

No. 15-

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IN THE  
**Supreme Court of the United States**

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
*Petitioner,*

*v.*

EDWARD J. O'BANNON, JR., *et al.*,  
on behalf of themselves and all others similarly situated,  
*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that NCAA rules defining “the eligibility of participants” in NCAA-sponsored athletic contests, *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984), violated the Sherman Act.

2. Whether the First Amendment protects a speaker against a state-law right-of-publicity claim based on the realistic portrayal of a person in an expressive work (here, a student-athlete in a college-sports videogame).

## **PARTIES TO THE PROCEEDINGS**

Petitioner, defendant-appellant below, is the National Collegiate Athletic Association. Respondents, plaintiffs-appellees below, are Edward J. O'Bannon, Jr.; Oscar Robertson; William Russell; Harry Flournoy; Thad Jaracz; David Lattin; Bob Tallent; Alex Gilbert; Eric Riley; Patrick Maynor; Tyrone Prothro; Sam Jacobson; Damien Rhodes; Danny Wimprine; Ray Ellis; Jake Fischer; Jake Smith; Darius Robinson; Moses Alipate; Chase Garnham; and a class of all others similarly situated.

Electronic Arts, Inc. and the Collegiate Licensing Company were named as defendants in the district court but did not participate in the appeal that is the subject of this petition.

## **CORPORATE DISCLOSURE STATEMENT**

The National Collegiate Athletic Association is an unincorporated, non-profit membership association composed of over 1,200 member schools and conferences. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

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

**OPINIONS BELOW**

The Ninth Circuit's opinion (App. 1a-68a) is published at 802 F.3d 1049. The district court's opinion (App. 69a-166a) is published at 7 F. Supp. 3d 955; its permanent injunction (App. 167a-169a) is unpublished, as is the Ninth Circuit's order denying rehearing en banc (App. 171a-172a).

## **JURISDICTION**

The Ninth Circuit entered judgment on September 30, 2015, and denied respondents' timely rehearing petition on December 16. On March 7, 2016, Justice Kennedy extended the deadline for filing this petition to April 14; on April 5, he further extended the deadline to May 13. This Court has jurisdiction under 28 U.S.C. §1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

The First Amendment to the U.S. Constitution provides in relevant part: "Congress shall make no law ... abridging the freedom of speech, or of the press."

## **INTRODUCTION**

Joint ventures sometimes adopt practices that are essential for their products to exist at all. This Court and others have recognized that such practices are pro-competitive because they lead to additional choices for consumers, and therefore have held that those practices rarely if ever run afoul of the Sherman Act's prohibition on unreasonable restraints of trade.

The NCAA, a joint venture formed by schools to superintend intercollegiate athletics, has long required that participants in college athletics be amateurs, i.e., that they not be paid to play. Amateurism helps ensure that college sports remain an integrated component of the scholastic experience and distinguishes college ath-

letics from professional sports. This Court has accordingly recognized that NCAA amateurism rules are pro-competitive. *See NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984).

The Ninth Circuit held here, however, that an NCAA amateurism rule violated the Sherman Act. That conclusion—which the court recognized was unprecedented, *see* App. 2a-3a—flowed from two fundamental errors. First, the court failed to follow decisions of this Court and other circuits under which rules that define the character of NCAA athletics, and are thus essential for the NCAA’s distinct product to exist, are upheld without “detailed analysis.” *American Needle, Inc. v. NFL*, 560 U.S. 183, 203 (2010). Second, having embarked upon such analysis, the Ninth Circuit deemed the NCAA liable because it previously allowed student-athletes to be reimbursed for *most* but not *all* of the expenses that the court deemed appropriate. That micromanagement was improper; it was not for the court to determine which expenses must be reimbursed, and certainly not for the court to deem the NCAA an antitrust violator just because it did not allow reimbursement of every last one of those expenses. The Ninth Circuit’s ruling jeopardizes the vitality of not only the NCAA and other amateur sports leagues, but also joint ventures more generally.

Finally, the Ninth Circuit’s decision is wrong because respondents lack standing. The court’s contrary ruling depended on an erroneous interpretation of the First Amendment, which led the court to conclude that student-athletes whose names, images, or likenesses had been used in sports-themed videogames could recover for that use via a state-law right-of-publicity claim. That interpretation of the First Amendment implicates a severe splintering of lower courts regarding

important free-speech principles. This Court's review is therefore warranted.

## STATEMENT

### A. The NCAA And Amateurism In College Sports

The NCAA was founded in 1905, in response to problems caused by inadequate oversight of intercollegiate athletics. App. 4a. "Since its inception ..., the NCAA has played an important role in the regulation of amateur collegiate sports." *Board of Regents*, 468 U.S. at 88. For example, the NCAA has "promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs." *Id.*

Amateurism has always been a central feature of NCAA-governed college sports. App. 5a. The year after its founding, for example, the NCAA adopted the "Principles of Amateur Sport," the core tenet of which was that students not be paid to play intercollegiate athletics. Thus began "[t]he NCAA[']s ... critical role in the maintenance of a revered tradition of amateurism in college sports." *Board of Regents*, 468 U.S. at 120.

Today, the NCAA has "roughly eleven hundred member schools," "organized into ... Divisions I, II, and III." App. 70a, 71a. Division I football is further subdivided into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS). App. 72a.

College sports are a popular form of entertainment (and have been for more than a century), and a few of those sports command significant commercial interest. That interest exerts pressures that could undermine

the distinctive nature of college athletics, driving them away from a scholastic endeavor and towards a professional one. The NCAA thus remains committed to amateurism, the purpose of which “is to maintain intercollegiate athletics as an integral part of the educational program” and thus to “retain a clear line of demarcation between intercollegiate athletics and professional sports.” NCAA C.A. Excerpts of Record at ER610; *see also id.* at ER611.

Consistent with the amateurism principle, NCAA rules limit participation in NCAA sports to students who are not paid for their athletic participation. To cover their educational expenses, however, Division I student-athletes may “receive institutional financial aid based on athletics ability,” including scholarships. NCAA C.A. ER620. Before 2014, the NCAA limited athletic scholarships to tuition and fees, room and board, and required books. App. 6a. In 2014, that limit was increased to “cost of attendance,” or COA, a federally defined amount that includes—in addition to the already-allowed tuition and fees, room and board, and required books—“supplies, transportation, and other expenses related to attendance at the institution.” App. 6a-7a & n.3; *see* 20 U.S.C. §1087l.<sup>1</sup> “The difference between [the pre-2014 scholarship limit] and the cost of attendance is a few thousand dollars at most schools.” App. 6a n.3.

## **B. Procedural History**

1. Respondents are a class of current and former FBS football and Division I men’s basketball players.

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<sup>1</sup> The Ninth Circuit asserted that COA also encompasses non-required books. App. 6a n.3. The court offered nothing to support that assertion, and to the NCAA’s knowledge there is nothing.

App. 9a. They alleged that NCAA rules requiring participants in NCAA athletics to be amateurs violated the Sherman Act. App. 8a. In particular, respondents claimed that these rules constituted an unlawful agreement among schools not to compensate FBS football and Division I men’s basketball players for the use of their names, images, and likenesses (NILs) in live-game broadcasts, sports-themed videogames, and archival game footage. App. 69a-70a. The alleged violation did not stem from any NCAA rule specifically prohibiting payment for use of student-athletes’ NILs; no such rule exists. Rather, respondents complained about a particular application of the NCAA’s general amateurism (i.e., no-pay-for-play) rules.

The district judge (whose jurisdiction respondents invoked under 28 U.S.C. §§1331 and 1337) certified a declaratory and injunctive class but not a damages class. App. 9a. Shortly before trial, the named respondents dismissed their damages claims. App. 10a.<sup>2</sup>

2. Following a bench trial, the district court entered judgment for respondents, ruling that “the challenged NCAA rules unreasonably restrain trade.” App. 70a.

The court first defined the relevant market as the “college-education” market, “a national market in which NCAA Division I schools compete to sell unique bundles of goods and services to elite football and basketball recruits.” App. 118a. Those “unique bundles” consist of “the opportunity to earn a higher education while playing for an FBS football or Division I men’s

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<sup>2</sup> Also before trial, respondents settled with the other defendants, Electronic Arts and the Collegiate Licensing Company. App. 10a.



basketball team.” App. 118a-119a. More specifically, the court found, recruits receive payments covering “tuition, fees, room and board, books, certain school supplies, tutoring, and academic support services,” as well as “high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences.” App. 76a. In exchange, schools receive the recruits’ “athletic services[,] ... acquiesce[nce] in the[] ... use of their names, images, and likenesses while they are enrolled,” and agreement to “pay for any other costs of attendance not covered by their” scholarship. *Id.*

The court next undertook a detailed rule-of-reason analysis, addressing (as Ninth Circuit precedent required, *see* App. 39a): (1) whether the challenged rules had significant anticompetitive effects in the college-education market; (2) if so, whether the rules had procompetitive benefits; and (3) if so, whether there was any less restrictive alternative through which those procompetitive benefits could be achieved.

After answering the first two questions in the affirmative, App. 117a-149a—including finding that NCAA amateurism rules enhance consumer interest in college sports and foster integration of student-athletes into their educational setting—the court turned to less restrictive alternatives. The alternative it embraced was for the NCAA to allow schools to use revenue generated by the use of student-athletes’ NILs to (1) raise the athletic-scholarship limit to COA and (2) pay student-athletes (after completion of their athletic eligibility) up to \$5,000 per year of their athletic participation. App. 158a-159a. The court permanently enjoined the NCAA from adopting rules more restrictive than that alternative. App. 167a-168a.

3. The Ninth Circuit affirmed in part and vacated in part.

The court first rejected several arguments the NCAA advanced for why the district court erred in subjecting the challenged NCAA rules to a detailed rule-of-reason analysis. These arguments included that under *Board of Regents* and other joint-venture precedent, NCAA amateurism rules are procompetitive as a matter of law, App. 24a-25a, and that plaintiffs lacked standing because any claim to enforce their supposed right to NIL payments from broadcasters and video-game producers would be precluded by the First Amendment, App. 32a-38a.

Turning to the rule-of-reason analysis, the Ninth Circuit “agree[d] with the district court that the compensation rules have a significant anticompetitive effect,” App. 43a, and found no clear error in the court’s analysis of the rules’ procompetitive effects—although it observed that “the district court probably underestimated the NCAA’s commitment to amateurism,” App. 46a. The court of appeals thus examined whether the district court had identified valid less restrictive alternatives, i.e., “reasonable alternatives to the NCAA’s current compensation restrictions.” App. 48a. The Ninth Circuit explained that to be valid, an alternative must be “substantially” less restrictive of competition (to avoid judicial micromanagement of business decisions), and “‘virtually as effective’ in serving the procompetitive purposes of the NCAA’s current rules, [] ‘without significantly increased cost.’” *Id.* Applying this standard, the court concluded that a rule allowing cash payments above COA was not a valid alternative, based on the “self-evident fact that paying students for their NIL rights will vitiate their amateur status.” App. 53a. But the court upheld the district court’s rul-

ing that setting the athletic-scholarship limit at COA (again, typically a few thousand dollars above the pre-2014 limit that respondents challenged) was a valid alternative. App. 49a-51a. The court of appeals accordingly vacated the district court’s judgment and injunction only to the extent they required the NCAA to allow cash payments above COA. App. 59a.

Chief Judge Thomas concurred in part and dissented in part, stating that he would have affirmed the district court in all respects. App. 59a-68a.

### **REASONS FOR GRANTING THE PETITION**

#### **I. THE NINTH CIRCUIT’S UNPRECEDENTED HOLDING THAT NCAA AMATEURISM RULES VIOLATED THE SHERMAN ACT IS WRONG**

The NCAA has administered a distinct form of athletic competition, amateur intercollegiate athletics, for over a century. That would not have been possible without agreement among the NCAA and its members on rules defining the character of the competitions they sponsor. That is because “league sports” are “[p]erhaps the leading example” of an “activit[y that] can only be carried out jointly.” *Board of Regents*, 468 U.S. at 101. Such joint activity necessarily requires a “myriad of rules ..., all [of which] must be agreed upon, and all [of which] restrain the manner in which institutions compete.” *Id.*

Among the rules essential to the NCAA’s joint venture—an *amateur* intercollegiate-sports league—are those defining who is eligible to participate. And for decades, NCAA Division I eligibility rules limited athletic scholarships to tuition and fees, room and board, and required course-related books, i.e., the vast majority of student-athletes’ expenses. App. 6a. In

2014, the NCAA raised this limit by adding supplies, transportation, and other miscellaneous expenses. App. 6a-7a & n.3. The Ninth Circuit held here that the post-2014 limit was lawful under the Sherman Act. Yet it also held that by adhering for years to a slightly lower limit, the NCAA had violated federal antitrust law.<sup>3</sup>

That ruling flowed from two related errors. *First*, the Ninth Circuit disregarded *Board of Regents'* teaching that NCAA rules defining and preserving its distinct “product” (amateur intercollegiate athletics) are procompetitive and should be upheld “in the twinkling of an eye,” i.e., without detailed rule-of-reason analysis, 468 U.S. at 109 n.39, *quoted in American Needle*, 560 U.S. at 203. As *Board of Regents* explained, such rules include those defining “the eligibility of participants,” *id.* at 117, which are what respondents challenge here.

*Second*, the Ninth Circuit, despite disavowing any intent “to micromanage organizational rules,” App. 51a, did precisely that. Under the guise of a “less-restrictive-alternative” analysis—part of the Ninth Circuit’s three-step rule-of-reason analysis—the court declared the NCAA an antitrust violator because it had allowed student-athletes to be reimbursed for certain expenses but not a few additional ones. But the question of which expenses can be reimbursed consistent with the preservation of amateur college sports is not a matter susceptible to a bright-line, right-or-wrong answer. Like other joint ventures seeking to define their product, the NCAA was entitled to exercise its judgment in establishing expense-reimbursement rules to

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<sup>3</sup> Although the pre-2014 scholarship limit was no longer in effect when the Ninth Circuit ruled, the court held the case was not moot because the NCAA could always reinstate that limit. App. 49a n.18.

maintain amateurism. Under this Court's decisions, such judgments violate antitrust law only if they produce a restraint not reasonably related to its procompetitive justifications. That standard was not met here. Instead, the Ninth Circuit set aside the restraint because it was not the *least* restrictive one possible—in the court's words, because the restraint was “more restrictive than necessary.” App. 59a.

Each of these overarching errors flowed from the Ninth Circuit's failure to heed this Court's admonition that the NCAA “needs ample latitude” in administering its amateur intercollegiate sports league. *Board of Regents*, 468 U.S. at 120. Antitrust law, that is, does not authorize judicial policing of the precise details of how the NCAA, as a joint venture, implements an agreement that is essential for its distinct product to exist at all.

In addition to departing from other courts' decisions, the Ninth Circuit's ruling—in a case the court itself labeled “momentous,” App. 2a—threatens far-reaching deleterious consequences. In particular, it exposes a host of NCAA rules, as well as the rules of other joint ventures, to litigation challenges and improper judicial tinkering. Correcting the Ninth Circuit's errors and avoiding those consequences justifies this Court's review.

**A. The Court of Appeals Disregarded This Court's Teachings Regarding Restraints Essential To A Joint Venture's Product**

Before this case, no appellate court had ever subjected an NCAA amateurism rule to detailed rule-of-reason analysis, let alone held that such a rule violated the Sherman Act. App. 2a-3a. That uniformity flowed from *Board of Regents*, where this Court, relying on its

joint-venture precedent, distinguished two types of NCAA rules: those that preserve the distinct “product” of amateur intercollegiate athletics and those that do not. The latter, this Court held, are subject to detailed rule-of-reason analysis, but the former—like other joint-venture restraints that “are essential if the product is to be available at all,” 468 U.S. at 101—are procompetitive and thus should be upheld without “detailed analysis,” *American Needle*, 560 U.S. at 203 (citing *Board of Regents*, 468 U.S. at 109 n.39). The Ninth Circuit erroneously disregarded that clear dichotomy.

**1. Restraints essential to a joint venture’s product—such as the rules challenged here—should be upheld without “detailed analysis”**

As *Board of Regents* explained, horizontal restraints are “often ... held to be unreasonable as a matter of law,” i.e., “illegal per se.” 468 U.S. at 99, 100. But where “activities ... can only be carried out jointly,” some “horizontal restraints on competition are essential if the product is to be available at all.” *Id.* at 101. Such restraints are not per se illegal, but are instead evaluated under the rule of reason. *Id.* at 100-101; *see also*, *e.g.*, *American Needle*, 560 U.S. at 203.

The rule of reason, however, is a “flexible” standard, requiring more scrutiny in some cases than in others. *American Needle*, 560 U.S. at 203 (citing cases); *see also California Dental Ass’n v. FTC*, 526 U.S. 756, 779-781 (1999). In particular, with restraints essential to the joint venture’s product, “the Rule of Reason may not require a detailed analysis; it ‘can sometimes be applied in the twinkling of an eye.’” *American Needle*, 560 U.S. at 203 (quoting *Board of Regents*, 468 U.S. at 109 n.39). And whatever level of scrutiny is applied,

such restraints are “likely to survive the Rule of Reason.” *Id.* Put differently, “[j]oint ventures and other cooperative arrangements are ... not usually unlawful ... where the agreement ... is necessary to market the product at all.” *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 23 (1979).

*Board of Regents* applied these principles of joint-venture antitrust law to the NCAA. In that case, universities challenged an NCAA limit on how many football games schools could license for telecast. 468 U.S. at 92-93. This Court held the restraint unlawful, *id.* at 88, but only after explaining why, under the joint-venture principles discussed above, the restraint was properly subject to a detailed rule-of-reason analysis—and, correspondingly, why “most of the regulatory controls of the NCAA” are not, *id.* at 117.

More specifically, the Court first held that although the telecast plan fixed prices and limited output, “it would be inappropriate to apply a *per se* rule” because “league sports” are “an industry in which horizontal restraints on competition are essential if the product is to be available at all.” 468 U.S. at 100-101. To create their product and bring it to market, leagues must impose a “myriad of rules,” from “the size of the field” to “the number of players on a team.” *Id.* at 101; *see also American Needle*, 560 U.S. at 202 (“NFL teams ... must cooperate in the production and scheduling of games”). While such rules “restrain the manner in which institutions compete,” it would be “pointless to declare the[m] ... illegal,” for then the product could not be produced. *Board of Regents*, 468 U.S. at 101.

Next the Court examined a feature of NCAA sports that it likewise deemed essential to the NCAA’s product: amateurism. By “enabl[ing] a product to be

marketed” that is different from professional sports, NCAA rules designed “to preserve the character and quality of” amateur college athletics—including rules that “athletes must not be paid”—“widen consumer choice.” 468 U.S. at 102. Since most NCAA rules fit that description, the Court declared it “reasonable to assume that most ... NCAA [rules] are justifiable means of fostering competition among amateur athletic teams, and therefore procompetitive.” *Id.* at 117. Indeed, this Court elaborated, “the preservation of the student-athlete in higher education ... is entirely consistent with the goals of the Sherman Act.” *Id.* at 120.

The Court, however, distinguished amateurism rules and others essential to the NCAA joint venture from the telecast plan at issue. Because the latter was *not* “based on a desire to maintain the integrity of college football as a distinct and attractive product,” it did “not ... fit into the same mold as do rules defining the conditions of the contest” or “the eligibility of participants.” 468 U.S. at 116-117. This Court accordingly conducted a detailed rule-of-reason analysis of the challenged plan. *Id.* at 104-117.

In short, consistent with joint-venture precedent, *Board of Regents* recognized both that a defining feature of the NCAA’s league is that participants must be *amateur* student-athletes, and that eligibility rules must be established by mutual agreement among members. Because those rules “enable[] a product to be marketed which might otherwise be unavailable,” 468 U.S. at 102, they are essential to the NCAA joint venture, no less than rules defining field and roster size, or requiring participants to be students. Consequently, they should be upheld as “procompetitive” “in the twinkling of an eye,” *id.* at 109 n.39, 117, i.e., without detailed rule-of-reason analysis. That is the only ap-



proach that gives the NCAA the “ample latitude” it “needs” to play its “critical role in the maintenance of a revered tradition of amateurism in college sports.” *Id.* at 120.

## **2. The Ninth Circuit erred in refusing to follow this Court’s joint-venture precedent**

Under the above framework, the rules challenged here should have been upheld as a matter of law, without detailed rule-of-reason scrutiny. The pre-2014 athletic-scholarship limit that respondents challenged implemented the defining foundational principle of amateur college sports: “athletes must not be paid.” *Board of Regents*, 468 U.S. at 102. The reimbursement of reasonable and verifiable education expenses is consistent with that principle (as NCAA rules have long recognized), and the pre-2014 limit—tuition and fees, room and board, and required books—reflected the NCAA’s estimation of those expenses. The limit reflected, in other words, the point at which, in the NCAA’s judgment, schools’ reimbursement of student-athletes’ expenses became, or risked becoming, professionalizing “pay for play,” thereby threatening the distinctive amateur character of college sports. (That judgment, like any other, can of course change with experience, as happened with the NCAA’s 2014 raising of the athletic-scholarship limit.) As explained, *Board of Regents* establishes that such rules, like other restraints defining the character of a joint venture’s offering, are procompetitive.

The Ninth Circuit, however, dismissed *Board of Regents*’ analysis because that case (in its view) “discussed the amateurism rules [simply] ... to explain why NCAA rules should be analyzed under the Rule of Rea-

son, rather than held to be illegal per se.” App. 24a. That reading is not plausible.

What the Ninth Circuit viewed as merely a “long encomium to amateurism” was not “dicta,” App. 25a, but rather essential to this Court’s assessment of the telecast plan at issue. *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996) (“When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result” that are binding.). Indeed, the “fundamental reason” *Board of Regents* gave for undertaking a detailed rule-of-reason analysis, 468 U.S. at 116, was that the television plan was *not* “based on a desire to maintain the integrity of college football as a distinct and attractive product,” i.e., did “not ... fit into the same mold as do rules defining the ... eligibility of participants,” *id.* at 117. This Court would not have gone to significant lengths to explicate that distinction if all NCAA rules were subject to the same scrutiny, namely, detailed rule-of-reason analysis.

Moreover, *American Needle*—citing *Board of Regents*—reaffirmed that restraints essential to a joint-venture product are “likely to survive the Rule of Reason,” and in fact can be upheld without “a detailed analysis.” 560 U.S. at 203. The Ninth Circuit never cited *American Needle*, let alone grappled with its endorsement of the framework employed in *Board of Regents* and other joint-venture precedent.

### **3. The decision below departs from other circuits’ precedent**

Before this case, every circuit to consider the issue had agreed that under *Board of Regents*, NCAA amateurism rules should be upheld without detailed rule-of-

reason analysis (let alone a trial). For example, in *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012), the Seventh Circuit read *Board of Regents* and *American Needle* to mean that NCAA rules that “define what it means to be an amateur or a student-athlete” should be sustained “‘in the twinkling of an eye’—that is, at the motion-to-dismiss stage,” *id.* at 341, 343. The only relevant question, the court explained, is “whether a rule is, on its face, supportive of the ‘no payment’ and ‘student-athlete’ models.” *Id.* at 343 n.7.

The Ninth Circuit acknowledged disagreement with this part of *Agnew*, but asserted that the rules at issue there “did not implicate the preservation of amateurism.” App. 27a. *Agnew’s* reading of *Board of Regents*, however, was essential to the court’s analysis. *Agnew* explained that if the rules at issue had been “of the type ... blessed” by *Board of Regents*, it would have upheld them without further inquiry. 683 F.3d at 341. The court required “a more searching Rule of Reason analysis” only because the rules at issue were “not directly related to the separation of amateur athletics from pay-for-play athletics.” *Id.* at 343, 345. The discussion in *Agnew* was therefore no more dicta than the relevant discussion in *Board of Regents*.

The Third and Fifth Circuits have also concluded that under *Board of Regents*, NCAA eligibility rules are procompetitive and therefore should be upheld as a matter of law. See *Smith v. NCAA*, 139 F.3d 180, 186-187 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459, 464 n.2 (1999); *McCormack v. NCAA*, 845 F.2d 1338, 1343-1345 (5th Cir. 1988). The Ninth Circuit denied any disagreement with these courts because they “ultimately subjected the NCAA’s rules to Rule of Reason scrutiny.” App. 26a. That focus on doctrinal labels, however, (contrary to this Court’s dictates, *see*

*California Dental*, 526 U.S. at 779) reflects a misunderstanding of *Board of Regents*. Where other courts of appeals split from the Ninth Circuit was not in the label they applied but in recognizing the critical substantive point: that in the context of joint ventures, the rule of reason should be applied without detailed analysis—and more specifically that once it is determined that a challenged NCAA rule is plausibly designed to preserve amateurism (and thus the NCAA’s distinct product), no further analysis is required and the challenged rule should be upheld as a matter of law. See *Smith*, 139 F.3d at 186-187 (eligibility rule “so clearly survives a rule of reason analysis” that we “do not hesitate” to uphold it at the motion-to-dismiss stage); *McCormack*, 845 F.2d at 1343-1345 (“little difficulty” rejecting, as a matter of law, a challenge to NCAA eligibility rules). These courts’ analyses and holdings simply cannot be reconciled with the Ninth Circuit’s approach here.

**B. The Relevant Portion Of The Ninth Circuit’s Less-Restrictive-Alternative Analysis Is Erroneous And Departs From This Court’s And Other Circuits’ Precedent**

The court of appeals’ error in subjecting the challenged rules to a detailed rule-of-reason analysis was compounded by the way the court then conducted part of that analysis. The court purported to agree with the NCAA (and its antitrust-scholar amici) that “courts should not use antitrust law to make marginal adjustments to broadly reasonable market restraints.” App. 50a. Yet the court did precisely that: It held that although the NCAA’s *post*-2014 athletic-scholarship limit was lawful, the NCAA had violated the Sherman Act because under its *pre*-2014 limit, student-athletes could be reimbursed for the vast majority of their expenses—

tuition and fees, room and board, and required course-related books—but not *also* for “supplies, transportation, and other expenses related to attendance at the institution.” App. 6a n.3.

That is quintessential micromanagement. As explained below, the Ninth Circuit’s characterization of the pre-2014 limit as “*patently and inexplicably* stricter” than necessary, App. 51a, does not withstand scrutiny. That the court nonetheless condemned the limit (because it excluded a few expenses) makes clear that the court embraced a de facto *least-restrictive-alternative* test. See App. 58a-59a (stating—“[b]y way of summation”—that “the NCAA’s rules have been more restrictive than necessary”). Such a test has no basis in precedent or sound antitrust principles, both of which teach that a restraint is valid if it is reasonably related to its procompetitive justifications. And like the Ninth Circuit’s departure from *Board of Regents*, a least-restrictive-alternative test would invite a flood of challenges to the NCAA’s (and other joint ventures’) rules, with plaintiffs asking courts to tinker at the margins of legitimate business judgments. That would further discourage procompetitive joint ventures from forming, and hamper their ability to function effectively, without any benefit to competition or consumers.

- 1. Cost of attendance is not a substantially less restrictive alternative to the challenged rules**

The Ninth Circuit framed the less-restrictive-alternative question as “whether there were means of achieving the NCAA’s procompetitive purposes that were ‘substantially less restrictive’ than” the challenged rules. App. 19a. And it correctly held that requiring the NCAA to allow cash payments to student-

athletes above COA was not a valid alternative. App. 51a-58a. Yet it concluded that requiring the NCAA to allow reimbursement of expenses up to COA *was* a substantially less restrictive alternative. App. 49a-51a. The court held, that is, that the NCAA had violated federal antitrust law by allowing student-athletes to be reimbursed for one set of expenses (those included in the pre-2014 scholarship limit) rather than a slightly bigger—but largely overlapping—set (COA).

That is untenable. Which expenses can be reimbursed consistent with amateur status is a matter of judgment, not something amenable to a single “right” answer. To be sure, federal law defines one possible group of expenses, COA. But there is nothing talismanic about that definition, particularly as a benchmark for determining what is consistent with amateurism. The statute itself recognizes as much, leaving several components of COA to be “determined by the institution.” *E.g.*, 20 U.S.C. §1087ll(3), (4)(A), (9), (11), (13). That recognition is consistent with this Court’s view that the NCAA deserves substantial judicial deference in administering collegiate athletics.

The Ninth Circuit gave no explanation for treating COA as the single, unquestionably “correct” set of expenses against which the challenged rules should be measured. Nor did it address what it would mean for the NCAA if Congress re-defined COA in the future. The decision below could be read to mean that the NCAA would have to implement such a change immediately—no matter what it was—on pain of again being labeled an antitrust violator. There is no principled basis for that conclusion.

Furthermore, the Ninth Circuit’s ruling depended not only on deeming COA the sole “correct” set of ex-

penses, but also on the court’s view that the slightly lower pre-2014 athletic-scholarship limit was “*patently and inexplicably* stricter than ... necessary to accomplish all of [the NCAA’s] procompetitive objectives,” App. 51a—i.e., “patently and inexplicably” below COA. The court did not explain either part of that characterization, and both parts are incorrect.<sup>4</sup>

First, the pre-2014 limit was not “patently” lower than COA. As discussed, those two groups of expenses largely overlap; the only additional expenses allowed under COA are “supplies, transportation, and miscellaneous personal expenses.” 20 U.S.C. §10871l(2). These additional expenses typically total “a few thousand dollars,” App. 6a n.3, a small fraction of COA. The exclusion of that fraction did not, in any reasonable sense of the word, make the pre-2014 limit “patently” (or substantially) stricter than the cost-of-attendance limit that the Ninth Circuit approved.

The pre-2014 limit was also not “inexplicably” below COA. The NCAA could have made a reasonable judgment that the pre-2014 limit protected amateurism better than COA. One could reasonably conclude, for example, that “miscellaneous personal expenses,” 20 U.S.C. §10871l(2), which were excluded under the pre-2014 limit, was such a vague term that it raised a significant risk of being abused, i.e., of threatening student-

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<sup>4</sup> The court appeared to view “patently and inexplicably stricter” as a rephrasing of its traditional “substantially less restrictive” standard, i.e., the notion that a restraint must be upheld if it is reasonably related to legitimate procompetitive justifications. Hence, for the same reasons given in the text that follows, the challenged rules were reasonably related to their procompetitive justifications, and the alternative the Ninth Circuit approved was not substantially less restrictive.

athletes' amateur status by becoming a loophole for surreptitious payments unconnected to actual educational expenses.

Put simply, it cannot be that allowing reimbursement of supplies, transportation, and other miscellaneous expenses *in addition to* tuition and fees, room and board, and required books is the difference between a lawful amateurism rule and a violation of the Sherman Act. Such a threadbare distinction finds no support in the text of the Sherman Act, sound antitrust principles, or this Court's precedent.

Indeed, by fixating on the "proper" expense limit, the Ninth Circuit lost sight of its mandate under the Sherman Act to guard against harm to *competition*. See *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) ("[T]he plaintiff here must ... prove harm ... to competition itself."); *id.* at 136-137 (conduct that leads to higher prices but does not result in a "less competitive market" does not violate section 1). As discussed, the Ninth Circuit merely set a slightly higher limit on the reimbursement that student-athletes may receive. But even accepting that limits on expense reimbursement are akin to limiting the "price" that colleges "pay" student-athletes, antitrust courts may not "act as [a] central planner[]" in trying to "identify[] the proper price." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Rather, a "joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells." *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006). And while the Ninth Circuit evidently deemed COA more reasonable than the NCAA's pre-2014 scholarship limit, "the difference between legal and illegal conduct" cannot "depend upon so uncertain a test as whether prices



are reasonable.” *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927). The court’s (mistaken) view of the “price” set by the NCAA’s pre-2014 limit as unreasonable was not a legitimate basis to deem the limit a violation of the antitrust laws.

## **2. A least-restrictive-alternative standard should be rejected**

The Ninth Circuit’s invalidation of the NCAA’s pre-2014 athletic-scholarship limit, despite the lack of a substantial difference between that limit and COA, makes clear that the court employed a *least-restrictive-alternative* standard. In fact, the court appeared to acknowledge this, stating in summarizing its opinion that the challenged rules were unlawful because they were merely “more restrictive than necessary to maintain its tradition of amateurism.” App. 59a. But a least-restrictive-alternative (i.e., strict-necessity) test is improper and inconsistent with the precedent of this Court and other circuits.

Through more than a century of experience with the rule of reason, this Court “has never indicated that ... the availability of an alternative means of achieving the asserted business purpose renders the existing arrangement unlawful if that alternative would be less restrictive of competition no matter to how small a degree.” *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975). Rather, to be upheld a restraint ordinarily need only be “reasonably necessary” to achieve the procompetitive benefits. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967), *overruled on other grounds by Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *see also Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 406 (1911) (“With respect to contracts in

restraint of trade, restraint[s] ... must be ... fairly necessary[.]”), *overruled on other grounds by Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007). Hence, in *Continental* this Court upheld a restraint despite noting that it was “neither the least nor the most restrictive provision that [the defendant] could have used.” 433 U.S. at 58 n.29; *see also NFL v. North Am. Soccer League*, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting from denial of certiorari) (“The Court of Appeals [went] too far by adopting the least restrictive alternative analysis that is sometimes used in constitutional law. The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity.”). The Ninth Circuit’s ruling is inconsistent with this precedent.

It also departs from the law of other circuits. The Third Circuit, for example, held in *American Motor Inns* that “[i]n a rule of reason case, the test is not whether the defendant deployed the least restrictive alternative. Rather the issue is whether the restriction actually implemented is ‘fairly necessary.’” 521 F.2d at 1248; *see also Graphic Prods. Distribs. v. Itek Corp.*, 717 F.2d 1560, 1577 (11th Cir. 1983) (“Numerous courts have explicitly endorsed the reasonably necessary test.”). Similarly, in an opinion by Judge Bork, the D.C. Circuit affirmed summary judgment for an antitrust defendant after finding that “[t]he restraints it imposes are reasonably necessary to the business it is authorized to conduct.” *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986). The First Circuit, reversing a preliminary injunction entered against an antitrust defendant, likewise observed that the defendant “was not required to adopt the least restrictive means of stopping [plaintiff] from selling abroad, but merely means reasonably suited to that

purpose.” *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 860 (1st Cir. 1984). And the Fifth Circuit rejected an antitrust challenge to NCAA “rules restricting the benefits that may be awarded student athletes” on the ground that those rules “reasonably further [the NCAA’s] goal.” *McCormack*, 845 F.2d at 1340, 1345.<sup>5</sup>

These other circuits’ holdings are correct. As its name suggests, the rule of reason is about whether a particular restraint is reasonable under all the circumstances. The less-restrictive-alternative analysis, as part of the rule of reason, should reflect the same inquiry. A *least*-restrictive-alternative test fails to do that, because—again as this Court’s precedent confirms—some restraints are reasonable under all the circumstances despite not being “the least ... restrictive provision that [the defendant] could have used.” *Continental*, 433 U.S. at 58 n.29.

A least-restrictive-alternative test would improperly “plac[e] the courts in the awkward position of routinely second-guessing business decisions,” ABA Section of Antitrust Law, *The Rule of Reason* 123 (1999), thus threatening to “interfere with the legitimate objectives at issue without ... adding that much to competition,” 7 Areeda & Hovenkamp, *Antitrust Law* ¶1505b (3d ed. 2015). In fact, such a test would encourage litigation premised on nothing more than “the imaginations of lawyers” in “conjur[ing] up” some marginally

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<sup>5</sup> As noted, the Ninth Circuit professed agreement with these other circuits. App. 50a. But that does not alter what the court *did*—and hence the need for this Court’s review. If left undisturbed, the decision below will undoubtedly induce other courts to conclude, erroneously, that “reasonably necessary” or “fairly necessary” permits the same judicial micromanagement that the Ninth Circuit engaged in here.

less restrictive alternative. *American Motor Inns*, 521 F.2d at 1249. Such litigation would be rampant, because a “skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements.” 11 *Antitrust Law* ¶1913b. The Ninth Circuit’s “rigid ‘no less restrictive alternative’ test ... [thus] would place an undue burden on the ordinary conduct of business.” *American Motor Inns*, 521 F.2d at 1249.

### **C. The Question Presented Is Recurring And Important**

As the cases cited above make clear, the NCAA has faced numerous antitrust challenges to its rules over the years. The decision below will only increase the frequency of such challenges, particularly in the Ninth Circuit. (Indeed, the NCAA is already facing—in addition to a \$42 million fee award in this case—other lawsuits asking courts to further second-guess its rules. *See, e.g., Jenkins v. NCAA*, No. 14-cv-2758 (N.D. Cal.).) And a court following the Ninth Circuit’s reasoning here might find merit in a host of challenges that other courts have properly rejected, including a challenge to academic-eligibility requirements, *see Bowers v. NCAA*, 9 F. Supp. 2d 460, 497-498 (D.N.J. 1998), or a challenge to the rules preventing students-athletes from securing agents in anticipation of entering a professional draft, *see Banks v. NCAA*, 977 F.2d 1081, 1089-1090 (7th Cir. 1992). The NCAA should not have to undergo a full trial (and years of litigation) or face treble damages whenever a plaintiff or counsel hits on a supposedly better way to administer college athletics.

The Ninth Circuit’s reasoning, moreover, is not necessarily limited to the NCAA. Other sports leagues routinely impose a variety of limits, such as on the size

of each team’s roster. These limits could be viewed as restraining labor markets, even though they are essential to the functioning of the leagues. And a league forced to defend an antitrust challenge to such limits would surely struggle to demonstrate that the precise roster limit it adopted is no more restrictive than necessary. Why, a court following the Ninth Circuit could wonder, shouldn’t the limit on a football team’s roster spots be increased by 5, 10, or some other number? As other circuits have recognized, this is not a proper use of antitrust law. *See, e.g., Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (3d Cir. 2010) (“[S]ports-related organizations should have the right to determine for themselves the set of rules that they believe best advance their respective sport[.]”). Nor is the problem limited to sports leagues. For example, a clearing house offering blanket licenses for copyrighted musical compositions could be vulnerable under the decision below if a court deemed the choice not to lower the license fee slightly (or to not offer licenses on a per-composition basis) “inexplicabl[e].” App. 51a; *cf. Broadcast Music*, 441 U.S. at 17-18.

Clarifying the extent to which this Court’s joint-venture precedent precludes potentially endless antitrust challenges to NCAA rules is thus critically important, as is resolving whether courts may use the rubric of less (or least) restrictive alternatives to tinker with every NCAA rule—and the rules that other joint ventures adopt to create their products. *See Pacific Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438, 452 (2009) (emphasizing “the importance of clear rules in antitrust law”). The need for review is particularly strong given the nationwide scope and importance of college athletics; as this Court has recognized, the NCAA is “the guardian of an important American tra-

dition,” *Board of Regents*, 468 U.S. at 101 n.23. Even the Ninth Circuit described this as a “momentous case.” App. 2a. The need to correct the Ninth Circuit’s unprecedented departures from both established antitrust principles and from the decisions of this Court and other circuits justifies review.

## II. THE DECISION BELOW RESTS ON A FLAWED INTERPRETATION OF THE FIRST AMENDMENT

### A. The Ninth Circuit’s Standing Ruling Depended On Its Holding In *Keller*

One of the NCAA’s defenses to respondents’ claim that they were harmed by the uncompensated use of their NILs was that respondents had not shown the necessary injury from any such NIL use, and thus lacked standing. The Ninth Circuit’s rejection of that argument rested entirely on a prior case in which the court badly misinterpreted the First Amendment.<sup>6</sup>

In particular, the Ninth Circuit held here that respondents had standing regarding NIL use in videogames because “the NCAA’s rules ha[d] foreclosed the market for their NILs in video games.” App. 33a. (The court did not analyze NIL use in live-game broadcasts or archival footage, saying those presented “thornier questions,” *id.*). As the NCAA argued, however, there was no videogame NILs “market” to foreclose, because any claim to enforce state-law rights relating to NIL use in videogames would be precluded by the First Amendment. App. 36a n.13. The Ninth Circuit reject-

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<sup>6</sup> The NCAA framed its argument as one of antitrust standing, whereas the Ninth Circuit addressed it as Article III standing. App. 32a-33a. *But see* App. 59a n.1 (op. of Thomas, C.J.). Because the underlying First Amendment issue here does not depend on the proper label, the petition refers simply to standing.

ed this argument based on *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013) (hereafter *Keller*), which held that the First Amendment did *not* preclude a right-of-publicity claim arising from the use of college-football players' NILs in videogames. App. 36a n.13.<sup>7</sup>

As Chief Judge Thomas recognized, then, the Ninth Circuit's holding that respondents had standing depended on the validity of *Keller*. App. 59a n.1. But *Keller* was wrongly decided—and it deepened lower-court disarray on an important First Amendment question. The Court should grant certiorari to resolve that disarray.

### **B. *Keller's* First Amendment Holding Is Wrong**

1. As noted, *Keller* held that the First Amendment did not foreclose right-of-publicity claims stemming from the use in videogames of college-football players' NILs. More specifically, the court first held that the proper test to apply in evaluating such claims is the “transformative use” test. *See* 724 F.3d at 1271. Under that test, the First Amendment bars a right-of-publicity claim only if the plaintiff's depiction in the relevant expressive work is sufficiently different, i.e., “transformed,” from reality. *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001) (describing the test—which it created—as “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”), *quoted in Keller*, 724 F.3d at 1273.

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<sup>7</sup> *Keller* was an interlocutory appeal arising from right-of-publicity claims (since settled) that for years were consolidated with the *O'Bannon* antitrust claims.

Applying the transformative-use test, *Keller* held (over a dissent) that the videogame at issue was not protected by the First Amendment because it “realistically portrays college football players in the context of college football games.” 724 F.3d at 1279; *see also id.* at 1271. The court, that is, held the game’s alleged use of players’ likenesses insufficiently “transformative” to merit First Amendment immunity from a state-law right-of-publicity claim.

2.a. *Keller* cannot be reconciled with foundational First Amendment principles. Right-of-publicity claims like *Keller*’s penalize speech based on content; liability is imposed because the speakers’ expression includes one or more public figures’ name, image, or likeness. *See Bartnicki v. Vopper*, 532 U.S. 514, 521 (2001). Because the speech targeted by right-of-publicity claims does not fall within one of the “few historic and traditional categories” of expression subject to content-based regulation, *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012), such claims must be limited to applications that survive strict scrutiny, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

The transformative-use test does not impose such a limit. In fact, as *Keller* illustrates, the test perversely punishes speech for being truthful and accurate; the more realistic a particular depiction is, the more the test ratchets up the risk of liability. That has matters backwards: “The constitutional guarantees of freedom of expression” require that “[t]ruth may not be the subject of either civil or criminal sanctions.” *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Hence, accuracy and realism (i.e., truth) are generally a *defense* to liability for otherwise tortious speech, not a basis for withholding First Amendment protection. *See Curtis Pub’g Co. v. Butts*, 388 U.S. 130, 151 (1967) (“Truth has become an



absolute defense in almost all [libel] cases[.]”); *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (criticizing a Florida law that banned publicizing names of sexual-offense victims, because the law “punish[ed] truthful publication”).

No compelling government interest justifies a departure from these principles in the context of right-of-publicity claims. The interest supposedly furthered by such claims is “protect[ing] a form of intellectual property [in one’s person] that society deems to have some social utility.” *Keller*, 724 F.3d at 1280 (second alteration in original). The point, in other words, is to reward the “money, time and energy ... needed to develop one’s prominence in a particular field.” *Id.*; *see also id.* at 1281 (“Keller’s claim is that [the videogame maker] has appropriated ... 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—and safeguarding it is not important enough to justify punishing truthful 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, balances two competing *speech* interests: the interest in using copyright protection to induce the creation of new works and the interest in permitting others to engage in their own expression by expanding or commenting on existing works. *See Eldred v. Ashcroft*, 537 U.S. 186, 219-220 (2003). But here, speech interests exist on only one side of the balance, because publicity rights create an incentive to pursue fame, not expression. No precedent or 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” equivalent to “the right of free expression.” *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 157 (3d Cir. 2013).

b. The transformative-use test is also subjective and unpredictable, and thus threatens to chill large amounts of protected expression.

“Under our Constitution, ‘esthetic and moral judgments about art ... are for the individual to make, not for the Government to decree.’” *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 790 (2011) (ellipsis in original). Allowing government officials to make such judgments and thereby restrict speech generates tremendous uncertainty, causing speakers to “‘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) (citation omitted). 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 when otherwise-protected expression can be penalized based on how “transformative” a court deems the expression. 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 depicting or referring to famous people cannot—and should not have to—reliably predict whether their 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 it have sought to draw “subtle” distinctions among expressive works, *Comedy III*, 21 P.3d at 811,

seemingly based on judges' personal sense of whether a particular work is sufficiently artistic or creative to warrant protection. For example, in one case the California Supreme Court withheld First Amendment protection from a charcoal drawing of The Three Stooges after finding it insufficiently creative—but mused 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.*

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

The potential extent of such chilling is striking. 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 GM factories in Michigan). The very point of an artist's work is often to represent a real subject as faithfully as possible. Yet under the transformative-use test, achieving that artistic goal is exactly what invites liability. Such a regime contravenes the First Amendment.

3. Many courts have rejected the transformative-use test, embracing a variety of others instead. *See, e.g., Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 514 & n.5 (7th Cir. 2014) (“The Supreme Court has not addressed the question, and decisions from the lower

courts are a conflicting mix[.]” (citing cases)); *Keller*, 724 F.3d at 1279-1282. This Court should resolve this splintering—and adopt the “*Rogers* test,” named after *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). Under that test, which four circuits and two state high courts employ, speakers may be held liable only if they depict or refer to a celebrity in order to sell something, by either falsely claiming a commercial endorsement or gratuitously publishing a celebrity image to attract attention.

So confined, right-of-publicity claims satisfy First Amendment dictates. Commercial speech that falsely claims a product endorsement is akin to the fraudulent speech that may properly be regulated. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Likewise, the gratuitous use of a celebrity’s image, unrelated to any expressive content, falls beyond First Amendment protection. Hence, under the *Rogers* test, right-of-publicity claims raise little if any free-speech concern.

Limiting publicity rights to misleading commercial speech also properly returns them to their original form. The courts that first recognized a privacy tort (the forerunner to the right-of-publicity tort) predicted that it would not threaten free expression precisely because “the publication of one’s picture for advertising purposes [includes] 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). Finally, adopting the *Rogers* test would bring the United States 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.”).

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

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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