

**RESPONSE BRIEF OF DEFENDANTS-APPELLEES
FANDUEL, INC. AND DRAFTKINGS, INC.**

Dated: June 9, 2018

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INTRODUCTION

Appellants and their amici mischaracterize the nature of online fantasy sports. Online fantasy sports platforms provide a means for more than 50 million Americans to “receive their sports-news,” Brief of Amicus Curiae Fantasy Sports Trade Ass’n (“FSTA Br.”) 13, “digest and engage with real-time sporting news and statistics,” *id.* at 6, and deepen their engagement with that news by playing the role of virtual general managers. Fantasy sports contests are thus not “casinos” frequented by “gamblers,” Brief of Plaintiffs-Appellants Akeem Daniels, Cameron Stingily, and Nicholas Stoner (“App. Br.”) 10, nor are they “an entirely *artificial* game-playing structure [designed] to encourage customers to risk money,” Amicus Curiae Brief of the Major League Baseball Players Ass’n *et al.* (“PA Br.”) 18 (emphasis in original). They are, in essence, the modern equivalent of the water-cooler, dinner table, and neighborhood bar: a place for like-minded fans to engage in competition, debate, and discussion in connection with athletes and the publicly available statistical record of their accomplishments.

Likewise, Appellants and their amici mischaracterize the Indiana right-of-publicity statute. They contend, for example, that the statutory exceptions to Indiana’s right of publicity are narrowly confined to news disseminated by traditional media organizations, *see* App. Br. 22, or are somehow inapplicable to conduct that is of a “commercial nature,” *id.* 15; PA Br. 17. But that is wrong. Consistent with the text of the statute itself and a host of caselaw interpreting similar right of publicity statutes, Indiana’s exceptions are broad,

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apply explicitly to speech made for a commercial purpose, and are necessitated by First Amendment principles that recognize the myriad ways—particularly in the digital age—that the public receives and engages with newsworthy material. For these reasons, online fantasy sports contests like those offered by Appellees fall within the heart of the exceptions to Indiana’s right of publicity statutes for “material” that has “newsworthy value,” I.C. § 32-36-1-1(c)(1)(B), and “reporting” on topics of “public interest,” I.C. § 32-36-1-1(c)(3). Indeed, were this not the case, Indiana’s right of publicity statute would be vulnerable to serious First Amendment challenge, as the Eighth Circuit’s opinion in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007) makes clear.

Finally, Appellants mischaracterize the nature of the relevant inquiry through their repeated assertion that fantasy sports are illegal. That allegation is meritless and, in any event, irrelevant to their statutory claim. Appellants have never attempted to justify their proposed illegality exception with reference to statutory text, nor could they. Instead, they ask this Court to rewrite the statute to reflect their own—and not the legislature’s—policy preferences. Such a rewriting, always disfavored, is particularly unwelcome here because Appellants’ policy preferences conflate statutory exceptions with “speech privileges,” App. Br. 31; invite rather than avoid constitutional questions; and encourage extensive collateral litigation on as yet unnamed and unwritten public policy exceptions in every right-of-publicity case. Appellants’

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position is impossible to reconcile with the text of the statute, the legislature's intent, or common sense.

For these reasons, the answer to the certified question is "No."

I. APPELLEES' CONDUCT IS COVERED BY THE STATUTORY EXCEPTIONS TO INDIANA'S RIGHT OF PUBLICITY.

Consistent with a wealth of precedent, *see* Br. 22-28, the district court held that the relevant "material" that has "newsworthy value" in this case is the public-domain sports statistics reported on Appellees' platforms and integrated into Appellees' fantasy sports contests. *See* Brief of Defendants-Appellees FanDuel, Inc. and DraftKings, Inc. ("Br.") 22-28; *see also, e.g., Gionfriddo v. MLB*, 94 Cal. App. 4th 400, 411 (Cal. Ct. App. 2001) ("[R]ecords and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today's performances"); *C.B.C.*, 505 F.3d at 823 (recognizing the "public value of information" regarding sports and athletes). Citing an abrogated District of Minnesota case from 1970, the Players Associations dispute this analysis and claim that "[b]ecause statistics regarding an athlete's performance are part of an athlete's 'likeness,'" PA Br. 8, the relevant "material" here is the online fantasy sports contests themselves, *see id.* 9, 17. The Players Associations cite no support for the proposition that an athlete's "likeness" includes public domain statistical information measured and collected by third parties as a result of athletes' public performances. But this inquiry is beside the point. Whether the Court views the relevant material here as public domain sports statistics, online fantasy sports contests, or

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(given their inextricably linked nature) a combination of the two, Appellees' conduct falls within the statutory exceptions to Indiana's right of publicity.

The arguments of Appellants and their amici to the contrary are unpersuasive.

a. The “Commercial Nature” of Appellees’ Speech Is Irrelevant Because the Statutory Right of Publicity and Its Exceptions Apply *Only* to Commercial Speech.

Appellants spend much of their brief arguing that Appellees' conduct cannot fall within the statutory exceptions because Appellees' platforms have an “expressly commercial nature.” App. Br. 15; *id.* 24 (“The ‘commercial purpose’ (IC §32-36-1-8) of Operator’s speech could not have been any more direct.”); *see also* PA Br. 17 (“The FSG’s 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. . . .”). Judge Tanya Walton Pratt dismissed this argument out of hand, and with good reason. As Judge Pratt observed, Indiana’s right of publicity statute applies *only* to the “use of a personality’s right of publicity *for a commercial purpose*.” District Court Op., District Court ECF No. 75, 7th Cir. ECF No. 1-1 (“Op.”) at 7 (quoting I.C. § 32-36-1-8(a)). Thus, “the universe of prohibited conduct is, from the outset, limited to material that is used for a commercial purpose,” and “the exceptions must apply to uses that are commercial in nature.” *Id.*; *see also* FSTA Br. 14 (“[T]he right of publicity is a limited right, and a person is not entitled to restrict all use or mention of his or her name, *even when the person using the name makes money doing so*.” (emphasis in original)). The “commercial nature” of a

challenged use is an essential component of every claim under the Indiana right of publicity statute, and thus the commercial nature of Appellees' platforms provides no basis for arguing that the statute's exceptions do not apply.

b. Online Fantasy Sports Contests Are Not Stripped of Newsworthy Value Because They Are “Games.”

Appellants and their amici argue the relevant “material” for purposes of I.C. §§ 32-36-1-1(c)(1)(B) and 1-(c)(3) is Appellees' websites and online fantasy sports contests, and that Appellees thus lose because those websites and contests are not “material” that has “newsworthy value” protected by the statutory exemptions. But the conclusion does not flow from the premise.

At the outset, Appellants and their amici argue that Appellees and their platforms are not the kinds of entities protected by the statute. *See* App. Br. 24 (arguing that the statutory exceptions protect only traditional “news media entities”); Amicus Curiae Brief of CMG Worldwide, Inc. (“CMG Worldwide”) 10-11 (arguing that the statutory exceptions protect only “literary works, theatrical works, musical compositions, film, radio, or television programs, original works of fine art, and the like.”). That is incorrect. As Appellees demonstrated in their opening brief, *see* Br. 24-25—neither the “newsworthiness,” I.C. § 32-36-1-1(c)(1)(B), nor the “public interest,” I.C. § 32-36-1-1(c)(3), exception is, as a textual matter, limited to traditional print and broadcast media. Indeed, a *different* exception—for “promotional material”—is limited to “news reporting” mediums, I.C. § 32-36-1-1(c)(1)(D), defined to include newspapers, magazines, and radio, television, and cable stations, *id.* § 32-36-1-4. These provisions,

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unaddressed by Appellants and their amici, demonstrate that the General Assembly knew when it wanted to limit right of publicity exceptions to traditional news media, and when it did not.

More broadly, Appellants and their amici argue that the websites and fantasy sports contests simply lack newsworthy value. But that is wrong for at least three reasons. First, Appellees' websites are material that has newsworthy value because they report on and are a reference for sports statistics—including real-time statistics generated by real athletes in live sporting events—that are the subject of intense public interest for millions of Americans. Second, the websites and contests are material that has newsworthy value because they provide an interactive means for better understanding sports and sports statistics. Third, the websites are material that has newsworthy value because fantasy sports themselves are the subject of intense public interest.

The contrary arguments of Appellants and their amici are meritless. Appellants' amici contend, for example, that fantasy sports contests “do not function as sources of newsworthy information, PA Br. 9, because, “[r]ather than reporting truthful information, the operators create an entirely *artificial* game-playing structure to encourage customers to risk money based upon roster performances . . . and rules governing how performances are measured.” PA Br. 18 (emphasis in original); *see also id.* at 9 (claiming online fantasy sports contests “do not function as sources of newsworthy information or as vehicles to report upon matters of public interest, but are simply games

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designed to promote competition for prize money”). But the Players Associations’ own description of fantasy sports only further demonstrates why the contests *do* have newsworthy value. In selecting “rosters,” users generally do not pick at random, but rather evaluate athletes based on historical performance and predictions of future performance. These evaluations require the careful review and analysis of the sports news and statistics available on Appellees’ websites.

Moreover, the “game-playing structure” of online fantasy sports contests does not result in prizes assigned randomly. To the contrary, “performances are measured” based on the statistics generated by athletes in real-life games. Thus, like a stock ticker or a rolling footer on a news channel, Appellees’ platforms provide customers with up-to-the-minute statistics from ongoing sports events. Customers thus can regularly, and do, track every inning and every down, for example, through Appellees’ platforms just as if they were listening to a broadcast of the game on sports radio. Under any common understanding of the terms, this provision of real-time sports statistics is “reporting” on topics of “public interest,” and “material” that has “newsworthy value.”

Beyond serving as a source of up-to-the-minute news, Appellees’ contests are material of newsworthy value because they allow users to engage deeply with the information they receive: users evaluate one athlete against another; determine how an athlete’s particular skills are likely to fare against a specific opponent; make judgments about when the received wisdom about an athlete

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over- or under-values the athlete. In sum, users experience the trade-offs real-life general managers face in evaluating and predicting player performance and seeking to maximize a team's success while operating under a fixed salary constraint. FSTA Br. 8 (fans "interact by simulating owning and running a team").

Appellants and their amici do not dispute that users of Appellees' platforms go through all of these steps when playing online fantasy sports. Through these steps, users necessarily gain a deeper understanding of sports statistics the Players Associations concede are "inherently 'newsworthy' or [a] matter of 'public interest.'" PA Br. 9. As a result, even under Appellants' and their amici's own formulation, online fantasy sports contests "help[] to inform the public about matters of public interest of newsworthiness." *Id.* 18.

Put another way, Appellees' contests are material that has newsworthy value because the games help the users better understand the news. The budget game featured on *The New York Times* has newsworthy value because it helps users understand the federal budget, even if no one cares how Jane Doe herself chooses to balance the budget when she plays the game.¹ See Br. 26-27 (describing budget game). And commentary written by John Doe on U.S.-North Korea relations is material that has newsworthy value because it helps readers understand the North Korea conflict, even if it is not independently newsworthy either that John Doe or that any individual reader has formed a

¹ As discussed *infra* page 14-15, many people *do* care how fantasy sports contestants perform, underscoring the newsworthiness of the contests themselves.

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particular view on the conflict. Likewise, fantasy sports games are material that has newsworthy value because they help users better understand the sports news and statistics, information that is of the highest interest for millions of Americans. Indeed, a contrary view would suggest that a piece of public-domain news that appears on the front page of a newspaper that is widely read is “newsworthy,” but that the *very same* piece of public domain news that appears on the front page of an obscure academic journal or blog is not. That is not and cannot be the law.

While not contesting that fantasy sports contests allow users to gain a deeper understanding of sports news, amicus New Sports Economy Institute (“NSEI”) appears to argue that merely deepening the public’s appreciation of the news is not sufficient, and that fantasy sports contests cannot be material that has newsworthy value unless fantasy sports, *itself*, is a matter of public interest. See New Sports Economy Institute Brief Amicus Curiae (“NSEI Br.”) 10 (“That Villanova guard Donte DiVincenzo scored a career high 31 and carried Villanova to a national title is clearly a ‘topic of general or public interest’ and exempted by the statute. That Donte DiVincenzo scored a career high 31 points and carried Jane Doe to a winning DFS ‘contest’ is not.”).

NSEI is wrong on that score. See *supra* 10-13. But even were NSEI correct, Appellees would still prevail. As both Appellees and the FSTA explained, see Br. 28-29; FSTA Br. 10-12, online fantasy sports *itself* is a matter of wide public interest and has newsworthy value in its own right. Numerous television shows, websites, and other forms of media are dedicated

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to reporting on fantasy sports contests, the contestants most likely to garner points, and their strategies. Thus, even under the narrowest view of the relevant material that has newsworthy value, Appellees prevail.²

Finally, the fact that fantasy sports contests through which millions of Americans receive and deeply engage with sports news are “games” does not strip the contests of their “newsworthy value” or diminish the intense “public interest” in sports news. The Players Associations claim “[d]aily FSGs are ‘a game, not a reference source.’” PA Br. 19 (quoting *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1283 (9th Cir. 2013)). But the two are not mutually exclusive, and the sharp line amici urge between a game and a reference source is refuted, not supported, by the statutory text and relevant caselaw. The statutory exemptions to the right of publicity do not contain a carve-out for “material that has . . . newsworthy value” but that is a game. I.C. § 32-36-1-1(c)(1)(B). And the U.S. Supreme Court has long recognized that the line between speech that “inform[s]” and speech that “entertain[s]” is “elusive,” and that both are entitled to full and equivalent protection, *Winters v. New York*, 333 U.S. 507, 510 (1948); *see also 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). As Appellees explained

² That the fantasy sports achievements of any one individual “Jane Doe” is not the subject of national news is, of course, beside the point, and imposing such a requirement would narrow the right of publicity solely to newsworthy material received by celebrities. Neither NSEI nor Appellants provide any reason for why the General Assembly would have wished to create an exception of such absurdly narrow scope.

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at length in their opening brief, games from Trivial Pursuit to Jeopardy have long been a medium through which individuals engage with news and current events, and no right of publicity claim has ever been recognized in this context. See Br. 25-27. As noted in Appellees' opening brief, the interactive nature and competitive structure of video games makes them a particularly powerful medium for educating and informing. See *id.* 25-28; see generally FSTA Br. 9-13.³

Cases have, moreover, recognized the newsworthy value of fantasy sports games specifically. The very case the Players Associations rely upon—*NCAA Student-Athlete*—expressly *distinguished* protected fantasy sports contests from video games, finding video games subject to California's right of publicity liability law because, *unlike* fantasy sports, simulated video games are “not a means for obtaining information about real-world football games[, and do] not . . . include the athletes' names along with their likenesses and statistical data.” *NCAA Student-Athlete*, 724 F.3d at 1283. And, as noted above, *NCAA Student-Athlete* was clearly correct – users regularly obtain “information about real-world” sporting events from the websites and contests at issue here.

³ Amicus NSEI, citing mid-twentieth-century European historians and sociologists, makes the surprising argument that online fantasy sports “is not a game” at all because it “could not conclude without having a connection to real life.” NSEI Br. 7, 9. Even leaving aside that this “definition” of a game would render myriad activities—from Monopoly to charades—not “games” because they have a connection to real life, NSEI's argument does not aid Appellants. The General Assembly did not exclude games from the statutory carve-outs for newsworthy material or reporting on a matter of public interest. And it is precisely *because* fantasy sports integrate up-to-the-minute “real life” sports news and statistics into the games that it is newsworthy and thus protected.

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Further, *NCAA Student-Athlete* relied in part upon *C.B.C.*, a case related specifically to fantasy sports that Appellants fail even to mention, and the Players Associations relegate to a mere footnote. *C.B.C.* specifically addressed—and rejected—a right of publicity claim brought against commercial operators of fantasy baseball games finding the use of public-domain statistics in commercial fantasy sports was protected by the First Amendment. 505 F.3d at 823-24. The *C.B.C.* court noted “the information used in CBC’s fantasy baseball games is all readily available in the public domain,” and concluded “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. Building on *C.B.C.*, *CBS Interactive Inc. v. National Football League Players Association*, 259 F.R.D. 398, 417-19 (D. Minn. 2009)—a case Appellants and their amici ignore—found operators of fantasy football games immune from right of publicity liability, noting that contestants in these games “closely track player statistics.”⁴

In sum, the General Assembly could easily have limited the statutory exceptions to a particular medium through which the public receives material

⁴ It is no answer for the Players Associations to claim that “FSGs *cannot* be used to track the performance of the athletes that most interest a customer,” or that customers do not solely select players based on the “public interest in or newsworthiness of their performances.” PA Br. 19. The Players Associations concede, as they must, that college and professional sports statistics are matters of wide public interest, *see id.* at 9, and they do not argue that the newsworthy value of that information is diminished simply because customers may select for their rosters particular athletes with whom, absent fantasy sports, they might not be familiar. Moreover, Appellees’ platforms report on the statistics of all players—popular and not—in the sports for which they offer leagues. Thus, up-to-the-minute statistical information about athletes “that most interest a customer” is available, regardless. *Id.* 19.

with newsworthy value. The General Assembly did not do so and, as caselaw has recognized, fantasy sports serve exactly the function of “inform[ing] the public about matters of public interest or newsworthiness,” PA Br. 18, that the statutory exceptions protect.

c. Decades of Right-of-Publicity Precedent and Principles of Constitutional Avoidance Support Appellees’ and the District Court’s Interpretation of the Statute.

The Players Associations claim that the district court’s interpretation of the newsworthiness and public interest exceptions to the statutory right of publicity “narrowed Indiana’s right-of-publicity protections to the point of triviality,” PA Br. 9, and is inconsistent “with decades of case law,” *id.* at 19. The Players Associations are wrong on both counts.

Under the district court’s and Appellees’ interpretation, the right of publicity retains all of its vitality and vindicates what the Players Associations themselves recognize as the key components of the right: (1) protecting the endorsement value and compensation that flows from a celebrity’s likeness and (2) “provid[ing] an economic incentive for [celebrities] to make the investment required to produce a [work] of interest to the public.” PA Br. 11 (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563 (1977) (brackets in original)). Taking each component in turn, Appellees’ websites report on sports news and integrate thousands of athletes’ names and statistics into their online games.

Crucially, Appellees “do *not* use players’ names or personalities to endorse a product.” FSTA Br. 6; *see id.* (“[N]o one is offering the ‘Peyton

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Manning Fantasy Game,’ and if they are, there would be little question as to Mr. Manning’s right to challenge this use under right of publicity laws.”). Indeed, courts have recognized this very point. *See C.B.C.*, 505 F.3d at 824 (“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.”); *NCAA Student-Athlete*, 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”).

Thus, the “decades of caselaw” the Players Associations cite distinguishes itself. For example, in *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, 340 N.Y.S.2d 144, 146-47 (Sup. Ct.), *modified*, 345 N.Y.S.2d 17 (App. Div. 1973), the court found Howard Hughes’s right of privacy violated by an unauthorized “Howard Hughes Game,” that did not “disseminat[e] news” or “educat[e] the public as to the achievements of Howard Hughes,” but rather simply used Hughes’s name and likeness to “market” a dice game. *Id.* at 145-46. The contrast with fantasy sports contests, for which up-to-the-minute sports news and the statistics of thousands of athletes are integral, could not be more stark.

Likewise, in *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 415 (9th Cir. 1996), the court found General Motors had used Kareem Abdul-Jabbar’s former name (Lew Alcindor) without authorization in a television advertisement in order to “attract[] television viewers’ attention [and] gain[] a commercial

advantage.” The court held this isolated focus on a single individual could have suggested to the public Abdul-Jabbar’s endorsement of GM’s cars, and indeed found plausible that it would “make it difficult for [Abdul-Jabbar] to endorse other automobiles.” *Id.* at 416.⁵ Again, the use of Appellants’ names and statistics, among thousands, does not plausibly suggest any endorsement.

Contrary to amicus CMG Worldwide assertions, *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 513 (7th Cir. 2014), concerning Illinois’s right of publicity statute, is also in accord. In *Jordan*, a supermarket chain purchased an advertisement in an edition of *Sports Illustrated* solely dedicated to the achievements of Michael Jordan. The advertisement listed a number of Jordan’s achievements and then, using the supermarket’s slogan and logo, congratulated a fellow Chicagoan who was “just around the corner” for many years. *Id.* at 512. In reversing summary judgment, the court observed “[t]he ad obviously isn’t part of the editorial coverage of Jordan’s career. It isn’t an article, a column, or a news photograph or illustration,” *id.* at 519, rather it was “plainly aimed at fostering goodwill for the Jewel brand among the targeted consumer group—‘fellow Chicagoans’ and fans of Michael Jordan—for the purpose of increasing patronage at Jewel–Osco stores,” *id.* at 518. Again, the unauthorized use of a particular celebrity’s likeness to market a product is

⁵ *Abdul-Jabbar* is likewise distinguishable 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, Indiana’s exceptions to the right of publicity apply specifically in the commercial context. *See supra* 9-10.

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worlds apart from Appellees' use of real-time public domain sports statistics of thousands of known, and unknown, athletes.⁶

Moreover, contrary to the claim of the Players Associations, fantasy sports-contests simply do not implicate the “economic incentive for [celebrities] to make the investment required to produce a [work] of interest to the public.” PA Br. 11 (brackets in original). The Players Associations assert that, “[f]or college athletes, the right [of publicity] often provides their only opportunity to benefit from the name recognition earned by years of training.” *Id.* This confusing statement raises more questions than it answers. For one, NCAA athletes are precluded, at the cost of losing their eligibility, from receiving any financial “benefit” as a result of their participation in collegiate sports. So it is unclear what benefit the Players Associations are referring to, at all.

Beyond this, however, even if there were some conceivable financial benefit athletes could receive as a result of participating in collegiate athletics, there is simply no plausible claim that online fantasy sports contests could deprive athletes of this benefit. As Appellees previously noted, *see* Br. 30-31, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), is particularly instructive in this regard. The unauthorized video recording of the entirety of a live performance in *Zacchini* in effect negated the public's need to

⁶ CMG's additional point that “the certified question at issue is not only regarding the operation of Fanduel's contests, but the *advertising* of the contests as well,” CMG Worldwide Br. 13, is of no moment. As Appellees' previously explained, I.C. § 32-36-1-1(c)(1)(E), specifically exempts from right of publicity liability the advertising of activities that are otherwise covered by a statutory exception. Br. 34-35.

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purchase tickets and attend the performance. 433 U.S. at 575-76. But even Appellants do not claim that the existence of online-fantasy sports impacts the public's desire to attend, and watch broadcasts of, sports events. Indeed, given that fantasy sports generates interest in teams and athletes customers might not otherwise support, if anything fantasy sports *increases* the viewership of, and attendance at, athletic events.

The Players Associations' citation to out-of-state caselaw provides them no assistance. PA Br. 15. None of the cases the Players Associations cites interprets a newsworthiness or public interest exception written into statutory text. The exceptions to New York and Rhode Island's statutes were judicially-created, *see Stephano v. News Grp. Publ'ns, Inc.*, 474 N.E.2d 580, 584-85 (N.Y. 1984); *Mendonsa v. Time Inc.*, 678 F. Supp. 967, 970-71 (D.R.I. 1988), and New Jersey does not have a right of publicity statute at all.

Moreover, even if those cases had salience here, Appellees' conduct would clearly be exempt under the very state laws the Players Associations cite. For example, in *Stephano*, the New York court applied its broad definition of "newsworthiness" to exempt from right of publicity liability a photograph of a professional model wearing a jacket, notwithstanding that the "defendant may have included this item . . . solely or primarily to increase the circulation of its magazine and therefore its profits." 474 N.E.2d at 585.

In *Mendonsa*, by contrast, the court found the plaintiff had stated a right of publicity claim under Rhode Island law when *Time* sold "limited edition" versions of a famous historic photograph containing the plaintiff and one other

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individual, for \$1,600 each. But, unlike Appellees' platforms that contain the statistics of thousands of individuals, the photograph at issue in *Mendonsa* focused prominently on the two individuals, and was of questionable newsworthy value given that the exact same image had been widely-available for over 40 years.

Palmer v. Schonhorn Enterprises, Inc., 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967), a New Jersey trial court decision from 1967, involved a board game that featured 23 renowned golfers chosen in part to “enhance the marketability of the game and public acceptance thereof.” *Id.* at 459. Appellees, by contrast, use the statistics of thousands of players—some renowned and others less so—whose statistics are integral to the operation, not merely the marketing, of online fantasy sports contests. *Presley's Estate v. Russen*, 513 F. Supp. 1339, 1359 (D.N.J. 1981), is likewise distinguishable as a New Jersey variant on *Zacchini*: a show that “serves primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society” is hardly comparable to Appellees' platforms that provide real-time sports news and a means for customers to engage deeply with that news.⁷

Notably, neither Appellants nor any of their amici even reference another “decades” old legal principle directly implicated by their interpretation of the

⁷ The Players Associations also rely on *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970), but *Uhlaender* was abrogated by the Eighth Circuit in *C.B.C.*, 505 F.3d at 823-24. See *Dryer v. NFL*, 55 F. Supp. 3d 1181, 1199 (D. Minn. 2014) (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”), *aff'd*, 814 F.3d 938 (8th Cir. 2016).

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right of publicity, namely constitutional avoidance. As Appellees noted, the only two cases to directly confront a right of publicity claim in the context of fantasy sports, *C.B.C.* and *CBS Interactive*, found such a claim precluded by the First Amendment. See Br. 31-34; *C.B.C.*, 505 F.3d 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*, 259 F.R.D. at 417 (“[L]ike in *C.B.C. Distribution*, the package of information used here comes within the ambit of the First Amendment.”). This Court has long applied the “familiar canon of statutory interpretation that statutes should be interpreted so as to avoid constitutional issues.” *City of Vincennes v. Emmons*, 841 N.E.2d 155, 162 (Ind. 2006). Yet reading the statute and its exceptions in the manner suggested by Appellants and their amici would require courts to confront, not avoid, important First Amendment questions, and would likely lead to the invalidation of the statute itself in many applications. Constitutional avoidance, in addition to right-of-publicity caselaw, thus buttresses Appellees’ and the district court’s suggested interpretation.

d. The Nature of Appellees’ Operations Does Not Negate Their Platforms’ Newsworthy Value.

Perhaps recognizing that fantasy sports games *are* a critical source of real-time sports news for over fifty million Americans, Appellants and their amici attempt to explain why specific aspects of Appellees’ operations should

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nullify the newsworthiness of their contests. Appellants point to the fact that the customers on Appellees platforms must pay a fee to access some (but not all) information and fantasy sports contests contained therein. App. Br. 20 (“[S]tatements disseminated solely to private audiences cannot meaningfully be held to constitute ‘reports’ within the meaning of the statute.”) Not surprisingly, Appellants cite nothing relevant in support of this proposition, and their rule would create right of publicity liability for myriad entities that make their newsworthy content available upon the payment of a fee, including *The Wall Street Journal* and *The New York Times*. Sensibly, the General Assembly included no such qualification in the statute.

The Players Associations, by contrast, focus on the behavior of a tiny subset of the millions of Americans that play fantasy sports—those who purportedly enter rosters “generated through custom-built predictive models.” PA Br. 18. Even if the article referenced by the Players Association were accurate, the use of such models hardly indicates that these customers do not use Appellees’ platforms as a source of sports news. Indeed, the very same article notes these customers spend hours doing research and inputting publicly-available sports statistics into their models. See 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>. Regardless, the behavior

of a tiny portion of fantasy sports customers is hardly indicative of the newsworthy value of the platforms for the vast majority of users.

II. FANTASY SPORTS ARE LEGAL AND, REGARDLESS, LEGALITY IS IRRELEVANT TO APPELLANTS' STATUTORY CLAIMS.

Appellees' businesses are legal as a matter of state law, as the Indiana General Assembly confirmed in 2016. I.C. § 4-33-24-1 ("A paid fantasy sports game conducted under this chapter does not constitute gambling for any purpose"); *see also id* § 4-33-24-9 (describing "paid fantasy sports games" as one in which "all winning outcomes reflect the relative knowledge and skill of the game participants").⁸ The same is true as a matter of federal law, as Congress expressly provided that fantasy sports competitions fall outside the definition of "bet or wager" in the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–5365. *Id.* § 5362(1)(E)(ix).⁹

But even if daily fantasy sports were illegal, it would make no difference for the answer to the certified question. Appellants allege a statutory violation.¹⁰ And the right of publicity statute lays out a highly detailed scheme for regulating speech. The statute *nowhere* mentions an "exception to the

⁸ CMG Worldwide's assertion that "FanDuel is unquestionably in the business of online gambling" is therefore incorrect. *See* CMG Br. 14.

⁹ For this reason, NSEI's claim that fantasy sports is illegal under federal law is meritless. *See* NSEI Br. at 7-15. In any event, no court has held that state law authorizing fantasy sports is preempted by federal securities law, and this case—where the certified question is an issue of state statutory interpretation—provides no occasion for this Court to opine on this issue.

¹⁰ Appellants note that a common-law right-of-publicity claim remains available to Indiana plaintiffs. *See* App. Br. 32 (citing *Felsher v. Univ. of Evansville*, 755 N.E.2d 589 (Ind. 2001)). Appellants, however, chose not to bring a common-law claim in this case.

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exceptions” for illegality. Appellants’ proposed exception is thus “extra-textual,” 7th Cir. Op. 5, which means that it fails at the first and only analytical step this Court should undertake—analyzing the unambiguous text of the applicable law. *See State v. Thakar*, 82 N.E.3d 257, 260 (Ind. 2017).

Appellants’ brief makes clear that they are asking this Court to fashion a policy exception rather than apply the text as written by the General Assembly. Appellants’ entire legal argument proceeds from the premise that the statutory exceptions are “speech privileges” or “speech protections.” App. Br. 31. But that premise is unsupported and incorrect. The exceptions simply carve out areas of speech the General Assembly decided to exclude from Indiana’s statutory right of publicity. Whether that speech would also be protected by the First Amendment is beside the point in interpreting the scope of the exceptions. Indeed, as Appellees noted in their opening brief, it is highly unlikely the General Assembly would choose to replicate in statutory text the very same speech protections already available under the First Amendment. *See* Br. 37. That would render the exceptions superfluous.

The primary case upon which Appellants rely—*Rocca v. Southern Hills Counseling Center, Inc.*, 671 N.E.2d 913 (Ind. Ct. App. 1996)—does not support their argument. In *Rocca*, the court of appeals held a mental health facility was permitted to disclose a patient’s murder threats to her alleged target. *Id.* at 920-21. The court’s reasoning was self-consciously limited to this extraordinary, and inapposite, context. But even were *Rocca*’s subject matter relevant here, it still would not suggest that this Court should rewrite Indiana’s

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right of publicity statute to adopt Appellants' policy preferences. That is so for at least two reasons.

First, the medical malpractice statute at issue in *Rocca* articulated a broad standard through just a few words, *id.* at 916 ("All information obtained and maintained in the course of providing services to a patient or client is confidential" (quoting I.C. § 16-14-1.6-8)), and the court expressly noted that the General Assembly had not attempted to address through legislation all the privilege issues implicated by the statute, *id.* at 920. Here, by contrast, the General Assembly has crafted an intricate scheme containing numerous exceptions that reflect careful policy judgments. Courts are rightly hesitant to supplement the statutory text in such circumstances. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (reasoning that a "comprehensive and reticulated statute ... should not be supplemented by ... the common-law doctrines advocated by respondents" (quotation marks omitted)); *Evans v. State*, 751 N.E.2d 245, 247 (Ind. Ct. App. 2001) (recognizing that strict adherence to statutory language is necessary when the General Assembly has enacted a detailed scheme).

Second, the court in *Rocca* found it significant that the General Assembly had amended the statute soon after the relevant conduct occurred to address the very same issue raised in the case. 671 N.E.2d at 918. Thus, the *Rocca* court was not creating out of whole cloth *its* vision of public policy; rather it was implementing the *legislature's* policy to activities that pre-dated the amendment. *Id.* Here, again by contrast, the legislature has never suggested

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that it intended to create right of publicity liability for otherwise exempted conduct that is illegal. The General Assembly's failure to act in this regard is telling, given that it has shown itself willing and able to enact legislation concerning speech connected to illegal activity. See I.C. § 5-2-6.3-1 *et seq.* (Indiana's "Son of Sam" law).¹¹

Appellants' other cases are easily distinguishable. As a threshold matter, all of Appellants' cases concern privileged communications or the First Amendment—neither of which speaks to the proper interpretation of Indiana's right of publicity statute. See *Clark v. United States*, 289 U.S. 1, 12-19 (1932) (holding that a common-law jury deliberation privilege did not apply where the defendant secured her role on the jury through fraud); *In re An Original Investigation, Special Grand Jury of Marion Cnty.*, 402 N.E.2d 962, 965 (Ind. 1980) (holding that pen register surveillance does not violate the First Amendment); *Green v. State*, 257 Ind. 244, 254-55, 274 N.E.2d 267, 272-73 (1971) (holding that a physician-patient privilege statute did not bar a police officer's testimony about a bullet removed from the defendant's body); *Bd. of Sch. Comm'rs v. Pettigrew*, 851 N.E.2d 326, 331-32 (Ind. Ct. App. 2006) (holding that a common-law privilege defense to defamation applied where the defendant voiced suspicions that a coworker participated in a drug deal); *Lahr v. State*, 731 N.E.2d 479, 482-84 (Ind. Ct. App. 2000) (holding that an

¹¹ The General Assembly has considered issues related to illegality in the right-of-publicity context as well. See I.C. § 32-36-1-1(c)(4) (establishing that the right of publicity does not exist for individuals whose personality attributes have "commercial value solely because the personality has been formally charged with or convicted of a crime").

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attorney's testimony regarding forged evidence was not protected by the attorney-client privilege); *L.E. Servs., Inc. v. State Lottery Comm'n of Ind.*, 646 N.E.2d 334, 347-48 (Ind. Ct. App. 1995) (holding that Indiana statutes prohibiting a corporation from using the word "lottery" does not violate the First Amendment); *Helton v. State*, 624 N.E.2d 499, 509-11 (Ind. Ct. App. 1993) (holding that Indiana's "criminal gang" statute does not violate the First Amendment).

Moreover, even if Appellants' cases had some relevance, they would counsel *against* the result Appellants seek because they reinforce the importance of fidelity to the statutory text. In *Green v. State*, for example, this Court focused on the language of the physician-patient privilege statute, reasoning that "[i]t does not . . . by its '*wording*' prohibit third parties from testifying who are not connected with the physician under the physician-patient relationship." 274 N.E.2d at 254 (emphasis added). Likewise, in *Lahr v. State*, the court tied its analysis to statutory language—holding that the term "confidential communication" in I.C. § 34-46-3-1 could not encompass information that the speaker "clearly intended . . . to be made public." 731 N.E.2d at 482.¹² In short, these cases demonstrate a fundamental point: Indiana courts do not create statutory exceptions related to illegal activity

¹² As in *Rocca*, moreover, these statutes articulate broad standards in few words. See *Lahr*, 731 N.E.2d at 482 (attorney-client privilege statute); *Green*, 274 N.E.2d at 253-54 (physician-patient privilege statute); cf. *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (citing express statutory authorization to consider factors beyond those articulated in the statute). Thus, to the extent judicial additions to a legislative scheme were ever appropriate, it would be far more appropriate in these cases than in the right-of-publicity context.

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absent any textual indication in the statute itself. Appellants' argument thus cannot succeed.

Appellants correctly note that “Indiana courts will ‘not presume that the Legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result.’” App. Br. 39 (quoting *City of Carmel v. Steele*, 865 N.E.2d 612, 618 (Ind. 2007)). But their illegality exception would lead to precisely such an outcome. As Appellants would have it, every statutory right of publicity case requires a full First Amendment inquiry, see Br. 38, a consideration of possible extra-textual, public-policy exceptions, and extensive collateral litigation regarding the legality or wisdom of a defendant’s operations under whatever criminal statute or other exception the civil plaintiff identifies. Appellants’ rule would require courts in right of publicity cases to adjudicate criminality where the state has expressed no interest in bringing criminal charges. And, upon a finding of liability, Appellants would have plaintiffs and their lawyers in civil suits be the first to receive payment, before any other victims of the allegedly illegal conduct and before the State—directly contradicting the General Assembly’s policy choices in analogous circumstances. See I.C. § 5-2-6.3-1 *et seq.*; Br. 38-40. There is no reason to believe the General Assembly, *sub silentio*, intended these policy outcomes or this use of scarce judicial resources. See *A.A. v. Eskenazi Health/Midtown CMCH*, No. 49SO2-1711-MH-688, -- N.E.3d --, 2018 WL 2276123, at *8 (Ind. May 17, 2018) (appealing to the “presum[ption] that the legislature intended for the statutory language to be applied in a logical manner” and thus interpreting

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a statute to avoid “a significant waste of judicial resources” (internal quotation
marks omitted)).

CONCLUSION

The Court should answer the certified question in the negative.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Indiana Appellate Rule 44(F), I verify that this Brief contains no more than 9,000 words, as determined by the word processing system used to prepare the Brief (Microsoft Word 2013).

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CERTIFICATE OF SERVICE

Pursuant to Indiana Appellate Rule 24(D), I certify that on June 9, 2018, the foregoing Response Brief of Appellant was electronically filed through the Indiana E-filing System ("IEFS") and was served electronically to counsel of record as follows:

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