

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-3051

Short Caption: Akeem Daniels, et al. v. FanDuel, Inc. and DraftKings, Inc

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

FanDuel, Inc

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
FanDuel Limited

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
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DraftKings, Inc

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Norris Choplin Schroeder LLP, 101 West Ohio Street, Ninth Floor, Indianapolis, IN 46204-4213; Foley & Lardner LLP, 777; E. Wisconsin Avenue, Milwaukee, WI 53202; Barnes & Thornburg LLP, 11 South Meridian St., Indianapolis, IN 46204; Boies Schiller Flexner LLP, 575 Lexington Avenue, New York, NY 10022

(3) If the party or amicus is a corporation:

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

21st Century Fox America, Inc.

Attorney's Signature: s/ Damien J. Marshall Date: January 16, 2018

Attorney's Printed Name: Damien J. Marshall

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21st Century Fox America, Inc.

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Attorney's Printed Name: Leigh M. Nathanson

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JURISDICTIONAL STATEMENT

Appellants' jurisdictional statement is complete and correct.

RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellees FanDuel, Inc. ("FanDuel") and DraftKings, Inc. ("DraftKings"), operate online daily fantasy sports platforms through which contestants act as general managers or owners of their fantasy teams, using skill to draft their fantasy rosters from among the same pool of real-life athletes. Contestants then compete against one another for cash prizes based on the statistical performance of the athletes on their fantasy teams. Appellants are former college football players whose names and statistics were available to be selected for fantasy sports teams on Appellees' platforms. Appellants claim the use of their names and athletic records on Appellees' platforms violated Indiana's right of publicity statute, Ind. Code §§ 32-36-1, *et seq.* The questions presented for review are:

- (1) Did the district court correctly rule that Indiana's right of publicity statute, Ind. Code § 32-36-1-1(c)(1)(B), did not prohibit Appellees' conduct because Appellees' use of Appellants' likenesses had "newsworthy value"?
- (2) Did the district court correctly rule that Indiana's right of publicity statute, Ind. Code § 32-36-1-1(c)(3), did not prohibit Appellees' conduct because Appellees' use of Appellants' likenesses was "in connection with the broadcast or reporting of an event or topic of general or public interest?"

STATEMENT OF THE CASE

Millions of sports fans play fantasy sports online. Appellees provide an online platform for individuals to enter daily fantasy sports contests with friends, family, or other fantasy-sports enthusiasts. Contestants rely on historical data, abundant commentary, and analysis, to assemble fantasy rosters of real athletes. They then compete against fellow contestants using real statistics from real games to determine the outcome of the fantasy sports contest. Major media outlets such as ESPN and CBS among others host online fantasy leagues and provide the news and commentary that fantasy players rely on to craft their fantasy teams. Appellees FanDuel and DraftKings host fantasy sports contests in which contestants can assemble fantasy teams, while also giving users access to historical statistics, advice and commentary, updating roster performance in real time, and permitting users to compete for monetary prizes.

Appellants here are college athletes who contend that the use of their names and statistics on Appellees' websites without authorization and compensation violated Indiana's right of publicity. But the plain text of the statute forecloses their claim. As the district court correctly held, Appellees' dissemination, use, and analysis of publicly available statistical information for college football athletes falls within the newsworthiness and public interest exceptions that the Indiana legislature included in Indiana's right of publicity law, Ind. Code § 32-36-1-1.

Statistics such as those that Appellees provided to their users and used on their fantasy sports platforms have been read, digested, analyzed, and

debated by tens (if not hundreds) of millions of fans who follow college football with passion and interest and access Appellees' sites each week to track and predict the performances of their fantasy teams. By any common understanding of the terms, those publicly available statistics and the commentary they generate are both "newsworthy" and of broad "public interest."

Appellants cannot reasonably (and for the most part do not) dispute that the plain text of the statutory exceptions forecloses their claim. Appellants thus ask this Court instead to rewrite the statute more to their liking. Appellants assert, in conclusory fashion, that Appellees' daily fantasy sports contests constitute illegal gambling so their speech is unprotected under the First Amendment. But, as the district court found, the legality of Appellees' operations and the First Amendment implications of their speech are entirely irrelevant to the only question at issue in this case: whether Appellees' use of Appellants' names and statistics is prohibited by Indiana's right of publicity statute.

Although Appellants argue that the Indiana statute should not be read to allow speech the First Amendment would not protect, the statute contains no such exceptions beyond those the General Assembly itself wrote. The statute's carve-outs for newsworthy information and the reporting of events in the public interest do not depend on whether the use at issue involves protected or unprotected speech – they simply provide that such a use does not violate Appellants' right of publicity. In any event, Appellees' fantasy sports contests are, in fact, legal under Indiana law. And, even if Appellants could allege otherwise, the speech here, which is not integrally related to the alleged illegality,

would still be protected by the First Amendment and thus outside the scope of the statute they have asked this Court to craft.

A. Daily Fantasy Sports

Contestants on daily fantasy sports websites, such as those operated by Appellees, enter contests in which they assemble a fantasy team of comprised of real-life athletes and earn fantasy points based on statistics those athletes generate in sporting events during the duration of the contest.¹ District Court Op., District Court ECF No.75, 7th Cir. ECF No. 1-1 (“Op.”) at 2. Fans create a fictitious team of real-life athletes, each of whom has been assigned a “salary” by Appellees, within the constraint of a fictional “salary cap.” *Id.* Although the players’ salaries are entirely fictitious, they represent Appellees’ approximation of a player’s athletic ability as measured by the player’s performance statistics. Am. Class Action Compl. ¶ 32, District Court ECF No. 17. Once a fan selects and submits her team, the team competes against teams of other contestants, either in head-to-head contests or in a tournament against multiple entrants in which the highest performing team prevails. Op. 2. Teams garner points during contests based on a scoring system that attributes fantasy points to certain statistics generated during real-life games – for example, scoring a touchdown in football or a three-point shot in basketball. *Id.* Fans whose teams prevail or achieve a certain score can be awarded cash prizes. *Id.* In addition to facilitating

¹ Appellees operate both websites and mobile platforms through which fans can play fantasy sports. Op. 2. Although the district court’s ruling and the arguments in this brief cover both means of accessing Appellees’ services, for ease of reference this brief will refer solely to Appellees’ “websites.”

fantasy sports games, Appellees' websites also contain athlete profiles, including projections of future performance, and reports of the week's sports news. *Id.* at 14. Appellees also host discussion fora in which fans can share opinions about athletes' skills and discuss strategy for fantasy team selection. *Id.* at 3, 14.

As the District Court observed, not only are professional and college sports matters of wide public interest throughout the country, but fantasy sports are a matter of significant interest in their own right. *Id.* at 3. The daily fantasy sports industry has generated roughly \$3 billion in customer entry fees since 2015, and numerous media outlets produce weekly fantasy sports-related broadcasts that offer strategy and advice for success in fantasy competition. *Id.*

B. Appellants' Lawsuit

Appellants Akeem Daniels, Cameron Stingily, and Nicholas Stoner seek to represent a class of individuals who played college football and whose names were available to be selected for fantasy teams through Appellees' websites. *Id.* at 2-3. Appellants' names each appeared at least once on the roster of athletes available to be selected for a fantasy team and were assigned fictitious salaries by Appellees. *Id.* at 3. As with virtually all other athletes available to be selected, Appellees' websites contained commentary posted by both Appellees and fans on the merits of selecting Appellants for fantasy teams in light of Appellants' expected performance and assigned salary. Appellants' Brief ("Br.") at 3-4.

In May 2016, Appellants filed suit in Indiana state court alleging that, by featuring Appellants on their websites, Appellees violated Indiana's right of

publicity law as codified in Ind. Code § 32-36-1-8(a).² District Court ECF No.

17. That statute provides, in relevant part:

A person may not use an aspect of a personality's right of publicity for a commercial purpose during the personality's lifetime or for one hundred (100) years after the date of the personality's death without having obtained previous written consent from a person specified in section 17 of this chapter.

The statute contains several exceptions that reflect the Indiana General Assembly's "obvious attempt to avoid potential constitutional infirmities with the statute." *Dillinger, LLC v. Elec. Arts Inc.*, 795 F. Supp. 2d 829, 836 (S.D. Ind. 2011). As most relevant here, § 32-36-1-8(a) does not apply to "[t]he use of a personality's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms," Ind. Code § 32-36-1-1(c) in

1. "[m]aterial that has political or newsworthy value," Ind. Code § 32-36-1-1(c)(1)(B); or
2. "the broadcast or reporting of an event or a topic of general or public interest," Ind. Code § 32-36-1-1(c)(3).

Appellees removed the case to federal court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), *et seq.*, see District Court ECF No. 1, and then moved to dismiss in light of Appellants' failure to state a claim upon which relief could be granted, see District Court ECF No. 27. Appellees argued that

² Appellants originally filed suit in the Northern District of Illinois alleging a violation of Illinois's right of publicity. See Complaint *Daniels v. FanDuel, Inc.*, No. 16-1223 (N.D. Ill.) (Jan. 27, 2016); Complaint, *Daniels v. DraftKings, Inc.*, No. 16-1220 (N.D. Ill. Jan. 27, 2016) (same). Appellants dismissed those suits voluntarily, thus avoiding Illinois's one-year statute of limitations for right of publicity claims that would have foreclosed their claim. See *Blair v. Nev. Landing P'ship*, 859 N.E.2d 1188, 1191-92 (Ill. App. Ct. 2006).

Appellants' right of publicity claim was barred by, among other things, these two statutory exceptions and the First Amendment.

C. The District Court's Decision

The district court granted Appellees' motion to dismiss. Addressing what it characterized as the "dispositive" issue in the case, the court held that Appellees' conduct fell within those two statutory exceptions to Indiana's right of publicity law described above. Op. 6. The "newsworthiness" exception, the court found, "has been defined in the most liberal and far reaching terms . . . to include all types of factual, educational, and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general." *Id.* at 8 (quoting *Time Inc. v. Sand Creek Partners, L.P.*, 825 F. Supp. 210 (S.D. Ind. 1993)). Not only was this definition dictated by Indiana common law, but the court also deemed it necessary "to avoid [the] potential constitutional infirmities" that would be raised were the statute read to cover broad swaths of First Amendment-protected expression. *Id.* at 9. Under the plain text of the statute, "[Appellants'] athletic achievements and activities are 'newsworthy' as contemplated by the statutory exception." *Id.* at 11. The court refused Appellants' attempt to confine the "newsworthiness" exception only to "news organizations," noting that no such limitation appears in the statute.

For much the same reason, the district court also found Appellees' conduct exempted from Indiana's right of publicity statute because the use of Appellants' likenesses was "in connection with the broadcast or reporting of an event or a topic of general or public interest." *Id.* at 13 (quoting Ind. Code § 32-36-1-1(c)(3))

(internal quotation marks omitted). The court recognized that content falling within the “newsworthiness” exception will usually also qualify as material in the “public interest,” and thus its analysis focused on whether Appellees’ conduct constituted “broadcasting or reporting.” *Id.* at 13-14. Appellees’ websites “provide factual data” about athletes, and the district court found the sites “could be used as ‘reference sources,’ either for purposes of playing the associated [fantasy] game, or for information about the collegiate sports and athletes represented on the websites.” *Id.* at 16. The court recognized that both the Eighth Circuit (in holding) and the Ninth Circuit (in dicta) had rejected the notion that the unauthorized use of publicly available statistics in fantasy sports gave rise to an actionable right to privacy claim. Noting “Indiana’s interpretive preference to read statutes in a manner that avoids constitutional issues, as well as other Circuits’ reasoning on similar issues,” the court found Appellees were engaged in “reporting” of a “topic of general or public interest” as that term was used in the Indiana statute. *Id.*; see Ind. Code § 32-36-1-1(c)(3).³

The district court rejected Appellants’ efforts to construe the “newsworthiness” and “public interest” exceptions in a manner other than that required by the plain language of the statute. Thus, the court dismissed as

³ The district court rejected Appellees’ remaining statutory arguments. Thus, the court held that the existence of factual disputes precluded the court’s ruling, on a motion to dismiss, that the Appellees’ websites use of fell within the statute’s exception pertaining to use of material in “literary works.” See Op. 17 (addressing Ind. Code § 32-36-1-1(c)(1)(A)). And the court rejected Appellees’ invocation of the “recorded performances” exception, which covers “[t]he use of a personality’s name to truthfully identify the personality as the performer of a recorded performance.” See Op. 18-19 (addressing Ind. Code § 32-36-1-1(c)(2)(B)). Neither of these rulings is at issue in this appeal.

irrelevant Appellants' principal argument that none of the statutory exceptions to the right of publicity statute should apply because Appellees were allegedly engaging in illegal conduct by operating fantasy sports websites in Indiana. The court concluded that "the legality of the [Appellees'] conduct has no bearing" on the applicability of the statutory exceptions because Appellants "provide[d] no authority or citation to support the contention that illegal behavior would render [Appellees'] materials somehow outside the scope of the statutory exceptions." Op. 19 & n.5. To the contrary, "[t]he statute itself does not include any such provision, and [Appellants] have cited no other authority or rule of law in support of their contention." *Id.* at 19. The court thus explicitly refused to hold that "if Defendants were engaged in illegal conduct, such conduct would render Indiana Code § 32-26-1-1 inapplicable." *Id.*

The court likewise rejected Appellants' argument that Appellees' creation of fictitious salaries and provision of commentary regarding Appellants' athletic performance on their websites somehow brought Appellees' conduct outside the scope of the statutory exemptions. The court observed that "[t]he statute does not prohibit the use of material 'associated with' the name, likeness, or any other of the enumerated aspects of an individual's personality – it prohibits the use of the names and likenesses themselves." *Id.* at 12. Reading the right of publicity to cover any material merely "associated with" an individual, as Appellants argued, "would bring an almost limitless universe of materials within its reach, with obvious First Amendment implications." *Id.*

Finally, the court addressed Appellees' constitutional arguments. Appellees noted that the Eighth Circuit had held in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007), that the use of athlete names and statistics in fantasy sports was protected from a right of publicity claim by the First Amendment. The district court concluded, however, that resolution of the First Amendment issue "requires an analysis of evidence that is not possible or appropriate at the motion to dismiss stage." Op. 20-21. In particular, the court believed that a First Amendment analysis would require determining whether Appellees' expression qualified as "commercial speech," and the court concluded that it currently lacked "the proper factual and evidentiary basis to conduct such an analysis." *Id.* at 22.⁴ The court thus dismissed the complaint in reliance on its analysis of the statutory exceptions without resolving Appellees' alternative constitutional arguments.

⁴ The Court likewise rejected Appellee DraftKings' argument that Indiana's right of publicity statute was preempted by the Copyright Act, 17 U.S.C. § 301(a). *Id.* at 22-24. This ruling is not at issue in this appeal.

SUMMARY OF ARGUMENT

Almost all of Appellants' brief is focused on a question that is not presented by this case and that the district court properly declined to address. The district court found Appellees' conduct exempted from Indiana's right of publicity law by two statutory exceptions regardless of the legality of Appellees' websites under Indiana's gambling law. The district court's straightforward application of the right of publicity law – the only statute that Appellants invoked – was correct, and this Court should affirm.

First, Appellees' use of Appellants' likenesses falls within the newsworthiness exception to the right of publicity and is therefore not actionable under Indiana's statute. Although Indiana courts have not explicitly addressed the scope of this exception, the common law definition of "newsworthy" is expansive, covering "all types of factual . . . data," including entertainment, related to "interesting phases of human activity." *Time Inc.*, 825 F. Supp. 212–13 (internal quotation marks omitted). The information at issue falls squarely within that definition. Hundreds of thousands of fans attend games live; tens of millions watch on television; and millions more read news accounts and analysis of games and college athletes on the Internet and through more traditional media outlets every day of the season. Case after case confirms that sports and the statistics they generate are, by any common understanding of the word, "newsworthy." Moreover, not only are college athletics an eminently newsworthy subject, but fantasy sports in its own right is also a subject of intense public interest.

That Appellees are not traditional brick and mortar or television news media organizations does not change the statutory analysis because the applicability of the exception turns on the *content* of the speech, not the *identity* of the speaker or how such content is conveyed to the consumer. See Ind. Code § 32-36-1-1. Nor do the fictitious “salaries” Appellees assigned to Appellants’ render Appellees liable under the Indiana statute, as the assignment of virtual “salaries” to athletes does not implicate the right of publicity at all. In any event, those “salaries” reflect the considered judgments of Appellees’ analysts as to the relative rankings of the various athletes. Rankings of athletes based on merit are ubiquitous today, and Appellees’ assessments, like the underlying statistics, are eminently newsworthy.

Second, Appellees’ conduct is exempted from the right of publicity statute by the public interest exception. For the same reasons that college sports and fantasy sports are newsworthy, they are “topic[s] of general or public interest.” Ind. Code § 32-36-1-1(c)(3). In addition, by publishing statistical information and detailed analysis and commentary about college sports on their websites and by facilitating fantasy contests, Appellees are engaged in “report[ing]” on those topics. *Id.* The fact that Appellees’ sites entertain as well as inform is beside the point. The Supreme Court has acknowledged that the line between speech that entertains and speech that informs is at best “elusive,” and cases have routinely rejected the significance of the distinction in addressing the dissemination, use, and analysis of sports statistics in fantasy sports and other related contexts.

Underscoring the fact that the district court reached the correct outcome, application of these statutory exceptions to Appellees' websites makes sense because "the facts in this case barely, if at all, implicate the interests that states typically intend to vindicate by providing rights of publicity to individuals." *C.B.C. Distrib. & Mktg., Inc.*, 505 F.3d at 824. The information that Appellants claim Appellees exploited consists entirely of publicly available statistical data, reported and broadcast across the country in a variety of means. And, as other courts have held, the speech at issue does not simply propose or advertise a commercial transaction; it is speech that informs and educates. *See infra* at 27.

Appellants' principal response asks the Court not to interpret the statute but to rewrite it. Appellants thus contend that, notwithstanding the clarity of the text, the statutory exceptions do not apply because (Appellants claim) Appellees are engaged in illegal gambling. But that is both irrelevant and incorrect. The district court correctly found the statute contains no "exception to the exceptions" for purportedly illegal conduct, and it declined Appellants' invitation to create such a carve-out when the Indiana General Assembly did not see fit to do so. None of Appellants' arguments call into question the correctness of the district court's conclusion.

Even if Appellants had any basis to allege that Appellees are engaged in illegal gambling (they do not) *and* if the statutory exceptions incorporated a carve-out for speech promoting illegal conduct (they do not), Appellants' argument that Appellees' speech would not be protected under the First Amendment would still fail. This Court denied First Amendment protection only

to speech that constitutes “an integral part of the crime.” *United States v. Kaun*, 827 F.2d 1144, 1152 (7th Cir. 1987). In contrast, the speech of which Appellants complain – the use of their likenesses on Appellees’ websites – is entirely distinct from the conduct they believe renders Appellees in violation of Indiana anti-gambling laws – the collection of entry fees and the payment of cash prizes. Thus, even if the statutory exceptions excluded purportedly illegal conduct, they would still exempt Appellees’ speech here.

The decision of the district court granting Appellees’ motion to dismiss should be affirmed.

ARGUMENT

II. The District Court Ruled Correctly That Appellants’ Claims Are Barred by the Statutory Exceptions to Ind. Code § 32-36-1-1.

The district court correctly determined that Appellees’ dissemination, use, and analysis of publicly-available statistical information about college athletes was protected by the newsworthiness and public interest exceptions to Indiana’s right of publicity law, Ind. Code § 32-36-1-1. The plain text of the statute dictates that result, and principles of constitutional avoidance reinforce what the plain text demands. Statistics such as those that Appellees provide to their customers and use on their websites are read, digested, analyzed, and debated by tens (if not hundreds) of millions of fans who follow college sports with passion and interest and access Appellees’ websites each week to track and predict the performances of their fantasy teams. As court after court has recognized in construing the right of publicity, the law does not impose right-of-publicity liability on companies like Appellees for their commercial dissemination, use,

and analysis of publicly-available statistical information concerning the athletes that we watch and root for every day. *See, e.g., Gionfriddo v. MLB*, 94 Cal. App. 4th 400 (Cal. 2001); *C.B.C. Distrib. Mktg., Inc.* 505 F.3d at 823-24.

The particular question here is one of Indiana law, informed by First Amendment concerns that necessarily guide most analyses of the right of publicity. When sitting in diversity on a case brought under Indiana law, a federal court's role "is not to create state law, but rather to follow the principles enunciated by the state courts and to predict what the Indiana Supreme Court would hold in such a situation." *Miller v. Pardner's Inc.*, 893 F.2d 932, 934 (7th Cir. 1990); *E.T. Prod., LLC v. D.E. Miller Holdings, Inc.*, 872 F.3d 464, 467 (7th Cir. 2017). Having predicted how the state court would decide the case, the federal court must "decide it the same way." *MindGames, Inc. v. W. Publ'g Co.*, 218 F.3d 652, 655-56 (7th Cir. 2000). In a situation such as this, where neither the Indiana Supreme Court nor the Indiana Court of Appeals has ruled on the specific issues presented, the court must canvass whatever information is available to aid its prediction. *Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 635 (7th Cir. 2007) (observing that when analyzing "a novel question of state law" federal courts should consult "a variety of other sources, including other relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand" (internal quotation marks omitted)). Consistent with the evidence regarding a state court's likely interpretation, "[w]hen given a choice between an interpretation of [state] law which reasonably

restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path (at least until the [state supreme court] tells us differently).” *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1412 (7th Cir.1994) (en banc). Applying these principles, the district court’s decision must be affirmed.

A. Appellees’ dissemination, use, and analysis of publicly available statistical information about Appellants is “newsworthy.”

Indiana has chosen to exempt from its right of publicity statute “[m]aterial that has political or newsworthy value.” Appellees’ dissemination, use, and analysis of the statistical performance of college athletes is “newsworthy” as a matter of law and thus exempt from liability under Indiana’s right of publicity statute.

Indiana courts have not explicitly addressed the scope of § 32-36-1-1(c)(1)(B)’s exception from the right of publicity for “newsworthy” materials. The Indiana General Assembly enacted the right of publicity and its exceptions against the backdrop of a common law right to privacy, *see Continental Optical Co. v. Reed*, 86 N.E.2d 306, 308 (Ind. Ct. App. 1949), and judicially-imposed exceptions thereto. Under Indiana law, “[t]he legislature is presumed to know the common law and to incorporate it into [a] statute except where it expressly indicates otherwise.” *Bailey v. Manors Grp.*, 642 N.E.2d 249, 252 (Ind. Ct. App. 1994).

The Indiana common-law definition of “newsworthy” is appropriately expansive. As the court explained in *Time Inc.*, 825 F. Supp. at 212–13, in the context of an individual’s claimed privacy interest in a photograph of himself,

[t]he scope of the subject matter which may be considered of ‘public interest’ or ‘newsworthy’ *has been defined in most liberal and far reaching terms*. The privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond *to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general*.

(emphasis added) (quoting *Rogers v. Grimaldi*, 695 F. Supp. 112, 117 (S.D.N.Y. 1988)).⁵ Under Indiana law, “when the legislature enacts a statute in derogation of the common law, this Court presumes that the legislature is aware of the common law and does not intend to make any change therein beyond what it declares either in express terms or by unmistakable implication.” *McKnight v. State*, 658 N.E.2d 559, 562 (Ind. 1995) (quotation marks omitted). In light of this doctrine – and absent any indication the General Assembly intended to adopt a different definition – the district court correctly determined that Indiana courts would adopt the broad common law definition of “newsworthy” when interpreting the statutory exception.

⁵ This broad definition comports with other courts’ interpretations of similar newsworthiness exceptions to right of publicity statutes. *See, e.g., Bogie v. Rosenberg*, 705 F.3d 603, 614 (7th Cir. 2013) (interpreting Wisconsin law and holding “[t]he newsworthiness or public interest exception should be construed broadly, covering not only descriptions of actual events, but also articles concerning political happenings, social trends or any subject of public interest” (internal quotation marks omitted)); *Finger v. Omni Publications Int’l, Ltd.*, 566 N.E.2d 141, 144 (N.Y. 1990) (interpreting New York law and holding “the ‘newsworthiness exception’ should be liberally applied”); *Anonsen v. Donahue*, 857 S.W.2d 700, 703 (Tex. App. 1993) (noting that the newsworthiness defense under Texas law “is broad and extends beyond subjects of political or public affairs to all matters of the kind customarily regarded as ‘news’ and all matters giving information to the public for purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published”).

A determination of whether content is “newsworthy” for purposes of the statutory exception is a matter of law, *see Dillinger, LLC*, 795 F. Supp. 2d at 835-836, and the district court found Appellants’ “athletic achievements and activities . . . ‘newsworthy’ as contemplated by the statutory exception,” Op. 11. That holding was correct. The district court noted – and plaintiffs do not now seriously contest – the reality that collegiate athletics is the subject of intense public interest, “as is demonstrated by, among other indicators, the plethora of media outlets dedicated to the coverage of collegiate sporting events.” *Id.* Hundreds of thousands of fans attend games live; tens of millions watch on television; and millions more read news accounts and analysis of games and college athletes on the Internet and through more traditional media outlets every day of the season.

Case after case confirms that sports and the statistics they generate are, by any common understanding of the word, “newsworthy.” For example, in *Gionfriddo*, 94 Cal. App. 4th at 400, the court rejected the claims of former professional baseball players that Major League Baseball’s publication of their names, photographs, and athletic statistics on a website violated California’s statutory and common law right to privacy. The court noted (among other things) that “[m]ajor league baseball is followed by millions of people across the country on a daily basis”; that “records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today’s performances”; and that “[t]he recitation and discussion of factual data concerning the athletic performance of these plaintiffs commands a substantial

public interest.” *Id.* at 411; *see also id.* at 416 (stating, in rejecting plaintiffs’ statutory right of publicity claim, that “[i]n view of baseball’s pervasive influence on our culture, we conclude that the types of uses raised in the record before us are ‘public affairs’ uses exempt from consent”).

The Eighth Circuit reached the same conclusion – and expressly endorsed the analysis of the *Gionfriddo* court – while holding on First Amendment grounds that commercial providers of fantasy sports could not be held liable for right of publicity claims based on their use of athletes’ names and likenesses. *See C.B.C. Distrib. Mktg.*, 505 F.3d at 823-24. In *C.B.C.*, the Eighth Circuit noted that “[c]ourts have also recognized the public value of information” about sports and athletes, and, after quoting extensively from *Gionfriddo*, found that court’s views “persuasive.” *Id.* at 823; *see also CBS Interactive Inc. v. Nat’l Football League Players Ass’n, Inc.*, 259 F.R.D. 398, 417-19 (D. Minn. 2009) (applying *C.B.C.* to hold that the First Amendment precluded a right of publicity claim based on a fantasy football website operator’s use of players’ names, profiles, statistics, and biographical information, and noting that “[c]onsumers of fantasy football (apparently the most popular fantasy game in the fantasy sports industry), like consumers of fantasy baseball, closely track player statistics”). Similarly, in *Dryer v. NFL*, the court rejected claims by former football players that the National Football League’s use of their images in historic video clips violated various states’ rights of publicity because “there is no dispute that both professional baseball and professional football . . . are closely followed by a large segment of the public.” 55 F. Supp. 3d 1181, 1198 (D. Minn. 2014), *aff’d* 814

F.3d 938 (8th Cir. 2016) (quotation marks omitted). *Cf. Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330, 1136 n.11 (N.D. Ind. 1997) (noting, in the related context of whether speech concerns a matter of “public interest” so as to impose the “actual malice” standard in a defamation suit, the reality that “college football in general[] is a matter of public interest”).

Moreover, not only is collegiate athletics newsworthy, but fantasy sports – including in this case Appellants’ status as potential roster choices in Appellees’ fantasy games – is itself newsworthy. As the district court observed, “[n]umerous media outlets produce weekly fantasy sports-related broadcasts, offering strategy and advice for success in fantasy competition.” Op. 3. Thus, as used in Appellees’ fantasy sports games, Appellants’ identities and statistics are newsworthy in two distinct ways.

The fact that Appellees are not members of the traditional news media does not change this analysis. The newsworthiness exception, Ind. Code § 32-36-1-1(c)(1)(B), is in no way limited to news organizations. Indeed, the statute places no limitation on the identity of the speaker, defining the exception solely by the content of the speech. Crucially, the General Assembly *did* limit the application of another exemption – for “[p]romotional material” – to “a news reporting . . . medium,” Ind. Code § 32-36-1-1(c)(1)(D), defined to include newspapers, magazines, and radio, television, and cable stations. Ind. Code § 32-36-1-4. The absence of a speaker-based limitation in the newsworthiness exception, and its presence elsewhere, is compelling evidence that the newsworthiness exception is not limited to traditional news organizations. *See, e.g., United States Gypsum,*

Inc. v. Ind. Gas Co., 735 N.E.2d 790, 797 (Ind. 2000) (recognizing a statute’s exclusion of the term “public utility” – when it appeared in other statutes – demonstrated that “the legislature knows how to say and include municipal utilities when it so desires”).

Appellants’ efforts to avoid the scope of the newsworthiness exception are entirely unpersuasive. Appellants contend, for example, that Appellees’ creation of fictitious “salaries” for the athletes who appear on their sites places Appellees’ speech outside the scope of the newsworthiness exception. But the right of publicity statute is very specific in what it prohibits: “[T]he use of the names and likenesses” of an individual. *See* Op. 12. The statute does not, by contrast, prohibit the use of *all* information merely associated with an individual, as Appellants claim. *Id.* Appellants’ virtual “salaries” implicate neither their “names” nor their “likenesses,” and that alone places them outside the scope of the statute.

Moreover, while fictitious, the “salaries” assigned to each player reflect Appellees’ attempt to capture all public information about a player’s statistical worth into a single “dollar figure” that allows users easily to compare the relative strength of each player. The players’ salaries are thus derivative of the very statistics themselves that are newsworthy for the reasons discussed above. More important, the player “salaries” are properly understood as akin to rankings of players that are ubiquitous on sports news sites and media outlets around the country. Just as it is newsworthy when a college football analyst at (for example) Sports Illustrated or the Chicago Tribune contends that Player A is “twice as

good” as Player B, it is newsworthy when a college football analyst at FanDuel or DraftKings contends that Player A’s “salary” is “twice as high” as that of Player B. The relative rankings of athletes according to their projected statistical productivity has been the subject of loud and vigorous debate for as long as sports leagues have had fans; the fact that Appellees use dollar figures to express the ranking does not make them any less a ranking or any less newsworthy.

Nor can Appellants prevail by suggesting that, “under the plain language of the statute,” the newsworthiness exception does not apply because Appellees are engaged in “purely commercial speech” that is (according to Appellants) “wholly devoid of any ‘newsworthy’ or ‘public interest’ content whatsoever.” Br. 31. Indiana’s right of publicity statute applies *only* to use of an individual’s likeness “for a commercial purpose,” Ind. Code § 32-36-1-8(a), and thus “the exceptions must apply to uses that are commercial in nature” as well. Op. 7. Non-commercial uses of names and likenesses, whether newsworthy or not, are already outside the scope of the right of publicity statute, which proscribes only commercial uses. Appellants’ contention that the newsworthiness exception applies only to non-commercial uses that the statute does not prohibit in the first place would render the statutory exception superfluous. *See Buelna v. State*, 20 N.E.3d 137, 142 (Ind. 2014) (“We read statutes as a whole – avoiding an interpretation that makes any part of the statute superfluous.”).

Appellants’ interpretation of the exception also defies the “familiar canon of statutory interpretation that statutes should be interpreted so as to avoid constitutional issues.” *See City of Vincennes v. Emmons*, 841 N.E.2d 155, 162

(Ind. 2006). This doctrine of constitutional avoidance has particular salience here: when enacting the right of publicity statute in 1994, the Indiana General Assembly included several exceptions – including for material that has newsworthy value or material used in connection with the reporting of an event of general or public interest – in an “obvious attempt to avoid potential constitutional infirmities with the statute.” *Dillinger, LLC*, 795 F. Supp. 2d at 836. Commercial speech, and particularly speech (like that here) in a commercial context that concerns news or matters of public interest, has long been protected by the First Amendment. *See, e.g., Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977); *Gionfriddo*, 94 Cal. App. 4th at 411. The district court was thus correct in interpreting the newsworthiness and public interest exceptions “broadly” to avoid the “significant constitutional implications” that would arise from a more circumscribed interpretation. Op. 8; *see Dillinger, LLC*, 795 F. Supp. 2d at 836 (“[I]nterpreting ‘literary works’ [in Ind. Code § 32-36-1-1(C)(1)(A)] broadly would effectuate the General Assembly’s obvious attempt to avoid potential constitutional infirmities with the statute.”).

Finally, Appellants’ absurd suggestion that “college athletes themselves . . . were being sold” through Appellees’ websites, Br. at 33, *see also id.* at 29-30, underscores the baselessness of their complaint. Appellees do not take Appellants to seriously contend that Appellees were actually engaged in the purchase or sale of college athletes. Of course, what a fantasy sports user purchases, by paying an entry fee, is the right to compete for prizes based on the

performance of a fantasy team as measured by publicly available statistics of real athletes. Nothing more. If Appellants mean to suggest that Appellees deprived them of compensation to which they were entitled, the text of the right of publicity statute and its exceptions belies that implication.

B. Appellees' dissemination, use, and analysis of publicly available statistical information about Appellants constitutes the "reporting of . . . a topic of general or public interest."

The district court also correctly held that Appellees' conduct fell within a second statutory exception for the use of a likeness "in connection with the broadcast or reporting of an event or a topic of general or public interest." Op. 13 (quoting Ind. Code § 32-36-1-1(c)(3)). For the same reasons that college athletics and fantasy sports are newsworthy, *see supra* 16-24, they also constitute "topic[s] of general or public interest." *See id.* at 13. Appellants' argument that § 32-36-1-1(c)(3) should apply only to "news media organizations," Br. 36, is inconsistent with the text of the statute and relevant case law.

The text of § 32-36-1-1(c)(3) defines the "public interest" exception not by the identity of the speaker, but rather by the activity in which the speaker engages: "the broadcast or reporting of . . . a topic of general or public interest." Ind. Code § 32-36-1-1(c)(3). It is undisputed that Appellees "report" information about college sports" by profiling players on their websites, collecting weekly news about athletes, and publishing performance information. Op. 14. As the district court observed, Appellees "provide factual data, and their websites could be used as 'reference sources,' either for purposes of playing the associated

[fantasy] game, or for information about the collegiate sports and athletes represented on the websites.” *Id.* at 16. The district court’s observations reflect the reality that millions of users repeatedly check Appellees’ websites to track the progress of their fantasy teams. Appellees’ websites clearly report information that is of public interest.

In this regard, the opinion of the California court in *Gionfriddo* is instructive. There, the appellate court addressed the scope of an analogous provision of the California right of privacy statute that exempts from liability the use of an individual’s name “in connection with any news, public affairs, or sports broadcast or account.” 94 Cal. App. 4th at 415. The court held that the use of former professional baseball players’ statistics – “factual data concerning the players, their performance statistics, and verbal descriptions and video depictions of their play” – on Major League Baseball’s “Web sites, documentaries, and game day programs” was “all ‘in connection with [a] news, public affairs, or sports account’ within the meaning of the statutory exception. *Id.* The same analysis applies here.

Moreover, nothing in the statutory text limits the exception only to “news media organizations.” See Ind. Code § 32-36-1-1(c)(1)(B). The Indiana General Assembly demonstrated that it knew how to circumscribe statutory exceptions to traditional news organizations or media when it so desired. As noted, see *supra* 20-21, the General Assembly limited the application of a different statutory exception to “[p]romotional material . . . for a news reporting . . . medium.” Ind. Code § 32-36-1-1(c)(1)(D) (emphasis added). The General Assembly expressly

defined a “news reporting . . . medium” as “[n]ewspapers,” “[m]agazines,” “[r]adio and television networks and stations,” and “[c]able television systems.” *Id.*; Ind. Code § 32-36-1-4. Had the Legislature intended to limit the “newsworthy” exception in this fashion, as Appellants contend, it would have done so. See *United States Gypsum, Inc.*, 735 N.E.2d at 797.

Nor do Appellees lose the benefit of the statutory exception simply because, in addition to publishing this information, Appellees run online fantasy games that entertain their users. In *C.B.C.*, the Eighth Circuit recognized that the use of player names and statistics in fantasy sports for entertainment purposes constitutes protected speech. 505 F.3d at 824. The Supreme Court has rejected efforts to draw the “elusive” line between speech that “informs” and speech that “entertains,” treating both as entitled to full and equivalent protection. *Winters v. New York*, 333 U.S. 507, 510 (1948); see also *Zacchini*, 433 U.S. at 578 (“[E]ntertainment itself can be important news.”); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996) (“Speech that entertains, like speech that informs, is protected by the First Amendment because “[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.” (quoting *Winters*, 333 U.S. at 510 (brackets in original))); cf. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (holding that video games are expressive works protected by the First Amendment).

Appellees’ fantasy sports games both provide entertainment *and* report information about college athletes. *In re NCAA Student-Athlete Name & Likeness Licensing Litig. (“Keller”)*, 724 F.3d 1268, 1271-72 (9th Cir. 2013), upon which

Appellants heavily rely, aptly demonstrates this point. In *Keller*, former student athletes brought suit against EA Sports, a publisher of popular sports video games, claiming that its use of the athletes' likenesses (dissociated from their real names) as avatars in video games violated California's right of publicity. The court held that exemptions from the right of publicity for "the act of publishing or reporting" matters of public interest were inapplicable to EA's video games. But, in so holding, the court *specifically* highlighted the dispositive distinction between video games and fantasy sports, whose use of athlete statistics has been exempted from the right of publicity in *Gionfriddo, C.B.C.*, and other cases. *Id.* at 1282. The court observed that "EA's video game is a means by which users can play their own virtual football games, not a means for obtaining information about real-world football games," and held that "EA's interactive game is not a publication of facts about college football; it is a game, not a reference source." *Id.* at 1283. The contrast with fantasy sports could not be more stark. Providing their users with real-life athlete statistics is a core function of Appellees' websites – analyzing those facts underlies the strategy of fantasy sports, as evidenced by the extensive commentary that appears on the websites.

Principles of constitutional avoidance underscore the public interest exception's application here. *See Op.* 16.⁶ Particularly in the digital age, the First Amendment has been understood to protect an ever-expanding array of

⁶ *See, e.g., New Kids on the Block v. News Am. Publg., Inc.*, 971 F.2d 302, 310 n.10 (9th Cir. 1992) (noting that California's similar "public affairs" exception to the right of publicity "is not coextensive with the First Amendment. Rather, it is designed to avoid First Amendment questions in the area of misappropriation by providing extra breathing space for the use of a person's name in connection with matters of public interest").

speakers and content. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 869–70 (1997) (recognizing the internet is a “dynamic, multifaceted category of communication” and that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium”). With the advent of the Internet the Supreme Court has found the “line between the media and others who wish to comment on political and social issues . . . far more blurred.” *Citizens United v. FEC*, 558 U.S. 310, 352 (2010). And, as noted, the Eighth Circuit has concluded that the First Amendment protects fantasy sports from right of publicity claims like the ones here. Were the public interest exception read to cover only traditional news organizations, Indiana’s right of publicity statute could preclude the operation not only of online fantasy sports websites but of countless other nontraditional media operating on the internet and elsewhere. Such a limitation would raise problematic First Amendment implications and, for this reason, too, Appellees’ conduct should be deemed protected by the public interest exception.

C. The district court’s decision is logically sound and consistent with every case applying the right of publicity to fantasy sports.

Every court to have considered the issue to date has held that commercial providers of fantasy sports products cannot be liable for right-of-publicity claims based on their use of athletes’ names, biographical information, and performance statistics. The Eighth Circuit in *C.B.C.* rejected a right of publicity challenge to a fantasy sports site like the ones Appellees run here. *See C.B.C.*, 505 F.3d at 820; *see also id.* at 823 (“[T]he information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be

strange law that a person would not have a first amendment right to use information that is available to everyone.”); *CBS Interactive Inc.*, 259 F.R.D. at 417-18. The Ninth Circuit, while permitting a right of publicity to suit to proceed against the makers of an interactive video game, was careful to distinguish fantasy sports, noting that “there is a big difference between a video game like NCAA Football and fantasy baseball products like those at issue in *C.B.C.*” *Keller*, 724 F.3d at 1283 n.12. Still other cases have rejected right of publicity claims premised on the unauthorized use of statistical data. *See, e.g., Gionfriddo*, 94 Cal. App. 4th at 413 (statistics in game programs and websites). *Cf. Cardtoons*, 95 F.3d at 972-73 (parody baseball cards). As the Eighth Circuit correctly observed, fantasy sports “barely, if at all, implicate the interests that states typically intend to vindicate by providing rights of publicity to individuals.” *C.B.C.*, 505 F.3d at 824.

These rulings are grounded in common sense. Fantasy sports use statistics from all athletes participating in the real-life sporting events, and thus there is no risk the public will be misled into believing that Appellants have endorsed Appellees’ websites. *See id.* at 823 (“Nor is there any danger here that consumers will be misled, because the fantasy baseball games depend on the inclusion of all players and thus cannot create a false impression that some particular player with ‘star power’ is endorsing CBC’s products.”); *Keller*, 724 F.3d at 1287-88 (Thomas, J., dissenting) (observing that “the sheer number of athletes involved inevitably diminish[es] the significance of the publicity right at issue”).

Moreover, courts have recognized that the speech like that at issue here does not simply propose or advertise a commercial transaction – it informs and educates. *C.B.C.*, 505 F.3d at 823 (“Courts have also recognized the public value of information about the game of baseball and its players.”); *Gionfriddo*, 94 Cal. App. 4th at 411, 413 (rejecting right of publicity challenge in part because the challenged uses were “not advertisements, nor speech where the primary message is ‘buy,’” and thus “is a form of expression due substantial constitutional protection”) (internal quotation marks omitted); *Keller*, 724 F.3d at 1283 (distinguishing video games at issue in that case from sites involved in “publishing or reporting factual data” and providing a “means for obtaining information about real-world football games”); *Cardtoons*, 95 F.3d at 970 (noting that baseball cards are not “transformed into commercial speech merely because they are sold for profit”).

None of the cases Appellants cite is to the contrary. Most important, in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663 (7th Cir. 1986), this Court did not hold that to “market a game based on [a] player’s career statistics’ is a violation of the athlete’s right of publicity,” as Appellants suggest. Br. 31 (quoting *Baltimore Orioles*, 805 F.2d at 676 n.24) (alterations omitted). To the contrary, the Court found the Copyright Act *preempted* any right of publicity claim the players in that case might have had and suggested that such a claim would not be preempted were the material in question not covered by a copyright. 805 F.2d at 676 n.24. Nowhere in the opinion did this

Court analyze or even address the merits of the right of publicity claim or consider statutory exceptions like those at issue in this case.⁷

III. Appellants' Baseless Contention That Fantasy Sports Are Illegal Is Irrelevant to a Right of Publicity Claim.

Appellants make no attempt to distinguish the text and the controlling authority establishing the breadth of Indiana's statutory exceptions, and they largely ignore the persuasive authority holding specifically that fantasy sports do not violate athletes' right of publicity. Rather, they argue the broad exceptions *should* not apply from a policy standpoint based on their assertion that daily fantasy sports constitute illegal gambling in Indiana. As Appellants would have it, the statutory exemptions are co-extensive with the First Amendment, and the First Amendment provides no defense because (Appellants assert) daily fantasy sports is illegal. Even were Appellants correct in their reading of Indiana gambling law – and they are not – their theory still fails.

First, Appellants provide no authority to establish that the statutory exceptions codify, or are co-extensive with, First Amendment protections. In fact, the statutory text is unambiguous. Principles both of statutory

⁷ Appellants' reliance on *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970), is misplaced in light of *Uhlaender's* abrogation by the Eighth Circuit in *C.B.C.*, 505 F.3d at 823-24. See *Dryer*, 55 F. Supp. 3d at 1199 (noting "much of the *Uhlaender* court's discussion is directly contrary to the Eighth Circuit's more recent holding in the *C.B.C.* case"). *Abdul-Jabbar v. General Motors Corp.*, 75 F.3d 1391, 1401 (9th Cir. 1996) *opinion amended and superseded on denial of reh'g*, 85 F.3d 407 (9th Cir. 1996), is likewise irrelevant because the Ninth Circuit ruled on its understanding that California's "newsworthiness" exception applied only to noncommercial speech. Regardless of whether this is correct as a matter of California state law, as the district court here correctly held, Indiana's exceptions to the right of publicity apply specifically in the commercial context. See Op. 7.

construction and of constitutional avoidance counsel this Court to decline Appellants' invitation to insert an "exception to the exceptions" for purportedly illegal conduct when the Indiana General Assembly did no such thing. *Second*, even if there were a carve-out for illegal conduct, and even if Appellees' conduct were actually illegal, Appellants' argument would still fail because the speech to which they object is not integrally related to the activity they claim is illegal.⁸

A. The Statutory Exemptions Do Not Depend on Legality.

The district court properly rejected Appellants' contention that the statutory exceptions are unavailable to uses of individuals' names and likenesses that are somehow related to "illegal conduct." As the district court noted, Appellants provided "no authority or citation to support the contention that illegal behavior would render [Appellees'] materials somehow outside the scope of the statutory exceptions." Op. 19. That ruling was correct. As the Indiana courts have held, where "the text of the statute" is "clear and unambiguous, our task is merely to apply the plain meaning of the statute." *B.K.C. v. State*, 781 N.E.2d 1157, 1167 (Ind. Ct. App. 2003). Thus, when the "plain text" of the statute contains no ambiguity, courts "begin – and end – [the] analysis' with that plain text." *State v. Thakar*, 82 N.E.3d 257, 260 (Ind. 2017) (quoting *Rogers v. Martin*, 63 N.E.3d 316, 327 (Ind. 2016)).

⁸ The question of whether Appellees are engaged in illegal gambling is not before the Court. As Appellees explained below, however, Appellees' fantasy sports games are not, and have never been, illegal in Indiana. *See, e.g.*, FanDuel Reply in Support of Motion to Dismiss, at 2-5, District Court ECF No. 52; DraftKings Reply in Support of Motion to Dismiss, at 15-17, District Court ECF No. 51.

The “newsworthiness” and “public interest” exceptions to Indiana’s right of publicity are unambiguous. Both clearly define what is and is not exempted. Neither contains an “exception to the exception” for purportedly illegal conduct or for speech that would not be protected under the First Amendment. And application of the exceptions as written properly avoids extensive collateral litigation, such as (for example) Appellants’ efforts here to convert a right of publicity lawsuit into a referendum on the legality of Appellees’ operations. The General Assembly carefully drew these exceptions, and this Court should decline Appellants’ invitation to rewrite the statute to adopt Appellants’ policy preferences.

Principles of constitutional avoidance counsel the same result. Reading the statutory exemptions to cover only conduct that is (1) newsworthy or involving a matter of public interest *and* (2) protected by the First Amendment would require courts to conduct a full First Amendment analysis in this and many other cases. The First Amendment concerns here are serious. *See, e.g., C.B.C.*, 505 F.3d at 820 (right of publicity claims against fantasy sports site barred by First Amendment); *infra* 38-40 (discussing First Amendment protection even for entities alleged to be operating illegally). And, in light of those concerns, it would be particularly inappropriate for a court to rewrite the Indiana statute to require that those constitutional claims be routinely confronted, rather than generally avoided, as the Indiana General Assembly intended.

Appellants’ arguments to the contrary are unavailing. In a section entitled “The Plain Language of the Statute,” Appellants’ notably fail to quote the relevant

statutory language. See Br. 20-21. Nor do Appellants explain how straightforward statutory text that makes no mention of a carve-out for purportedly illegal conduct should be read to include such an exemption. Instead, Appellants note that the newsworthiness exception “speak[s] of ‘materials’ ‘that are *also* protected under the First Amendment.’” *Id.* (quoting *Dillinger LLC*, 795 F. Supp. 2d at 836). But the mere fact that speech may be both permitted by statute and “also” protected by the First Amendment does not mean that the scope of the statutory and constitutional protections is identical. Indeed, if anything is to be gleaned from the fact that the Legislature passed specific statutory exemptions to Indiana’s right of publicity law, it is that it *did not* want the law’s reach to be cabined only by First Amendment principles that would apply regardless. As the Ninth Circuit noted with respect to the analogous provisions of the California statute, “[a]lthough these defenses are based on First Amendment concerns, they are not coextensive with the Federal Constitution, and their application is thus a matter of state law.” *Keller*, 724 F.3d at 1282 (internal citations omitted). The same is true here.

Appellants likewise gain nothing from their contention that “where the speech at issue is integral to criminal conduct, there is no First Amendment defense to be invoked.” Br. 15. The district court *did not* rely on a First Amendment defense in dismissing Appellants’ claims – the court did not hold that, for example, but for Appellees’ invocation of the First Amendment, their conduct would have been prohibited by Indiana’s right of publicity statute. Rather, the court held that Appellants could not state a claim because “the

prohibition of using an individual's right of publicity without his consent *does not apply* to Defendants' conduct" because of two independent exceptions carved out by the Indiana legislature. Op. 12-13 (emphasis added). Regardless of whether Indiana's limitations on the right of publicity were originally "rooted in the First Amendment" (Br. 8), the exceptions are defined by the statute's text, under which Appellants cannot state a claim.

Appellants' appeal to precedent fares no better. Appellants acknowledge that the Indiana Supreme Court has never held that the newsworthiness or public interest exception does not apply to purportedly illegal conduct, *see* Br. 16, and the other cases Appellants cite are not to the contrary. In *L.E. Services, Inc. v. State Lottery Commission of Indiana*, 646 N.E.2d 334, 338-39 (Ind. Ct. App. 1995), the court upheld an injunction prohibiting a company from reselling out-of-state lottery tickets in a manner the Lottery Commission deemed in violation of Indiana's gambling laws. As part of its holding, the court rejected an argument that Indiana's lottery statutes violated the First Amendment because they prohibited a corporation from using the word "lottery" in its corporate name absent permission from the Lottery Commission. *Id.* at 347-348. The holding of the case demonstrates its irrelevance: *L.E. Services* has nothing to do with the right of publicity or its statutory exceptions, and it thus never addresses whether those statutory exceptions implicitly exclude purportedly illegal conduct.

In re Original Investigation, Special Grand Jury of Marion County, 402 N.E.2d 962, 965 (Ind. 1980) (*Bell Telephone*), is similarly inapposite. *Bell Telephone* held that Indiana courts were authorized by state law to approve

warrants for pen registers. In so holding, the Indiana Supreme Court reiterated the unremarkable proposition that Free Association rights do not protect “associations made in furtherance of a conspiracy.” *Id.* (quotation marks omitted). *Bell Telephone* has nothing to do with the statutory exceptions to the right of publicity law, and the district court here explicitly did not rely on First Amendment grounds.

Appellants also cite *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 75 (1983), in apparently arguing that Appellees are engaged in false or misleading commercial speech that should not receive First Amendment protection. Br. 18. This argument is, again, incorrect. The district court found Appellees’ speech exempted from the right of publicity by the statutory exceptions, *not* the First Amendment. See Op. 13, 16. Moreover, the district court correctly held that those exceptions covered commercial speech, regardless of its level of protection under the First Amendment, because the right of publicity statute itself applies only to use of a name or likeness that has “a commercial purpose.” *Id.* at 7. *Bolger* is thus entirely irrelevant – and even if it had some relevance here, there is no allegation that Appellees are promulgating “false or misleading product information.” Br. 18 (quoting *Bolger*, 463 U.S. at 68). Thus *Bolger*’s observation that such conduct is not protected by the First Amendment would not apply regardless.⁹

⁹ The host of other cases Appellants cite in passing are similarly irrelevant. See Br. 17-18. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 504 (1949), held that a Missouri statute prohibiting union activities in restraint of trade did not violate the First Amendment. That case, concerning the First Amendment implications of a different law from a different state, has no bearing here. The remainder of Appellants’ cited cases all

Finally, contrary to Appellants' contentions, Appellees have never "acknowledge[d] that the newsworthiness and public interest statutory exceptions represent a codification of the First Amendment, and that the First Amendment thus supplies the basis for any potential eligibility that [Appellees] may have for either such exception." Br. 20. All of Appellants' citations to Appellees' briefs simply repeat Appellees' argument before the district court that the application of Indiana's right of publicity statute was precluded by the statutory exceptions *and* the First Amendment. *See, e.g.*, FanDuel Memo. To Support Motion to Dismiss at 12, District Ct. ECF No. 27; Draftkings Memo. To Support Motion to Dismiss at 19, District Ct. ECF No. 29. The fact that conduct is exempted from liability by a statute and independently protected by the Constitution does not, of course, mean that those two protections are co-extensive – indeed, Appellants' interpretation would render the separate statutory language superfluous.¹⁰

stand for the unremarkable proposition that there is no First Amendment protection for speech integral to the commission of a crime. *See Kaun*, 827 F.2d at 1152 (inciting tax violations); *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 248 (4th Cir. 1997) (publishing a book defendant conceded would "immediately be used by criminals and would-be criminals in the solicitation, planning, and commission of murder and murder for hire"); *United States v. White*, 769 F.2d 511, 512 (8th Cir. 1985) (inciting tax violations); *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) (impeding an IRS agent conducting his duties by threatening assault and murder). Appellants' reliance on these cases is based on the false premise that the newsworthiness and public interest exceptions incorporate background First Amendment principles. As explained above, *see supra* 32-37, they do not.

¹⁰ Because Appellants' arguments concerning the alleged illegality of Appellees' conduct are irrelevant, the district court was correct to deny Appellants' motion to file a surreply as moot. *See Op.* 19 n.5. Appellants' challenge to the district court's ruling on its motion to file a surreply is entirely derivative of its claim that Appellees' are engaging in

B. Even if the Statute Incorporated First Amendment Limitations, Appellees' Conduct Would Still Be Exempt Because It Was Not Integral to the Allegedly Illegal Conduct.

The heart of Appellants' complaint is that "[Appellees] have taken [Appellants'] names, likenesses, and mannerisms and constructed fantasy football contests based on the use of [Appellants'] information." Br. 8.¹¹ While Appellants claim that Appellees' use of their likenesses violates Indiana's right of publicity, they do not – and cannot – claim that it was a criminal act for Appellees to base their fantasy games on athletes' performance statistics. The right of publicity law, even if it applies, is a civil liability statute. Rather, Appellants claim that Appellees are facilitating illegal gambling by collecting entrance fees from users and paying out cash prizes. *Id.* at 23-24. Appellants' claims of illegality are baseless and, as the district court recognized, they are not necessary to address in this case.

But even if Appellants were correct that Appellees are engaging in illegal gambling, the speech at issue in this case is not "an integral part of the crime." *Kaun*, 827 F.2d at 1152 (quoting *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir.1985)). Appellants do not contend – nor could they – that Appellees' inclusion of their names in fantasy rosters was itself a criminal act. Rather,

illegal conduct. See Br. 40-41. That challenge thus fails for the same reasons that Appellants' claim fails.

¹¹ It is, incidentally, unclear what Appellants mean when they claim Appellees are using their "mannerisms" for fantasy sports. As the district court noted, fantasy sports games are based solely on the performance statistics of athletes. See Op. 2. A player's "mannerisms" – just like his personality or other non-statistical attributes – play no role whatsoever in a fantasy game.

Appellants contend (erroneously) that Appellees' collection of entrance fees and payment of prizes in fantasy sports games constitutes illegal gambling. The speech at issue, therefore, is unrelated to the conduct that Appellants allege renders Appellees' paid fantasy sports games illegal. Indeed, some of the college fantasy sports games contests Appellees provided were free (*i.e.*, with no entrance fee and no prizes) and therefore inarguably could not implicate Indiana's gambling law – yet the use of Appellants' names was exactly the same. As Appellants' own citations make clear, *see* Br. 14-16, speech, to lose its constitutional protection, must be the vehicle by which the crime is committed. *See, e.g., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 493-94, 498 (1949) (holding that union picket of private store itself constituted antitrust violation); *Kaun*, 827 F.2d at 1147 (holding that inciting tax violations was unprotected speech in violation of prohibition on promoting abusive tax shelters); *see also United States v. Rowlee*, 899 F.2d 1275, 1278 (2d Cir. 1990) (speech unprotected where “it is the very vehicle of the crime itself.” (quotation marks omitted)). That is manifestly not the case here. Thus, even if Appellants were correct (and they are not) that Appellees were engaged in illegal conduct that could place them outside the scope of the statutory exceptions, their argument would still fail.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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Dated: January 16, 2018

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This Brief complies with type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 10,634 words excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Bookman Old Style font for the main text and 11-point Bookman Old Style font for footnotes.

Dated: January 16, 2018

s/Ian Heath Gershengorn
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CERTIFICATE OF SERVICE

I, Ian Heath Gershengorn, an attorney, hereby certify that on January 16, 2018, I caused the foregoing **Brief of Defendants-Appellants FanDuel, Inc. and DraftKings, Inc.**, to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the **Brief of Defendants-Appellants FanDuel, Inc. and DraftKings, Inc.** to be transmitted to the Court via hand delivery within 7 days of that notice date.

s/Ian Heath Gershengorn
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