IN THE
INDIANA SUPREME COURT

Akeem Daniels, Cameron Stingily, and Nicholas Stoner, Plaintiffs-Appellants, v. FanDuel, Inc. and DraftKings, Inc., Defendants-Appellees.	Supreme Court Case No.18S-CQ-00134 U.S. Court of Appeals for the Seventh Circuit Case No. 17-3051

AMICUS CURIAE BRIEF OF THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, THE MAJOR LEAGUE SOCCER PLAYERS ASSOCIATION, THE NATIONAL BASKETBALL PLAYERS ASSOCIATION, THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, THE NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, THE UNITED STATES WOMEN'S NATIONAL TEAM PLAYERS ASSOCIATION, AND THE WOMEN'S NATIONAL BASKETBALL PLAYERS ASSOCIATION

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CERTIFIED QUESTION PRESENTED

Whether online fantasy-sports operators that condition entry on payment, and distribute cash prizes, need the consent of players whose names, pictures, and statistics are used in the contests, in advertising the contests, or both.

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The Major League Baseball Players Association, Major League Soccer Players Association, National Basketball Players Association, National Football League Players Association, National Hockey League Players' Association, United States Women's National Team Players Association, and Women's National Basketball Players Association ("Associations") represent professional athletes in collective bargaining, group licensing, and other matters.

The Associations regularly negotiate group licensing agreements on behalf of professional athletes, authorizing use of their member-athletes' names and likenesses in a range of commercial products and services.[1] Through these agreements, the Associations ensure that their members are associated only with products they choose to support, that the commercial value of their names and likenesses is neither tarnished nor diluted through misuse or overuse, and that they receive fair compensation when their personas are used to increase a product's consumer appeal. The effectiveness of these agreements largely depends upon the continued enforceability of state right-of-publicity laws, like Ind. Code §32-36-1-0.2 *et seq.*

SUMMARY OF ARGUMENT

Although the certified question encompasses a range of potential issues, amici focus on the two statutory exemptions to Indiana's right-of-publicity law principally at issue.

Because statistics regarding an athlete's performance are part of an athlete's "likeness," *see, e.g.*, *Uhlaender v. Henricksen*, 316 F.Supp. 1277, 1279 (D. Minn. 1970), and because the use of an individual's name, picture, or likeness in a consumer product is a "commercial use"

[1] The MLSPA licenses its members' group publicity rights to Major League Soccer, which licenses them to others.

for right-of-publicity purposes, *see, e.g.*, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013) ("*NCAA Student-Athletes*"), any non-consensual commercial use of an athlete's name or statistics in a fantasy sports game ("FSG") violates Indiana's right-of-publicity statute unless a specific exemption applies.

The federal district court dismissed plaintiffs' claims after concluding, as a matter of law, that FanDuel's and DraftKings' appropriation of college athletes' names, photographs, and likenesses was protected by exemptions for use of a personality's identity in "material that has … newsworthy value" or "in connection with the broadcast or reporting of an event or a topic of general or public interest." I.C. §32-36-1-1(c)(1)(B), (c)(3). That court wrongly focused on whether *the athletes' names and statistics* were inherently "newsworthy" or matters of "public interest" (as almost any public figure's identity would be). But the text and history of Indiana's statute demonstrate that context matters, and that whether a particular use is protected depends not on whether the plaintiffs are public figures, but on whether *the commercial uses* of their names and performance data are newsworthy or report upon matters of public interest.

The district court narrowed Indiana's right-of-publicity protections to the point of triviality and applied those two statutory exemptions far more broadly than other states have construed similar right-of-publicity exemptions. Other states uniformly require a context- and fact-specific inquiry into how a company packages and presents an individual's name or likeness to increase its product's commercial appeal. Because defendants' FSGs do not function as sources of newsworthy information or as vehicles to report upon matters of public interest, but are simply games designed to promote competition for prize money, their uses of plaintiffs' identities fall outside the statutory exemptions.

ARGUMENT

I. Indiana's Right of Publicity Protects Public Figures from Unauthorized Commercial Exploitation.

Courts have long recognized, as a matter of fundamental fairness, that athletes and other well-known individuals have the right to control the commercial use of their personas, including through the marketing and sale of products whose appeal is enhanced by their celebrity. *See, e.g.*, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). This "right of publicity" is recognized by common law or statute in 33 states and the District of Columbia. Jonathan D. Reichman, *Right of Publicity in 21 Jurisdictions Worldwide 2014* 123, 130 (2013). Courts have protected that right in a range of settings, from trading cards depicting professional baseball players, *Haelan Laboratories*, 202 F.2d 866; and board games featuring professional golfers, *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J.Super. 72, 232 A.2d 458 (1967); to video games depicting college athletes, *NCAA Student-Athletes*, 724 F.3d 1268; *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

The Indiana courts first recognized a form of this publicity right in 1949. *Cont'l Optical Co. v. Reed*, 119 Ind.App. 643, 86 N.E.2d 306 (1949). The Legislature codified the right in 1994, adopting "one of the most sweeping right of publicity statutes in the nation," J. Thomas McCarthy, 1 The Rights of Publicity and Privacy §6:59 (2d ed. 2009), and declaring that, "without having obtained previous written consent," "[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[.]" I.C. §32-36-1-8(a). This right applies to any use of a personality's "name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms," and to any "act or event that occurs within

Indiana, regardless of a personality's domicile, residence, or citizenship." I.C. §§32-36-1-1, 32-36-1-7.

The right of publicity serves the "straightforward" purpose "of preventing unjust enrichment by the theft of good will." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977). Its "basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference." *Palmer*, 96 N.J.Super. at 79 (citation omitted). "A famous individual's name, likeness, and endorsement carry value and an unauthorized use harms the person both by diluting the value of the name and depriving that individual of compensation." *McFarland v. Miller*, 14 F.3d 912, 919 (3d Cir. 1994) (citation omitted).

The right of publicity "provides an economic incentive for [celebrities] to make the investment required to produce a [work] of interest to the public." *Zacchini*, 433 U.S. at 563. For professional athletes, the ability to control the commercial use of their names and likenesses provides an important return on substantial career investments. For college athletes, the right often provides their only opportunity to benefit from the name recognition earned by years of training.

The right of publicity also enables individuals to avoid association with particular commercial products or works—for example, enabling someone with strongly held moral views to prevent his name from being associated with a distasteful product or controversial advertisement. *See, e.g.*, *Parks v. LaFace Records*, 329 F.3d 437, 453-55, 459-61 (6th Cir. 2003) (suit by Rosa Parks against rap group whose song "Rosa Parks" contained "lyrics . . . laced with profanity").

II. The Statutory Exemptions Are Context-Dependent and Require Analysis of the Purpose and Function of the Work as a Whole.

Because enforcement of right-of-publicity laws can implicate First Amendment-protected speech, the Legislature exempted various expressive uses of otherwise-protected identities, including in "material that has political or newsworthy value" and "in connection with the broadcast or reporting of an event or a topic of general or public interest." I.C. §32-36-1-1(c)(1)(B), (c)(3).

The district court concluded that these "newsworthiness" and "public interest" exemptions allowed FSG operators to use college athletes' names and performance statistics in their daily FSGs because collegiate athletics itself is "newsworthy" and college athletes' performances are matters of "public interest." *Daniels v. FanDuel, Inc.*, No. 1:16-cv-01230-TWP-DKL, 2017 WL 4340329, at *6-*7 (S.D. Ind. Sept. 29, 2017). But that focus on *plaintiffs'* newsworthiness was improper, and would effectively gut Indiana's statutory protections as applied to public figures. The proper inquiry under the statutory exemptions must be whether *the particular product or work in which the plaintiff's persona is presented* has "newsworthy" value or involves "the broadcast or reporting" of a matter of "public interest." That inquiry requires a fact- and context-specific analysis into the purpose and function of the product as a whole.

A. The Exemptions Apply Only to Newsworthy *Products or Works* and to *Reporting or Broadcasting* on Matters of Public Interest.

The "newsworthiness" exemption applies to "[t]he use of a personality's name … [or] likeness … in … [m]aterial that has political or newsworthy value." I.C. §32-36-1-1(c)(1)(B). This exemption necessarily requires inquiry into whether the *material* in which the plaintiff's name and likeness was used *itself* has "newsworthy" value, not whether the plaintiff's persona is "newsworthy." Celebrity status may make an individual's conduct generally newsworthy, but

does not make every commercial appropriation of that individual's identity newsworthy as well. *Abdul-Jabbar v. G.M.*, 85 F.3d 407, 416 (1996) (use of "newsworthy" information about athlete's career in automobile advertisement not within California's "newsworthiness" exemption). That exemption applies only where the purpose and function of the product is to disseminate information about newsworthy matters. *Midler v. Ford Motor Co*., 849 F.2d 460, 462 (9th Cir. 1988) ("If the purpose is informative or cultural the use is immune; if it … merely exploits the individual portrayed, immunity will not be granted.") (citation omitted); *see also infra* Section II.B.

The "public interest" exemption applies to the use of a personality's persona "in connection with the broadcast or reporting of an event or a topic of general or public interest." I.C. §32-36-1-1(c)(3). This exemption also turns upon the context in which the plaintiff's identity is used—namely, whether it is in connection with some form of "broadcasting" or "reporting." While identifying "a topic of general or public interest" is a necessary precondition, it is not sufficient; the defendant must also be engaged in *broadcasting* or *reporting* that topic. *See, e.g., NCAA Student Athletes*, 724 F.3d at 1282 (broadcasting exemption inapplicable to video game).

Because Indiana's right of publicity only applies to names or likenesses that have "commercial value," *see* I.C. §32-36-1-6, to exempt any name or likeness deemed newsworthy or of public interest would effectively eliminate that right, or narrow it to the handful of persons who are neither newsworthy nor of public interest yet have commercially valuable identities. *But see Northern Ind. Bank & Trust Co. v. State Bd. of Finance*, 457 N.E.2d 527, 532 (Ind. 1983) ("[C]ourts will not presume the legislature intended to do a useless thing or to enact a statute that is a nullity."). Such a rule would deny right-of-publicity protection to those most in need, and

would depart from the longstanding recognition that public figures are entitled to the same protection as private individuals. *See* Jennifer E. Rothman, *The Right of Publicity* 30-33 (2018) (discussing historical development); *Beverley v. Choices Women's Medical Center, Inc.*, 78 N.Y.2d 745, 752-53, 587 N.E.2d 275 (1991) ("Ordinary citizens are entitled to the protective mantle of [New York's right-of-publicity] statute, and persons with professional reputations should receive no less coverage in this respect.").

The legislative history confirms that application of Indiana's statutory exemptions depends upon the context in which a "newsworthy" plaintiff's name or likeness is used. The Indiana Legislature created the statutory right in 1994 in part due to the experiences of AIDS victim Ryan White's family. After White's death, trading cards featuring White and other AIDS victims were sold to the public, leading White's mother to urge the Legislature to prohibit offensive and un-consented commercial appropriations of her son's name and likeness. Dan Wetzel, "Law Ends Pirating of Celebrities," *Indianapolis Star* (June 25, 1994), at B-2; *see also* Jonathan L. Faber, "Recent Right of Publicity Revelations: Perspective from the Trenches," 3 Sav. L. Rev. 37, 47 (2016). Because White's name, likeness, and history were indisputably newsworthy and of public interest—during his short life, White had become the national face of public education about AIDS and had inspired federal legislation—interpreting Indiana's statute to exempt any use of a name or likeness that is "newsworthy" or of "public interest" would eliminate from statutory regulation the very exploitative uses White's mother successfully fought. *See Northern Ind. Bank & Trust*, 457 N.E.2d at 532 (courts must "always endeavor to follow the intent of the legislature").

B. Applying the Statutory Exemptions Requires a Careful, Fact- and Context-Specific Analysis of the Purpose and Function of the Work as a Whole.

State and federal court decisions nationwide (especially those preceding the 1994 enactment of the Indiana statute) provide useful guides to how the Indiana Legislature intended the statutory exemptions to apply. Those decisions require a context- and fact-specific inquiry into the purpose and function of any product alleged to be non-infringing.

New York's right-of-publicity statute, N.Y. Civ. Rights Law §51, much like Indiana's, exempts "publications concerning newsworthy events or matters of public interest." *Stephano v. News Group Publ'ns.*, 64 N.Y.2d 174, 184, 474 N.E.2d 580 (1984). That exemption has repeatedly been held to apply only to speech whose primary purpose is to disseminate information. In *Rosemont Enters, Inc. v. Urban Systems, Inc.*, 340 N.Y.S.2d 144, 145, 72 Misc.2d 788 (N.Y. Sup. Ct. 1973), *aff'd in relevant part*, 345 N.Y.S.2d 17, 18, 42 A.D.2d 544 (N.Y. App. Div. 1973), for example, the court considered how the exception applied to a Howard Hughes board game. After carefully reviewing "the media used, the nature of the subject matter, and the extent of the actual invasion of [plaintiff's rights]," the court found the newsworthiness exception inapplicable because "defendants [were] not disseminating news" or "educating the public as to the achievements of Howard Hughes." *Id*. at 146-47.

Similarly, in *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85 (2d Cir. 1989), the Second Circuit rejected the argument that because a magazine reported on professional wrestling and was a "bona fide newsstand publication" protected by the First Amendment, in-magazine posters were categorically exempt from right-of-publicity claims. *Id.* at 88. The court recognized that the newsworthiness exemption depended upon whether the photos on the posters were included "primarily for their public interest aspect" or whether that aspect was "merely incidental to the distributor's commercial purpose," and explained that fact-finders must consider a "variety of factors including, but not limited to the nature of the item, the extent of its

relationship to the traditional content of a magazine, … and how the publisher markets the item." *Id.* at 88-89.

Rhode Island takes a similar approach. Although Rhode Island's right-of-publicity law excludes dissemination of newsworthy information, that exclusion only applies when the primary purpose of the product is to communicate such information—a determination requiring "full development of the facts." *Mendosa v. Time Inc.*, 678 F.Supp. 967, 971-72 (D.R.I. 1988) (while original publication of plaintiff's photograph "contributed information about the recent surrender of the Japanese and the reaction of Americans to it," question remained as to whether subsequent uses "functioned primarily as a means of commercial exploitation").

New Jersey also requires a contextual analysis of purpose and function. In *Presley's Estate v. Russen*, 513 F.Supp. 1339 (D.N.J. 1981), the court considered whether Elvis Presley's estate could pursue a right-of-publicity claim against an Elvis imitator. After analyzing details of the defendant's performance, the court concluded that the estate's claim was viable even though the performance had First Amendment value and "Presley's immense contribution to rock 'n roll" made him a figure of public interest, because "the primary purpose of defendant's activity [was] to appropriate the commercial value of the likeness of Elvis Presley." *Id.* at 1360.

This method of analysis reflects the underlying purpose of such exemptions: to balance a plaintiff's publicity rights against "societal interests in free expression." *Id.* at 1356. Achieving that balance requires consideration of all relevant facts under the actual circumstances of the case. *See, e.g.*, *Zacchini*, 433 U.S. at 575-79 (First Amendment did not preclude right-of-publicity claim targeting new broadcast of performance that significantly interfered with performer's economic interests, while plaintiff's claim had limited impact on speech interests); *see also Gionfriddo v. MLB*, 94 Cal.App.4th 400, 410, 114 Cal.Rptr.2d 307 (2001) ("[T]his

balancing process begins by identifying and weighing the factors properly taken into account. At a minimum, a court must first consider the nature of the precise information conveyed and the context of the communication[.]").

III. Use of Athletes' Names and Likenesses in Daily FSGs Violates Indiana's Statutory Right of Publicity.

Following these precedents, this Court should hold that Indiana's statutory "newsworthiness" and "public interest" exemptions require a careful, context-specific analysis to determine whether the product serves to disseminate newsworthy information or report or broadcast matters of public interest. Applying that analysis, it is clear that the use of athletes' names and likenesses in defendants' daily FSGs should not be exempt from statutory coverage. The FSGs' purpose in using the athletes' names and statistics is to capitalize upon the commercial value of those athletes' identities by enticing customers to spend and win money based upon the athletes' on-field performances, not to inform the public about matters that are newsworthy or of public interest.

Defendant's FSGs enable customers to compete against each other by drafting rosters of athletes whose individual performances in real games are scored and aggregated to determine a winner. Customers pay entry fees of between $0.25 and $10,000 per contest. *See* DailyFantasySports Strategy, "DraftKings Review," http://www.dfsstrategy.com/draft-kings-review/. Customers then "draft" a roster of athletes with pre-assigned "salaries." The total salary of a customer's roster cannot exceed an artificial "salary cap." *See, e.g.*, Drew Harwell, "All the Reasons You (Probably) Won't Win Money Playing Daily Fantasy Sports," *Washington Post* (Oct. 12, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/10/12/all-the-reasons-you-probably-wont-win-money-playing-daily-fantasy-sports/. Operators assign artificial point values to achievements such as touchdowns or home runs, and customers accrue points

based on the performances of the drafted athletes in that day's games. *See, e.g.*, FanDuel, "Rules," https://www.fanduel.com/rules. Customers may compete head-to-head or against multiple opponents, and may compete in contests guaranteeing particular prizes (up to $1,000,000) or a guaranteed percentage of winners. DailyFantasySports Strategy, *supra* (describing contest types).

The *sole* fact suggesting that FSG operators' use of athletes' identities has an informative purpose is that the athletes' names and statistics are matters of public interest and newsworthiness. The context surrounding defendants' *use* of the athletes' names and likenesses, however, overwhelmingly demonstrates the games' commercial, non-informative purpose. Rather than reporting truthful information, the operators create an entirely *artificial* game-playing structure to encourage customers to risk money based upon roster performances, establishing artificial salaries, a salary cap inapplicable to real-life games, and rules governing how performances are measured, the terms of contest-entry, and the available prize amounts. None of these elements helps to inform the public about matters of public interest or newsworthiness; they merely promote competition with (sometimes substantial) financial stakes.

That defendants' games are not designed to inform the public about individual athletes' performances is underscored by the fact that the customers who generate the greatest financial returns do so by entering a huge number of contests using lineups generated through custom-built predictive models and "bespoke software." Joshua Brunstein & Ira Boudway, "You Aren't Good Enough To Win Money Playing Daily Fantasy Football," *Bloomberg Businessweek* (Sept. 10, 2015), https://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football. In 2015, "the top 100 ranked players enter[ed] 330 winning lineups per day, and the top 10 players combine[d] to win an average of 873 times

daily." *Id.* The operators' products reward such practices, which have nothing to do with the newsworthiness of or public interest in the athletes' performances.

Daily FSGs are "a game, not a reference source." *NCAA Student Athletes*, 724 F.3d at 1283. They differ substantially from products that courts have previously found exempt as products designed to promote "the free dissemination of information" about newsworthy matters of public interest. *Gionfriddo,* 94 Cal.App.4th at 410-11, 415-16 (exempting Major League Baseball's use of "factual data concerning [retired baseball] players, their performance statistics, and verbal descriptions and video depictions of their play" in "game programs, Web sites, and video clips"). Indeed, defendants' FSGs *cannot* be used to track the performance of the athletes that most interest a customer. Instead of being allowed to designate every player they want to follow, customers must draft players whose "salaries" fit within the FSG's "salary cap." Customers thus choose players based upon their fantasy "value," not the public interest in or newsworthiness of their performances. *See, e.g.*, Harwell, *supra* ("Picking your favorite players … typically eat[s] up a lot of your fantasy team's salary cap. … The best point-makers … are undervalued, little-known and play not just great, but surprisingly great.").

Recognizing that daily FSGs are not exempt from right-of-publicity claims is consistent with decades of case law analyzing products incorporating the names and statistical information of accomplished athletes. Half a century ago, for example, the right of publicity was applied to the use of professional golfers' names and biographies in a golf-themed board game, *Palmer*, 96 N.J.Super. at 74, and to the use of professional baseball players' names and sporting accomplishments in baseball-themed parlor or table games, *Uhlaender*, 316 F.Supp. at 1279. Likewise, the Seventh Circuit recognized in 1986 that the right of publicity applies to the

marketing of a baseball game "based upon [a] player's career statistics." *Baltimore Orioles, Inc. v. Major League Baseball Players Association*, 805 F.2d 663, 676 n.24 (7th Cir. 1986).

Each of these decisions is persuasive in its own right. These decisions are entitled to particular weight in construing Indiana's statutory right of publicity, however, because the Legislature was presumably aware of them when it enacted Indiana's 1994 law, and if it intended to depart from their well-established principles, it would have done so expressly. *Clark v. Clark*, 971 N.E.2d 58, 62 (Ind. 2012).[2]

Accordingly, applying a careful, fact- and context-specific analysis of the particular manner in which FSG operators' use athletes' names and likenesses, the overall product in which the names and likenesses are used, and the relevant precedents, it is clear that daily FSGs do not fall within the "newsworthiness" or "public interest" exemptions to Indiana's right of publicity.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question by holding that the operators' daily FSGs infringe upon plaintiffs' statutory publicity rights and are not within any statutory exemption.

Dated: May 18, 2018 Respectfully submitted,

[2] Consistent with these precedents, the only previous case to consider whether the use of athletes' names and likenesses in fantasy sports products infringed upon the right of publicity concluded that the athletes had established a state law claim. *CBC Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 822-23 (8th Cir. 2007). With limited analysis, the court then held that the First Amendment provided the defendant with a complete defense. *Id.* at 824.

The First Amendment is not at issue in the certified question, and defendants have not challenged the denial of their motion to dismiss on First Amendment grounds. Further, *CBC* involved crucial facts not present here, while the facts described above (which were never considered in *CBC*) establish that daily FSGs do not serve a primarily expressive or informative purpose that might support such a defense.

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CERTIFICATE OF WORD COUNT

Pursuant to Ind. Appellate Rule 44(F), I hereby verify that this brief contains 3,746 words, excluding the items listed in App. R. 44(C). I rely on the word count of the word processing program used to prepare this brief.

Dated: May 18, 2018

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CERTIFICATE OF SERVICE

Pursuant to Indiana Appellate Rule 24(D), the undersigned hereby certifies that a copy of the foregoing has been served by E-filing and by United States Mail, first class, postage prepaid, on the 18th day of May 2018 upon the following:

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