding the motions—including the allegations that "EA designs the virtual football players to resemble real-life college football athletes" and that "these virtual players are nearly identical to their real-life counterparts." App. 42a. Although NCAA disputes these allegations, it too assumes them to be true for the purpose of this petition.

3a. A divided panel of the Ninth Circuit affirmed the dismissal of the anti-SLAPP motion. *See* App. 1a-39a. The court acknowledged that videogames are core expressive works entitled to full First Amendment protection. *See Brown v. Entertainment Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (*EMA*), *cited in* App. 2a. But it concluded that the First Amendment did not preclude Keller's right-of-publicity claim. The court rejected EA's argument that it should apply a speech-protective standard known as the *Rogers* test, after *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). *See* App. 18a (labeling that test a "broader First Amendment defense" than the transformative-use test). Instead, like the district court, the court of appeals applied a standard known as the "transformative-use" test. Under that test, the court held, *NCAA Football* did not warrant First Amendment protection because the game "realistically portrays college football players in the context of college football games." App. 17a; *see also* App. 2a (EA's alleged use of Keller's likeness "does not qualify for First Amendment protection as a matter of law because it literally recreates Keller in the very setting in which he has achieved renown"). In other words, the court held, the game's purported use of Keller's likeness was insufficiently "transformative" to qualify for First Amendment protection.

Judge Thomas dissented. He observed that the majority misapplied the transformative-use test by "confin[ing] its inquiry to how a single athlete's likeness is represented in the video game, rather than examining the transformative and creative elements in the video game as a whole." App. 30a. Applying that "holistic analysis," Judge Thomas concluded that the games' "transformative elements predominate[d]," so much so that "EA's *NCAA Football* is [essentially] a

work of interactive historical fiction.” App. 30a-31a. He also stated that he, “[u]nlike the majority, ... would not punish EA for the realism of its games.... [T]he lifelike roar of the crowd and the crunch of pads ... demonstrates how little of *NCAA Football* is driven by the particular likeness of Sam Keller, or any of the other plaintiffs.” App. 34a. Finally, Judge Thomas addressed what he saw as the far-reaching consequences of the majority’s decision, as well as its departure from other cases:

The logical consequence of the majority view is 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. Absent the use of actual footage, the motion picture *Forrest Gump* might as well be just a box of chocolates. Without its historical characters, *Midnight in Paris* would be reduced to a pedestrian domestic squabble. The majority’s holding that creative use of realistic images and personas does not satisfy the transformative use test cannot be reconciled with the many cases affording such works First Amendment protection.

App. 39a.⁹

⁹ The majority “reject[ed] the notion that [its] holding has such broad consequences.” App. 17a-18a n.10. It stated that its decision could be cabined by employing the part of the transformative-use test that examines “whether a likely purchaser’s primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist.” App. 18a n.10.

The Ninth Circuit subsequently granted EA's motion to stay the issuance of its mandate pending EA's filing, and this Court's disposition, of a petition for certiorari to review the court of appeals' judgment. App. 65a.

b. A few weeks before the Ninth Circuit's decision, the Third Circuit decided a very similar case, *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013). There too, a divided panel rejected, under the transformative-use test, a First Amendment defense to a former college football player's right-of-publicity claim against EA, stemming from its *NCAA Football* games. The NCAA is not a party in *Hart*.

4. EA filed a petition asking this Court to review the Ninth Circuit's judgment (No. 13-377).¹⁰ Soon thereafter, however, the plaintiffs, EA, and CLC announced that they had reached a settlement in principle. See Stipulation & Proposed Order at 1, No. 09-cv-1967 (N.D. Cal. Sept. 26, 2013). The plaintiffs made clear, however, that "[t]his settlement does not affect Plaintiffs' claims against" the NCAA. *Id.* That includes plaintiffs' conspiracy claim, which is wholly derivative of the right-of-publicity claim against EA, and thus remains viable only because of the court of appeals' First Amendment ruling.¹¹

¹⁰ EA simultaneously sought certiorari in *Hart* (No. 13-376).

¹¹ In addition to settling with the plaintiffs, EA recently announced that it will stop producing *NCAA Football*. See, e.g., Eder, *Settlement in Athletes' Likeness Lawsuit*, N.Y. Times, Sept. 27, 2013, at B18, available at http://www.nytimes.com/2013/09/27/sports/ncaafootball/ea-sports-wont-make-college-video-game-in-2014.html?_r=0.

Because the settlement in principle makes dismissal of EA's petitions likely, the NCAA, which is a party to the action but participated in the court of appeals as an amicus, is today moving for leave to intervene in this Court so that it can file this petition. Despite the partial settlement, the issues remain the same as framed in EA's petition. The NCAA, as an alleged "co-conspirator," will need to continue to defend against Keller's underlying claim—and absent this Court's review will need to do so under the under-protective First Amendment standard adopted by the court of appeals.

REASONS FOR GRANTING THE PETITION

The lower courts are badly divided over how to balance First Amendment rights with rights of publicity. Indeed, the transformative-use test employed by the Ninth Circuit here is one of at least five tests that lower courts have used in similar cases—and the transformative-use test itself has more than one version. This doctrinal disarray is firmly established, and the issue is a recurring and important one. Moreover, this is a good vehicle to resolve the disarray, both because the relevant arguments were presented and passed on below and because the lower courts' choice of test here was outcome-determinative. Finally, the Ninth Circuit's choice was wrong. The transformative-use test is inconsistent with settled First Amendment doctrine. To begin with, it punishes expression for being accurate, i.e., truthful. It also strikes a false balance, equating publicity rights, which protect economic interests, with the foundational freedoms protected by the First Amendment. And it requires subjective and indeterminate evaluations by courts, inevitably chilling free expression. The predominant-use test and other vague

balancing tests used by other lower courts are likewise flawed and will deter valuable speech. Those tests contrast with the *Rogers* test, which properly confines right-of-publicity claims and thereby protects free speech. The Court should grant review and adopt that test as the appropriate First Amendment standard.

I. THE LOWER COURTS HAVE SPLINTERED OVER HOW TO BALANCE FIRST AMENDMENT FREEDOMS AGAINST RIGHT-OF-PUBLICITY CLAIMS

A. Several Courts Employ Some Version Of The Transformative-Use Test

In its decision here, the Ninth Circuit held (as the Third Circuit did in *Hart*) that the First Amendment bars a right-of-publicity claim that stems from the use of a person's image or likeness in an expressive work only if the image or likeness is sufficiently "transform[ed]." App. 27a; *Hart*, 717 F.3d at 165. This transformative-use test was first adopted by the California Supreme Court in *Comedy III Productions*, 21 P.3d 797. That court described the test as "essentially ... 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 799. The California court borrowed the transformative-use test from copyright's fair-use doctrine, despite acknowledging that three of the four statutory fair-use factors were not useful for these purposes. *See id.* at 807-808 & n.10.

As explained below, other courts reject the transformative-use test. But even within jurisdictions that use it, there is disagreement about how to apply it properly. Both here and in *Hart*, for example, the majority looked primarily (if not solely) at whether the plaintiff's image or likeness itself was transformed. *See*

App. 12a-13a; *Hart*, 717 F.3d at 165.¹² In contrast, the dissent in both cases argued that courts applying the test should consider the expressive work as a whole, and both dissenters concluded that under that approach EA would prevail. App. 33a; *Hart*, 717 F.3d at 174-176 (Ambro, J., dissenting). The Sixth Circuit, when it has applied the transformative-use test, has also looked to the work as a whole. See *ETW Corp.*, 332 F.3d at 938.¹³

B. Other Courts Follow The *Rogers* Test

Four circuits and two state supreme courts have rejected the transformative-use test in favor of a rule that the First Amendment protects all uses of a name, image, or likeness in an expressive work, unless a use is tantamount to an unauthorized commercial endorsement or is wholly unrelated to the expression. That approach—commonly known as the *Rogers* test—is also endorsed by the Restatement. See *Restatement (Third) of Unfair Competition* § 47 cmt. c (1995) (“[I]f the name or likeness is used solely to attract attention to a work that is not related to the identified person,

¹² The district court here took the same approach. See App. 50a-51a.

¹³ Reflecting further doctrinal confusion, the Ninth Circuit suggested in an earlier case that even sufficient transformation may not defeat a right-of-publicity claim, if the expressive work at issue was created with “actual malice.” See *Hoffman*, 255 F.3d at 1184. In subsequent cases, including this one, the Ninth Circuit seems to have steered away from this suggestion; the court has often (as here) simply described *Hoffman* without engaging with its analysis. See App. 11a n.6. This may be because *Hoffman* would appear to threaten speakers with liability both when their depictions are true, i.e., realistic (because then the work will be insufficiently transformative) and false (because then actual malice can be found).

the user may be subject to liability for a use of the other's identity in advertising.").

This test was first applied in *Rogers*, the case that gave the test its name. There, the court considered a Lanham Act and right-of-publicity claim brought by Ginger Rogers against the makers of *Ginger and Fred*, a film about a fictional Italian duo who imitated Rogers and Fred Astaire. See 875 F.2d at 996-997. The Second Circuit concluded that the use of a person's name in the title of an expressive work was protected by the First Amendment unless the use was "wholly unrelated" to the work or "was simply a disguised commercial advertisement for the sale of goods or services." *Id.* at 1004 (internal quotation marks omitted).

Other circuits have embraced the *Rogers* test (or a substantively identical standard). The Fifth Circuit, for example, cited *Rogers* in concluding that a partially fictionalized biography was protected by the First Amendment because it was not merely a disguised advertisement. See *Matthews*, 15 F.3d at 440. Similarly, in *Parks*, the Sixth Circuit adopted the *Rogers* test and remanded for a determination of whether the use of Rosa Parks' name in a song title was in fact a "disguised commercial advertisement" or used "solely to attract attention" and thus unrelated to the work. 329 F.3d at 461.¹⁴ And prior to *Rogers*, the Eleventh Circuit followed a similar approach in *Valentine*, 698 F.2d 430. The court there construed a right-of-publicity statute not to apply where the defendants "did not use

¹⁴ As noted above, the Sixth Circuit in a different case applied the transformative-use test. See *ETW Corp.*, 332 F.3d at 938. The court in that case did not actually adopt that test; it was instead applying a variety of tests to the publicity claim before it. See *id.* at 937-938.

[the individual's] name to directly promote a product or service." *Id.* at 433. A contrary construction, the court observed, would raise "grave questions" regarding the constitutionality of the law. *Id.*

State supreme courts have similarly applied *Rogers*-like tests in setting the outer bounds of the right of publicity. The Kentucky Supreme Court has cabined the right-of-publicity tort to situations in which "use of a person's name or likeness" is insufficiently "related to the underlying work, or, if the otherwise constitutionally-protected work is simply [a] disguised commercial advertisement for the sale of goods or services." *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001) (footnote and internal quotation marks omitted). And the Florida Supreme Court has found that, in light of significant constitutional concerns, the state's right-of-publicity law does not apply to works "which do not directly promote a product or service." *Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 810 (Fla. 2005).

C. Still Other Courts Employ A Variety Of Different Approaches

In contrast to the courts discussed above, several circuits and state supreme courts do not use either the transformative-use test or the *Rogers* test when confronted with a right-of publicity claim that is based on an expressive work.

The Missouri Supreme Court, for example, has endorsed a "predominant-use" test, which asks whether the "predominant purpose" of the speech is to "make an expressive comment on or about a celebrity"—in which case the speech receives First Amendment protection—or whether the speech "predominantly exploits the commercial value of an individual's identity"—in

which case it does not. *Doe*, 110 S.W.3d at 374. That court has also expressly rejected the transformative-use test. *See id.*

The Eleventh Circuit, meanwhile, has opined that the proper test requires courts simply to “engage in a fact-sensitive balancing, with an eye toward that which is reasonable and that which resonates with our community morals.” *Toffoloni v. LFB Publ’g Group*, 572 F.3d 1201, 1208 (11th Cir. 2009). Applying Georgia law, the court in that case also fashioned a “newsworthiness” exception to that state’s right-of-publicity law. *Id.*¹⁵

Other courts have likewise used nebulous forms of balancing that do not consider “transformation,” “predominant purpose,” or whether a work involves an unauthorized endorsement. In *Cardtoons, LC*, for example, the Tenth Circuit considered a right-of-publicity claim against parody playing cards that featured caricatures of real baseball players. *See* 95 F.3d at 962-963. After holding that the cards enjoyed “full First Amendment protection,” *id.* at 970, the court “examined the importance of Cardtoons’ right to free expression and the consequences of limiting that right” before vaguely “weigh[ing] those consequences against the effect of infringing on [the players’] right of publicity,” *id.* at 972. The court ultimately concluded, without articulating any more specific considerations, that the First Amendment interests in the case outweighed any justifications given for the right of publicity. *See id.* at 973-976.

¹⁵ The *Toffoloni* court did not mention its prior decision in *Valentine*.

The Eighth Circuit engaged in similar balancing in *CBC*. There the court extended First Amendment protection to fantasy baseball products containing the real names of and information about major league baseball players. *See* 505 F.3d at 820. Citing *Cardtoons*, the court “recognized the public value of information about the game of baseball and its players” and concluded that it would be “strange” to deny First Amendment protection to the use of publicly available data. *Id.* at 823. After further noting that the case “barely, if at all, implicate[d] the interests that states typically intend to vindicate” with right-of-publicity laws, the court held that the First Amendment interests involved “superseded” any rights of publicity. *Id.* at 823-824.

In sum, there is pervasive disagreement among the lower courts about the proper test to use in cases like this. That disagreement, moreover, is often outcome determinative and will inevitably chill free speech.

II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT, AND THIS IS A GOOD VEHICLE FOR DECIDING IT

The issue presented here warrants resolution by this Court. As indicated by the decisions cited above, the extent to which the First Amendment limits right-of-publicity claims is a question that arises frequently throughout the country, and in a wide variety of expressive contexts. The cited cases also show that the disagreement among the lower courts is both broad and entrenched; there is thus nothing to be gained by awaiting further development (and divergence) in the lower courts. Finally, the question presented is manifestly important, as it involves efforts to limit, across a broad swath of expressive conduct, the fundamental

protections afforded by the First Amendment. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 636 (1979) (noting “the importance the Court always has attached to First Amendment rights”). This Court has in recent Terms repeatedly reaffirmed the importance and robustness of First Amendment protections, rejecting an array of government efforts to restrict the freedom of expression—including in the videogame context presented in this case. *See EMA*, 131 S. Ct. 2729; *see also Agency for Int’l Dev. v. Alliance for Open Society Int’l, Inc.*, 133 S. Ct. 2321 (2013); *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *United States v. Stevens*, 559 U.S. 460 (2010); *Citizens United v. FEC*, 558 U.S. 310 (2010). The Court’s attention is needed again; without it, substantial uncertainty will exist regarding whether and to what extent the First Amendment protects expressive conduct that makes use of the name, image or likeness of athletes, politicians, movie stars, authors, and others.

This case presents a good opportunity to redress the doctrinal disarray in the lower courts. The NCAA’s First Amendment arguments were both pressed and passed upon in the court of appeals, rendering the issue suitable for review by certiorari. *See, e.g., Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). The Ninth Circuit, moreover, acknowledged that its choice of the transformative-use test rather than the *Rogers* test was outcome-determinative: The court stated that “absent evidence that EA explicitly misled consumers” (which evidence does not exist), Keller “would be hard-pressed to support” a claim “that consumers are being illegally misled into believing that he is endorsing EA or its products,” as would be required under the *Rogers* test. App. 21a.

Indeed, the same day that it decided this case, the Ninth Circuit also decided a similar case in which former NFL star Jim Brown challenged EA's use of his likeness in its *Madden NFL* videogames. *See Brown v. Electronic Arts, Inc.*, 724 F.3d 1235 (9th Cir. 2013). Brown's claim was brought under the Lanham Act rather than right-of-publicity law, so the court of appeals applied the *Rogers* test. *See id.* at 1241-1242. That test led the court to reject Brown's claim; the court explained that because the record did not show that Electronic Arts had explicitly misled consumers about Brown's involvement with the games, "the public interest in free expression outweighs the public interest in avoiding consumer confusion." *Id.* at 1248. Had the court applied the *Rogers* test in *Keller*, the right-of-publicity claim would have yielded to the First Amendment, just as the Lanham Act claim did in *Brown*.

III. THE NINTH CIRCUIT'S HOLDING IS WRONG

A. The Transformative-Use Test Does Not Adequately Protect First Amendment Rights

A right-of-publicity claim like *Keller*'s penalizes speech based on its content: The tort holds the speaker liable because her expression includes another's name or likeness. *See Bartnicki v. Vopper*, 532 U.S. 514, 521 (2001); *see also* Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903, 912 n.35 (2003) ("The right of publicity is clearly content-based: It prohibits the unlicensed use of particular content (people's names or likenesses)."). Such content-based regulations of speech "are presumptively invalid" and must be subjected to the strictest constitutional scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also, e.g., 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."); *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").

This Court has generally allowed content-based speech restrictions only with a "few historic and traditional categories [of expression] long familiar to the bar." *Alvarez*, 132 S. Ct. at 2544 (alteration in original) (internal quotation marks omitted). These include obscenity, defamation, fighting words, true threats, child pornography, and speech integral to criminal conduct. *See id.* Those types of expression are "of such slight social value ... 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. Thus, "the[ir] prevention and punishment ... have never been thought to raise any Constitutional problem." *EMA*, 131 S. Ct. at 2733. This Court has consistently rebuffed recent attempts to add new categories of expression that the government may restrict based on content. *See, e.g., Alvarez*, 132 S. Ct. at 2544; *Stevens*, 559 U.S. at 482; *EMA*, 131 S. Ct. at 2734, 2741.

The vast quantity of expression that can be subject to right-of-publicity claims does not fall within any of the categories listed above. The videogames at issue here, for example, are plainly not obscene, defamatory, fraudulent, threatening, and so on. Nor is there any basis for adding all depictions of celebrities or uses of their names to the historical list. There is no serious argument, after all, that such depictions and uses are always "of such slight social value ... 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.

The right of publicity accordingly must be limited to applications that can survive strict scrutiny. The transformative-use test fails to impose such a limit.

1. The test perversely punishes speech for being truthful and accurate

As this case shows, the transformative-use test improperly steers the right of publicity into the very heartland of what is protected by the First Amendment. The more accurate and realistic a particular depiction is, the more the test ratchets up the risk of liability. That is entirely backwards. Accuracy and realism (i.e., truth) are generally a reliable *defense* to liability for otherwise tortious speech, not a basis for withholding First Amendment protection. *See, e.g., The 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”).¹⁶ This is particularly so for expression that uses facts in the public domain, *see N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)—such as the biographical details used by EA in its video-

¹⁶ *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.”); *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”).

games, *see* App. 35a-36a (Thomas, J., dissenting). “[I]t would be a strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone,” *CBC*, 505 F.3d at 823. Yet that is the rule of law that the Ninth Circuit embraced here.

The potential reach of that rule is breathtaking. Countless expressive works use a real person’s actual name or likeness, including films like *The Social Network* (about the rise of Facebook) and *Ray* (about the singer Ray Charles), and documentaries like *Capturing the Friedmans* (about a high-profile investigation of alleged child molestation) and *Roger and Me* (about the closing of General Motors’ factories in Flint, Michigan). Often, the very point of an artist’s work is to represent a real subject as faithfully as possible. Yet under the transformative-use test, achieving that artistic goal is exactly what invites liability. *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 in Hart*, 717 F.3d at 164. That approach is not remotely consistent with this Court’s First Amendment jurisprudence.

The Ninth Circuit defended its approach by asking: “If EA creates a virtual likeness of Tom Brady using only publicly available data, does EA have free reign 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[.]” App. 27a n.12. But this reasoning fails because the court’s hypothetical involved a false

claim of celebrity endorsement. That type of misleading commercial speech *can* constitutionally be the subject of a right-of-publicity claim—as the *Rogers* test recognizes. See *infra* Part III.C. But the First Amendment’s tolerance for regulating such misleading speech cannot justify the test, or the result, adopted by the court of appeals here. That court simply asked the wrong question. The question is whether any compelling state interest justifies withholding First Amendment protection from realistic, *non-commercial* and *non-misleading* expression, like the expression at issue here.

The answer is no. The state interest supposedly furthered by right-of-publicity torts is “‘protect[ing] a form of intellectual property [in one’s person] that society deems to have some social utility.’” App. 21a (second alteration in original) (quoting *Comedy III*, 21 P.3d at 804). The point, in other words, is to reward the “[o]ften considerable money, time and energy ... needed to develop one’s prominence in a particular field.” *Id.*; see also App. 22a. (“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.”). But society already provides ample incentives for becoming a celebrity; the marginal additional incentive from the right to cash in on one’s publicity is minimal. Safeguarding that added incentive is manifestly not important enough to justify penalizing truthful, non-commercial expression.

The contrary conclusion reached by courts that have adopted the transformative-use test derives from a profound false equivalence. The fair-use doctrine in copyright, which inspired the transformative-use test, is designed to balance competing *speech* interests—the interest in using copyright protection to induce the cre-

ation of new works and the interest in permitting others to expand or comment on existing works. *See Eldred v. Ashcroft*, 537 U.S. 186, 219-220 (2003). In this context, by contrast, there are speech interests on only one side of the balance; publicity rights create an incentive to pursue fame, not expression. No precedent—and no sound principle—supports the notion underlying the transformative-use test: that “the right to control, manage, and profit from one’s own identity” is a “fundamental protection” that is equivalent to and thus must be balanced against “the right of free expression.” *Hart*, 717 F.3d at 157.

2. The test chills protected speech

In addition to perversely punishing certain expression for being too truthful, the transformative-use test is subjective and unpredictable, and hence threatens to chill large amounts of protected expression.

As this Court has explained, “[u]nder our Constitution, ‘esthetic and moral judgments about art ... are for the individual to make, not for the Government to decree.’” *EMA*, 131 S. Ct. at 2733 (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000)); *see also* *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.”). The Court has further explained that allowing government officials to make such judgments, and thereby restrict speech, generates tremendous uncertainty, as speakers must guess what a government censor will deem sufficiently artistic at some point in the future. Faced with such uncertainty, speakers inevitably “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)). The result is an "obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 871-872 (1997).

These dangers are fully realized by allowing otherwise-protected expression to be penalized based on how "transformative" a court deems it. While there are surely easy cases at either transformative extreme, there is a vast gray area in the middle. The countless biographers, filmmakers, singers, photographers, and other artists who create works that depict or refer to famous people cannot reliably guess—and should not be forced to guess—whether their particular depictions or references are sufficiently "transformative" to escape liability.

Evidently seeking to limit the enormous chilling potential created by the transformative-use test, courts adopting that test have sought to draw "subtle" distinctions among expressive works, *Comedy III*, 21 P.3d at 811, based on judges' personal sense of whether a particular work is sufficiently artistic or creative to warrant protection. The California Supreme Court in *Comedy III*, for example, withheld First Amendment protection from a charcoal drawing of The Three Stooges after finding it insufficiently creative. The court mused, however, that it would have reached the opposite conclusion about Andy Warhol's portraits of Marilyn Monroe because those works represent "a form of ironic social comment on the dehumanization of celebrity itself." *Id.* at 811.

The Ninth Circuit has drawn similarly subtle distinctions. In one case, the court found a greeting card

parody of the television show *The Simple Life*, a card that featured Paris Hilton's head superimposed on a cartoon body, insufficiently transformative because "the basic setting is the same [as in the show]: we see Paris Hilton, born to privilege, working as a waitress." *Hilton*, 599 F.3d at 911. But another Ninth Circuit panel opined in dicta that a magazine's use of an image of Dustin Hoffman from the film *Tootsie* was transformative because "Hoffman's body was eliminated and a new, differently clothed body was substituted in its place." *Hoffman*, 255 F.3d at 1184 n.2.

Protecting the many valuable expressive works that accurately depict real people does not require, and should not depend, on "subtle" distinctions. So long as they apply the transformative-use test, however, courts will have to engage in unpredictable and subjective—and hence chilling—line-drawing.

Finally, as this case shows, the need for courts to make value-laden judgments in these situations has led to violations of this Court's directive against medium-specific First Amendment standards. See *EMA*, 131 S. Ct. at 2733. Dissenting in *Hart*, for example, Judge Ambro charged the majority with treating videogames as less worthy of First Amendment protection than other types of expressive works. See 717 F.3d at 174 (Ambro, J., dissenting). The majority barely responded to Judge Ambro's concern, simply asserting that it had followed this Court's admonition that videogames "enjoy the full force of First Amendment protections." *Id.* at 148 (majority opinion).

The majority below, meanwhile, all but admitted that it was granting less protection to videogames than it would have given other media. Judge Thomas warned in dissent that the majority's holding "jeopard-

ize[d] the creative use of historic figures in motion pictures, books, and sound recordings.” App. 39a (Thomas, J., dissenting). Disagreeing that its holding was so broad, the majority explained that its 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*.” App. 17a n.10 (emphasis added) (citations omitted).¹⁷ The court’s care in protecting “other kinds of expressive works” did not, however, extend to videogames. Such selectivity is not consistent with this Court’s precedent.¹⁸

¹⁷ The Ninth Circuit’s supposed safety-valve is problematic for a second reason: It requires a speaker to guess what a court might hold to be “a likely *purchaser’s* primary motivation” in buying an expressive work. App. 18a n.10. Many speakers will simply self-censor rather than run the risk that their multi-dimensional guesswork will later prove wrong.

¹⁸ As discussed earlier, the majorities and dissenters in both this case and *Hart* disagreed over whether the transformative-use test focuses on the depiction or description of the celebrities (as the majorities concluded) or at the expressive work as a whole (as the dissenters argued). While both iterations suffer from all the flaws identified in the text, the majorities’ approach is particularly indefensible. That approach would allow *any* use of a name, image, or likeness in an expressive work to trigger liability, even if the use constituted the tiniest fraction of the overall work. In the movie *Forrest Gump*, for example, the title character encounters various historical figures. These encounters are generally brief, some lasting only a few seconds. But under the majority’s test here, those figures (or their estates if deceased) could presumably recover for the unauthorized use of the individuals’ images. That approach would constitute a staggering constriction in the scope of the First Amendment.

**B. The Predominant-Use Test And Nebulous
Balancing Approaches Used By Other Courts
Are Equally Problematic**

The Missouri Supreme Court's "predominant-use" test and the more nebulous balancing engaged in by other courts are no more consistent with this Court's First Amendment precedents than the transformative-use test.

The predominant-use test requires courts to determine whether a speaker's depiction or description of a celebrity was primarily expressive or primarily "exploit[ed] the commercial value of an individual's identity." *Doe*, 110 S.W.3d at 374. The *Doe* court gave virtually no guidance as to how to make such determinations, however, particularly in the (very common) situation in which the challenged work is highly expressive but also plainly commercial. In any event, it is difficult to see how courts could evaluate speakers' predominant use of expression without making a value judgment about the expression itself. All this would lead to the same chilling effect discussed above in regard to the transformative-use test.

The Third Circuit in *Hart* aptly summarized the flaws with the predominant use test:

[T]he Predominant Use Test is subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics. These two roles cannot co-exist.... [Use of the test] would be tantamount to admitting that it is proper for courts to analyze select elements of a work to determine how much they contribute to the entire work's expressiveness. Moreover, as a necessary (and insidious) consequence, the [test]'s

approach would suppose that there exists a broad range of seemingly expressive speech that has no First Amendment value.

717 F.3d at 154. Although the court failed to see that much of its criticism applies with equal force to the transformative-use test, that criticism was well-founded.

The various vague forms of balancing employed by other courts fare no better. This Court has never sanctioned a “free-floating test for First Amendment coverage.” *Stevens*, 559 U.S. at 470; *see also EMA*, 131 S. Ct. at 2734. And “[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.” *Stevens*, 559 U.S. at 470. Furthermore, the economic interests protected by the right of publicity are, as explained, in no way equivalent to the speech interests protected by the First Amendment. *See supra* pp.23-24. Such incommensurate interests ought not be balanced (vaguely or otherwise). Any attempt to do so will inevitably be unpredictable and therefore chill protected expression.

C. The *Rogers* Test Properly Confines The Right Of Publicity

Unlike the other approaches used by courts in cases like this, the *Rogers* test confines right-of-publicity claims to situations in which speakers have 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.

So confined, right-of-publicity claims raise satisfy First Amendment dictates. Speech that falsely claims a

commercial endorsement is akin to the category of fraudulent speech that the government has long been permitted to regulate. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia 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 beyond First Amendment protection. Hence, as confined by the *Rogers* test, right-of-publicity claims raise little if any First Amendment concern.

The *Rogers* test is also consistent with this Court's decision in *Zacchini*. The Court in that case made clear that it was not addressing the typical "lawsuit[] that may arise under the heading of 'appropriation'" 433 U.S. at 573 n.10. Rather, *Zacchini* involved the copying of a performer's entire act—akin to a copyright violation. And the Court emphasized that such wholesale copying was quite "unlike the unauthorized use of another's name for purposes of trade." *Id.* at 576. One critical difference is that in a case like *Zacchini* there is no new expressive work at issue; the defendant has taken the *plaintiff's* expressive work and simply shown it herself. The First Amendment interests on the defendant's side are thus weaker. Moreover, unlike in the typical right-of-publicity case, there *are* substantial First Amendment interests on the plaintiff's side; protection of the plaintiff's entire act from misappropriation maintains the same "engine of free expression" that the copyright laws promote, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). The Court's allowance of the right-of-publicity claim in those specific circumstances in no way precludes adop-

tion of the *Rogers* test for the far-more-common set of cases like the one here.

Finally, limiting the right of publicity to misleading commercial speech returns it to its original form. The courts that first recognized a privacy tort believed the tort would not threaten freedom of expression precisely because “[t]here is in the publication of one’s picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion.” *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905). Adopting this limit would also bring the United States closer in line with other common law jurisdictions, such as Great Britain, which (despite generally being less speech-protective than the United States) have rejected or greatly restricted the right of publicity in order to protect free expression. *See, e.g., Lyngstad & Others v. Anabas Prods. Ltd.*, [1977] 1 FSR 62 (“To suggest that there is some proprietary right in the plaintiffs’ name which entitled them to sue simply for its use is contrary to all the English authorities.”); *Tolley v. J.S. Fry & Sons, Ltd.* [1929] 1 K.B. 467, 477 (“[S]ome men and women voluntarily enter professions which by their nature invite publicity, and public approval or disapproval. It is not unreasonable in their case that they should submit without complaint to their names and occupations and reputations being treated ... almost as public property.”), *rev’d on other grounds* [1931] A.C. 333.¹⁹

¹⁹ *See also* Cornish et al., *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* § 9-04 (7th ed. 2010) (observing that the *Report of the Committee on Privacy*, Cmnd. 5012 (1972), was particularly concerned that a privacy right “might be used too readily to trespass upon the freedom to receive and make use of information and to express opinions”); *see also Gould Estate v. Stoddart Publ’g Co.*, [1996] 30 O.R.3d 520, ¶ 14 (Can.

In short, the *Rogers* test properly reconciles right-of-publicity claims with the constitutional right to free expression.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
DANIEL S. VOLCHOK
DANIEL T. DEACON
ARI HOLTZBLATT
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006-3642
(202) 663-6000
seth.waxman@wilmerhale.com

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Ont.) (suggesting that “the tort of appropriation of personality is restricted to endorsement-type situations”).

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NCAA STUDENT-ATHLETE NAME & LIKENESS
LICENSING LITIGATION,

SAMUEL MICHAEL KELLER, *et al.*,
Plaintiffs-Appellees,
v.

ELECTRONIC ARTS INC.,
Defendant-Appellant,
and
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Defendants.

No. 10-15387
Argued and Submitted Feb. 15, 2011
Submission Vacated Feb. 18, 2011
Argued and Resubmitted July 13, 2012
Filed July 31, 2013

OPINION

* * *

BYBEE, Circuit Judge:

Video 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—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features

distinctive to the medium (such as the player's interaction with the virtual world)." *Brown v. Entm't Merchs. Ass'n*, ___ U.S. ___, ___, 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708 (2011).¹ Such rights are not absolute, and states may recognize the right of publicity to a degree consistent with the First Amendment. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574-75, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977). In this case, we must balance the right of publicity of a former college football player against the asserted First Amendment right of a video game developer to use his likeness in its expressive works.

The district court concluded that the game developer, Electronic Arts ("EA"), had no First Amendment defense against the right-of-publicity claims of the football player, Samuel Keller. We affirm. Under the "transformative use" test developed by the California Supreme Court, EA's use does not qualify for First Amendment protection as a matter of law because it literally recreates Keller in the very setting in which he has achieved renown. The other First Amendment defenses asserted by EA do not defeat Keller's claims either.

¹ In *Brown v. Electronic Arts, Inc.*, No. 09-56675, slip op. at 9-10 (9th Cir. July 31, 2013), we noted that "there may be some work referred to as a 'video game' (or referred to as a 'book,' 'play,' or 'movie' for that matter) that does not contain enough of the elements contemplated by the Supreme Court [in *Brown v. Entertainment Merchants Association*] to warrant First Amendment protection as an expressive work," but asserted that "[e]ven if there is a line to be drawn between expressive video games and non-expressive video games, and even if courts should at some point be drawing that line, we have no need to draw that line here." The same holds true in this case.

I

Samuel Keller was the starting quarterback for Arizona State University in 2005 before he transferred to the University of Nebraska, where he played during the 2007 season. EA is the producer of the *NCAA Football* series of video games, which allow users to control avatars representing college football players as those avatars participate in simulated games. In *NCAA Football*, EA seeks to replicate each school's entire team as accurately as possible. Every real football player on each team included in the game has a corresponding avatar in the game with the player's actual jersey number and virtually identical height, weight, build, skin tone, hair color, and home state. EA attempts to match any unique, highly identifiable playing behaviors by sending detailed questionnaires to team equipment managers. Additionally, EA creates realistic virtual versions of actual stadiums; populates them with the virtual athletes, coaches, cheerleaders, and fans realistically rendered by EA's graphic artists; and incorporates realistic sounds such as the crunch of the players' pads and the roar of the crowd.

EA's game differs from reality in that EA omits the players' names on their jerseys and assigns each player a home town that is different from the actual player's home town. However, users of the video game may upload rosters of names obtained from third parties so that the names do appear on the jerseys. In such cases, EA allows images from the game containing athletes' real names to be posted on its website by users. Users can further alter reality by entering "Dynasty" mode, where the user assumes a head coach's responsibilities for a college program for up to thirty seasons, including recruiting players from a randomly generated pool of high school athletes, or "Campus Leg-

end” mode, where the user controls a virtual player from high school through college, making choices relating to practices, academics, and social life.

In the 2005 edition of the game, the virtual starting quarterback for Arizona State wears number 9, as did Keller, and has the same height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, facial features, and school year as Keller. In the 2008 edition, the virtual quarterback for Nebraska has these same characteristics, though the jersey number does not match, presumably because Keller changed his number right before the season started.

Objecting to this use of his likeness, Keller filed a putative class-action complaint in the Northern District of California asserting, as relevant on appeal, that EA violated his right of publicity under California Civil Code § 3344 and California common law.² EA 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, and the district court denied the motion. We have jurisdiction

² There are actually nine named plaintiffs, all former National Collegiate Athletic Association (“NCAA”) football or basketball players: Keller, Edward O’Bannon, Jr. (UCLA), Byron Bishop (University of North Carolina), Michael Anderson (University of Memphis), Danny Wimprine (University of Memphis), Ishmael Thrower (Arizona State University), Craig Newsome (Arizona State University), Damien Rhodes (Syracuse University), and Samuel Jacobson (University of Minnesota). EA’s NCAA basketball games are also implicated in this appeal. Because the issues are the same for each plaintiff, all of the claims are addressed through our discussion of Keller and *NCAA Football*.

over EA's appeal pursuant to 28 U.S.C. § 1291. See *Batzel v. Smith*, 333 F.3d 1018, 1024-26 (9th Cir. 2003).³

II

California's anti-SLAPP statute is designed to discourage suits that "masquerade as ordinary lawsuits but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Batzel*, 333 F.3d at 1024 (internal quotation marks omitted). The statute provides:

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

Cal. Civ. Proc. Code § 425.16(b)(1). We have determined that the anti-SLAPP statute is available in federal court. *Thomas v. Fry's Elecs., Inc.*, 400 F.3d 1206 (9th Cir. 2005) (per curiam).

We evaluate an anti-SLAPP motion in two steps. First, the defendant must "make a prima facie showing that the plaintiff's suit arises from an act by the defendant made in connection with a public issue in furtherance of the defendant's right to free speech under the United States or California Constitution." *Batzel*, 333 F.3d at 1024. Keller does not contest that EA has

³ We review *de novo* the district court's denial of a motion to strike under California's anti-SLAPP statute. *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010).

made this threshold showing. Indeed, there is no question that “video games qualify for First Amendment protection,” *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2733, or that Keller’s suit arises from EA’s production and distribution of *NCAA Football* in furtherance of EA’s protected right to express itself through video games.

Second, we must evaluate whether the plaintiff has “establish[ed] a reasonable probability that the plaintiff will prevail on his or her ... claim.” *Batzel*, 333 F.3d at 1024. “The plaintiff must demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited.” *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001) (internal quotation marks omitted). The statute “subjects to potential dismissal only those actions in which the plaintiff cannot state and substantiate a legally sufficient claim.” *Navellier v. Sletten*, 29 Cal.4th 82, 124 Cal.Rptr.2d 530, 52 P.3d 703, 711 (Cal. 2002) (internal quotation marks omitted). EA did not contest before the district court and does not contest here that Keller has stated a right-of-publicity claim under California common and statutory law.⁴ Instead, EA raises four affirmative defenses derived from the First Amendment: the “transformative use” test, the *Rogers* test, the “public interest” test, and the “public

⁴ The elements of a right-of-publicity claim under California common law are: “(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.” *Stewart v. Rolling Stone LLC*, 181 Cal.App.4th 664, 105 Cal.Rptr.3d 98, 111 (internal quotation marks omitted). The same claim under California Civil Code § 3344 requires a plaintiff to prove “all the elements of the common law cause of action” plus “a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.” *Id.*

affairs” exemption. EA argues that, in light of these defenses, it is not reasonably probable that Keller will prevail on his right-of-publicity claim. This appeal therefore centers on the applicability of these defenses. We take each one in turn.⁵

A

The California Supreme Court formulated the transformative use defense in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 106 Cal.Rptr.2d 126, 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.” *Id.* at 799. The California Supreme Court explained that “when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.” *Id.* at 808. The court rejected the wholesale importation of the copyright “fair use” defense into right-of-publicity claims, but recognized that some aspects of that defense are “particularly pertinent.” *Id.*; see 17 U.S.C. § 107; see also *SOFA Entm’t, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1277–78 (9th Cir. 2013) (discussing the “fair use” defense codified in 17 U.S.C. § 107).

Comedy III gives us at least five factors to consider in determining whether a work is sufficiently trans-

⁵ Just as we did in *Hilton v. Hallmark Cards*, we reserve the question of whether the First Amendment furnishes a defense other than those the parties raise. 599 F.3d 894, 909 n.11 (9th Cir. 2009).

formative to obtain First Amendment protection. See J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 8:72 (2d ed. 2012). First, if “the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized,” it is more likely to be transformative than if “the depiction or imitation of the celebrity is the very sum and substance of the work in question.” *Comedy III*, 106 Cal.Rptr.2d 126, 21 P.3d at 809. Second, the work is protected if it is “primarily the defendant’s own expression”—as long as that expression is “something other than the likeness of the celebrity.” *Id.* This factor requires an examination of whether a likely purchaser’s primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist. McCarthy, *supra*, § 8:72. Third, to avoid making judgments concerning “the quality of the artistic contribution,” a court should conduct an inquiry “more quantitative than qualitative” and ask “whether the literal and imitative or the creative elements predominate in the work.” *Comedy III*, 106 Cal.Rptr.2d 126, 21 P.3d at 809. Fourth, the California Supreme Court indicated that “a subsidiary inquiry” would be useful in close cases: whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted.” *Id.* at 810. Lastly, the court indicated that “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,” the work is not transformative. *Id.*

We have explained that “[o]nly if [a defendant] is entitled to the [transformative] defense *as a matter of law* can it prevail on its motion to strike,” because the California Supreme Court “envisioned the application of the defense as a question of fact.” *Hilton*, 599 F.3d at

910. As a result, EA “is only entitled to the defense as a matter of law if no trier of fact could reasonably conclude that the [game] [i]s not transformative.” *Id.*

California courts have applied the transformative use test in relevant situations in four cases. First, in *Comedy III* itself, the California Supreme Court applied the test to T-shirts and lithographs bearing a likeness of The Three Stooges and concluded that it could “discern no significant transformative or creative contribution.” *Id.* at 811. The court reasoned 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.* “[W]ere we to decide that [the artist’s] depictions were protected by the First Amendment,” the court continued, “we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements.” *Id.*

Second, in *Winter v. DC Comics*, the California Supreme Court applied the test to comic books containing characters Johnny and Edgar Autumn, “depicted as villainous half-worm, half-human offspring” but evoking two famous brothers, rockers Johnny and Edgar Winter. 30 Cal.4th 881, 134 Cal.Rptr.2d 634, 69 P.3d 473, 476 (Cal. 2003). The court held that “the comic books are transformative and entitled to First Amendment protection.” *Id.* at 480. It reasoned that the comic books “are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs’ mere likenesses.” *Id.* at 479. “To the extent the drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature.” *Id.* Importantly, the court relied on the fact that the brothers “are but cartoon characters ... in a larger story, which is itself quite expressive.” *Id.*

Third, in *Kirby v. Sega of America, Inc.*, the California Court of Appeal applied the transformative use test to a video game in which the user controls the dancing of “Ulala,” a reporter from outer space allegedly based on singer Kierin Kirby, whose “‘signature’ lyrical expression ... is ‘ooh la la.’” 144 Cal.App.4th 47, 50 Cal.Rptr.3d 607, 609-10 (Ct. App. 2006). The court held that “Ulala is more than a mere likeness or literal depiction of Kirby,” pointing to Ulala’s “extremely tall, slender computer-generated physique,” her “hairstyle and primary costume,” her dance moves, and her role as “a space-age reporter in the 25th century,” all of which were “unlike any public depiction of Kirby.” *Id.* at 616. “As in *Winter*, Ulala is a ‘fanciful, creative character’ who exists in the context of a unique and expressive video game.” *Id.* at 618.

Finally, in *No Doubt v. Activision Publishing, Inc.*, the California Court of Appeal addressed Activision’s *Band Hero* video game. 192 Cal.App.4th 1018, 122 Cal.Rptr.3d 397, 400 (Ct. App. 2011), *petition for review denied*, 2011 Cal. LEXIS 6100 (Cal. June 8, 2011) (No. B223996). In *Band Hero*, users simulate performing in a rock band in time with popular songs. *Id.* at 401. Users choose from a number of avatars, some of which represent actual rock stars, including the members of the rock band No Doubt. *Id.* at 401. Activision licensed No Doubt’s likeness, but allegedly exceeded the scope of the license by permitting users to manipulate the No Doubt avatars to play any song in the game, solo or with members of other bands, and even to alter the avatars’ voices. *Id.* at 402. The court held that No Doubt’s right of publicity prevailed despite Activision’s First Amendment defense because the game was not “transformative” under the *Comedy III* test. It reasoned that the video game characters were “literal rec-

reations of the band members,” doing “the same activity by which the band achieved and maintains its fame.” *Id.* at 411. According to the court, the fact “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 that “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.* (internal quotation marks omitted).

We have also had occasion to apply the transformative use test. In *Hilton v. Hallmark Cards*, we applied the test to a birthday card depicting Paris Hilton in a manner reminiscent of an episode of Hilton’s reality show *The Simple Life*. 599 F.3d at 899. We observed some differences between the episode and the card, but noted that “the basic setting is the same: we see Paris Hilton, born to privilege, working as a waitress.” *Id.* at 911. We reasoned that “[w]hen we compare Hallmark’s card to the video game in *Kirby*, which transported a 1990s singer (catchphrases and all) into the 25th century and transmogrified her into a space-age reporter, ... the card falls far short of the level of new expression added in the video game.” *Id.* As a result, we concluded that “there is enough doubt as to whether Hallmark’s card is transformative under our case law that we cannot say Hallmark is entitled to the defense as a matter of law.” *Id.*⁶

⁶ We also briefly addressed the transformative use test in a footnote in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001). We indicated that if we had considered the test, we would have concluded that an image of Dustin Hoffman from

With these cases in mind as guidance, we conclude that EA's use of Keller's likeness does not contain significant transformative elements such that EA is entitled to the defense as a matter of law. The facts of *No Doubt* are very similar to those here. EA is alleged to have replicated Keller's physical characteristics in *NCAA Football*, just as the members of No Doubt are realistically portrayed in *Band Hero*. Here, as in *Band Hero*, users manipulate the characters in the performance of the same activity for which they are known in real life—playing football in this case, and performing in a rock band in *Band Hero*. The context in which the activity occurs is also similarly realistic—real venues in *Band Hero* and realistic depictions of actual football stadiums in *NCAA Football*. As the district court found, Keller is represented as “what he was: the starting quarterback for Arizona State” and Nebraska, and “the game's setting is identical to where the public found [Keller] during his collegiate career: on the football field.” *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, at *5 (N.D. Cal. Feb. 8, 2010).

EA argues that the district court erred in focusing primarily on Keller's likeness and ignoring the transformative elements of the game as a whole. Judge Thomas, our dissenting colleague, suggests the same. *See* Dissent at 1285. We are unable to say that there was any error, particularly in light of *No Doubt*, which reasoned much the same as the district court in this

“Tootsie” that had been altered to make it appear like he was wearing fashions from a decade later “contained ‘significant transformative elements.’” *Id.* at 1184 n.2; 1182-83. “Hoffman's body was eliminated and a new, differently clothed body was substituted in its place. In fact, the entire theory of Hoffman's case rests on his allegation that the photograph is not a ‘true’ or ‘literal’ depiction of him, but a false portrayal.” *Id.* at 1184 n.2.

case: “that the avatars appear in the context of a video-game 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.” *No Doubt*, 122 Cal.Rptr.3d at 411.⁷ EA suggests that the fact that *NCAA Football* users can alter the characteristics of the avatars in the game is significant. Again, our dissenting colleague agrees. *See* Dissent at 1286-87. In *No Doubt*, the California Court of Appeal noted that *Band Hero* “d[id] not permit players to alter the No Doubt avatars in any respect.” *Id.* at 410. The court went on to say that the No Doubt avatars “remain at all times immutable images of the real celebrity musicians, in stark contrast to the ‘fanciful, creative characters’ in *Winter* and *Kirby*.” *Id.* The court explained further:

[I]t is the differences between *Kirby* and the instant case ... which are determinative. In *Kirby*, the pop singer was portrayed as an entirely new character—the space-age news reporter Ulala. In *Band Hero*, by contrast, no

⁷ Judge Thomas argues that the “sheer number of virtual actors,” the absence of “any evidence as to the personal marketing power of Sam Keller,” and the relative anonymity of each individual player in *NCAA Football* as compared to the public figures in other California right-of publicity cases all mitigate in favor of finding that the EA’s First Amendment rights outweigh Keller’s right of publicity. *See* Dissent at 1286-88. These facts are not irrelevant to the analysis—they all can be considered in the framework of the five considerations from *Comedy III* laid out above—but the fact is that EA elected to use avatars that mimic real college football players for a reason. 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.

matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as literal recreations of the band members. 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 No Doubt's members doing exactly what they do as celebrities.

Id. at 410-11. Judge Thomas says that “[t]he Court of Appeal cited character immutability as a chief factor distinguishing [*No Doubt*] from *Winter* and *Kirby*.” Dissent at 1287. Though No Doubt certainly mentioned the immutability of the avatars, we do not read the California Court of Appeal’s decision as turning on the inability of users to alter the avatars. The key contrast with *Winter* and *Kirby* was that in those games the public figures were transformed into “fanciful, creative characters” or “portrayed as ... entirely new character[s].” *No Doubt*, 122 Cal.Rptr.3d at 410. On this front, our case is clearly aligned with *No Doubt*, not with *Winter* and *Kirby*. We believe *No Doubt* offers a

persuasive precedent that cannot be materially distinguished from Keller's case.^{8,9}

The Third Circuit came to the same conclusion in *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013). In *Hart*, EA faced a materially identical challenge under New Jersey right-of-publicity law, brought by former Rutgers quarterback Ryan Hart. *See id.* at 163 n.28 (“*Keller* is simply [*Hart*] incarnated in California.”). Though the Third Circuit was tasked with interpreting New Jersey law, the court looked to the trans-

⁸ EA further argues that *No Doubt* is distinguishable because the video game company in that case entered into a license agreement which it allegedly breached. However, the California Court of Appeal did not rely on breach of contract in its analysis of whether the game was transformative. 122 Cal.Rptr.3d at 412 n.7. Keller asserts here that EA contracted away its First Amendment rights in a licensing agreement with the NCAA that purportedly prohibited the use of athlete likenesses. However, in light of our conclusion that EA is not entitled to a First Amendment defense as a matter of law, we need not reach this issue and leave it for the district court to address in the first instance on remand should the finder of fact determine in post-SLAPP proceedings that EA's use is transformative.

⁹ In dissent, Judge Thomas suggests that this case is distinguishable from other right-to-publicity cases because “an individual college athlete's right of publicity is extraordinarily circumscribed and, in practical reality, nonexistent” because “NCAA rules prohibit athletes from benefitting economically from any success on the field.” Dissent at 1289. Judge Thomas commendably addresses the fairness of this structure, *see* Dissent at 1289 n.5, but setting fairness aside, the fact is that college athletes are not indefinitely bound by NCAA rules. Once an athlete graduates from college, for instance, the athlete can capitalize on his success on the field during college in any number of ways. EA's use of a college athlete's likeness interferes with the athlete's right to capitalize on his athletic success once he is beyond the dominion of NCAA rule.

formative use test developed in California. *See id.* at 158 n.23 (noting that the right-of-publicity laws are “strikingly similar ... and protect similar interests” in New Jersey and California, and that “consequently [there is] no issue in applying balancing tests developed in California to New Jersey”); *see also id.* at 165 (holding that “the Transformative Use Test is the proper analytical framework to apply to cases such as the one at bar”). Applying the test, the court held that “the *NCAA Football* ... games at issue ... do not sufficiently transform [Hart]’s identity to escape the right of publicity claim,” reversing the district court’s grant of summary judgment to EA. *Id.* at 170.

As we have, the Third Circuit considered the potentially transformative nature of the game as a whole, *id.* at 166, 169, and the user’s ability to alter avatar characteristics, *id.* at 166-68. Asserting that “the lack of transformative context is even more pronounced here than in *No Doubt*,” *id.* at 166, and that “the ability to modify the avatar counts for little where the appeal of the game lies in users’ ability to play as, or alongside[,] their preferred players or team,” *id.* at 168 (internal quotation marks omitted), the Third Circuit agreed with us that these changes do not render the *NCAA Football* games sufficiently transformative to defeat a right-of-publicity claim.

Judge Ambro dissented in *Hart*, concluding that “the creative components of *NCAA Football* contain sufficient expressive transformation to merit First Amendment protection.” *Id.* at 175 (Ambro, J., dissenting). But in critiquing the majority opinion, Judge Ambro disregarded *No Doubt* and *Kirby* because “they were not decided by the architect of the Transformative Use Test, the Supreme Court of California.” *Id.* at 172 n.4. He thus “d[id] not attempt to explain or distin-

guish the[se cases'] holdings except to note that [he] believe[s] *No Doubt*, which focused on individual depictions rather than the work in its entirety, was wrongly decided in light of the prior precedent in *Comedy III* and *Winter*.” *Id.* We recognize that we are bound only by the decisions of a state’s highest court and not by decisions of the state’s intermediate appellate court when considering statelaw issues sitting in diversity jurisdiction. See *In re Kirkland*, 915 F.2d 1236, 1238-39 (9th Cir. 1990). Nonetheless, where there is no binding precedent from the state’s highest court, we “must predict how the highest state court would decide the issue using *intermediate appellate court decisions*, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.” *Id.* at 1239 (emphasis added). As stated above, we believe *No Doubt* in particular provides persuasive guidance. We do not believe *No Doubt* to be inconsistent with the California Supreme Court’s relevant decisions, and we will not disregard a well-reasoned decision from a state’s intermediate appellate court in this context. Like the majority in *Hart*, we rely substantially on *No Doubt*, and believe we are correct to do so.

Given that *NCAA Football* realistically portrays college football players in the context of college football games, the district court was correct in concluding that EA cannot prevail as a matter of law based on the transformative use defense at the anti-SLAPP stage. *Cf. Hilton*, 599 F.3d at 910-11.¹⁰

¹⁰ Judge Thomas asserts that “[t]he logical consequence of the majority view is 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,” “jeopardiz[ing] the creative use of historic figures in motion pictures, books, and sound recordings.” Dissent at 1290. We reject the notion that our holding has

B

EA urges us to adopt for right-of-publicity claims the broader First Amendment defense that we have previously adopted in the context of false endorsement claims under the Lanham Act: the *Rogers* test.¹¹ See *Brown v. Elec. Arts*, No. 09-56675, slip op. at 5-6 (applying the *Rogers* test to a Lanham Act claim brought by former NFL player Jim Brown relating to the use of his likeness in EA's *Madden NFL* video games).

Rogers v. Grimaldi is a landmark Second Circuit case balancing First Amendment rights against claims under the Lanham Act. 875 F.2d 994 (2d Cir. 1989). The case involved a suit brought by the famous performer Ginger Rogers against the producers and distributors of *Ginger and Fred*, a movie about two fictional Italian cabaret performers who imitated Rogers and her frequent performing partner Fred Astaire. *Id.* at 996-97. Rogers alleged both a violation of the Lanham Act for creating the false impression that she en-

such broad consequences. As discussed above, one of the factors identified in *Comedy III* "requires an examination of whether a likely purchaser's primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist." McCarthy, *supra*, § 8:72; see *Comedy III*, 21 P.3d at 809. Certainly this leaves room for distinguishing between this case—where we have emphasized EA's primary emphasis on reproducing reality—and cases involving other kinds of expressive works.

¹¹ Keller argues that EA never asked the district court to apply *Rogers* and has therefore waived the issue on appeal. Although it could have been more explicit, EA's anti-SLAPP motion did cite *Rogers* and argue that Keller had not alleged that his likeness was "wholly unrelated" to the content of the video game or a "disguised commercial advertisement," the two prongs of the *Rogers* test.

dorsed the film and infringement of her common law right of publicity. *Id.* at 997.

The *Rogers* court recognized that “[m]ovies, plays, books, and songs are all indisputably works of artistic expression and deserve protection,” but that “[t]he purchaser of a book, like the purchaser of a can of peas, has a right not to be misled as to the source of the product.” *Id.* “Consumers of artistic works thus have a dual interest: They have an interest in not being misled and they also have an interest in enjoying the results of the author’s freedom of expression.” *Id.* at 998. The *Rogers* court determined that titles of artistic or literary works were less likely to be misleading than “the names of ordinary commercial products,” and thus that Lanham Act protections applied with less rigor when considering titles of artistic or literary works than when considering ordinary products. *Id.* at 999-1000. The court concluded that “in general the Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.” *Id.* at 999. The court therefore held:

In the context of allegedly misleading titles using a celebrity’s name, that balance will normally not support application of 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.

We first endorsed the *Rogers* test for Lanham Act claims involving artistic or expressive works in *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir.

2002). We agreed that, in the context of artistic and literary titles, “[c]onsumers expect a title to communicate a message about the book or movie, but they do not expect it to identify the publisher or producer,” and “adopt[ed] the *Rogers* standard as our own.” *Id.* Then, in *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, we considered a claim by a strip club owner that video game maker Rock Star incorporated its club logo into the game’s virtual depiction of East Los Angeles, violating the club’s trademark right to that logo. 547 F.3d 1095, 1096-98 (9th Cir. 2008). We held that Rock Star’s use of the logo and trade dress was protected by the First Amendment and that it therefore could not be held liable under the Lanham Act. *Id.* at 1099-1101. In so doing, we extended the *Rogers* test slightly, noting that “[a]lthough this test traditionally applies to uses of a trademark in the title of an artistic work, there is no principled reason why it ought not also apply to the use of a trademark in the body of the work.” *Id.* at 1099.

In this case, EA argues that we should extend this test, created to evaluate Lanham Act claims, to apply to right-of-publicity claims because it is “less prone to misinterpretation” and “more protective of free expression” than the transformative use defense. Although we acknowledge that there is some overlap between the transformative use test formulated by the California Supreme Court and the *Rogers* test, we disagree that the *Rogers* test should be imported wholesale for right-of-publicity claims. Our conclusion on this point is consistent with the Third Circuit’s rejection of EA’s identical argument in *Hart*. See *Hart*, 717 F.3d at 154-58. As the history and development of the *Rogers* test makes clear, it was designed to protect consumers from the risk of consumer confusion—the hallmark element of a Lanham Act claim. See *Cairns v. Franklin*

Mint Co., 292 F.3d 1139, 1149 (9th Cir. 2002). The right of publicity, on the other hand, does not primarily seek to prevent consumer confusion. *See Hart*, 717 F.3d at 158 (“[T]he right of publicity does not implicate the potential for consumer confusion ...”). Rather, it primarily “protects a form of intellectual property [in one’s person] that society deems to have some social utility.” *Comedy III*, 21 P.3d at 804. As the California Supreme Court has explained:

Often considerable money, time and energy are needed to develop one’s prominence in a particular field. Years of labor may be required before one’s skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. For some, the investment may eventually create considerable commercial value in one’s identity.

Id. at 804-05 (internal quotation marks and citations omitted).

The right of publicity protects the *celebrity*, not the *consumer*. Keller’s publicity claim is not founded on an allegation that consumers are being illegally misled into believing that he is endorsing EA or its products. Indeed, he would be hard-pressed to support such an allegation absent evidence that EA explicitly misled consumers into holding such a belief. *See Brown v. Elec. Arts*, No. 09-56675, slip op. at 23 (holding under the *Rogers* test that, since “Brown’s likeness is artistically relevant to the [*Madden NFL*] games and there are no alleged facts to support the claim that EA explicitly misled consumers as to Brown’s involvement with the games,” “the public interest in free expression outweighs the public interest in avoiding consumer confu-

sion”). Instead, 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. The reasoning of the *Rogers* and *Mattel* courts—that artistic and literary works should be protected unless they explicitly mislead consumers—is simply not responsive to Keller’s asserted interests here. *Cf. Hart*, 717 F.3d at 157 (“Effectively, [EA] argues that [Hart] should be unable to assert a claim for appropriating his likeness as a football player precisely because his likeness was used for a game about football. Adopting this line of reasoning threatens to turn the right of publicity on its head.”).

We recognize that *Rogers* also dealt with a right-of-publicity claim—one under Oregon law—and applied a modified version of its Lanham Act test in order to adapt to that particular context:

In light of the Oregon Court’s concern for the protection of free expression, ... the right of publicity [would not] bar the use of a celebrity’s name in a movie title unless the title was “wholly unrelated” to the movie or was “simply a disguised commercial advertisement for the sale of goods or services.”

875 F.2d at 1004. However, the *Rogers* court was faced with a situation in which the “Oregon Courts ... [had] not determined the scope of the common law right of publicity in that state.” *Id.* at 1002. In the absence of clear state-law precedent, the *Rogers* court was “obliged to engage in the uncertain task of predicting what the New York courts would predict the Oregon courts would rule as to the contours of a right of publicity under Oregon law.” *Id.* In light of *Comedy III* and its progeny, we are faced with no such uncertain task.

Lastly, we note that the only circuit court to import the *Rogers* test into the publicity arena, the Sixth Circuit, has done so inconsistently. In *Parks v. LaFace Records*, the Sixth Circuit indicated that the *Rogers* test was appropriate for right-of-publicity claims, noting that the Restatement (Third) of Unfair Competition had endorsed use of the test in that context. 329 F.3d 437, 461 (6th Cir. 2003) (citing *Restatement (Third) of Unfair Competition* § 47 cmt. c). Subsequently, in *ETW Corp. v. Jireh Publishing, Inc.*, the court acknowledged the *Parks* decision but did not apply the *Rogers* test to the Ohio right-of-publicity claim in question. 332 F.3d at 915, 936 & n.17 (6th Cir. 2003). Instead, the court applied a balancing test from comment d in the *Restatement* (analyzing “the substantiality and market effect of the use of the celebrity’s image ... in light of the informational and creative content”), as well as the transformative use test from *Comedy III. Id.* at 937-38; see *Hart*, 717 F.3d at 157 (“We find *Parks* to be less than persuasive [as to the applicability of the *Rogers* test to right-of-publicity cases] given that just over a month later another panel of the Sixth Circuit decided [*ETW*], a right of publicity case where the Circuit applied the Transformative Use Test.”). Similarly, the Tenth Circuit in *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959 (10th Cir. 1996), and the Eighth Circuit in *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007), rejected the *Rogers* test in favor of a flexible case-by-case approach that takes into account the celebrity’s interest in retaining his or her publicity and the public’s interest in free expression. Therefore, we decline EA’s invitation to extend the *Rogers* test to right-of-publicity claims.

C

California has developed two additional defenses aimed at protecting the reporting of factual information under state law. One of these defenses only applies to common law right-of-publicity claims while the other only applies to statutory right-of-publicity claims. *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 640 (Ct. App. 1995). Liability will not lie for common law right-of-publicity claims for the “publication of matters in the public interest.” *Id.* at 640-41. Similarly, liability will not lie for statutory right-of-publicity claims for the “use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign.” Cal. Civ. Code § 3344(d). Although these defenses are based on First Amendment concerns, *Gill v. Hearst Publ’g Co.*, 253 P.2d 441, 443-44 (Cal. 1953), they are not coextensive with the Federal Constitution, *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 310 n.10 (9th Cir. 1992), and their application is thus a matter of state law.

EA argues that these defenses give it the right to “incorporate athletes’ names, statistics, and other biographical information” into its expressive works, as the defenses were “designed to create ‘extra breathing space’ for the use of a person’s name in connection with matters of public interest.” Keller responds that the right of publicity yields to free use of a public figure’s likeness only to the extent reasonably required to report information to the public or publish factual data, and that the defenses apply only to broadcasts or accounts of public affairs, not to EA’s *NCAA Football* games, which do not contain or constitute such reporting about Keller.

California courts have generally analyzed the common law defense and the statutory defense separately, but it is clear that both defenses protect only the act of publishing or reporting. By its terms, § 3344(d) is limited to a “broadcast or account,” and we have confirmed that the common law defense is about a publication or reporting of newsworthy items. *Hilton*, 599 F.3d at 912. However, most of the discussion by California courts pertains to whether the subject matter of the communication is of “public interest” or related to “news” or “public affairs,” leaving little guidance as to when the communication constitutes a publication or reporting.

For instance, in *Dora v. Frontline Video, Inc.*, a well-known surfer sued the producer of a documentary on surfing entitled “The Legends of Malibu,” claiming misappropriation of his name and likeness. 18 Cal. Rptr. 2d 790, 791 (Ct. App. 1993). The court held that the documentary was protected because it was “a fair comment on real life events which have caught the popular imagination.” *Id.* at 792 (internal quotation marks omitted). The court explained that surfing “has created a lifestyle that influences speech, behavior, dress, and entertainment,” has had “an economic impact,” and “has also had a significant influence on the popular culture,” such that “[i]t would be difficult to conclude that a surfing documentary does not fall within the category of public affairs.” *Id.* at 794-95. Similarly, in *Gionfriddo v. Major League Baseball*, retired professional baseball players alleged that Major League Baseball violated their right of publicity by displaying “factual data concerning the players, their performance statistics, and verbal descriptions and video depictions of their play” in game programs and on its website. 114 Cal. Rptr. 2d 307, 314 (Ct. App. 2001).

The court reasoned that “[t]he recitation and discussion of factual data concerning the athletic performance of these plaintiffs command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection.” *Id.* at 315. And in *Montana v. San Jose Mercury News, Inc.*, former NFL quarterback Joe Montana brought a right-of-publicity action against a newspaper for selling posters containing previously published pages from the newspaper depicting the many Super Bowl victories by Montana and the San Francisco 49ers. *Montana*, 40 Cal. Rptr. 2d at 639-40. The court found that “[p]osters portraying the 49’ers’ [sic] victories are ... a form of public interest presentation to which protection must be extended.” *Id.* at 641 (internal quotation marks omitted).

We think that, unlike in *Gionfriddo*, *Montana*, and *Dora*, EA is not publishing or reporting factual data. EA’s video game is a means by which users can play their own virtual football games, not a means for obtaining information about real-world football games. Although EA has incorporated certain actual player information into the game (height, weight, etc.), its case is considerably weakened by its decision not to include the athletes’ names along with their likenesses and statistical data. EA can hardly be considered to be “reporting” on Keller’s career at Arizona State and Nebraska when it is not even using Keller’s name in connection with his avatar in the game. Put simply, EA’s interactive game is not a publication of facts about college football; it is a game, not a reference source. These state law defenses, therefore, do not apply.¹²

¹² We similarly reject Judge Thomas’s argument that Keller’s right-of-publicity claim should give way to the First Amendment in light of the fact that “the essence of *NCAA Football* is founded

III

Under California's transformative use defense, EA's use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment. We reject EA's suggestion to import the *Rogers* test into the right-of-publicity arena, and conclude that state-law defenses for the reporting of information do not protect EA's use.

AFFIRMED.

on publicly available data." Dissent at 1288. Judge Thomas compares *NCAA Football* to fantasy baseball products that the Eighth Circuit deemed protected by the First Amendment in the face of a right-of-publicity claim in *C.B.C. Distribution and Marketing*, 505 F.3d at 823-24. Dissent at 1288. But there is a big difference between a video game like *NCAA Football* and fantasy baseball products like those at issue in *C.B.C.* Those products merely "incorporate[d] the names along with performance and biographical data of actual major league baseball players." *Id.* at 820. *NCAA Football*, on the other hand, uses virtual likenesses of actual college football players. It is seemingly true that each likeness is generated largely from publicly available data—though, as Judge Thomas acknowledges, EA solicits certain information directly from schools—but finding this fact dispositive would neuter the right of publicity in our digital world. Computer programmers with the appropriate expertise can create a realistic likeness of any celebrity using only publicly available data. If EA creates a virtual likeness of Tom Brady using only publicly available data—public images and videos of Brady—does EA have free reign to use that likeness in commercials without violating Brady's right of publicity? We think not, and thus must reject Judge Thomas's point about the public availability of much of the data used given that EA produced and used actual likenesses of the athletes involved.

THOMAS, Circuit Judge, dissenting:

Because the creative and transformative elements of Electronic Arts' *NCAA Football* video game series predominate over the commercial use of the athletes' likenesses, the First Amendment protects EA from liability. Therefore, I respectfully dissent.

I

As expressive works, video games are entitled to First Amendment protection. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011). The First Amendment affords additional protection to *NCAA Football* because it involves a subject of substantial public interest: collegiate football. *Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330, 1337 (N.D. Ind. 1997). Because football is a matter of public interest, the use of the images of athletes is entitled to constitutional protection, even if profits are involved. *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 643 n.2 (Cal. Ct. App. 1995); *see also* Cal. Civ. Code § 3344(d) (exempting from liability the "use of a name ... or likeness in connection with any ... public affairs, or sports broadcast or account").

Where it is recognized, the tort of appropriation is a creature of common law or statute, depending on the jurisdiction. However, the right to compensation for the misappropriation for commercial use of one's image or celebrity is far from absolute. In every jurisdiction, any right of publicity must be balanced against the constitutional protection afforded by the First Amendment. Courts have employed a variety of methods in balancing the rights. *See, e.g., Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (en banc). The California Supreme Court applies a "transformative use" test

it formulated in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).¹

As the majority properly notes, the transformative use 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.” *Comedy III*, 21 P.3d at 799. The rationale for the test, as the majority notes, is that “when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.” *Id.* at 808.

The five considerations articulated in *Comedy III*, and cited by the majority, are whether: (1) the celebrity likeness is one of the raw materials from which an original work is synthesized; (2) the work is primarily the defendant’s own expression if the expression is something other than the likeness of the celebrity; (3) the literal and imitative or creative elements predominate in the work; (4) the marketability and economic value of the challenged work derives primarily from the fame of the celebrity depicted; and (5) an artist’s skill and talent

¹ I agree with the majority that the test articulated in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), should not be employed in this context. The *Rogers* test is appropriately applied in Lanham Act cases, where the primary concern is with the danger of consumer confusion when a work is depicted as something it is not. 15 U.S.C. § 1125(a)(1). However, the right of publicity is an economic right to use the value of one own’s celebrity. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576-77 (1977). Therefore, a more nuanced balancing is required. In our context, I believe the transformative use test—if correctly applied to the work as a whole—provides the proper analytical framework.

has been manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit the celebrity's fame. *Id.* at 809-10.

Although these considerations are often distilled as analytical factors, Justice Mosk was careful in *Comedy III* not to label them as such. Indeed, the focus of *Comedy III* is a more holistic examination of whether the transformative and creative elements of a particular work predominate over commercially based literal or imitative depictions. The distinction is critical, because excessive deconstruction of *Comedy III* can lead to misapplication of the test. And it is at this juncture that I must respectfully part ways with my colleagues in the majority.

The majority confines its inquiry to how a single athlete's likeness is represented in the video game, rather than examining the transformative and creative elements in the video game as a whole. In my view, this approach contradicts the holistic analysis required by the transformative use test. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170-76 (3d Cir. 2013) (Ambro, J., dissenting).² The salient question is whether the entire work is transformative, and whether the transformative elements predominate, rather than whether an individual persona or image has been altered.

When EA's *NCAA Football* video game series is examined carefully, and put in proper context, I conclude that the creative and transformative elements of the games predominate over the commercial use of the likenesses of the athletes within the games.

² I agree fully with Judge Ambro's excellent dissent in *Hart*, which describes the analytic flaws of applying a transformative use test outside the context of the work as a whole.

A

The first step in conducting a balancing is to examine the creative work at issue. At its essence, EA's *NCAA Football* is a work of interactive historical fiction. Although the game changes from year to year, its most popular features predominately involve role-playing by the gamer. For example, a player can create a virtual image of himself as a potential college football player. The virtual player decides which position he would like to play, then participates in a series of "try-outs" or competes in an entire high school season to gauge his skill. Based on his performance, the virtual player is ranked and available to play at select colleges. The player chooses among the colleges, then assumes the role of a college football player. He also selects a major, the amount of time he wishes to spend on social activities, and practice—all of which may affect the virtual player's performance. He then plays his position on the college team. In some versions of the game, in another mode, the virtual player can engage in a competition for the Heisman Trophy. In another popular mode, the gamer becomes a virtual coach. The coach scouts, recruits, and develops entirely fictional players for his team. The coach can then promote the team's evolution over decades of seasons.

The college teams that are supplied in the game do replicate the actual college teams for that season, including virtual athletes who bear the statistical and physical dimensions of the actual college athletes. But, unlike their professional football counterparts in the *Madden NFL* series, the NCAA football players in these games are not identified.

The gamers can also change their abilities, appearances, and physical characteristics at will. Keller's im-

pressive physical likeness can be morphed by the gamer into an overweight and slow virtual athlete, with anemic passing ability. And the gamer can create new virtual players out of whole cloth. Players can change teams. The gamer could pit Sam Keller against himself, or a stronger or weaker version of himself, on a different team. Or the gamer could play the game endlessly without ever encountering Keller's avatar. In the simulated games, the gamer controls not only the conduct of the game, but the weather, crowd noise, mascots, and other environmental factors. Of course, one may play the game leaving the players unaltered, pitting team against team. But, in this context as well, the work is one of historic fiction. The gamer controls the teams, players, and games.

Applying the *Comedy III* considerations to *NCAA Football* in proper holistic context, the considerations favor First Amendment protection. The athletic likenesses are but one of the raw materials from which the broader game is constructed. The work, considered as a whole, is primarily one of EA's own expression. The creative and transformative elements predominate over the commercial use of likenesses. The marketability and economic value of the game comes from the creative elements within, not from the pure commercial exploitation of a celebrity image. The game is not a conventional portrait of a celebrity, but a work consisting of many creative and transformative elements.

The video game at issue is much akin to the creations the California Supreme Court found protected in *Winter v. DC Comics*, 69 P.3d 473, 476 (Cal. 2003), where the two fabled guitarists Johnny and Edgar Winter were easily identifiable, but depicted as chimeras. It is also consistent with the California Court of Appeal's decision in *Kirby v. Sega of America, Inc.*, 50 Cal. Rptr. 3d 607, 609-10 (Cal. Ct. App. 2006), where a

character easily identified as singer Kierin Kirby, more popularly known as Lady Miss Kier, was transformed into a “fanciful, creative character’ who exists in the context of a unique and expressive video game.” *Id.* at 618. So, too, are the virtual players who populate the world of the *NCAA Football* series.

No Doubt v. Activision Publishing, Inc., 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011), is not to the contrary. The literal representations in *No Doubt* were not, and could not be, transformed in any way. Indeed, in *No Doubt*, the bandmembers posed for motion-capture photography to allow reproduction of their likenesses, *id.* at 402, and the Court of Appeal underscored the fact that the video game did not “permit players to alter the No Doubt avatars in any respect” and the avatars remained “at all times immutable images of the real celebrity musicians,” *id.* at 410. The Court of Appeal cited character immutability as a chief factor distinguishing that case from *Winter* and *Kirby*. *Id.* Unlike the avatars in *No Doubt*, the virtual players in *NCAA Football* are completely mutable and changeable at the whim of the gamer. The majority places great reliance on *No Doubt* as support for its proposition that the initial placement of realistic avatars in the game overcomes the First Amendment’s protection, but the Court of Appeal in *No Doubt* rejected such a cramped construction, noting that “even literal reproductions of celebrities may be ‘transformed’ into expressive works based on the context into which the celebrity image is placed.” *Id.* at 410 (citing *Comedy III*, 21 P.3d at 797).³

³ Of course, to the extent that the Court of Appeal’s opinion in *No Doubt* may be read to be in tension with the transformative use test as articulated by the California Supreme Court in *Comedy III* and *Winter*, it must yield.

Unlike the majority, I would not punish EA for the realism of its games and for the skill of the artists who created realistic settings for the football games. Majority op. at 1279 n.10. That the lifelike roar of the crowd and the crunch of pads contribute to the gamer's experience demonstrates how little of *NCAA Football* is driven by the particular likeness of Sam Keller, or any of the other plaintiffs, rather than by the game's artistic elements.

In short, considering the creative elements alone in this case satisfies the transformative use test in favor of First Amendment protection.

B

Although one could leave the analysis with an examination of the transformative and creative aspects of the game, a true balancing requires an inquiry as to the other side of the scales: the publicity right at stake. Here, as well, the *NCAA Football* video game series can be distinguished from the traditional right of publicity cases, both from a quantitative and a qualitative perspective.

As a quantitative matter, *NCAA Football* is different from other right of publicity cases in the sheer number of virtual actors involved. Most right of publicity cases involve either one celebrity, or a finite and defined group of celebrities. *Comedy III* involved literal likenesses of the Three Stooges. *Hilton v. Hallmark Cards*, 599 F.3d 894, 909-12 (9th Cir. 2009), involved the literal likeness of Paris Hilton. *Winter* involved the images of the rock star brother duo. *Kirby* involved the likeness of one singer. *No Doubt* focused on the likenesses of the members of a specific legendary band.

In contrast, *NCAA Football* includes not just Sam Keller, but thousands of virtual actors. This consideration is of particular significance when we examine, as instructed by *Comedy III*, whether the source of the product marketability comes from creative elements or from pure exploitation of a celebrity image. 21 P.3d at 810. There is not, at this stage of the litigation, any evidence as to the personal marketing power of Sam Keller, as distinguished from the appeal of the creative aspects of the product. Regardless, the sheer number of athletes involved inevitably diminish the significance of the publicity right at issue. *Comedy III* involved literal depictions of the Three Stooges on lithographs and T-shirts. *Winter* involved characters depicted in a comic strip. *Kirby* and *No Doubt* involved pivotal characters in a video game. The commercial image of the celebrities in each case was central to the production, and its contact with the consumer was immediate and unavoidable. In contrast, one could play *NCAA Football* thousands of times without ever encountering a particular avatar. In context of the collective, an individual's publicity right is relatively insignificant. Put another way, if an anonymous virtual player is tackled in an imaginary video game and no one notices, is there any right of publicity infringed at all?

The sheer quantity of the virtual players in the game underscores the inappropriateness of analyzing the right of publicity through the lens of one likeness only. Only when the creative work is considered in complete context can a proper analysis be conducted.

As a qualitative matter, the essence of *NCAA Football* is founded on publicly available data, which is not protected by any individual publicity rights. It is true that EA solicits and receives information directly from colleges and universities. But the information is

hardly proprietary. Personal vital statistics for players are found in college programs and media guides. Likewise, playing statistics are easily available. In this respect, the information used by EA is indistinguishable from the information used in fantasy athletic leagues, for which the First Amendment provides protection, *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823-24 (8th Cir. 2007), or much beloved statistical board games, such as Strat-O-Matic. An athlete's right of publicity simply does not encompass publicly available statistical data. See, e.g., *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 271-72 (2d Cir. 2010) ("The First Amendment protects [e]ven dry information, devoid of advocacy, political relevance, or artistic expression." (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001))) (alteration in original)).⁴

Further, the structure of the game is not founded on exploitation of an individual's publicity rights. The players are unidentified and anonymous. It is true that third-party software is available to quickly identify the players, but that is not part of the EA package. And the fact that the players can be identified by the knowledgeable user by their position, team, and statistics is somewhat beside the point. The issue is whether the marketability of the product is driven by an individual celebrity, or by the game itself. *Comedy III*, 21 P.3d at 810. Player anonymity, while certainly not a complete

⁴ Contrary to the majority's suggestion, I do not claim that any use of a likeness founded on publicly available information is transformative. Majority op. 1283-84 n.12. The majority's analogy to a commercial featuring Tom Brady is inapposite for at least two reasons: (1) a commercial is not interactive in the same way that *NCAA Football* is, and (2) Brady's marketing power is well established, while that of the plaintiffs is not.

defense, bears on the question of how we balance the right of publicity against the First Amendment. This feature of the game places it in stark contrast with *No Doubt*, where the whole point of the enterprise was the successful commercial exploitation of the specifically identified, world-famous musicians.

Finally, as a qualitative matter, the publicity rights of college athletes are remarkably restricted. This consideration is critical because the “right to exploit commercially one’s celebrity is primarily an economic right.” *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 318 (Cal. Ct. App. 2001). NCAA rules prohibit athletes from benefitting economically from any success on the field. NCAA Bylaw 12.5 specifically prohibits commercial licensing of an NCAA athlete’s name or picture. NCAA, *2012–13 NCAA Division I Manual* § 12.5.2.1 (2012). Before being allowed to compete each year, all Division I NCAA athletes must sign a contract stating that they understand the prohibition on licensing and affirming that they have not violated any amateurism rules. In short, even if an athlete wished to license his image to EA, the athlete could not do so without destroying amateur status. Thus, an individual college athlete’s right of publicity is extraordinarily circumscribed and, in practical reality, nonexistent.⁵

⁵ The issue of whether this structure is fair to the student athlete is beyond the scope of this appeal, but forms a significant backdrop to the discussion. The NCAA received revenues of \$871.6 million in fiscal year 2011-12, with 81% of the money coming from television and marketing fees. However, few college athletes will ever receive any professional compensation. The NCAA reports that in 2011, there were 67,887 college football players. Of those, 15,086 were senior players, and only 255 athletes were drafted for a professional team. Thus, only 1.7% of seniors re-

In sum, even apart from consideration of transformative elements, examination of the right of publicity in question also resolves the balance in favor of the First Amendment. The quantity of players involved dilutes the commercial impact of any particular player and the scope of the publicity right is significantly reduced by the fact that: (1) a player cannot own the individual, publicly available statistics on which the game is based; (2) the players are not identified in the game; and (3) NCAA college athletes do not have the right to license their names and likenesses, even if they chose to do so.⁶

ceived any subsequent professional economic compensation for their athletic endeavors. NCAA, *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level* (2011), available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2011/2011+probability+of+going+pro>.

And participation in college football can come at a terrible cost. The NCAA reports that, during a recent five-year period, college football players suffered 41,000 injuries, including 23 non-fatal catastrophic injuries and 11 fatalities from indirect catastrophic injuries. NCAA, *Football Injuries: Data From the 2004/05 to 2008/09 Seasons*, available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/health+and+safety/sports+injuries/resources/football+injuries>.

⁶ While acknowledging that these considerations are relevant to the *Comedy III* analysis, the majority says EA's use of realistic likenesses demonstrates that it sees "value in having an avatar designed to mimic each individual player." Majority op. at 1276 n.7. But the same is true of any right of publicity case. The defendants in *Winter* saw value in using comic book characters that resembled the Winter brothers. Andy Warhol—whose portraits were discussed in *Comedy III*—saw value in using images of celebrities such as Marilyn Monroe. In those cases, the products' marketability derives primarily from the creative elements, not from a pure commercial exploitation of a celebrity image. The same is true of *NCAA Football*.

II

Given the proper application of the transformative use test, Keller is unlikely to prevail. The balance of interests falls squarely on the side of the First Amendment. The stakes are not small. The logical consequence of the majority view is 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. Absent the use of actual footage, the motion picture *Forrest Gump* might as well be just a box of chocolates. Without its historical characters, *Midnight in Paris* would be reduced to a pedestrian domestic squabble. The majority's holding that creative use of realistic images and personas does not satisfy the transformative use test cannot be reconciled with the many cases affording such works First Amendment protection.⁷ I respectfully disagree with this potentially dangerous and out-of-context interpretation of the transformative use test.

For these reasons, I respectfully dissent.

⁷ See, e.g., *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (affording First Amendment protection to an artist's use of photographs of Tiger Woods); J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 8.65 (2013 ed.) (collecting cases); *Hart*, 717 F.3d at 173 (Ambro, J., dissenting) (describing cases).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAMUEL MICHAEL KELLER, on behalf
of himself and all others similarly situated,
Plaintiff,

v.

ELECTRONIC ARTS INC., et al.,
Defendants.

No. C 09-1967 CW
Filed February 8, 2010

**ORDER ON DEFENDANTS' MOTIONS TO DISMISS
(Docket Nos. 34, 47, 48) AND ELECTRONIC ARTS'
ANTI-SLAPP MOTION TO STRIKE (Docket No. 35)**

Defendants Electronic Arts, Inc. (EA), the National Collegiate Athletics Association (NCAA) and the Collegiate Licensing Company (CLC) move separately to dismiss Plaintiff Samuel Michael Keller's claims against them. EA also moves to strike Plaintiff's claims against it pursuant to California Civil Code section 425.16 (Docket No. 35). Plaintiff opposes the motions. As *amici curiae*, James "Jim" Brown and Herbert Anthony Adderley filed a brief in opposition to EA's motion to dismiss. The motions were heard on December 17, 2009. Having considered all of the papers submitted by the parties, the Court DENIES EA's Motion to Dismiss (Docket No. 34), GRANTS NCAA's Motion in part and DENIES it in part (Docket No. 48), DENIES

CLC's Motion (Docket No. 47) and DENIES EA's Motion to Strike (Docket No. 35).

BACKGROUND

Plaintiff is a former starting quarterback for the Arizona State University and University of Nebraska football teams. EA, a Delaware corporation with a principal place of business in California, develops interactive entertainment software. It produces, among other things, the "NCAA Football" series of video games. In the games, consumers can simulate football matches between college and university teams. Plaintiff alleges that, to make the games realistic, EA designs the virtual football players to resemble real-life college football athletes, including himself. He claims that these virtual players are nearly identical to their real-life counterparts: they share the same jersey numbers, have similar physical characteristics and come from the same home state. To enhance the accuracy of the player depictions, Plaintiff alleges, EA sends questionnaires to team equipment managers of college football teams. Although EA omits the real-life athletes' names from "NCAA Football," Plaintiff asserts that consumers may access online services to download team rosters and the athletes' names, and upload them into the games. Plaintiff claims that, in recent iterations, EA has included features that facilitate the upload of this information.

Plaintiff alleges that EA uses his likeness without his consent. He asserts that NCAA, an unincorporated association based in Indiana, and CLC, a Georgia corporation headquartered in Atlanta, facilitated this use. Plaintiff claims that EA, NCAA and CLC met at NCAA's Indiana headquarters and EA's California

headquarters to negotiate the agreements that underlie the alleged misconduct.

Plaintiff alleges other misconduct by NCAA and CLC, related to NCAA's amateurism rules. Plaintiff maintains that NCAA's approval of EA's games violates NCAA's "duty to NCAA athletes to honor its own rules prohibiting the use of student likenesses...." Compl. ¶ 15. He cites NCAA Bylaw 12.5, which prohibits the commercial licensing of the "name, picture or likeness" of athletes at NCAA-member institutions. Compl. ¶ 13. Plaintiff asserts that CLC must honor NCAA's prohibitions on the use of student likenesses.

Plaintiff charges NCAA with violations of Indiana's right of publicity statute, civil conspiracy and breach of contract. He charges CLC with civil conspiracy and unjust enrichment. Against EA, he pleads claims for violations of California's statutory and common law rights of publicity, civil conspiracy, violation of California's Unfair Competition Law and unjust enrichment. He intends to move to certify his case as a class action and seeks, among other things, damages and an injunction prohibiting the future use of his and putative class members' likenesses.

LEGAL STANDARD

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a claim is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007). In considering whether the complaint is sufficient to state

a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). However, this principle is inapplicable to legal conclusions; “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” are not taken as true. *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1949–50, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 555).

DISCUSSION

I. Indiana Right of Publicity Claim

Plaintiff alleges that NCAA violated his Indiana right of publicity. He argues that Indiana law applies to NCAA because its headquarters are located in Indiana and the alleged violation occurred in Indiana. NCAA argues that Plaintiff’s claim fails as a matter of law because he does not allege that it used his image or likeness. Plaintiff responds that NCAA used his likeness because it “expressly reviewed and knowingly approved each version of each NCAA-brand videogame” Opp’n to NCAA’s Mot. to Dismiss at 4.

Under Indiana law, personalities have a property interest in, among other things, their images and likenesses. Ind. Code § 32-36-1-7. A personality is a living or deceased person whose image and likeness have commercial value. *Id.* § 32-36-1-6. Indiana Code section 32-36-1-8 provides,

A person may not use an aspect of a personality’s right of publicity for a commercial purpose during the personality’s lifetime or for one hundred (100) years after the date of the personality’s death without having obtained previous written consent from a person

(emphasis added).

Although the parties do not offer controlling authority on this point, the plain language of the statute favors NCAA's position. Plaintiff argues that NCAA's liability under Indiana law arises from its knowing approval of EA's use of his likeness. This interpretation expands liability under the Indiana statute to include persons who enable right of publicity violations. However, Plaintiff does not offer any authority to show that section 32-36-1-8 encompasses this type of misconduct. The Court declines to adopt Plaintiff's interpretation.

Plaintiff makes a related argument that NCAA should be held liable under Indiana's right of publicity statute as a co-conspirator of EA, which used his likeness. He cites cases that provide that co-conspirators can be held liable as joint tortfeasors for damages caused by another co-conspirator. *See, e.g., Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 511, 28 Cal.Rptr.2d 475, 869 P.2d 454 (1994); *Boyle v. Anderson Fire Fighters Ass'n Local 1262*, 497 N.E.2d 1073, 1079 (Ind. Ct. App. 1986). However, these cases are inapposite because Plaintiff has not alleged that either EA or CLC, NCAA's alleged co-conspirators, violated Indiana's right of publicity statute.

Plaintiff's Indiana right of publicity claim against NCAA is dismissed with leave to amend to allege that NCAA used his likeness or conspired with others to violate his right of publicity under Indiana law.

II. California Right of Publicity Claims

California's right of publicity statute provides,

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.

Cal. Civ. Code § 3344(a). The statutory right of publicity complements the common law right of publicity, which arises from the misappropriation tort derived from the law of privacy. *See Comedy III Prods., Inc. v. Saderup*, 25 Cal.4th 387, 391, 106 Cal.Rptr.2d 126, 21 P.3d 797 (2001). To state a claim under California common law, a plaintiff 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)). Although the statutory and common law rights are similar, there are differences. For example, to state a claim under section 3344, a plaintiff must prove knowing use in addition to satisfying the elements of a common law claim. *Kirby v. Sega of Am., Inc.*, 144 Cal.App.4th 47, 55, 50 Cal.Rptr.3d 607 (2006).

EA does not contest the sufficiency of Plaintiff’s claims. It asserts, however, that his right of publicity claims are barred by the First Amendment and California law. The Court considers and rejects each of these defenses in turn.

A. Transformative Use Defense¹

A defendant may raise an affirmative defense that the challenged 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.” *Hilton*, 580 F.3d at 889 (quoting *Comedy III*, 25 Cal.4th at 407, 106 Cal.Rptr.2d 126, 21 P.3d 797) (internal quotation marks omitted). The defense “poses what is essentially a balancing test between the First Amendment and the right of publicity.” *Hilton*, 580 F.3d at 889 (quoting *Winter v. DC Comics*, 30 Cal.4th 881, 885, 134 Cal.Rptr.2d 634, 69 P.3d 473 (2003)) (internal quotation marks omitted).

To determine whether a work is transformative, a court must inquire into

whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness. And when we use the word “expression,” we mean expression of something other than the likeness of the celebrity.

¹ *Amici* invite the Court to adopt another standard to assess right of publicity claims. Because the Court finds that the transformative test is sufficient for the purposes of this motion, it does not address *amici*’s arguments.

Comedy III, 25 Cal.4th at 406, 106 Cal.Rptr.2d 126, 21 P.3d 797. “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.” *Winter*, 30 Cal.4th at 888, 134 Cal.Rptr.2d 634, 69 P.3d 473 (quoting *Comedy III*, 25 Cal.4th at 408, 106 Cal.Rptr.2d 126, 21 P.3d 797) (internal quotation and editing marks omitted). The analysis “simply requires the court to examine and compare the allegedly expressive work with the images of the plaintiff to discern if the defendant’s work contributes significantly distinctive and expressive content.” *Kirby*, 144 Cal.App.4th at 61, 50 Cal.Rptr.3d 607. “If distinctions exist, the First Amendment bars claims based on appropriation of the plaintiff’s identity or likeness; if not, the claims are not barred.” *Id.*

Two California Supreme Court cases “bookend the spectrum” used to measure a work’s transformative nature. *Hilton*, 580 F.3d at 890-91. On one end, *Comedy III* provides an example of a nontransformative work. There, the defendant’s “literal, conventional depictions of The Three Stooges,” drawn in charcoal and printed on tee-shirts, did not contain transformative elements that warranted protection by the First Amendment. *Comedy III*, 25 Cal.4th at 409, 106 Cal.Rptr.2d 126, 21 P.3d 797. Interpreting *Comedy III*, the Ninth Circuit stated that “it is clear that merely merchandising a celebrity’s image without that person’s consent ... does not amount to a transformative use.” *Hilton*, 580 F.3d at 890.

Winter offers the opposite bookend. There, a comic book publisher depicted two musicians, Johnny and Edgar Winter, as half-human, half-worm cartoon characters. *Winter*, 30 Cal.4th at 890, 134 Cal.Rptr.2d 634, 69 P.3d 473. The court affirmed summary judgment in

favor of the defendant, holding that the images were sufficiently transformative. The court stated,

Although the fictional characters Johnny and Edgar Autumn are less-than-subtle evocations of Johnny and Edgar Winter, the books do not depict plaintiffs literally. Instead, plaintiffs are merely part of the raw materials from which the comic books were synthesized.

Id.

Using *Comedy III* and *Winter* as guideposts, *Kirby* applied the transformative use analysis to a video game. There, the court held that the main character in the defendant's video game was transformed. The plaintiff was a musician and dancer, known for saying the phrase "ooh la la." *Kirby*, 144 Cal.App.4th at 50-51, 50 Cal.Rptr.3d 607. Ulala, the main character in the defendant's game, worked as a news reporter in the twenty-fifth century, "dispatched to investigate an invasion of Earth." *Id.* at 52, 50 Cal.Rptr.3d 607. Although there were similarities between the two, the court held Ulala to be "more than a mere likeness or literal depiction of Kirby." *Id.* at 59, 50 Cal.Rptr.3d 607. "Ulala contains sufficient expressive content to constitute a 'transformative work' under the test articulated by the [California] Supreme Court." *Id.* In particular, Ulala was extremely tall and wore clothing that differed from the plaintiff's and the setting for the game was unlike any in which she had appeared. *Id.*

Here, EA's depiction of Plaintiff in "NCAA Football" is not sufficiently transformative to bar his California right of publicity claims as a matter of law.² In

² EA asks the Court to take judicial notice of the content of the video games "NCAA Football 2006" through "NCAA Football

the game, the quarterback for Arizona State University shares many of Plaintiff's characteristics. For example, the virtual player wears the same jersey number, is the same height and weight and hails from the same state. EA's depiction of Plaintiff is far from the transmogrification of the Winter brothers. EA does not depict Plaintiff in a different form; he is represented as he what he was: the starting quarterback for Arizona State University. Further, unlike in *Kirby*, the game's setting is identical to where the public found Plaintiff during his collegiate career: on the football field.

EA asserts that the video game, taken as a whole, contains transformative elements. However, the broad view EA asks the Court to take is not supported by precedent. In *Winter*, the court focused on the depic-

2009," "NCAA March Madness 2006" through "NCAA March Madness 2008," and "NCAA Basketball 2009," paragraphs four of the Strauser and O'Brien Declarations summarizing the content of these video games; various press releases announcing the release date of the video games; a United States Copyright Office document indicating the date of first publication for "NCAA March Madness 2007;" an August 15, 2008 order from *Kent v. Universal Studios, Inc.*, Case No. 08-2704 (C.D. Cal.); and the content of the CBSSports.com Fantasy College Football game. (Docket No. 36.) Generally, in ruling on a motion to dismiss, a court cannot consider material outside of the complaint. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds in Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002). However, a court may consider exhibits submitted with the complaint and those documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Id.* at 453-54.

Because Plaintiff refers to the video games in his complaint, the Court GRANTS EA's request for judicial notice of them. Plaintiff does not mention the press releases or other materials proffered by EA. Therefore, the Court DENIES EA's request as to the other materials.

tions of the plaintiffs, not the content of the other portions of the comic book. The court in *Kirby* did the same: it compared Ulala with the plaintiff; its analysis did not extend beyond the game's elements unrelated to Ulala. These cases show that this Court's focus must be on the depiction of Plaintiff in "NCAA Football," not the game's other elements.

Accordingly, at this stage, EA's transformative use defense fails.

B. Public Interest Defense

"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, 40 Cal.Rptr.2d 639 (1995)). "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." *Hilton*, 580 F.3d at 892 (quoting *Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536, 542, 18 Cal.Rptr.2d 790 (1993)).

In *Gionfriddo v. Major League Baseball*, the court held that the defendants were entitled to the public interest defense. 94 Cal.App.4th 400, 415, 114 Cal.Rptr.2d 307 (2001). There, the plaintiffs, four former baseball players, claimed that the defendants' use of their names and statistics violated their rights of publicity. *Id.* at 405-07, 114 Cal.Rptr.2d 307. Their information appeared on a website, which reported historical team rosters and listed names of players who won awards during each season. *Id.* at 406, 114 Cal.Rptr.2d 307. The defendants also included still photographs of the plaintiffs from their playing days in

video documentaries. *Id.* The court characterized these uses as “simply making historical facts available to the public through game programs, Web sites and video clips.” *Id.* at 411, 114 Cal.Rptr.2d 307. Because the public had an interest in the plaintiffs’ athletic performance, the First Amendment protected the “recitation and discussion of [their] factual data.” *Id.*

The public interest defense also applied in *Montana*. There, the defendant newspaper sold posters containing reproductions of newspaper pages reporting on the San Francisco 49ers’ win in the 1990 Super Bowl; these pages contained images of the plaintiff. 34 Cal.App.4th at 792, 40 Cal.Rptr.2d 639. The plaintiff conceded that the original newspaper accounts were protected by the First Amendment, but challenged their reproduction as posters. *Id.* at 794, 40 Cal.Rptr.2d 639. The court held that the posters were entitled to the same First Amendment protection as the original news stories. The court stated,

Montana’s name and likeness appeared in the posters for *precisely* the same reason they appeared on the original newspaper front pages: because Montana was a major player in contemporaneous newsworthy sports events. Under these circumstances, Montana’s claim that SJMN used his face and name solely to extract the commercial value from them fails.

Id. (emphasis in original). Citing *Montana*, the Ninth Circuit stated that the public interest defense “is about ... publication or reporting.” *Hilton*, 580 F.3d at 892.

“NCAA Football” is unlike the works in *Gionfriddo* and *Montana*. The game does not merely report or publish Plaintiff’s statistics and abilities. On the contrary, EA enables the consumer to assume the identity

of various student athletes and compete in simulated college football matches. EA is correct that products created for entertainment deserve constitutional protection. *See, e.g., Gionfriddo*, 94 Cal.App.4th at 410, 114 Cal.Rptr.2d 307 (“Entertainment features receive the same constitutional protection as factual news reports.”). But it does not follow that these protections are absolute and always trump the right of publicity.

EA cites cases in which courts held that the public interest exception protected online fantasy baseball and football games. Although these games are more analogous to “NCAA Football,” the cases are nonetheless distinguishable. In *C.B.C. Distribution and Marketing v. Major League Baseball Advanced Media*, a declaratory judgment action, the plaintiff sold “fantasy baseball products” that included the names and statistics of major league baseball players. 505 F.3d 818, 820-21 (8th Cir. 2007). Through these products, consumers could form fantasy baseball teams and compete with other users. *Id.* at 820. “A participant’s success ... depend[ed] on the actual performance of the fantasy team’s players on their respective actual teams during the course of the major league baseball season.” *Id.* at 820-21. The defendant counterclaimed, arguing that these products violated players’ rights of publicity. The court disagreed. It analogized the case to *Gionfriddo*, and held that the use of the players’ information in the fantasy game was a “recitation and discussion” of the players’ information. *Id.* at 823-24 (quoting *Gionfriddo*, 94 Cal.App.4th at 411, 114 Cal.Rptr.2d 307).

C.B.C. Distribution is inapplicable here. Success in “NCAA Football” does not depend on updated reports of the real-life players’ progress during the college football season. Further, EA’s game provides more than just the players’ names and statistics; it offers a

depiction of the student athletes' physical characteristics and, as noted, enables consumers to control the virtual players on a simulated football field. EA's use of Plaintiff's likeness goes far beyond what the court considered in *C.B.C. Distribution*.

EA is not entitled to the public interest defense on this motion.

C. Section 3344(d) Exemption

California Civil Code section 3344(d) provides a public affairs exemption to the statutory right of publicity. It exempts from liability under section 3344 "a use of a name ... or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign." Cal. Civ. Code § 3344(d). This exemption is not coextensive with the public interest defense; it "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." *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, 198 Cal.Rptr. 342 (1983)).

In *Dora v. Frontline Video, Inc.*, a California court held that section 3344(d) barred a plaintiff's statutory right of publicity claim. 15 Cal.App.4th at 546, 18 Cal.Rptr.2d 790. The defendant's documentary on surfing contained, among other things, the plaintiff's name and likeness. *Id.* at 540, 18 Cal.Rptr.2d 790. The court held that this use was exempted by section 3344(d) because the plaintiff's name and likeness were used in connection with public affairs. In doing so, the court addressed the meaning of "public affairs." The court distinguished "public affairs" from "news," stating that

“‘public affairs’ was intended to mean something less important than news.” *Dora*, 15 Cal.App.4th at 545, 18 Cal.Rptr.2d 790. Thus, the subject matter encompassed by public affairs is not limited “to topics that might be covered on public television or public radio.” *Id.* at 546, 18 Cal.Rptr.2d 790.

Here, Plaintiff does not dispute EA’s contention that college athletics are “public affairs.” He asserts, however, that section 3344(d) only applies to factual reporting.³ In essence, he asserts that section 3344(d) applies to the same type of “reporting” as does the public interest defense.

Neither party offered direct authority on the type of use for which the section 3344(d) exemption applies. However, *Montana* is instructive. There, the court stated that “the statutory cause of action specifically exempts from liability the use of a name or likeness in connection with the *reporting* of a matter in the public interest.” 34 Cal.App.4th at 793, 40 Cal.Rptr.2d 639 (emphasis added). Thus, without authority requiring otherwise, the Court construes section 3344(d) to require the same type of activity as the public interest defense discussed above, namely reporting.⁴ Although

³ EA understands Plaintiff to argue that reporting implicates newsworthy information. So interpreted, EA claims, Plaintiff’s argument must fail because *Dora* draws a distinction between “news” and “public affairs.” The Court does not construe Plaintiff’s argument in the same way. Instead, the Court reads Plaintiff to argue that “NCAA Football” does not constitute “reporting” and, as a result, EA does not use his name and likeness in a manner that is exempted by section 3344(d).

⁴ Although section 3344(d) and the public interest defense implicate the same type of activity, they are nonetheless not coextensive because section 3344(d) defines safe harbors for reporting in particular contexts. See *New Kids on the Block*, 971 F.2d at 310 n.10.

"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.

Accordingly, Plaintiff's California statutory and common law right of publicity claims are not barred as a matter of law.

III. Civil Conspiracy Claims

Defendants move separately to dismiss Plaintiff's civil conspiracy claims. All challenge the sufficiency of Plaintiff's claims, arguing that he does not plead an underlying tort, which is a necessary element. CLC separately asserts the agent immunity defense.

Plaintiff did not specify the state law under which his civil conspiracy claims arise. For the purposes of this motion, the Court assumes that his claims arise under California law.

A. Sufficiency of the Claims

Civil conspiracy "is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equipment Corp.*, 7 Cal.4th at 510, 28 Cal.Rptr.2d 475, 869 P.2d 454 (citing *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 784, 157 Cal.Rptr. 392, 598 P.2d 45 (1979)). "Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort." *Applied Equipment Corp.*, 7 Cal.4th at 511, 28 Cal.Rptr.2d 475, 869 P.2d 454.

A claim for civil conspiracy consists of three elements: "(1) the formation and operation of the conspira-

cy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct.” *Kidron v. Movie Acquisition Corp.*, 40 Cal.App.4th 1571, 1581, 47 Cal.Rptr.2d 752 (1995). “The conspiring defendants must ... have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose.” *Id.* at 1582, 47 Cal.Rptr.2d 752 (citing *Wyatt*, 24 Cal.3d at 784-86, 157 Cal.Rptr. 392, 598 P.2d 45). This knowledge must be combined with an intent to aid in achieving the objective of the conspiracy. *Kidron*, 40 Cal.App.4th at 1582, 47 Cal.Rptr.2d 752; *Schick v. Bach*, 193 Cal.App.3d 1321, 1328, 238 Cal.Rptr. 902 (1987). A claim of unlawful conspiracy must contain “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” *Twombly*, 550 U.S. at 556. A bare allegation that a conspiracy existed does not suffice. *Id.*

Plaintiff alleges that there were meetings among Defendants in California and Indiana. Compl. ¶¶ 54-56. He asserts that Defendants knew of NCAA principles barring the licensing of student-athlete identities, but nonetheless approved EA’s games containing the athletes’ likenesses without their consent. Compl. ¶¶ 12-15. Finally, he claims that EA’s actions violated his California statutory and common law rights of publici-

ty.⁵ These factual allegations sufficiently support liability under Plaintiff's civil conspiracy claim.⁶

B. CLC's Agent Immunity Defense

CLC maintains that the agent immunity defense bars Plaintiff's conspiracy claim against it. This defense provides that no liability shall lie "if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have that duty." *Doctors' Co. v. Superior Court*, 49 Cal.3d 39, 44, 260 Cal.Rptr. 183, 775 P.2d 508 (1989).

CLC maintains that Plaintiff's allegations that its role as a licensing company entering into agreements on behalf of NCAA establishes, as a matter of law, that it is NCAA's agent. These allegations are not sufficient

⁵ Plaintiff alleges that Defendants conspired to deprive "class members of their right to protect their names, likenesses and rights to publicity and their contractual, property rights." Compl. ¶ 80. For the purposes of this motion, the Court construes this allegation to refer to EA's alleged violation of Plaintiff's California right of publicity because he does not state a claim based on the tortious conduct of any other Defendant.

⁶ Citing *Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI*, 100 Cal.App.4th 1102, 123 Cal.Rptr.2d 297 (2002), CLC also argues that it cannot accrue tort liability under a civil conspiracy theory because Plaintiff has not alleged that it can make video games. This argument is unavailing. *Everest Investors 8* states that "tort liability from a conspiracy presupposes that the conspirator is legally capable of committing the tort—that he owes a duty to the plaintiff recognized by law and is potentially subject to liability for the breach of that duty." *Id.* at 1106, 123 Cal.Rptr.2d 297. Nothing in the record indicates that CLC is legally incapable of violating Plaintiff's rights of publicity.

at this early stage to establish CLC's entitlement to this defense.

IV. Section 17200 Claim

EA maintains that Plaintiff fails to state a claim under California Business and Professions Code section 17200 because he does not allege an underlying wrong or seek available relief. However, as discussed above, Plaintiff sufficiently asserts right of publicity and civil conspiracy claims. With regard to relief, he seeks an injunction, which EA concedes is available under section 17200. Thus, Plaintiff has stated a section 17200 claim against EA.

V. Breach of Contract Claim

NCAA argues that Plaintiff does not state a breach of contract claim because he has not identified an enforceable contract. Because Plaintiff does not specify the state law under which his claim arises, the Court assumes that California law applies.

To assert a cause of action for breach of contract in California, a plaintiff must plead: (1) existence of a contract; (2) the plaintiff's performance or excuse for non-performance; the defendant's breach; and (4) damages to the plaintiff as a result of the breach. *Armstrong Petrol. Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal.App.4th 1375, 1391 n. 6, 11 Cal.Rptr.3d 412 (2004).

Plaintiff has not identified a contract that he is seeking to enforce. Although he refers to an NCAA document as a contract, he does not attach the document to his complaint. Instead, he states that by signing the document, the athletes agree that "they have 'read and understand' the NCAA's rules" and that "to the best of [their] knowledge [they] have not violated

any amateurism rules.” Compl. ¶ 14. These phrases, on their own, do not indicate that the document is a contract. Plaintiff’s breach of contract claim against NCAA is dismissed with leave to amend to allege or attach an enforceable contract.

VI. Unjust Enrichment Claims

Plaintiff claims that EA and CLC were unjustly enriched through the sale of video games that use his likeness. EA and CLC argue that his claim is barred because California law does not provide a cause of action for unjust enrichment. Even if it did, EA and CLC argue, Plaintiff’s allegations regarding the existence of a contract with NCAA would independently bar an unjust enrichment claim.

California courts appear to be split on whether there is an independent cause of action for unjust enrichment. *Baggett v. Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1270-71 (C.D. Cal. 2007) (applying California law). One view is that unjust enrichment is not a cause of action, or even a remedy, but rather a general principle, underlying various legal doctrines and remedies. *McBride v. Boughton*, 123 Cal.App.4th 379, 387, 20 Cal.Rptr.3d 115 (2004). In *McBride*, the court construed a “purported” unjust enrichment claim as a cause of action seeking restitution. *Id.* There are at least two potential bases for a cause of action seeking restitution: (1) an alternative to breach of contract damages when the parties had a contract which was procured by fraud or is unenforceable for some reason; and (2) where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct and the plaintiff chooses not to sue in tort but to seek restitution on a quasi-contract theory. *Id.* at 388, 20 Cal.Rptr.3d 115. In the latter case, the law implies a

contract, or quasi-contract, without regard to the parties' intent, to avoid unjust enrichment. *Id.*

Another view is that a cause of action for unjust enrichment exists and its elements are receipt of a benefit and unjust retention of the benefit at the expense of another. *Lectrodryer v. SeoulBank*, 77 Cal.App.4th 723, 726, 91 Cal.Rptr.2d 881 (2000); *First Nationwide Savings v. Perry*, 11 Cal.App.4th 1657, 1662-63, 15 Cal.Rptr.2d 173 (1992).

Even under the more restrictive analysis of *McBride*, Plaintiff sufficiently pleads claims for restitution against EA and CLC on the theory that they obtained a benefit from him through their alleged wrongful conduct. His breach of contract claim against NCAA does not bar these claims. Although EA and CLC correctly note that the existence of such a contract could bar a restitutionary claim against a contracting party, it is not clear that his alleged contract with NCAA defined any rights between him and EA and CLC. *Cf. Cal. Med. Ass'n v. Aetna U.S. Healthcare of Cal.*, 94 Cal.App.4th 151, 172, 114 Cal.Rptr.2d 109 (2001) (holding that "as a matter of law, a quasi-contract action for unjust enrichment does not lie where, as here, express binding agreements exist and define the parties' rights"). Thus, Plaintiff has adequately stated his unjust enrichment claim for restitution against EA and CLC.

VII. EA's Anti-SLAPP Motion to Strike

Finally, EA moves under California Code of Civil Procedure section 425.16 to strike all of Plaintiff's claims against it. Section 425.16(b)(1), which addresses Strategic Lawsuits Against Public Participation (SLAPP), provides,

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

California anti-SLAPP motions are available to litigants proceeding in federal court. *Thomas v. Fry's El-ecs., Inc.*, 400 F.3d 1206, 1206 (9th Cir. 2005). California courts analyze anti-SLAPP motions in two steps. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." *Equilon Enter. v. Consumer Cause, Inc.*, 29 Cal.4th 53, 67, 124 Cal.Rptr.2d 507, 52 P.3d 685 (2002). Second, the court "determines whether the plaintiff has demonstrated a probability of prevailing on the claim." *Id.*

Assuming that the challenged causes of action arise from protected activity, Plaintiff makes a sufficient showing of his probability of success on the merits. EA incorrectly argues that Plaintiff has a substantial burden to show probability of success. It maintains that the Court must apply "the same standard governing motions for summary judgment, nonsuit, or directed verdict." EA's Mot. to Strike at 12. However, this standard does not apply in federal court.

"At the second step of the anti-SLAPP inquiry, the required probability that [a party] will prevail need not be high." *Hilton*, 580 F.3d at 888-89. The "statute does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning; it sub-

jects to potential dismissal only those actions in which the plaintiff cannot state and substantiate a legally sufficient claim.” *Id.* at 888 (quoting *Navellier v. Sletten*, 29 Cal.4th 82, 93, 124 Cal.Rptr.2d 530, 52 P.3d 703 (2002)) (quotation marks omitted). In *Thomas v. Fry’s Electronics*, the case that provides that anti-SLAPP motions are available to litigants proceeding in federal court, the court stated that “federal courts may not impose a heightened pleading requirement in derogation of federal notice pleading rules.” 400 F.3d at 1207; *see also Empress LLC v. City & County of S.F.*, 419 F.3d 1052, 1056 (9th Cir.2005) (holding that “a heightened pleading standard should only be applied when the Federal Rules of Civil Procedure so require”); *Verizon, Inc. v. Covad Commc’ns. Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (holding that procedural “state laws are not used in federal court if to do so would result in a direct collision with a Federal Rule of Civil Procedure” and noting that federal courts have “accordingly refused to apply certain discovery-limiting provisions of the anti-SLAPP statute because they would conflict with Fed. R. Civ. P. 56”).

Under Federal Rule of Civil Procedure 8, Plaintiff has sufficiently stated his claims against EA. Accordingly, the Court denies EA’s special motion to strike Plaintiff’s claims as a SLAPP.

CONCLUSION

For the foregoing reasons, the Court DENIES EA’s Motion to Dismiss (Docket No. 34), GRANTS NCAA’s Motion in part and DENIES it in part (Docket No. 48), DENIES CLC’s Motion (Docket No. 47) and DENIES EA’s Motion to Strike (Docket No. 35). Plaintiff’s claims for violation of his Indiana right of publicity and breach of contract against NCAA are

64a

dismissed with leave to amend. In accordance with this Court's Order of January 15, 2010 on consolidation, Plaintiff has thirty days from the date of this Order to file a consolidated amended complaint. A case management conference is scheduled for April 27, 2010 at 2:00 p.m.

IT IS SO ORDERED.

Dated: February 8, 2010

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NCAA STUDENT-ATHLETE NAME & LIKENESS
LICENSING LITIGATION,

SAMUEL MICHAEL KELLER, *et al.*,
Plaintiffs-Appellees,
v.

ELECTRONIC ARTS INC.,
Defendant-Appellant,
and
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Defendants.

No. 10-15387
D.C. No. 4:09-cv-01967-CW
Northern District of California, Oakland
Filed August 21, 2013

ORDER

Before: THOMAS and BYBEE, Circuit Judges, and
QUIST, Senior District Judge.

Appellant's motion for stay of the issuance of the
mandate pending application for writ of certiorari is
GRANTED. Fed. R. App. P. 41(b).

Therefore, it is ordered that the mandate is stayed
pending the filing of the petition for writ of certiorari in
the Supreme Court. The stay shall continue until final
disposition by the Supreme Court.