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(LASC Case No. BC520019)

COURT OF APPEAL – SECOND DIST.

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**COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO**

ELECTRONIC ARTS INC.,

Appellant,

vs.

JAMES BROWN,

Respondent.

Appeal from an Order Denying a Special Motion to Strike
Los Angeles County Superior Court,
Honorable Maureen Duffy-Lewis, Judge

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	7
II. CALIFORNIA’S RIGHT-OF-PUBLICITY LAW IS CONTENT-BASED AND, AS APPLIED TO EXPRESSIVE WORKS, DOES NOT SURVIVE STRICT SCRUTINY.....	9
A. EA Raised Strict Scrutiny Below.....	10
B. Labeling The Right Of Publicity As An “Intellectual Property” Right Does Not Insulate It From Strict Scrutiny.	12
C. <i>Zacchini</i> And <i>Comedy III</i> Do Not Prevent This Court From Applying Strict Scrutiny.....	13
D. In <i>Sarver</i> , The Ninth Circuit Joined Other Courts In Recognizing That The Right Of Publicity Is A Content-Based Restriction When Applied To Expressive Works.....	18
E. Because There Is No Compelling State Interest In Allowing Right-Of-Publicity Claims Against Expressive Works That Use Individuals’ Names, Likenesses, Or Biographical Information, Brown’s Claims Must Be Stricken.	23
III. IF THE COURT REACHES EA’S OTHER DEFENSES, BROWN’S CLAIMS STILL FAIL.....	26
A. The Public-Affairs Exemption	26
B. The Public-Interest Defense	28
C. The Transformative-Use Test	33
D. The Incidental-Use Test	43
E. The <i>Rogers</i> /Restatement Test	49
IV. CONCLUSION	51

TABLE OF AUTHORITIES

Page

CASES

<i>Aligo v. Time-Life Books</i> , 1994 U.S. Dist. Lexis 21559 (N.D. Cal. Dec. 19, 1994)	38
<i>Arkansas Writers' Project v. Ragland</i> , 481 U.S. 221 (1986).....	3
<i>Bank of Italy v. Bentley</i> , 217 Cal. 644 (1933)	27, 43
<i>Bill Graham Archives v. Dorling Kindersley Ltd.</i> , 448 F.3d 605 (2d Cir. 2006)	36
<i>Boos v. Barry</i> , 485 U.S. 312 (1988).....	3
<i>Brown v. Electronic Arts</i> , 724 F.3d 1235 (9th Cir. 2013)	17, 33, 35
<i>Brown v. Entertainment Merchants Ass'n ("EMA")</i> , 131 S. Ct. 2729 (2011).....	2, 3, 26, 36
<i>C.B.C. Distribution & Mktg. v. Major League Baseball Advanced Media</i> , 505 F.3d 818 (8th Cir. 2007)	37
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942).....	12
<i>Comedy III Prods. v. Gary Saderup, Inc.</i> , 25 Cal. 4th 387 (2001)	passim
<i>Daly v. Viacom</i> , 238 F. Supp. 2d 1118 (N.D. Cal. 2002).....	12
<i>Davis v. Electronic Arts, Inc.</i> , 775 F.3d 1172 (9th Cir. 2015)	43

<i>Doe v. Gangland Prods.</i> , 730 F.3d 946 (9th Cir. 2013)	20
<i>Dora v. Frontline Video</i> , 15 Cal. App. 4th 536 (1993)	20, 21, 24, 43
<i>Downing v. Abercrombie & Fitch</i> , 265 F.3d 994 (9th Cir. 2001)	25
<i>Dryer v. NFL</i> , 55 F. Supp. 3d 1181 (D. Minn. 2014).....	5, 12
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003).....	6
<i>ETW Corp. v. Jireh Publ'g</i> , 332 F.3d 915 (6th Cir. 2003)	8
<i>Frazier v. Boomsma</i> , 2007 U.S. Dist. LEXIS 72427 (D. Ariz. Sept. 27, 2007)	5, 12
<i>Gionfriddo v. Major League Baseball</i> , 94 Cal. App. 4th 400 (2001)	20, 21, 24
<i>Guglielmi v. Spelling-Goldberg Prods.</i> , 25 Cal. 3d 860 (1979)	8, 32
<i>Hart v. Electronic Arts, Inc.</i> , 717 F.3d 141 (3rd Cir. 213)	31, 32, 43
<i>Heller v. NBCUniversal, Inc.</i> , CV-15-09631-MWF-KS (C.D. Cal. Mar. 30, 2016)	23
<i>Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston</i> , 515 U.S. 557 (1995).....	34
<i>Hustler Magazine v. Falwell</i> , 485 U.S. 46 (1988).....	15
<i>In re Tam</i> , 808 F.3d 1321 (Fed. Cir. 2015)	7
<i>Johnson v. Harcourt, Brace, Jovanovich</i> , 43 Cal. App. 3d 880 (1974)	43

<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U.S. 495 (1952).....	35
<i>Keller v. Electronic Arts</i> , 724 F.3d 1268 (9th Cir. 2013)	passim
<i>Ladany v. William Morrow & Co.</i> , 465 F. Supp. 870 (S.D.N.Y. 1978)	40, 41, 42
<i>McCallum v. McCallum</i> , 190 Cal. App. 3d 308 (1987)	43
<i>Miranda B. v. Kitzhaber</i> , 328 F. 3d 1181 (9th Cir. 2003)	14
<i>Montana v. San Jose Mercury News</i> , 34 Cal. App. 4th 790 (1995)	20, 24
<i>No Doubt v. Activision</i> , 192 Cal. App. 4th 1018 (2011)	passim
<i>Noriega v. Activision</i> , 2014 WL 5930149 (Los Angeles Super. Ct. Oct. 27, 2014)	35, 36
<i>People v. Brown</i> , 54 Cal. 4th 314 (2012)	7
<i>Polydoros v. Twentieth Century Fox Film Corp.</i> , 67 Cal. App. 4th 318 (1998)	37
<i>Pooley v. Nat’l Hole-in-One Ass’n</i> , 89 F. Supp. 2d 1108 (D. Ariz. 2000)	38, 39
<i>Reed v. Town of Gilbert</i> , 135 S. Ct. 2218 (2015).....	3, 13, 18, 19
<i>Regan v. Time, Inc.</i> , 468 U.S. 641 (1984).....	3
<i>Rogers v. Grimaldi</i> , 875 F.2d 994 (2nd Cir. 1989)	20, 42, 43, 44
<i>Rosa and Raymond Parks Institute for Self Development v. Target Corporation</i> , 2016 WL 25495 (11th Cir. Jan. 4, 2016).....	23

<i>Sarver v. Chartier</i> , 2016 U.S. App. Lexis 2664 (9th Cir. Feb. 17, 2016).....	passim
<i>Sarver v. The Hurt Locker LLC</i> , 2011 U.S. Dist. Lexis 157503 (C.D. Cal. Oct. 13, 2011)	12, 19, 28
<i>Schad v. Mt. Ephraim</i> , 452 U.S. 61 (1981).....	36
<i>Simon & Schuster v. N.Y. State Crime Victims Bd.</i> , 502 U.S. 105 (1991).....	3
<i>SOFA Entm't v. Dodger Prods.</i> , 709 F.3d 1273 (9th Cir. 2013)	36
<i>Stewart v. Rolling Stone</i> , 181 Cal. App. 4th 664 (2010)	10, 43
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989).....	3
<i>U.S. v. Alvarez</i> , 132 S. Ct. 2537 (2012).....	3, 12
<i>U.S. v. Stevens</i> , 559 U.S. 460 (2010).....	3, 12
<i>Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council</i> , 425 U.S. 748 (1976).....	14
<i>Winter v. DC Comics</i> , 30 Cal. 4th 881 (2003)	26, 28
<i>Yeager v. Cingular Wireless</i> , 673 F. Supp. 2d 1089 (E.D. Cal. 2009)	38, 39
<i>Zacchini v. Scripps-Howard Broad.</i> , 433 U.S. 562 (1977).....	passim

STATUTES

California Business & Professions Code § 17200	43
California Civil Code § 3344(a).....	20
California Civil Code § 3344(d).....	20, 21

Lanham Act 35, 44

CONSTITUTIONAL PROVISIONS

United States Constitution, First Amendment..... passim

I. INTRODUCTION

In February, the Ninth Circuit held that “California’s right of publicity law clearly restricts speech based upon its content.” *Sarver v. Chartier*, 2016 U.S. App. Lexis 2664, *24 (9th Cir. Feb. 17, 2016). Thus, the court explained that as applied to expressive works, the law “is presumptively unconstitutional, and cannot stand unless [the plaintiff] can show a compelling state interest in preventing the defendants’ speech.” *Id.* at *30. Because no such interest justified punishing the defendants for using the plaintiff’s biographical information in their film *The Hurt Locker*, the court affirmed an order striking his right-of-publicity claims. *Id.*¹

The result in *Sarver* is not surprising. For decades, courts have applied an array of constitutional and statutory defenses to dismiss right-of-publicity claims that target the use of real-life individuals’ names, likenesses, and biographical information in expressive works. *See* Appellant’s Opening Brief (“AOB”) 37-40. But the *Sarver* court did not consider any of those defenses; instead, it first examined whether the right of publicity is a content-based restriction on speech when applied to expressive works. 2016 U.S. App. Lexis 2664 at *24-*30. As in *Sarver* and other strict-scrutiny cases cited in EA’s Opening Brief (*see* AOB 16,

¹ The plaintiff in *Sarver* has filed a petition for rehearing and rehearing *en banc*. *See* Nos. 11-56986, 12-55429 (9th Cir. March 1, 2016).

20-21), this Court should begin (and may end) its analysis by asking this threshold question: is California’s right-of-publicity law, as applied to EA’s expressive work, a content-based restriction on speech?

The answer is “yes.” Brown’s claims, like the claims in *Sarver*, arise from the content of EA’s work – in particular, EA’s decision to include biographical information about him in its expressive work. *See* 1 Appellant’s Appendix (“1AA”):7 at ¶ 31. It is irrelevant that EA’s expressive work is a video game and the *Sarver* defendants’ work was a film; the U.S. Supreme Court has made clear that video games enjoy the same First Amendment protection as films, books, and other forms of expression, and cannot be singled out for disfavored treatment. *Brown v. Entertainment Merchants Ass’n (“EMA”)*, 131 S. Ct. 2729, 2733 (2011).

Because the right of publicity as applied to *Madden NFL* is a content-based restriction, Brown’s claims must be stricken unless the Court identifies a compelling state interest in preventing EA from using his biographical information in its expressive work. Brown has not even attempted to identify any such state interest (*see* Respondent’s Brief (“RB”) 38-41), and none exists. Brown’s claims must be dismissed for this reason alone.

By applying strict scrutiny, the Court should dispose of Brown’s claims without having to address the other statutory and constitutional

defenses that EA has raised. If the Court reaches those defenses, however, they, too, defeat Brown’s claims as a matter of law.

**II. CALIFORNIA’S RIGHT-OF-PUBLICITY LAW IS
CONTENT-BASED AND, AS APPLIED TO EXPRESSIVE WORKS,
DOES NOT SURVIVE STRICT SCRUTINY.**

The U.S. Supreme Court has mandated that courts apply strict scrutiny to resolve the constitutionality of laws that target the content of speech. *See, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Even laws of general application that are not directed at particular viewpoints or messages are content-based (and are subject to strict scrutiny) if they “target speech based on its communicative content.” *Id.* Applying strict scrutiny, the Court has invalidated a series of federal, state, and local laws in recent years.²

² *See, e.g., Reed*, 135 S. Ct. at 2226 (ordinance restricting directional signs); *U.S. v. Alvarez*, 132 S. Ct. 2537, 2543, 2547 (2012) (statute restricting false statements about military honors); *EMA*, 131 S. Ct. at 2741 (statute restricting violent video games); *U.S. v. Stevens*, 559 U.S. 460, 482 (2010) (statute restricting depictions of animal cruelty); *Simon & Schuster v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 125-126 (1991) (“Son of Sam” statute targeting felons’ books about crimes); *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (statute prohibiting flag desecration); *Boos v. Barry*, 485 U.S. 312, 318-322 (1988) (statute prohibiting display of disparaging signs near foreign embassies); *Arkansas Writers’ Project v. Ragland*, 481 U.S. 221, 233 (1986) (tax targeting certain periodicals); *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984) (statute restricting depictions of currency).

Here, Brown has sued EA based on its editorial decision to include certain content – specifically, biographical facts about him (1AA:7 at ¶ 31) – in an expressive work. His claims target the content of EA’s work – just as the plaintiff’s right-of-publicity claims in *Sarver* targeted the content of the filmmakers’ work – and likewise are subject to strict scrutiny.

Brown’s arguments to the contrary are unpersuasive, and he fails to identify any compelling state interest that would justify imposing liability on EA.

A. EA Raised Strict Scrutiny Below.

Brown’s contention that EA “forfeited” its strict-scrutiny argument is baseless. *See* RB 38, 41. In its anti-SLAPP motion below, EA expressly argued that:

- “As applied to expressive works, the right of publicity is clearly content-based: It prohibits the unlicensed use of particular content (people’s name or likenesses)” (*see* 1AA:32) (internal citations and quotation marks omitted);
- Content-based restrictions on speech are presumptively unconstitutional and subject to strict scrutiny (*see id.*);
- The U.S. Supreme Court has created very few exceptions to this rule, none of which apply to Brown’s right-of-publicity claims (*see id.*); and

- The right of publicity “is presumptively invalid as applied to expressive works, and should be subject to strict constitutional scrutiny.” *Id.*

Brown even responded to EA’s strict-scrutiny argument in his opposition below, asserting: (1) that “[n]o California court has ever held [that the right of publicity is content based]”; and (2) that “no court has given EA the deference it seeks.” 2 Appellant’s Appendix (“2AA”):310 at n.2.

EA’s reply brief below featured an entire section under the heading “The Right Of Publicity Is A Content-Based Restriction And Is Presumptively Invalid.” 2AA:345. In that section, EA explained that:

- While no California court opinion has addressed the issue of whether the right of publicity is a content-based restriction on speech, other courts have answered that question affirmatively, including *Dryer v. NFL*, 55 F. Supp. 3d 1181 (D. Minn. 2014), *aff’d on other grounds*, 2016 U.S. App. Lexis 3435 (February 26, 2016); and *Frazier v. Boomsma*, 2007 U.S. Dist. LEXIS 72427 (D. Ariz. Sept. 27, 2007) (*see* 2AA:346);
- Brown did not even attempt to identify any compelling state interest to support his right-of-publicity claims against EA, or to show that the claims are narrowly tailored to serve that

compelling interest or that there are no less restrictive alternatives (*see id.*);

- Brown did not argue that the right of publicity falls within a recognized category of restrictions on speech that is exempt from strict scrutiny (*see id.*); and
- Brown’s claims, therefore, do not survive strict scrutiny (*see* 2AA:347).

Counsel for EA and Brown also addressed the application of strict scrutiny during oral argument. *See* 1 Reporter’s Transcript 9:4-10:1; 10:11-11:24.

Under these circumstances, there is no merit whatsoever to Brown’s forfeiture argument.

B. Labeling The Right Of Publicity As An “Intellectual Property” Right Does Not Insulate It From Strict Scrutiny.

Next, Brown mistakenly argues that “intellectual property” rights are categorically exempt from strict scrutiny. RB 40. There are two general types of intellectual-property protection: (1) copyright and patents, authority for which is provided by the federal Constitution; and (2) statutory and common-law forms of protection, such as trademark and the right of publicity. Copyright and patent laws are not subject to strict scrutiny because they proceed from constitutional authority that is coordinate to the First Amendment: Art. I, § 8 of the U.S. Constitution. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). But purely

statutory or common-law forms of protection – like trademark and the right of publicity – have no constitutional imprimatur to exempt them from strict scrutiny. The Federal Circuit confirmed this principle in *In re Tam*, 808 F.3d 1321, 1334-1337 (Fed. Cir. 2015), holding that a federal trademark law was content-based and presumptively unconstitutional. 808 F.3d at 1334-1337. As *In re Tam* demonstrates, Brown cannot exempt the right of publicity from strict scrutiny merely by describing it as an intellectual-property right.

C. *Zacchini And Comedy III Do Not Prevent This Court From Applying Strict Scrutiny.*

Brown insists that “the U.S. Supreme Court and the California Supreme Court have both held that strict scrutiny does not apply to right of publicity claims arising from expressive works.” RB 39 (citing *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (1977) and *Comedy III Prods. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001)). But strict scrutiny was not even addressed – much less decided – in either of those opinions. Indeed, neither the U.S. Supreme Court nor the California Supreme Court ever has addressed whether strict scrutiny applies to right-of-publicity claims targeting expressive works. “As cases are not authority for propositions not considered,” *People v. Brown*, 54 Cal. 4th 314, 330 (2012), *Zacchini* and *Comedy III* do not prevent this Court from applying strict scrutiny.

1. The *Zacchini* Court Addressed An Anomalous Right-Of-Publicity Claim Involving The Appropriation Of The Plaintiff’s Entire Performance, And Its Narrow Holding Provides Little Guidance Here.

Because *Zacchini* is the U.S. Supreme Court’s only right-of-publicity decision, plaintiffs – including Brown – often overstate its precedential value. The California Supreme Court has reminded us that “*Zacchini* was not an ordinary right of publicity case: the defendant television station had appropriated the plaintiff’s *entire act*, a species of common law copyright violation.” *Comedy III*, 25 Cal. 4th at 401 (emphasis in original); *see also Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 871 (1979) (distinguishing *Zacchini*). The Sixth Circuit likewise has instructed that in deciding right-of-publicity cases, courts “must look beyond *Zacchini*[,]” which was “very ‘narrowly drawn’ in that it involved the *wholesale reproduction of a live ‘entire act*[.]” *ETW Corp. v. Jireh Publ’g*, 332 F.3d 915, 956-957 (6th Cir. 2003) (emphasis added). The *ETW* court emphasized that the defendant’s conduct in *Zacchini* was “quite distinguishable from the unauthorized use of a person’s *identity*, particularly when the unauthorized use is in the form of an expressive work,” as in the present case. *Id.* (emphasis added).

In *Zacchini*, the Court held that a “human cannonball” performer could maintain a right-of-publicity claim against a television station that filmed and broadcast not just the performer’s likeness or biographical

information, but his “entire act,” making the public “less willing to pay to see” the act live. 433 U.S. at 575, 578. Hugo Zacchini was in the middle of a two-month run at a county fair, performing a twenty-second act that people were paying to see, when a local reporter filmed it against his wishes and the station broadcast it in its entirety. *Id.* at 563-564. In response, Zacchini filed what the Court characterized as a “narrow[] claim,” alleging that the station impermissibly “televised an entire act that [he] ordinarily gets paid to perform.” *Id.* at 574 n.10. It was crucial to the Court that the television station appropriated the “*entire performance*” by which Zacchini made his living. 433 U.S. at 575-576 (emphasis added). If the station could broadcast the entire act for free to an audience that otherwise would pay to see it, Zacchini would lose his only financial reward. And if he lost that reward, he would have no financial incentive to create more performances. *See id.*

Contrary to Brown’s suggestion, the *Zacchini* Court never considered whether strict scrutiny should apply. Instead, the Court focused primarily on whether the First Amendment compelled Ohio courts to apply an actual-malice-type privilege recognized by the Ohio Supreme Court to claims under that state’s right of publicity. 433 U.S. at 565, 569-571. The U.S. Supreme Court held that it did not. *Id.* at 569-571. Thus, at most, *Zacchini* stands for the propositions that: (1) the First Amendment is not an absolute bar to right-of publicity actions arising from transmission of an

“entire act” that is being sold contemporaneously by the plaintiff; and (2) state courts are not required to import the U.S. Supreme Court’s actual-malice standard from libel law into the right-of-publicity context (although California has elected to do so, *see, e.g., Stewart v. Rolling Stone*, 181 Cal. App. 4th 664, 680-682 (2010)). *Zacchini*, 433 U.S. at 574, 575 n.10. Accordingly, nothing in *Zacchini* prevents this Court from considering whether California’s right-of-publicity law is a content-based restriction when applied to the use of an individual’s name, likeness, or biographical information in an expressive work. *See Sarver*, 2016 U.S. App. Lexis 2664 at *24.

2. *Zacchini* Does Not Require The Court To Apply A Balancing Test.

Brown also asserts that *Zacchini* compels courts to use a balancing test to decide First Amendment challenges to right-of-publicity claims. RB 38. Yet, the Court in *Zacchini* did not address right-of-publicity claims arising from the use of a real-life person’s name or likeness, as opposed to his entire *performance*, in an expressive work, much less promulgate any test for resolving those claims. Instead, the Court sidestepped that issue, holding only that “[w]herever the line in particular situations is to be drawn ... the First and Fourteenth Amendments do not immunize the media when they broadcast a performer’s *entire act*.” *Id.* at 575 (emphasis added).

Of particular importance here, the Court distinguished claims, like Brown’s and virtually all other right-of-publicity plaintiffs’, that involve the “use of a [plaintiff’s] name or picture” in an expressive work, from Zacchini’s, which arose from “the broadcast of [his] entire performance” and threatened “the heart of [his] ability to earn a living as an entertainer.” *Id.* at 576. The Court observed that a “very different case” would have resulted if the station had “merely reported that petitioner was performing at the fair, and described or commented on his act, with or without showing his picture on television.” *Id.* at 569. That “very different case” is what currently is before this Court: a right-of-publicity claim targeting not the transmission of an entertainer’s “entire act,” but the use of an athlete’s publicly-available biographical information in an expressive work that includes a vast array of other creative and editorial elements. AOB 7; 1AA:7 at ¶ 31; 1AA:45 at ¶ 5; 1AA:46 at ¶¶ 6-8; 1AA:47 at ¶ 12; 1AA:72-137; 1AA:59 at ¶ 14; 1AA:242-251. Brown is not selling tickets to live performances of him playing football, and EA’s use of his alleged likeness does not remotely jeopardize his “ability to earn a living.” Nor is *Madden NFL* a replacement for the actual performance of Brown or any other current or former NFL player. Thus, *Zacchini* does not require the use of a balancing test.

D. In *Sarver*, The Ninth Circuit Joined Other Courts In Recognizing That The Right Of Publicity Is A Content-Based Restriction When Applied To Expressive Works.

Brown’s argument that “[n]o court” has applied strict scrutiny to right-of-publicity claims was incorrect even when he filed his Respondent’s Brief, six days before *Sarver* was decided. RB 40. As EA noted in its Opening Brief, a court found an Arizona right-of-publicity statute to be content-based in 2007, *Frazier*, 2007 U.S. Dist. Lexis 72427, at *42-*43, *48, and another court dismissed right-of-publicity claims in 2014 on the grounds that “content-based restrictions on non-commercial speech are appropriate ‘only in the most extraordinary circumstances.’” *Dryer*, 55 F. Supp. 3d at 1188, 1193. Similarly, in *Daly v. Viacom*, 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002), the district court held that the First Amendment was an absolute bar to right-of-publicity claims targeting expressive works.³

³ Brown’s attempts to distinguish *Frazier* and *Dryer* miss the mark. He is correct that the challenged use in *Frazier* was “political speech” (RB 40), but the constitutional presumption against content-based regulation is not limited to political speech. *See, e.g., Alvarez*, 132 S. Ct. at 2547; *Stevens*, 559 U.S. at 482. The presumption applies as long as the speech in question is not commercial speech and does not fall into one of the narrow categories of expression, like obscenity, defamation, or fraud, that the U.S. Supreme Court has held 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.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). And while Brown correctly notes that the district court in *Dryer* also applied a balancing test to the plaintiffs’ right-of-publicity claims, it did so as an alternative ground for dismissing them. 55 F. Supp. 3d at 1188, 1193.

The Ninth Circuit’s opinion in *Sarver* further erodes Brown’s position. *Sarver* involved right-of-publicity and other claims targeting *The Hurt Locker*, a fictional film based in part on Sergeant Jeffrey Sarver’s experiences as a U.S. Army bomb technician in Iraq. *Id.* at *5-*6, *23. Sergeant Sarver was interviewed by an embedded journalist covering the war, who later wrote the screenplay for *The Hurt Locker*. *Sarver*, 2016 U.S. App. Lexis 2664 at *4-*5. The film features a main character whose identity allegedly “mirror[s]” Sergeant Sarver’s life story, and who is depicted within a fictionalized narrative drawn from historical events – allegations that track Brown’s here. *Compare id.* at *5-*6 with RB 16 and 1AA:5 at ¶¶ 23-24; 1AA:7 at ¶ 31.

After Sergeant Sarver sued the filmmakers, the district court granted the defendants’ anti-SLAPP motion, holding that the transformative-use test provided a complete defense to his right-of-publicity claims. *Id.* at *7. On appeal, the Ninth Circuit found it unnecessary to parse the film under the transformative-use test. Instead, it affirmed by applying strict scrutiny, following the U.S. Supreme Court’s recent holding in *Reed* that “content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional.” *Sarver*, 2016 U.S. App. Lexis 2664 at *24 (quoting *Reed*, 135 S. Ct. at 2226). The court declared that “[b]y its terms, California’s right of publicity clearly restricts speech based upon its content.” 2016 U.S. App. Lexis 2664 at *24. Accordingly, the court held

that when applied to the defendants’ film, the right of publicity “is presumptively unconstitutional, and cannot stand unless [the plaintiff] can show a compelling state interest in preventing the defendants’ speech.” *Id.* at *30.

The court identified two potentially compelling state interests. The first is the interest in preventing unauthorized efforts “to capitalize off a celebrity’s image in commercial advertisements.” *Id.* at *29. EA agrees (and noted in its Opening Brief) that the right of publicity, as applied to advertisements and other forms of commercial speech, does not raise the same constitutional concerns as when it is applied to expressive works. *See* AOB 5-6, 47-50; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976). The Ninth Circuit made clear that *The Hurt Locker* did not implicate Sergeant Sarver’s interest in controlling advertising uses of his persona, because the film “is not speech proposing a commercial transaction.” *Id.* at 29.

The second potentially compelling interest the panel identified is regulating speech that “appropriates the economic value that the plaintiff has built in an *identity or performance*.” *Id.* at 26 (emphasis added). The panel was half-right. Preventing the appropriation of the economic value of an individual’s live *performance*, as in *Zacchini*, arguably may qualify as a sufficiently compelling state interest; protecting the “economic value” of a plaintiff’s *identity* – whatever that means – does not.

This flaw in the panel’s otherwise constitutionally sound reasoning likely reflected the Ninth Circuit’s strict adherence to the rule of horizontal *stare decisis*, which precludes one panel of the Ninth Circuit from overruling the decision of a prior panel. *See, e.g., Miranda B. v. Kitzhaber*, 328 F. 3d 1181, 1185 (9th Cir. 2003). This rule compelled the *Sarver* panel to attempt to harmonize its opinion with the majority opinion in *Keller*, which permitted right-of-publicity claims to proceed against EA’s *NCAA Football* video game on the grounds that the work “literally recreates [the plaintiff-football player] in the very setting in which he has achieved renown.” *Id.* at 27 (quoting *Keller v. Electronic Arts*, 724 F.3d 1268, 1271, 1277 n.9 (9th Cir. 2013)). *The Hurt Locker*, of course, depicts the character based on Sergeant Sarver in the “very setting” in which he served his country: as a U.S. Army bomb technician in Iraq.⁴ Thus, the panel faced the quandary of how to dismiss Sergeant Sarver’s claim without appearing to create a conflict with the *Keller* majority.

The panel chose to distinguish Sergeant Sarver from the quarterback in *Keller* on the basis that Sarver was “a private person” who did not invest money to build up a “marketable performance or identity.” *Sarver*, 2016 U.S. App. Lexis 2664 at *29. This approach is illogical; it makes it easier

⁴ *See* Brief for Appellant at 33-34, *Sarver v. Chartier*, 2016 U.S. App. Lexis 2664 (No. 12-55429) ECF No. 15; Appellant’s Reply Brief at 2-3, *Sarver v. Chartier*, 2016 U.S. App. Lexis 2664 (No. 12-55429) ECF No. 27.

for an entertainer, an athlete, or a political figure, than for a private citizen, to use the right of publicity to punish his or her unauthorized depiction in an expressive work, and it defies well-established First Amendment doctrine. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (recognizing value of speech about public figures). It also increases the risk that the right of publicity would allow “a celebrity to accomplish ... the censorship of unflattering commentary that cannot be constitutionally accomplished through defamation actions.” *Comedy III*, 25 Cal. 4th at 398.

The risk is hardly theoretical: the supposed state interest in restricting expressive works that “appropriate the economic value that [an individual] has built in an identity” would threaten all sorts of constitutionally protected works. Does an unauthorized cover story in an entertainment magazine about the latest travails of Justin Bieber “appropriate the economic value” of his “identity,” such that Bieber’s right-of-publicity claim against the publisher would survive strict scrutiny? What about an unauthorized biography about Donald Trump, timed to coincide with the seemingly limitless public fascination with the tycoon-turned-presidential-candidate? Or an unauthorized documentary about the just-retired NFL star Peyton Manning? Even the *Sarver* panel seemed unpersuaded by its private figure/public figure distinction; on the very next page of its opinion, the panel emphasized that “the First Amendment ... safeguards the storytellers and artists who take ... the stories of real

individuals... and transform them into art,” regardless of whether the real individual is “*ordinary or extraordinary*.” 2016 U.S. App. Lexis 2664 at *30 (emphasis added).

The critical takeaway from *Sarver* is that California’s right-of-publicity statute, as applied to expressive works, is a content-based restriction on speech and is subject to strict scrutiny. *Sarver*, 2016 U.S. App. Lexis 2664 at *29. At bottom, the *Sarver* panel was unable to overrule *Keller*, but unwilling to extend its holding to the depiction of Sergeant Sarver in *The Hurt Locker*. By correctly identifying California’s right-of-publicity statute as a content-based restriction when applied to expressive works, the panel reached the right outcome.

E. Because There Is No Compelling State Interest In Allowing Right-Of-Publicity Claims Against Expressive Works That Use Individuals’ Names, Likenesses, Or Biographical Information, Brown’s Claims Must Be Stricken.

EA submits that there is no compelling state interest in allowing individuals – private figures like Sergeant Sarver or celebrities like Jim Brown – to restrict the use of their names, likenesses, or biographical information in expressive works. Neither of the two legitimate state interests identified in *Sarver* – preventing unauthorized advertising uses and preventing the appropriation of the plaintiff’s entire performance (as in *Zacchini*) – justifies upholding Brown’s right-of-publicity claims:

- Like *The Hurt Locker*, *Madden NFL* is “not speech proposing a commercial transaction.” *Sarver* 2016 U.S. App. Lexis 2664 at *29; *Brown v. Electronic Arts*, 724 F.3d 1235, 1241 (9th Cir. 2013). Indeed, Brown acknowledges that *Madden NFL* is “expressive.” RB 39. Therefore, the use of his alleged likeness does not implicate the state’s interest in preventing unauthorized uses of an individual’s persona in advertising.
- Nor do Brown’s claims implicate the state’s interest, recognized in *Zacchini*, in preventing the wholesale appropriation of a performer’s entire act. *Madden NFL* does not usurp any athlete’s ability to be compensated for his performance in the way that the television station interfered with *Zacchini*’s ability to earn a living in that case.

Consequently, Brown’s claims do not survive strict scrutiny.⁵

Tellingly, even the NFL Players Association and other professional sports unions, which advocate broader rights of publicity for players, agree that claims like Brown’s do not survive strict scrutiny. In their recent *amici* brief in support of Sergeant Sarver’s petition for rehearing in the Ninth

⁵ Even if Brown advanced a compelling state interest, which he has not, he also would have to show that the right of publicity was narrowly crafted to promote that interest in order to survive strict scrutiny. *See Reed*, 135 S. Ct. at 2231.

Circuit, the unions predict that when strict scrutiny is applied, “*no right of publicity claim could ever be pursued in the context of works such as video games[.]*” *Amicus Curiae* Brief of the MLB Players Association, MLS Players Union, NBA Players Association, NFL Players Association, and NHL Players’ Association in Support of Petition for Rehearing or Rehearing *En Banc* at 14, *Sarver v. Chartier*, 2016 U.S. App. Lexis 2664 (No. 12-55429) ECF No. 59-2 (emphasis added).

Strict scrutiny is not, as Brown suggests, a “blanket immunity.” RB 40. Under strict scrutiny, however, only a compelling state interest can justify a content-based restriction on speech. The professional sports unions are correct that there is no compelling state interest in restricting video-game designers, filmmakers, or authors from using the *identities* of real-life individuals in their expressive works. Just as the application of strict scrutiny defeated Sergeant Sarver’s right-of-publicity claims against *The Hurt Locker*, so, too, must it defeat Brown’s claims against EA’s expressive work.⁶

⁶ Strict scrutiny is not a “policy preference,” as Brown mistakenly claims (*see* RB 42); it is a constitutionally-based test that must be applied where, as here, state laws purport to restrict expression based on its content. *See Reed*, 135 S. Ct. at 2226; *Sarver*, 2016 U.S. App. LEXIS 2664 at *24. Thus, Brown’s suggestion to leave the resolution of this issue to the California Legislature is misguided.

**III. IF THE COURT REACHES EA’S OTHER DEFENSES,
BROWN’S CLAIMS STILL FAIL.**

Because California’s right-of-publicity law, as applied to an expressive work like *Madden NFL*, is a content-based restriction on speech, and because Brown has failed to identify a compelling state interest justifying the restriction, this Court should strike Brown’s claims with prejudice without reaching EA’s other defenses. If this Court nevertheless is inclined to examine EA’s public-affairs, public-interest, transformative-use, incidental-use, or *Rogers*/Restatement test defenses, each *independently* compels dismissal of Brown’s claims.

A. The Public-Affairs Exemption

California’s statutory public-affairs exemption, Civil Code § 3344(d), provides a straightforward means of dismissing Brown’s claims. The trial court mistakenly held that Section 3344(d) is not a defense to right-of-publicity claims. 2AA:533. But Section 3344(d) unequivocally provides that “a 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, shall not constitute a use for which consent is required under subdivision (a).” It is undisputed that Section 3344(d)

provides an absolute defense to a right-of-publicity claim under Section 3344(a).⁷

While Brown acknowledges that Section 3344(d) provides a defense to such claims, he contends his claims survive because *Madden NFL* does not involve a “broadcast” or “account” in connection with public affairs, does not inform the public about professional football, and does not report facts about Brown or other players. RB 36-37. He is incorrect. As explained in EA’s Opening Brief, controlling California case law undermines any attempt to engraft a “reporting” limitation onto the statutory public-affairs exemption (AOB 46), and EA has identified many ways in which *Madden NFL* informs the public about professional football and its current and retired players. *Id.* Moreover, the words “broadcast” and “account” in Section 3344(d) modify the word “sports”; they do not modify “public affairs.” Even assuming they did, Brown offers no principled reason to exempt the posters about NFL football in *Montana*, the game programs about professional baseball in *Gionfriddo*, and the documentary about surfing in *Dora*, but not EA’s video game about professional football.

⁷ See *Doe v. Gangland Prods.*, 730 F.3d 946, 961 (9th Cir. 2013); *Dora v. Frontline Video*, 15 Cal. App. 4th 536, 546 (1993); *Montana v. San Jose Mercury News*, 34 Cal. App. 4th 790, 796 (1995); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 416 (2001).

B. The Public-Interest Defense

Like the court below, Brown mistakenly argues that *Keller* categorically denies public-interest protection to video games. RB 35; 2AA:532. But nothing in *Keller* reasonably can be read to make video games constitutional outcasts. To the contrary, the *Keller* majority confirmed that “[v]ideo games are entitled to the full protections of the First Amendment, because like 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).” 724 F.3d at 1270 (internal citations and quotations omitted).

Nevertheless, Brown urges this Court to restrict the public-interest defense to works that “report” or “publish” factual data. RB 34. But as EA explained in its Opening Brief, that restriction improperly denies constitutional protection to works of pure entertainment and to innovative forms of expression. Courts in this state never have embraced such arbitrary boundaries on the scope of constitutional protection. To the contrary, California courts long have recognized that expressive works do not “lose their constitutional protections because they are for purposes of entertaining rather than informing,” and that the First Amendment “does not disfavor nontraditional media of expression.” *Comedy III*, 25 Cal. 4th

at 398. Nor does First Amendment protection depend on the message being conveyed; an expressive work is entitled to constitutional protection “even if it conveys no discernable message.” *Id.* Brown’s insistence that the public-interest defense applies only to the reporting or publication of factual data defies the expansive constitutional protection historically afforded by California courts to all variety of expressive works, regardless of the message or medium.

Thus, the dispositive question is not whether an expressive work “reports” or “publishes” factual data, but whether the subject matter of the work in which the plaintiff’s name and likeness appears concerns an issue of public interest. The district court’s recent decision in *Heller v. NBCUniversal, Inc.*, CV-15-09631-MWF-KS (C.D. Cal. Mar. 30, 2016), is instructive. There, the former manager of the music group N.W.A. brought a right-of-publicity claim (among other claims) against the producers of the film *Straight Outta Compton*, alleging that they depicted him without his permission. *Id.* at 11. The district court granted the defendant-producers’ motion to dismiss the claim without leave to amend, recognizing that “no cause of action will lie for the publication of matters in the public interest.” *Id.* Because the subject matter of the film involved matters of public interest – specifically, the public controversy over the plaintiff’s tumultuous relationship with N.W.A., a group that “has had an immense influence on popular culture both domestically and internationally” – the district court

found that the First Amendment insulated the defendants from liability for using the plaintiff's name and likeness in the film. *Id.* at 12. Notably, the district court's evaluation of the public-interest defense did not turn on whether the film published or reported factual data about the plaintiff; the court evaluated *the content of the film*. *Id.*

A recent Eleventh Circuit decision reinforces this point. In *Rosa and Raymond Parks Institute for Self Development v. Target Corporation*, 2016 WL 25495 (11th Cir. Jan. 4, 2016) (applying Michigan law), the court affirmed the dismissal of right-of-publicity and related claims brought by the organization that controls Rosa Parks' publicity rights against Target arising from the sale of merchandise bearing the civil-rights icon's name and likeness. Like California, Michigan courts recognize a public-interest defense to right-of-publicity claims. *Id.* at *4. The Eleventh Circuit found that the use of Parks' name, likeness, and biographical information in books and movies, and even on plaques, was protected by that defense, given Parks' role in the civil-rights movement. *Id.* at *5. The court focused not on the medium in which her name and likeness were used, or whether the plaques "reported" information, but on the public interest in the subject matter of the defendant's works. *Id.*

Here, there can be no question that the subject matter of *Madden NFL* – professional football – is of widespread public interest. Indeed, numerous courts have recognized the significant public interest in sports,

including professional football. *See Montana*, 34 Cal. App. 4th at 796-798 (professional football is matter of public interest); *Gionfriddo*, 94 Cal. App. 4th at 411 (professional baseball); *Dora*, 15 Cal. App. 4th at 543 (surfing). Brown cannot meaningfully distinguish these cases simply by focusing on the medium in which the information was disseminated. RB 35-36. Constitutional protection extends to documentaries, posters, game programs, websites, and video games alike, provided they concern matters of public interest and the plaintiff's name and likeness is not used for commercial purposes.⁸

Brown also contends that the public-interest defense does not apply because EA omitted the retired players' names and jersey numbers. RB 34. However, this contention ignores the allegations underlying Brown's claims, which are *not* based on the use of his name or jersey number in *Madden NFL*. Instead, Brown's claims arise from the alleged use of other publicly-available information about him: his playing position, years in the NFL, height and weight, age, home state, skin color, "right handedness,"

⁸ Brown argues that, if this Court applies the public-interest defense beyond the "publishing" and "reporting" of factual data, the defense would insulate from right-of-publicity claims any product whose subject matter is of public interest. RB 36. But Brown ignores that the public-interest defense shields only expressive uses from right-of-publicity challenges. *See, e.g., Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1002 n.2 (9th Cir. 2001). The defense would not protect the use of a plaintiff's name and likeness in advertisements and promotional materials for non-expressive goods and services.

and relative skill level. 1AA:7 at ¶ 31. Moreover, Brown has argued that his contributions to professional football are so significant that he is readily identifiable in *Madden NFL* whether or not his name and jersey number are used. RB 15-16.

Brown does not dispute that the subject matter of *Madden NFL* is of widespread public interest, or that EA's work conveys a wealth of information about the NFL and its players, including the rules of the game, current NFL teams' rosters and playbooks, the league's draft, its salary cap, and its history, among other things. See 1AA:60 at ¶ 20; 1AA:271-275; 1AA:59-60 at ¶¶ 14-19; 1AA:242-270; 1AA:47 at ¶ 112; 1AA:72-137; 1AA:45 at ¶ 4; 1AA:62-71.⁹ Thus, even if the *Keller* majority's "publishing or reporting" test were constitutionally sound – which it is not – *Madden NFL* still would be protected.¹⁰

⁹ Brown cannot drag this litigation out by characterizing this issue as one of fact. As the trial court expressly recognized, where the work at issue is before the court, constitutional issues are properly resolved at the early stages of the litigation, as a matter of law. *Winter v. DC Comics*, 30 Cal. 4th 881, 891-892 (2003) (noting speedy resolution of cases involving free speech is desirable).

¹⁰ Brown continues to argue that *Madden NFL's* interactivity – which is what he means when he complains that the work allows users to assume his identity to play football – strips it of constitutional protection. RB 36. EA explained in its Opening Brief that the Supreme Court in *EMA* flatly rejected the argument that interactivity weakens First Amendment protection. 131 S. Ct. at 2738. Brown does not even bother to address this seminal case.

C. The Transformative-Use Test

Brown’s discussion of the California Supreme Court’s decision in *Comedy III* is misleading. Although he highlights certain language from that decision, he never identifies the *dispositive inquiry* that courts must apply to determine whether the use of a celebrity’s likeness is transformative. Contrary to Brown’s argument, the *Comedy III* Court did *not* instruct that transformativeness should be evaluated using the five factors he lists in his Respondent’s Brief. That five-factor test actually derives from the majority decision in *Keller*, which the dissent in that case correctly criticized as an “excessive deconstruction of *Comedy III*” that resulted in a “misapplication of the test.” *Keller*, 724 F.3d at 1285 (Thomas, J., dissenting).¹¹

Instead, the California Supreme Court in *Comedy III* instructed that “*the inquiry is 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.*” 25 Cal. 4th at 406 (emphasis added). The *Comedy III* Court identified a “subsidiary inquiry” necessary only in “close cases”: “does the

¹¹ Notably, Brown does not even bother to apply the five-factor test he advocates.

marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted?” *Id.* at 407.¹²

This Court should follow *Comedy III*'s formulation of the transformative-use test, not *Keller*'s. *Bank of Italy v. Bentley*, 217 Cal. 644, 653 (1933) (intermediate federal appellate opinions are not binding on state courts). Moreover, because the *Keller* iteration requires courts to make subjective assessments about the defendant's work, it cannot be reconciled with the California Supreme Court's direction that the transformative-use test must be straightforward and predictable, so that "courts can often resolve the question [of transformative use] as a matter of law simply by viewing the work in question." *Winter*, 30 Cal. 4th at 891-892.

Applying the *Comedy III* test to *Madden NFL*, the game clearly is transformative. Importantly, Brown now concedes that the Court must consider EA's work "as a whole" to determine whether it is transformative (RB 27-28), rather than focusing solely on its depiction of Brown (as he argued below, *see* 2AA:321-322). Given *Madden NFL*'s elaborate artistry in sound and graphics, its complex programming, its hours leading into days' worth of gameplay, its 209 teams with more than 7,500 avatars, and

¹² EA posits that even the California Supreme Court struggled to apply this "subsidiary inquiry." In *Comedy III*, the Court identified Andy Warhol's silkscreens of Marilyn Monroe as transformative works, although their value arguably derives from Monroe's fame. *See* 25 Cal. 4th at 408-409. In any event, as explained below, Brown's claims do not present a "close case" and even if they did, EA's work is transformative even under this "subsidiary inquiry."

its wealth of information about professional football (1AA:46 at ¶ 8), Brown’s “height, weight, skin color, playing years, right-handedness” and playing ability are not even remotely the “sum and substance” of the work. That biographical information is merely among the innumerable “raw materials” from which the game is synthesized.

The district court’s opinion in *Sarver* is instructive. There, the court found that the defendants’ use of Sergeant Sarver’s identity in *The Hurt Locker* was transformative as a matter of law, because “a significant amount of original expressive content” – beyond his depiction – “was inserted in the [film] through the writing of the screenplay, and the production and direction of the movie.” *Sarver v. The Hurt Locker LLC*, 2011 U.S. Dist. Lexis 157503, at *21 (C.D. Cal. Oct. 13, 2011), *aff’d sub nom Sarver*, 2016 U.S. App. Lexis 2664. On that basis, the court granted the defendants’ anti-SLAPP motion. *Id.* at *24-25. The same is true here of the countless audiovisual, programming, editorial, and other creative elements, beyond Brown’s alleged likeness, that EA incorporated into *Madden NFL*.¹³

¹³ In its football-themed works, EA creates exceedingly complex and compelling virtual worlds. Rather than relying on its own description of the various creative elements within its game (1AA:60 at ¶ 20; 1AA:271-275; 1AA:59-60 at ¶¶ 14-19; 1AA:242-270; 1AA:47 at ¶ 112; 1AA:72-137; 1AA:45 at ¶ 4; 1AA:62-71), EA calls attention to Judge Thomas’ description of the very similar *NCAA Football* game that was at issue in *Keller*: “At its essence, EA’s *NCAA Football* is a work of interactive historical fiction. Although the game changes from year to year, its most

EA submits that this is not a “close case” under the *Comedy III* standard. Even if it were, the California Supreme Court’s “subsidiary inquiry” would weigh heavily in favor of a finding of transformative use. No reasonable trier of fact could conclude that “the marketability and economic value” of *Madden NFL* “derive primarily” (or at all) from the presence of Brown’s alleged likeness – in other words, his biographical data in the game. *Comedy III*, 25 Cal. 4th at 407. Brown’s inapt comparison of *Madden NFL* to a static “Jim Brown action figure” both demonstrates his unfamiliarity with EA’s work and provides a useful example for purposes of the subsidiary inquiry. RB 29. EA agrees that the marketability and economic value of a Jim Brown action figure might

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 ‘tryouts’ 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.” 724 F.3d at 1285-1286 (Thomas, J., dissenting). *Madden NFL* contains many similar creative features, including its related “Franchise Mode” and “fantasy draft” functions. See AOB 10; 1AA:60 at ¶ 17; 1AA:264. The richness of EA’s work puts the lie to Brown’s bizarre assertion that *Madden NFL* is no more expressive than “an action figure.” RB 29.

derive primarily from his celebrity, much as the California Supreme Court found that the economic value of the t-shirts and lithographs at issue in *Comedy III* derived primarily from The Three Stooges' fame. 25 Cal. 4th at 409. But Brown cannot seriously argue that gamers purchase *Madden NFL* because it contains his alleged height, weight, or other statistical information, much less that the work's value derives "primarily" from that information.

Conspicuously, Brown only briefly addresses whether his alleged likeness is the sum and substance of *Madden NFL* and whether its economic value derives primarily from his alleged likeness. Without citing any evidence, he argues that *Madden NFL* is "designed to capitalize on his celebrity status by appealing to fans of NFL football and Jim Brown himself." RB 27. EA agrees that its work is intended to "appeal[] to fans of NFL football," but that self-evident proposition does not make the game more or less transformative. And the game's supposed appeal to Brown's own fans is not supported by anything in the record, and seems unlikely in any event; Brown's name and likeness do not appear in the game, on its packaging, or in EA's marketing (1AA:47 at ¶ 10; 1AA:45 at ¶ 4; 1AA:62-71), and he is only one of approximately 7,500 players depicted in the game. 1AA:46-47 at ¶ 8. His fans presumably have much better ways to satisfy their curiosity about their hero. But even if the game were designed to appeal to his fans, that would not affect its constitutional protection, any

more than the fact that a book like *Becoming Beyoncé*, a best-selling biography of the famed singer, presumably appealed to her fans would affect that work's protection.

Otherwise, Brown's transformative-use discussion is a hodgepodge of irrelevant (and often inaccurate) asides that do not address the elements of the relevant test. Predictably, he leans on *No Doubt v. Activision*, 192 Cal. App. 4th 1018 (2011), and *Keller* for their view that literal depictions of real-life individuals in the environments in which they gained public notice are not transformative. RB 28. But neither he nor those courts explain why realistic depictions should be constitutionally disfavored. As Judge Thomas noted in his dissent in *Keller*, this view is a "dangerous and out-of-context interpretation of the transformative use test." 724 F.3d at 1290. Judge Ambro echoed that concern in *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013), cautioning that Brown's position "is at odds with the First Amendment protection afforded to expressive works incorporating real-life figures. That protection does not depend on whether the characters are depicted realistically." 717 F.3d at 174 (Ambro, J., dissenting). *See also Keller*, 724 F.3d at 1290 (Thomas, J., dissenting) (any rule under which "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").

The dissenting judges' concerns are well-taken. The *No Doubt/Keller* approach not only contradicts a long line of authorities holding that the First Amendment protects realistic depictions of celebrities in expressive works (*see* AOB 37-40), it also defies the California Supreme Court's right-of-publicity jurisprudence. In *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 872 (1979), the Court recognized that the First Amendment barred a right-of-publicity claim arising from a docudrama that depicted Rudolph Valentino in the context in which he gained fame, as a famous Hollywood star of the 1920s. When the Court formulated the transformative-use test 22 years later, it expressly identified that docudrama, along with a biography of Howard Hughes, as examples of works *that would be protected*. 25 Cal. 4th at 406-407. The Court even warned that the right of publicity must be limited so it does not become a weapon for public figures seeking to punish the creators of such works. *Id.* at 398. To the extent that *No Doubt* and *Keller* purport to restrict constitutional protections for realistic works, they contravene these well-established authorities from the California Supreme Court and other courts.

Brown dismisses this concern, insisting that *No Doubt* and *Keller* protect docudramas, biographies, and similar works – but not *Madden NFL* – because those more traditional forms of expression have “over-arching narrative, description, and commentary[.]” RB 29. This supposed distinction is factually and legally incorrect. To begin with, it assumes that

Madden NFL lacks those elements, when, in fact, it has all three. Brown’s alleged likeness consists of biographical information describing him: his playing position, his years in the NFL, and his height, weight, age, home state, skin tone, “righthandedness,” and relative skill level. 1AA:7. The game’s creators included this information because they commented on the 1965 Cleveland Browns by naming them one of the NFL’s 146 most historically significant teams. 1AA:46 at ¶ 8. And the game contains multiple narratives that are constructed by users as they lead their teams to victory or defeat over the course of a season, or manage a team over as long as thirty seasons in “Franchise Mode.” See AOB 10; 1AA:60 at ¶ 17; 1AA:264. As the Ninth Circuit explained in *Brown v. Electronic Arts*, “[e]very version of [*Madden NFL*] features characters (players), dialogue (between announcers), plot (both within a particular simulated game and more broadly), and music.” 724 F.3d at 1241.

But even if EA’s work lacked “narrative, description, and commentary,” Brown’s argument still would be misguided. He overlooks the fact that neither *No Doubt* nor *Keller*, in denying First Amendment protection to expressive works that depict celebrities doing “the same activity by which [they] achieved and maintain” their fame, made any exception for realistic works with a narrative or commentary. 724 F.3d at 1276; 192 Cal. App. 4th at 1034. And even if they had, such an exception would be inconsistent with well-settled First Amendment doctrine. As the

U.S. Supreme Court repeatedly has held, a “succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Thus, a transformative-use test that protects works with a narrative, but not those without, would not pass constitutional muster.

Brown’s remaining arguments regarding transformative use are similarly unpersuasive. By characterizing EA’s work as “a product,” “not an editorial,” and comparing it to an action figure, he apparently asks the Court to treat *Madden NFL* as commercial speech. But *Madden NFL* is no more a “product” than a DVD of *The Social Network* or a copy of *Justice Brennan: Liberal Champion*, the acclaimed biography of the Supreme Court justice. Labeling them as such does not diminish their First Amendment protection. There can be no doubt that *Madden NFL* is a fully protected expressive work, not commercial speech. *Brown*, 724 F.3d at 1241 (recognizing that *Madden NFL* is an expressive work entitled to full constitutional protection; dismissing Brown’s Lanham Act claim targeting EA’s work).

Brown also suggests that *Madden NFL*’s profitability diminishes its First Amendment protection. RB 20. It is well-settled, however, that the

creator of an expressive work does not compromise his First Amendment protection by selling his work for a profit. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (rejecting theory that “motion pictures do not fall within the First Amendment’s aegis because their production, distribution, and exhibition is a large-scale business conducted for profit”).

The thinness of Brown’s argument becomes clear when he discusses *Noriega v. Activision*, 2014 WL 5930149, *4, n.4 (Los Angeles Super. Ct. Oct. 27, 2014), where the court refused to apply the *No Doubt/Keller* view of transformative use on the grounds that it was “in conflict with the controlling California authorities[.]” Brown declares that there is “simply no comparison” between the two cases because Manuel Noriega is a “political figure[.]” and “other videogames featuring political leaders ... might implicate [] protections for political speech.” RB 31 n.6. But even assuming that the defendant’s game there, *Call of Duty*, a first-person shooter game, is “political speech,” so what? “Entertainment, as well as political and ideological speech, is protected” under the First Amendment. *Schad v. Mt. Ephraim*, 452 U.S. 61, 65 (1981); *EMA*, 131 S. Ct. at 2733 (same). Putting aside the superficial distinction that Noriega was an infamous dictator and Brown a famous fullback, the two cases are on all fours: a well-known public figure alleged that the defendant violated his right of publicity by depicting him as he actually appeared, in the environment in which he gained notoriety, in a video game. In each game,

the plaintiff is a minor character in a cast of hundreds or thousands.

1AA:46 at ¶ 8; *Noriega*, 2014 WL 5930149, *at *3. If the creators of *Call of Duty* may use Manuel Noriega’s likeness without his permission in the setting in which he gained notoriety in their video game, so, too, may EA use Brown’s alleged likeness in its work.¹⁴

D. The Incidental-Use Test

Brown attempts to evade the incidental-use defense by declaring that it “presents a question of fact.” RB 24. But EA has identified numerous

¹⁴ Brown misses the point on the divergent evolutions of the “transformative use” concept in copyright and right-of-publicity law. To clarify, in the copyright space where it originated, “transformative use” has become an ever more expansive defense, protecting secondary uses that place an original work in a different expressive context or give it a new “meaning” – even without any physical change to the original work, and even when it robs the creator of a license fee she otherwise might receive. *See, e.g., SOFA Entm’t v. Dodger Prods.*, 709 F.3d 1273, 1278-1279 (9th Cir. 2013) (unaltered clip from a television program depicting a band sufficiently transformed by new context and expression of a play about the band); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608-612 (2d Cir. 2006) (unaltered Grateful Dead concert posters sufficiently transformed by new context and expression of a biography about the band). This is true even though copyright has its own constitutional grounding, and any expansion of fair use to accommodate First Amendment concerns happens at the expense of a copyright-owner’s rights. Contrast that development with right-of-publicity law, in which *No Doubt* and *Keller* have attempted to narrow the very same “transformative use” concept into a rigidly literal test that requires the defendant to physically distort the plaintiff’s name, likeness, and life story. Those courts totally ignore the transformative impact of a new context and new expression in a video game. Altogether, it is difficult to fathom how the First Amendment could make such significant inroads into the scope of constitutionally grounded copyright protection, while shrinking in unprecedented ways in order to accommodate a relatively new state-law tort.

cases in which courts determined incidental use as an issue of law. AOB 52. Moreover, Brown does not point to any part of the underlying record in need of factual development, explain why this Court cannot decide the defense's application simply by reviewing *Madden NFL*, or identify any prejudice he would suffer if this Court considered the defense. Under these circumstances, this Court should evaluate whether the incidental-use defense bars Brown's right-of-publicity claims.¹⁵

Brown acknowledges that incidental use must be resolved by consideration of the four factors announced in *Aligo v. Time-Life Books*, 1994 U.S. Dist. Lexis 21559, at *8 (N.D. Cal. Dec. 19, 1994): (1) whether the defendant's use of the plaintiff's name or likeness has a unique quality or value that would result in commercial profit to the defendant;

¹⁵ EA's licensing relationship with the National Football League Players Association is not an impediment to its incidental-use defense. Brown confuses business choices and legal obligations. In similar circumstances, courts have recognized that content creators have a constitutional right to use persons' names and likenesses without their approval, even where the content creator previously entered into voluntary licensing relationships for such rights. See *C.B.C. Distribution & Mktg. v. Major League Baseball Advanced Media*, 505 F.3d 818, 821, 823-824 (8th Cir. 2007) (holding fantasy-sports website had First Amendment right to use baseball players' names, statistics, and biographical data, even though website previously had licensed that information from MLB); *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318, 326 (1998) ("the industry custom of obtaining 'clearance' [from real-life persons depicted in films] establishes nothing, other than the unfortunate reality that many filmmakers may deem it wise to pay a small sum up front for a written consent to avoid later having to spend a small fortune to defend unmeritorious lawsuits").

(2) whether the use contributes something of significance to the defendant's work; (3) the duration or prominence of the name or likeness; and (4) the relationship between the reference to the plaintiff and the purpose and subject of the work. *See also Yeager v. Cingular Wireless*, 673 F. Supp. 2d 1089, 1100 (E.D. Cal. 2009); *Pooley v. Nat'l Hole-in-One Ass'n*, 89 F. Supp. 2d 1108, 1112 (D. Ariz. 2000).

An evaluation of these factors confirms that the use of Brown's alleged likeness in *Madden NFL* is incidental. First, Brown's alleged likeness has no unique quality or value that inures to EA. It is used in *Madden NFL* for one reason only – because EA made an editorial decision to include the 1965 Cleveland Browns among the 146 historic teams included in the game, and Brown was a member of that team. *See* 1AA:46 at ¶ 8. This fact distinguishes EA's use of Brown's alleged likeness from the uses at issue in *Pooley* and *Yeager*, where the advertisements were specifically designed to associate the defendants' products and services with those plaintiffs' inimitable professional accomplishments. *Yeager*, 673 F. Supp. 2d at 1101; *Pooley*, 89 F. Supp. 2d at 1113. For example, Chuck Yeager was the only historical figure whose name was used in the AT&T press release, and the executive who prepared it admitted that he sought to capitalize upon Yeager's heroism and wanted consumers "to make an association between [Yeager] breaking the sound barrier and [AT&T] breaking new barriers" with its cellular services. *Yeager*, 673 F.

Supp. 2d at 1094. Similarly, in *Pooley*, the defendant’s marketing video for its “Million Dollar Hole-in-One” fundraising service used the name and likeness of professional golfer Don Pooley, who won \$1 million for making a hole-in-one at a PGA event. 89 F. Supp. 2d at 1111. The *Pooley* court made clear that the footage of his feat “prominently stands out as the highlight of [the] [d]efendant’s advertisement.” There is no comparable use of Brown’s alleged likeness in *Madden NFL*.

Second, Brown’s alleged likeness contributes nothing of special significance to *Madden NFL*. Although Brown achieved distinction on the gridiron when he played for the Cleveland Browns five decades ago, Brown’s persona does not drive the game’s outcomes; “the individual users most directly influence the game’s outcome through their play-calling and their ability to use hand-held controllers to manipulate the avatars’ actions on the field.” 1AA:46 at ¶ 7.

Third, the relationship between Brown’s avatar and the purpose and subject of the work also confirms the incidental nature of the use. EA’s work is a “video-game series that allows users to simulate the experience of being a player, coach, or general manager in the [NFL].” 1AA:45 at ¶ 3. Thus, Brown’s alleged likeness is used in *Madden NFL* in the same manner as the other virtual players in the game – it is just one among several thousand avatars, included because he was among the approximately fifty members of an historically significant team.

Finally, Brown's alleged likeness does not occupy any prominent position in the game, nor could it. As Judge Thomas keenly observed in his evaluation of a similar video game, users could play *Madden NFL* thousands of times without ever encountering Brown's purported likeness.¹⁶ *See Keller*, 724 F.3d at 1277 n.7. Again, the *only* reason Brown's likeness appears in *Madden NFL* is because he actually played on an historically significant team, just as the Israeli athlete in *Ladany v. William Morrow & Co.*, 465 F. Supp. 870, 882-883 (S.D.N.Y. 1978), appeared in the book at issue in that case because he was part of the historical event the book recounts. Moreover, Brown's likeness is only one of the more than 7,500 virtual players appearing in the game, (*see* 1AA:46 at ¶ 8), just as the plaintiff in *Ladany* was only one of 101 characters mentioned in the defendant's book. 465 F. Supp. at 882. In this way, the use of Brown's alleged likeness here is analogous to the use that the *Ladany* court held was incidental as a matter of law. *See id.* In words that apply with equal force here, the *Ladany* court explained that "[i]t would distort the purpose of the legislature, and create unsettling precedent, to hold that this individual, one of one hundred referred to in a detailed narrative, and involved in only one

¹⁶ The fact that Brown's alleged avatar is a preloaded feature of *Madden NFL* (*see* RB 21) has no relevance to this inquiry. Every avatar depicted in *Madden NFL* is preloaded.

limited aspect of the overall account, fell within the [right-of-publicity] statute.” *Id.*

Brown attempts to distinguish *Ladany* by arguing that the plaintiff in that case played an insignificant role in the historical events the book describes. RB 24. His argument is factually inaccurate and legally irrelevant. The plaintiff in *Ladany* was by no means an insignificant part of the 1972 terrorist attack on the Israeli Olympic team. To the contrary, he was among the few Israeli athletes that escaped the attack on Block 31 and tried to summon help for teammates who had been taken hostage. 465 F. Supp. at 872. Even the plaintiff in *Ladany* acknowledged that his participation in that event made him a “newsworthy person.” *Id.* at 881. In any event, a plaintiff’s role in the *underlying historical events* that provide the setting for a work does not determine whether the use of the plaintiff’s likeness in that work is incidental; rather, as explained above, application of the incidental-use doctrine turns on the role that the plaintiff’s name or likeness plays *in the work itself*, viewed as a whole.

If credited, Brown’s interpretation of incidental use would have a perverse effect on the First Amendment rights of authors, filmmakers, and others to create expressive works that incorporate real people who were involved in historically significant events. Under Brown’s view that a content creator cannot use an individual’s name or likeness if it in any way enhances the marketability of a work, the author in *Ladany* would have to

negotiate a license with most of the individuals who played a part in the 1972 Munich massacre. Such an undue burden on expression would be unwarranted and unconstitutional, and may well have confined Steven Spielberg to creating movies about extraterrestrials, instead of making the Academy Award-nominated film *Munich*. Because the use of Brown's alleged likeness in *Madden NFL* is incidental, it is not actionable.

E. The *Rogers*/Restatement Test

Brown criticizes the *Rogers*/Restatement test for two reasons.¹⁷ First, he asserts that the test conflicts with *Comedy III* (RB 32), but never articulates the supposed conflict. Certainly, the mere fact that the *Rogers* and *Comedy III* courts adopted different tests does not necessarily mean those tests are in conflict, especially since the transformative-use test co-exists in California law with several other constitutional defenses to right-of-publicity claims, including actual-malice (*Stewart*, 181 Cal. App. 4th at 681-682), public-interest (*Dora*, 15 Cal. App. 4th at 542), and incidental-use (*Johnson v. Harcourt, Brace, Jovanovich*, 43 Cal. App. 3d 880, 891 (1974)). To the contrary, a closer examination confirms that the *Rogers*/Restatement test would respect the competing interests that the *Comedy III* Court identified in crafting the transformative-use test: the interest in protecting all forms of expression, regardless of the message or

¹⁷ See *Rogers v. Grimaldi*, 875 F.2d 994 (2nd Cir. 1989).

medium of expression, on the one hand, and the interest in respecting a celebrity's right to control the commercial use of his name and likeness, on the other. 25 Cal. 4th at 398. Far from posing a conflict, the *Rogers*/Restatement test provides a predictable mechanism to distinguish between the forms of expression deserving of First Amendment protection and those that must give way to the right of publicity.¹⁸

Second, Brown argues that unlike the Lanham Act, the right of publicity does not exist to prevent "customer confusion." RB 33. But that distinction provides an *even greater* incentive to apply a predictable, speech-protective test to right-of-publicity claims. As the court observed in *Rogers*, "[b]ecause the right of publicity ... has no likelihood of confusion requirement it is potentially more expansive than the Lanham Act." 875 F.2d at 1004. "Perhaps for that reason courts delineating the right of publicity, more frequently than in applying the Lanham Act, have

¹⁸ Brown notes that the courts in *Keller, Davis v. Electronic Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015), *Hart* and *No Doubt* considered and rejected the *Rogers*/Restatement test. RB 32. As explained above, none of these authorities is binding on this Court. *Bank of Italy*, 217 Cal. 3d at 653; *McCallum v. McCallum*, 190 Cal. App. 3d 308, 315 n.4 (1987). Additionally, the court in *No Doubt* did not consider the application of the *Rogers*/Restatement test to a right-of-publicity claim; that court was evaluating a claim under Business & Professions Code § 17200. *No Doubt*, 192 Cal. App. 4th at 1036-1040. Even Brown acknowledges that no California state appellate court has considered whether to apply the *Rogers*/Restatement test to right-of-publicity claims. However, numerous appellate courts in sister jurisdictions have adopted the *Rogers*/Restatement test as a defense to such claims. AOB 48.

recognized the need to limit the right to accommodate First Amendment concerns.” *Id.* To accord the proper breathing space for free expression, the *Rogers* court fashioned a test to balance the competing interests where, as here, a right-of-publicity claim targets an expressive work. Under *Rogers*, the First Amendment defeats a right-of-publicity claim arising from an expressive work, unless the use of the celebrity’s name or likeness is “wholly unrelated” to the work or is “simply a disguised commercial advertisement for the sale of goods or services.” *Rogers*, 875 F.2d at 1004. Thus, the test EA advocates here is, in fact, tailored to right-of-publicity claims.

Because Brown is not wholly unrelated to a work about professional football, and the use of his name and likeness in the work is not a disguised commercial advertisement, his claims fail under the *Rogers*/Restatement test, and should be dismissed.

IV. CONCLUSION

Brown’s right-of-publicity claims plainly target the content of EA’s work, and are subject to strict scrutiny. Because EA has not used Brown’s alleged likeness in a commercial advertisement and has not appropriated his entire act, there is no compelling state interest that justifies restricting EA’s exercise of its free-speech rights. Thus, as even the professional athletes’ unions acknowledge, his right-of-publicity claims cannot survive strict scrutiny. For that reason, and for the other reasons set forth above, EA

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 10,893 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

DATED: April 4, 2016

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