

No. 20-1448

IN THE
Supreme Court of the United States

DONNA CORBELLO,

Petitioner,

v.

FRANKIE VALLI, *ET AL.*,

Respondents.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit**

REPLY BRIEF FOR PETITIONER

GREGORY HARRIS GUILLOT

Counsel of Record

GREGORY H. GUILLOT, P.C.

2626 Cole Ave., Suite 300

Dallas, TX 75204

(972) 888-6072

gregory@guillot-law.com

Attorney for Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. Respondents Merits Arguments Confirm the
Certworthiness of this Case 2

II. The Work’s Fictions Are No “Ploy;” Are Common
in Biographical Works; And the Court Should
Review the “Asserted Truths Doctrine” and
Copyright Estoppel 7

III. There Are Circuit Conflicts, and Conflicts with
Relevant Decisions of this Court 12

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

<i>Arica Inst., Inc. v. Palmer</i> , 970 F.2d 1067 (2d Cir. 1992)	3
<i>Baker v. Selden</i> , 101 U.S. 99 (1879).....	10
<i>Burlington N. & Santa Fe Ry. v. White</i> , 548 U.S. 53 (2006)	6
<i>Crane v. Poetic Prods.</i> , 593 F.Supp.2d 585 (S.D.N.Y. 2009).....	12
<i>Estate of Diaz v. City of Anaheim</i> , 840 F.3d 592 (9th Cir. 2016)	6
<i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340 (1991)	2-5, 10
<i>Google LLC v. Oracle Am., Inc.</i> , 141 S. Ct. 1183 (2021)	11
<i>Harper & Row, Publs. v. Nation Enters.</i> , 471 U.S. 539 (1985)	2-5, 11, 12
<i>Hoehling v. Universal City Studios</i> , 618 F.2d 972 (2d Cir. 1980)	1, 3-5
<i>Jacobsen v. Deseret Book Company</i> , 287 F.3d 936 (10th Cir. 2002)	2, 5, 12
<i>Myers v. Mail & Express Co.</i> , 36 C.O.Bull. 478	

(S.D.N.Y.1919) 3

Narell v. Freeman, 872 F.2d 907 (9th Cir. 1989). 4

Novak v. Warner Bros Pictures, LLC, 387 Fed. Appx. 747 (9th Cir. 2010) (unpublished) 5

Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806 (1945). 10

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 6

Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987) 11

See v. Durang, 711 F.2d 141 (9th Cir. 1988) 7

Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 150 (9th Cir. 1992). 7

Softel, Inc. v. Dragon Medical and Scientific Communications, Inc., 118 F.3d 955 (2d Cir. 1997) 3

Suid v. Newsweek Magazine, 503 F. Supp. 146 (D.D.C. 1980) 12

Tennant v. Peoria & P. U. R. Co., 321 U.S. 29 (1944) 6

Wainwright Securities Inc. v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir. 1977). 5

Wilson v. Brennan, 390 Fed. Appx. 780 (10th Cir. 2010)
(unpublished) 5

Wilson v. Brennan, 666 F. Supp. 2d 1242 (D.N.M. 2009)
aff'd, 390 F. App'x 780 (10th Cir. 2010). 5

Constitution:

U.S. Const. amend. I 1, 12

U.S. Const. art. 1, § 8, cl. 8. 1

Federal Statutes:

17 U.S.C. § 106 7

17 U.S.C. § 107 11

H.R.Rep. No. 102–286 (1992), reprinted in 1992
U.S.C.C.A.N. 2553 11

S.Rep. No. 102–141 (1991) 11

Other Authorities:

Louis M. Smith, *Biographical Method*, in 1 SAGE
Biographical Research 12 (J. Goodwin, ed. 2012)
. 10

REPLY BRIEF FOR PETITIONER

The traditional criteria for certiorari weigh in favor of a grant. The petition shows: (1) the Ninth Circuit has decided important questions of federal law that have not been, but should be, settled by this Court; (2) the decision so departs from traditional principles of equity (*i.e.*, copyright estoppel), the “traditional contours of copyright,” including First Amendment accommodations, codified in the Copyright Act, and limits on judicial authority under the Copyright Clause, as to warrant this Court’s supervisory review; (3) there are circuit conflicts, and (4) conflicts with relevant decisions of this Court; (5) the decision is incorrect; (6) the questions presented are important; and, (7) this case is an ideal vehicle.

Respondents do not address the first, second, sixth, or seventh points, and provide half-hearted responses to the third and fourth, attempting to *factually* distinguish the decisions with conflicting holdings, while arguing for various other reasons that petitioner’s claims would fare no better before those courts. Opp.22-26. Respondents focus upon the fifth, arguing the Ninth Circuit’s decision is correct; rests solely on the proposition that copyright does not extend to facts; follows a “consistent and classic line of historical works rulings,” *id.*, at 1-6, 7-8, 21-22, 27, including such “legal chestnut[s]” as *Hoehling v. Universal City Studios*, 618 F.2d 972 (2d Cir. 1980), Opp.7; and, creates no new doctrine, applying copyright estoppel under a new name. Opp.8.

These conclusions are insupportable, and

respondents reach them through obfuscation, conflating the Work’s expression with historical fact, and *seriously* mischaracterizing the facts and law in this case. But respondents *cannot* deny that: **(1)** the “asserted truths doctrine” conflicts with this Court’s treatment, in *Harper & Row, Publr’s. v. Nation Enters.*, 471 U.S. 539 (1985), of a memoirist’s first written account of his own prior remarks, and subjective characterizations of public figures – treatments the Court reaffirmed in *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991); **(2)** the works in *Harper & Row* and *Jacobsen v. Deseret Book Company*, 287 F.3d 936 (10th Cir. 2002) would trigger “asserted truths,” but copyright estoppel was inapplicable, *because they were unpublished*; **(3)** copyright estoppel is an equitable doctrine; “asserted truths” is not; **(4)** Congress established *one* mechanism under the Copyright Act – fair use – for unlicensed appropriations of *original expression* from unpublished works; **(5)** no prior decision has applied copyright estoppel to an unpublished work; **(6)** the Tenth Circuit protects dialogue the asserted truths doctrine does not; and, **(7)** although respondents recognize and urge “virtually identical,” verbatim copying, not paraphrasing or adaptation, as infringements of “historical works,” the issue is “unsettled,” and remains for this Court to resolve. *Harper & Row*, 471 U.S. at 548. Finally, respondents’ merits arguments reveal *additional* conflicts warranting review.

I. Respondents Merits Arguments Confirm the Certworthiness of this Case

Respondents’ merits arguments, even if correct,

provide no reason to deny certiorari. Whether the Ninth Circuit was right or wrong, the questions presented warrant the Court's review, as demonstrated by the authorities and arguments invoked to defend it. Several "classic" "chestnut[s]" on which respondents rely, (Opp.7), either: (1) predate *Harper & Row* and/or *Feist*, and conflict with their holdings; (2) were cited in *Harper & Row* as examples of the conflicting views the Court declined to resolve, 471 U.S. at 548, but is asked to resolve here; or, (3) conflict with decisions in other circuits, providing *additional* reasons for certiorari.

For example, respondents' quote from *Myers v. Mail & Express Co.*, 36 C.O.Bull. 478, 479 (S.D.N.Y.1919), that "[t]here cannot be any such thing as copyright in the order of presentation of the facts, nor indeed in their selection," cited approvingly in *Hoehling*, 618 F.2d at 978, and represented as expressing "the very same view" as respondents' arguments, Opp.4, cannot be "good law" after *Feist*, which protects original factual selection and arrangement, 499 U.S. at 348, as the Second Circuit later acknowledged. *Arca Inst., Inc. v. Palmer*, 970 F.2d 1067, 1075 (2d Cir. 1992) ("sequences of fact presentation may . . . merit copyright protection"); *Softel, Inc. v. Dragon Medical and Scientific Communications, Inc.*, 118 F.3d 955, 964 n. 7 (2d Cir. 1997) (holding *Arca* limited *Myers'* and *Hoehling's* pronouncements on "selection and ordering" to "compilations of facts that fail to display the constitutional minimum of originality"). Respondents' view, then, of the Ninth Circuit's decision, and authorities supporting it, is that they accord less protection to biographies than a telephone directory.

This is inconsistent with *Harper & Row* and *Feist*, and warrants this Court's scrutiny.

Hoehling is also respondents' primary authority for contentions that the Work is entitled to only "thin protection" against "virtually identical" copying – a claim repeated in their brief. Opp.18, 4-6, 7. In *Hoehling*, the Second Circuit referred to "wholesale usurpation," "bodily appropriation," and "virtually identical" copying, in discussing infringement actions involving historical works, *Hoehling*, 618 F.2d at 979-980, and some decisions predating *Harper & Row* and/or *Feist*, repeated this, often in dicta, including *Narell v. Freeman*, 872 F.2d 907 (9th Cir. 1989), on which respondents also rely. Opp.3-4, 7, 9, 21, 24. The district court also applied "thin protection" to the Work, Pet.21, and the Ninth Circuit did not reverse this, despite acknowledging its "large impact on the scope of the trial and on the jury instructions" (Pet. App. 7a).¹ But this Court has applied "thin protection" only to compilations, *Feist*, 499 U.S. at 349, and *Harper & Row* placed "elegantly written biograph[ies]" and "sparsely embellished maps and directories" on *opposite* ends of the spectrum illuminating the extent to which expression may be copied under fair use. 471 U.S. at 563. Even Justice Brennan's dissent acknowledged that more than verbatim copying **must** be proscribed, stating: "The protection of literary form must proscribe

¹As explained in the petition (at 21-22), due to this order, the jury was permitted to consider only 12 similarities between the works, and instructed that they were the only ones involving protected expression. They are also the only similarities reviewed by the Ninth Circuit, leaving the effects of the district court's ruling in place.

more than merely word-for-word appropriation of substantial portions of an author's work.” 471 U.S. at 583, n. 5 (Brennan, J., dissenting). And both the majority *and* dissenting opinions cited *Hoehling* as one view among conflicting views, even *within* the Second Circuit, and did not endorse it. 471 U.S. at 548, 583, n. 5 (citing *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977) (protecting analysis, structuring of material and marshaling of facts, rather than merely ordering and “choice of words”)).

The Tenth Circuit *expressly rejected* a “supersubstantiality test” for autobiographies, because it “would ignore the differences between ‘sparsely embellished maps and directories’ and ‘elegantly written biograph[ies]’” involving “more creative effort and original expression than the telephone directories at issue in *Feist . . .*” *Jacobsen*, 287 F.3d at 944. And in *Wilson v. Brennan*, 390 Fed. Appx. 780, 783 n. 10 (10th Cir. 2010) (unpublished), the court commended the district court’s analysis of issues below, including its statement that “An example of a creative work is **a biography and it is entitled to the most protection under the copyright laws.**” *Wilson v. Brennan*, 666 F. Supp. 2d 1242, 1250 (D.N.M. 2009) *aff’d*, 390 F. App’x 780 (10th Cir. 2010). Thus, there is a conflict between the Tenth Circuit and the Second – and the Ninth Circuit, to the extent its decision sanctions thin protection for historical works.² This issue is fairly

²In *Novak v. Warner Bros Pictures, LLC*, 387 Fed. Appx. 747, 749 (9th Cir. 2010) (unpublished), a Ninth Circuit panel rejected the notion that *Narell*, 872 F.2d 907 substituted a thin

included in the petition's fourth question – a court requiring “virtual identity” for infringement will not protect works from paraphrasing or adaptation, as happened here.

Concerning respondents' factual assertions, all of which are disputed, with some wildly false,³ the question here is whether there was a sufficient evidentiary basis to support the verdict on petitioner's infringement claims, *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 70 (2006); namely, “whether ‘the evidence, construed in the light most favorable to [petitioner], permits only one reasonable conclusion . . . contrary to that of the jury.’” *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 604 (9th Cir. 2016). Courts may not reweigh the evidence, *Tennant v. Peoria & P. U. R. Co.*, 321 U.S. 29, 35-36 (1944), or make credibility determinations; must disregard evidence favorable for the movant the jury is not required to believe, and need only credit evidence for the movant that is uncontradicted, unimpeached, and from disinterested witnesses. *Reeves v. Sanderson Plumbing Products*,

protection standard for “substantial similarity” in cases involving historical works, but the decision is non-binding, and was rejected by the district court.

³Particularly egregious are assertions that DeVito discussed the Work with Brickman and Elice during his sole interview for the play, offered to send *them* a copy at its conclusion, and did. Opp.18. As detailed in the petition (at 14), that did not occur. During the interview, the Work was not mentioned, and Brickman was earlier instructed not to share it with anyone, including Elice. CA9 Br. 10-11. Nor are petitioner's claims based on material in that interview.

Inc., 530 U.S. 133, 150–51 (2000). No facts in respondents’ opposition fall in these categories. Here, the jury weighed all the evidence, including the notes and other materials admitted at trial, prepared and reviewed by the writers in creating the play; the outlines, drafts, and final scripts for the play;⁴ multiple conflicting, contradictory, and self-serving testimonies of respondents; the Work; expert testimony; and Woodard’s interviews and research; made credibility assessments, and found infringement. Moreover, the district court did not disturb that verdict, despite granting a JMOL on fair use, because it was supported by evidence of direct copying and “more than de minimis use” of protected elements, that an average audience familiar with the Work would recognize in the play. Pet.22-23. Thus, it is improbable that the verdict lacked sufficient evidentiary support. The remaining questions are those the petition presents.

II. The Work’s Fictions Are No “Ploy;” Are Common in Biographical Works; And the Court Should Review the “Asserted Truths Doctrine” and Copyright Estoppel.

⁴Respondents misrepresent Ninth Circuit law concerning their extensive, verbatim copying for outlines and draft scripts, citing *See v. Durang*, 711 F.2d 141, 142 (9th Cir. 1988) for the proposition that it is irrelevant. Opp.20. But that holding was limited, in *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1518 (9th Cir. 1992) to situations where a lawsuit alleges only infringement in the final work. Where a plaintiff sues for the intermediate copying, which 17 U.S.C. § 106 “unambiguously . . . proscribes,” *id.*, at 1518, as petitioner did here, it may infringe the copyright “regardless of whether the end product . . . also infringes those rights.” *Id.*, at 1519. *See* CA9 Rep. Br. 11-12.

Much of respondents' brief concerns a "ploy" purportedly engineered by petitioner's counsel, in response to a 2009 motion to dismiss, to recast material in the Work as fictitious. Opp.ii, 2-3, 8-15, 26 n. 10. There is none. Petitioner noted the Work's fictitious elements before respondents were served. This fact was irrelevant to her equitable accounting complaint against DeVito, but her *Amended Complaint*, filed in **August 2008**, joining respondents, alleged the Work "is not strictly a factual work," and "in certain respects . . . is fiction." (ER12525). Similar allegations appeared in subsequent complaints. CA9 Rep. Br.32. Moreover, the claims of fiction came, not from counsel, but Woodard's taped interviews with DeVito, and depositions of the 3 surviving "Four Seasons." Pet.10-13; CA9 Br.5-7; CA9 Rep. Br. 32.⁵

⁵Only these 3 depositions, not "35," as misrepresented by respondents (Opp.11) concerned this issue.

“Walk Like a Man”	
The Work	<i>Jersey Boys</i>
<p>“What's the name of your new hit, Bobby?” “Walk Like A Man.” “Walk Like A Man? As opposed to what -- like a woman?” “No, no,” explains Gaudio defensively, “the song is directed to teenage boys who need to walk and talk like men.” “In other words, instead of like girls?” “No! Instead of like boys. This song is going to serve as an anthem for every teenage boy who has let some girl twist him around her little finger!”</p>	<p>“TOMMY: I don't get it. BOB: What don't you get, Tommy? TOMMY: The title, Walk like a man. BOB: So? TOMMY: As opposed to what - a woman? BOB: It's for boys, Tommy. Teenage boys. We're telling them to act like men. TOMMY: Instead of like girls? BOB: Instead of like boys. Why are you doing this? CREWE: Look, Miss Congeniality – it's a metaphor. This is an anthem for every guy who's ever been twisted around a girl's little finger!”</p>

The Work's fictionalized *dialogue* is not untoward (Opp.12), but routine, which is why this case is important. At trial, an editor of *Time* testified it is “customary.” Pet.11. Nimmer agrees, noting “accepted literary usage” that “histories and biographies may be

fictionalized . . . to more accurately convey the flavor of the period or persons depicted.” Pet.32. The petition (at 11-12) documents this process for Woodard’s foregoing passage, and it is acknowledged in scholarly texts. *E.g.*, Louis M. Smith, *Biographical Method*, in 1 SAGE Biographical Research 12 (J. Goodwin, ed. 2012) (“Narrative biography’ involves a fictionalizing of scenes and conversations, based on letters and documents, that makes the writing both factual and highly-imaginative at the same time”). It is original, and entitled to protection under *Feist*. Its selection and placement in a recording session is also original.

Contrary to respondents’ assertions, the asserted truths doctrine is not copyright estoppel renamed. Opp.8. First, estoppel is an equitable doctrine; “asserted truths” is not. Pet.i, 24, 3-5, 28-30. And, it is an “equitable maxim” that “he who comes into equity must come with clean hands,” “clos[ing] the doors . . . to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief” *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). ***This is why it matters that respondents wrongly obtained the Work.*** See Opp.20. A thief absconding with a research prototype receives no warranty.

“Publication” is relevant to estoppel for reasons stated in the petition (at 26-27, 30-32); namely, under the traditional contours of copyright, it is then that an author’s ideas are released into the world, as respondents’ citation (at Opp.23) of *Baker v. Selden*, 101 U.S. 99, 108 (1879) confirms: “The very ***object of publishing*** a book . . . is to communicate to the world

the useful knowledge which it contains.” *Id.* Under copyright estoppel, having made that public “conveyance of ideas,” with claims of truthfulness, an author is precluded from suing those entitled to rely upon them (*i.e.*, the public), whether they did so or not, though perhaps not for biographies, absent representations that they are “entirely true.” Pet.32. Before publication, that “conveyance” has not occurred, and while one with access may take facts from the work, he may not appropriate expression without fair use. Fair use, not estoppel, is the historian’s protection before publication (Opp.12), keeping the copyright monopoly within lawful bounds. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198-99 (2021).⁶ Without it, “the biographer . . . may . . . have to content himself with reporting only the facts . . . even if he thereby pens a pedestrian sentence.” *Salinger v. Random House, Inc.*, 811 F.2d 90, 96-97 (2d Cir. 1987). He should not be entitled to rely on the truthfulness of an unfinished work the author is not prepared to publish, and under copyright estoppel, he cannot.⁷ But with “asserted truths,” he can, meaning a copyright owner

⁶Respondents claim the 1992 amendments to 17 U.S.C. § 107 affected *Harper & Row*. Opp.15. The legislative history disagrees. H.R.Rep. No. 102–286, at 9 (1992), reprinted in 1992 U.S.C.C.A.N. 2553, 2561 (“not the Committee’s intention to alter the weight currently given to the . . . unpublished nature of the work The general principles . . . in *Harper & Row* . . . still apply”); S.Rep. No. 102–141, at 5–6 (1991) (“we do not mean to depart from *Harper & Row*”).

⁷Respondents do not deny that the claims of truthfulness cited by the Ninth Circuit are contained on “Page 264,” which was excluded from this case, yet repeat its “truthful chronicle” verbiage. Opp.ii, 9; Pet.10.

risks losing protection, before his work is complete, based on statements found in his inchoate, developing draft. This seriously curtails the right of first publication, grounded in the First Amendment, and valued highly in *Harper & Row*. Pet.4, 27-28, 31-32.

III. There Are Circuit Conflicts, and Conflicts with Relevant Decisions of this Court

Respondents do not meaningfully contest the conflicts identified in the petition, and *add* conflicts with the Tenth Circuit and this Court, concerning “thin” versus “normal” copyright protection, as discussed *supra*, 5-6. Respondents note *Jacobsen* was decided on a motion to dismiss, (Opp.23), but that is irrelevant. The asserted truths doctrine would preclude *Jacobsen’s* victory, because his dialogue would be reclassified, *ab initio*, as “fact.” Finally, respondents admit the conflicts with *Harper & Row*, noting only that the Court did not associate quotes attributed to third persons in its Appendix (Opp.25), and claiming no characterizations from the Work were used. *Id.*, at 24-25. But the Appendix was “not intended to endorse any particular rule of copyrightability.” 471 U.S. at 605, n.8. Moreover, Justice Brennan described the holding in *Suid v. Newsweek Magazine*, 503 F. Supp. 146 (D.D.C. 1980) as applying only to verbatim quotations,⁸ which the Work’s third-party dialogues are not. The second point is simply false. Several portrayals in *Jersey Boys* are drawn from the Work’s subjective portraits, as

⁸471 U.S. at 582 n. 3 (Brennan J., dissenting). This principle, rather than estoppel, accounts for the outcome in *Crane v. Poetic Prods.*, 593 F.Supp.2d 585 (S.D.N.Y. 2009). See Opp.8.

detailed in the Krevolin Report, at ER6298-6315.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

June 2021

GREGORY HARRIS GUILLOT
Counsel of Record
GREGORY H. GUILLOT, P.C.
2626 Cole Ave., Suite 300
Dallas, TX 75204
(972) 888-6072
gregory@guillot-law.com

Attorney for Petitioner