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Brief of Amici Curiae Intellectual Property Law Professors

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Brief of Amici Curiae Intellectual Property Law Professors, *Daniels v. FanDuel, Inc.*, No. 18S-CQ-00134 (Ind. Sup. Ct. May 18, 2018)

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**IN THE
INDIANA SUPREME COURT**

Case No. 18S-CQ-00134

AKEEM DANIELS, CAMERON)
STINGILY, AND NICHOLAS)
STONER)

Plaintiffs/Appellants,)

v.)

FANDUEL, INC. AND)

Defendants/Appellees.)

Certified Question from the
United States Court of Appeals
for the Seventh Circuit

Case No. 17-3051

The Honorable Judge Easterbrook
Circuit Judge

**BRIEF OF *AMICI CURIAE*
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IDENTITY AND STATEMENT OF INTEREST OF AMICI CURIAE

Amici are professors of law who research, write, and teach in the area of intellectual property. Amici's institutional affiliations are provided for identification purposes only, and imply no institutional endorsement of the views expressed herein. Amici have no personal stake in the outcome of this case.

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SUMMARY OF ARGUMENT

Untethered to a sufficient public policy interest, right of publicity claims have exploded nationwide. Plaintiffs have asserted claims against inspirational plaques featuring civil rights icons, *Rosa and Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824 (11th Cir. 2016), artwork commemorating significant events, *Moore v. Weinstein Co., LLC*, 545 Fed. App'x. 405, 407 (6th Cir. 2013); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003), Wikipedia edits that truthfully connected an astronaut with the watch he wore on his Moon walk, *Scott v. Citizen Watch Co. of Am., Inc.*, 17-CV-00436-NC, 2018 WL 1626773 (N.D. Cal. Apr. 4, 2018), docudramas, *de Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (2018), and depictions of a company named for its founder, *Virag, S.R.L. v. Sony Computer Entm't Am. LLC*, 699 Fed. App'x. 667 (9th Cir. 2017), among many other uses. This Court has the opportunity to keep Indiana's right of publicity law within more appropriate bounds by focusing on protection of performers against

unauthorized recordings (similar to common-law copyright, as recognized in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)) and unauthorized use of identities in advertising (protecting against false endorsements).

The Court should take that opportunity, because a free-floating right of publicity operates as an unconstitutional, content-based regulation of otherwise truthful, protected speech. Given the First Amendment value of truthful, nondefamatory speech, courts should not lightly give the subjects of such speech control over it. Thus, the right of publicity must be carefully limited to avoid becoming a right to control public discourse. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (refusing to allow the tort of intentional infliction of emotional distress to evade the strict requirements of defamation as applied to editorial speech). Although the doctrine of constitutional avoidance might justify finding that these defendants' activities do not fall within the scope of the Indiana statute, the statute is unconstitutional to the extent that it goes beyond advertising and unauthorized recordings of performances.

ARGUMENT

I. The Statutory Right of Publicity is a Content-Based Regulation of Noncommercial and Commercial Speech That Cannot Survive Strict Scrutiny

A. The Indiana Statute Regulates Speech on the Basis of Its Content

As written, the Indiana statute, which prohibits use of an aspect of a personality's right of publicity for a "commercial purpose," covers far more than commercial speech.¹ Commercial

¹ Ind. Code § 32-36-1-2 (2017) defines "commercial purpose" to be use "(1) On or in connection with a product, merchandise, goods, services, or commercial activities; (2) For advertising or soliciting purchases of products, merchandise, goods, services, or for promoting commercial activities; (3) For the purpose of fundraising." Only (2) is commercial speech; (1) would generally be noncommercial speech, e.g., a biography of a public figure, while (3) would generally be

speech is not any speech that is sold in the market or that is supported by advertising, but rather “speech that does no more than propose a commercial transaction.” *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Some commercial speech doesn’t directly propose an immediate commercial transaction, but there is nonetheless a fundamental difference between, on the one hand, speech that aims to convince a listener to provide a separate economic benefit to the speaker, and on the other hand, speech that is itself the product or service being sold. The latter is not commercial speech, despite its potential commercial effects. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952) (holding that “expression by means of motion pictures is included within the free speech and free press guaranty” in the Constitution, even though filmmaking “is a large-scale business conducted for private profit”); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983) (holding that economic motivation for speech by itself does not make speech commercial); *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994) (finding that defendant’s novel fell “within the protection of the First Amendment” whether it was “viewed as an historical or fictional work,” so long as it was “not simply a disguised commercial advertisement for the sale of goods or services”). FanDuel’s product, like that of other fantasy sports leagues, is information about the players, just as speech is the product sold by newspapers and video games. FanDuel is not using information about players to advertise another product or invite some other commercial transaction.

To enforce the right of publicity statute, a court must examine the content of the challenged speech to determine whether it uses one of the protected types of personal identifiers (name, voice, signature, etc.). *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (a speech regulation is content

noncommercial speech, *see Riley v. Natl. Fedn. of the Blind of N. Carolina, Inc.*, 108 S. Ct. 2667, 2673 (1988).

based when it cannot be “justified without reference to the content of the regulated speech”); *see also Matal v. Tam*, 137 S. Ct. 1744, 1765–66 (2017) (Kennedy, J., concurring) (plurality opinion) (“[t]he First Amendment guards against laws ‘targeted at specific subject matter,’ a form of speech suppression known as content based discrimination.”) (quoting *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230 (2015)). Under the First Amendment, such content-based restrictions are subjected to strict scrutiny. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (content-based speech regulation subject to the highest level of scrutiny); *Sable Comm’ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (content-based speech restrictions must be narrowly drawn to serve a compelling government interest).

As the Ninth Circuit has already recognized in a similar situation, “California’s right of publicity law clearly restricts speech based upon its content.” *Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir. 2016). California’s law is therefore “presumptively unconstitutional and may only be justified if the government proves that [it is] narrowly tailored to serve compelling state interests.” *Id.* at 903–04; *see also In re Brunetti* 877 F.3d 1330, 1355 (Fed. Cir. 2017) (reaching same conclusion with respect to federal statutory bar on trademark registration that covered noncommercial speech). The Ninth Circuit noted that the motion picture in *Sarver* was “fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays,” and concluded that the plaintiff’s claim could not survive strict scrutiny. *Sarver*, 813 F.3d at 905–06. (As the Ninth Circuit acknowledged, its earlier right of publicity precedents did not consider this constitutional test. *Id.* at 903–906.)

The same analysis applies here, at least as to those parts of the right of publicity statute that go beyond regulating commercial speech.²

B. The Indiana Statute Cannot Survive Strict Scrutiny

Under strict scrutiny, a speech restriction must be narrowly tailored to a compelling government interest. *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). The First Amendment reflects the priority of speech: the speaker doesn't need to justify her speech or convince the court of its value. Rather, the government must justify its suppression of that speech, or its decision to make the speech hostage to the consent of a private censor. The state cannot meet that burden here. Simply put: There is no compelling state interest in stamping out discussions of people and imaginative reconstructions of sports teams, whether or not those discussions are conducted for profit.

Several justifications of the right of publicity have been offered; none legitimately extends to the noncommercial speech at issue here. The right of publicity, because it has no likelihood of confusion requirement, is “potentially more expansive than [federal trademark law],” *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989). The interests furthered by the right of publicity are also less significant than those furthered by trademark law—the right of publicity as applied to noncommercial speech protects the private interests of celebrities, whereas trademark law's protection from consumer confusion about endorsement protects the interests of the entire consuming public as well as of trademark holders. *See C.B.C. Distrib. & Mktg., Inc. v. Major*

² It might be possible, in the name of constitutional avoidance, to interpret the exclusions in the statute to cover all noncommercial speech. In particular, the Court could interpret the exclusion of “material that has ... newsworthy value” to include FanDuel's use. *See* Ind. Code § 32-36-1-1(c)(1)(B).

League Baseball Advanced Media, 505 F.3d 818, 824 (8th Cir. 2007) (reasoning that celebrities can protect their economic interests by controlling sponsorships and blocking confusing commercial uses, and that any noneconomic interests in controlling truthful reporting about their performances do not justify suppressing truthful speech). As the *C.B.C.* court reasoned, “the information used in [the 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.” *Id.* at 823.

Celebrities and professional athletes have more than adequate incentives to pursue their crafts without the government giving them a monopoly on the use of their names and likenesses in expressive works. *See, e.g.*, Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1187–88 (2006) (noting that there is “[n]ot a shred of empirical data” showing that celebrities are incentivized by publicity rights because they are already “handsomely compensated,” and observing that, in any event, “it is not at all clear that society should want to encourage fame for fame’s sake”); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 260–63 (2005) (noting that celebrities have significant incentives to invest in their primary fields and in their personas even absent a right of publicity, particularly since they would still have false endorsement claims in cases where there is a risk of confusion); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 910–11 (2003) (the right of publicity provides at most a “small speculative increase” in the incentive to become famous); *Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454, 460 (Cal. 1979) (Bird, C.J., concurring) (“[n]o author should be forced [by threat of a right-of-publicity claim] into creating mythological worlds or characters wholly divorced from reality.”).

Limiting the right of publicity to commercial speech would also be consistent with its the traditional scope. Depictions of real people, in any non-advertising medium, have long been understood to be protected by the First Amendment. *See, e.g., C.B.C.*, 505 F.3d at 824 (use of athletes' identities in fantasy sports leagues protected by First Amendment); *ETW*, 332 F.3d at 938 (use of professional golfer's likeness in prints sold for profit protected by First Amendment); *Matthews*, 15 F.3d at 440 (use of undercover police officer's identity in film protected by First Amendment); *Rogers*, 875 F.2d at 1005 (use of Fred Astaire's and Ginger Rogers' first names in movie title protected by First Amendment); *cf. Tyne v. Time Warner Entm't Co., L.P.*, 901 So. 2d 802, 808 (Fla. 2005) (concluding that allowing right of publicity claim based on use of events from plaintiff's life in film would "raise[] a fundamental constitutional concern").

The uses of athletes' names and other information at issue here is the same as that which would be used in any biography, docudrama, speculation about seasons to come, or other form of speech. The right to control discussion or use of a public figure's publicly available information is a dangerous one. Those who are the participants in newsworthy and historical events could censor and write the story and their descendants could do the same. This would be anathema to the core concept of free speech and a free press. *See, e.g., J. THOMAS MCCARTHY, 2 RIGHTS OF PUBLICITY & PRIVACY* § 8:64 (2d ed. 2017); *see also Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 677 (2010) (holding that a five-page editorial about indie rock concerned topics of public interest simply because it discussed "an extremely popular genre of music [and included] commentary on the many bands whose musical works have contributed to the development of the genre"); *Sarver*, 813 F.3d at 902 (concluding that a film's portrayal of the Iraq War implicated matters of public concern).

This same broad constitutional protection consistently has been applied to misappropriation and right-of-publicity claims purporting to arise from fictional or dramatized works, and for good reason—such media are often important parts of shaping how public figures are remembered, whether it’s Ronald Reagan as George Gipp in *Knute Rockne, All American* or Laurence Fishburne as Ike Turner in *What’s Love Got To Do With It*.³ In *Guglielmi v. Spelling-Goldberg Productions*, Justice Bird of the California Supreme Court explained:

Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person’s identity. Moreover, the creation of historical novels and other works inspired by actual events and people would be off limits to the fictional author. An important avenue of self expression would be blocked and the marketplace of ideas would be diminished.

Guglielmi, 603 P.2d at 461–62 (Bird, J., concurring). Fictionalization is even common in political discourse: Maureen Dowd and Aaron Sorkin wrote an editorial in which the fictional Jed Bartlett discusses the 2008 election with the very real Barack Obama, Maureen Dowd, *Aaron Sorkin Conjures a Meeting of Obama and Bartlet*, N.Y. TIMES (Sept. 20, 2008), <http://www.nytimes.com/2008/09/21/opinion/21dowd-sorkin.html>. More recent stories have imagined conversations between elected officials, Elizabeth Preza, *GOP official imagines Kelly*

³ Although fantasy sports might seem less significant than other media in shaping understanding of public figures, that is neither a judgment that courts are equipped to make under the First Amendment nor a stable fact. *See Winters v. New York*, 333 U.S. 507, 510 (1948) (explaining that both entertainment and news are fully 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”). Consider a player who is removed from a team for refusing to stand for the National Anthem, or one who is suspended for an incident of domestic violence—both situations that have made national headlines in the past few years. If the players have the right to control their appearance in fantasy sports, they also have the right to condition that approval on avoiding any negative mentions of players’ behavior.

and Mattis Discussed Tackling Trump if He ‘Lunges for the Nuclear Football,’ RAW STORY (Oct. 10, 2017), <https://www.rawstory.com/2017/10/kelly-and-mattis-discussed-literally-tackling-trump-in-the-event-he-lunges-for-the-nuclear-football-report/>.

Fantasy sports are a newer variety of fictionalization, but their novelty should not obscure their status as speech, and the corresponding need for the government to articulate a compelling interest—not just a private interest in transferring control from the speaker to the subject of the speech—in order to regulate them. As long as fictionalization is nondefamatory, it is protected by the First Amendment as a form of commentary on real-world events and people. The right of publicity should not be expanded to threaten this non-advertising speech.

II. *Zacchini* Provides No Warrant for Extending the Right of Publicity to the Defendants’ Conduct

While *Zacchini* allows a “right of publicity” lawsuit in the context of noncommercial speech, that extremely narrow decision depended on circumstances not applicable here. The Supreme Court consistently characterized the conflict in *Zacchini* as one between the television station’s First Amendment rights and the performer’s interest in his “entire act”—equivalent to a common-law copyright, not a conventional right of publicity claim. *Zacchini*, 433 U.S. at 575.⁴

⁴ See *Zacchini*, 433 U.S. at 573 (“the State’s interest [in permitting a right of publicity] is closely analogous to the goals of patent and copyright law”); *id.* at 575 (“The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.”); *id.* at 576 (“the same consideration underlies the patent and copyright laws long enforced by this Court”); MCCARTHY, *supra*, at § 11:55 (“The proper category for *Zacchini*’s claim was the state law of common law copyright, not the right of publicity.”); Dogan & Lemley, *supra*, at 1187 (same); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343, 1365 n.97 (1989) (same); Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART. & ENT. L. 35, 49–50 & n.43 (1998) (same); *cf. Comedy III*

The Court suggested that use of Zacchini’s entire act posed a “substantial threat to the economic value of that performance.” *Id.* But this concern was quite specific to broadcasting of the *entire* performance. *See id.* at 573 n.10 (emphasizing that Zacchini did not “merely assert that some generally use, such as advertising, was made of his name or likeness; he relie[d] on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform”). Indeed, the Court emphasized that “the broadcast of [Zacchini’s] entire performance, unlike the unauthorized use of another’s name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner’s ability to earn a living as an entertainer.” *Id.* at 576. Thus, according to the Court, “Ohio ha[d] recognized what may [have been] the strongest case for a ‘right of publicity’—involving, not the appropriation of an entertainer’s reputation to enhance the attractiveness of a commercial product, but the very activity by which the entertainer acquired his reputation in the first place.” *Id.*

This case does not involve anything like use of the Appellants’ “entire acts,” and it does not involve a performance in which Appellants could have a common-law copyright.

III. Categorical Protection for Noncommercial Speech Against Right of Publicity Claims is Superior to the Alternatives.

In the absence of a recorded performance to which *Zacchini* would apply, a defendant cannot be subject to liability for noncommercial speech about a matter of public interest that is not false or defamatory. No other balancing or set of exceptions is necessary. This bright-line approach

Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 806 (Cal. 2001) (“*Zacchini* was not an ordinary right of publicity case: the defendant television station had appropriated the plaintiff’s entire act, a species of common law copyright violation.”).

avoids the chilling effects, unpredictability, and risks of mistake otherwise caused by attempts to apply more detailed exemptions such as those listed in the statute, which require courts to weigh incommensurable and unmeasurable free speech interests against a plaintiff's inchoate interests in "controlling" his or her public presentation. *Cf. United States v. Stevens*, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.").⁵

Amici believe that categorical protection for truthful noncommercial speech is superior to alternate approaches that require courts to parse already First-Amendment protected speech for "material that has political or newsworthy value" or to evaluate the form of a nondefamatory work to determine whether it constitutes a "literary" work or other work exempted by the statute, Ind. Code § 32-36-1-1(c)(1)(A)–(B).⁶ This rule avoids content discrimination based on the court-determined merit of the speech or the person depicted, so long as the speech is noncommercial.

⁵ See also *Stevens*, 559 U.S. at 479 ("Most of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation.").

⁶ Notably, the Indiana statute exempts "literary" works but not equally fully First Amendment-protected video games, *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011). It also exempts "original" fine art but not copies of fine art, such as lithographs, posters made of paintings, or numbered prints. Ind. Code § 32-36-1-1(c)(1)(A), (C). This kind of medium discrimination lacks a compelling interest as well, and further shows that, while the law may have been tailored to protect some currently powerful industries, it is not narrowly tailored for First Amendment purposes.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court limit application of the Indiana statute to advertising and unauthorized recordings of performances.

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WORD COUNT CERTIFICATE

Pursuant to Indiana Appellate Rule 44(E), I verify that this brief contains no more than 3,750 words.

/s/ John A. Conway _____
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing has been served upon the Clerk for the Indiana Supreme Court via electronic filing, this 18th day of May 2018, and on the following counsel in accordance with Rule 24:

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