No. 22-970

In the

Supreme Court of the United States

JAMES H. GRIFFITH, JR., DBA CJ'S SPORTS BAR, ET AL.,
Petitioners,

v.

JOE HAND PROMOTIONS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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May 4, 2023

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QUESTIONS PRESENTED

1. Whether a case is ripe for review by this Court where the court of appeals has remanded the case to the district court for further proceedings consistent with its opinion.

2. Whether a court of appeals may consider the parties' agreements in the record in an appeal from a district court's order granting summary judgment, as the Sixth Circuit did here.

3. Whether a court of appeals can cause a conflict among the courts of appeals on a question of law where the court of appeals did not reach the question of law because it concluded the parties' factual agreements were determinative.

LIST OF PARTIES

Petitioners James H. Griffith, Jr., DBA CJ's Sports Bar and Lisa Leslie were the Defendants and Appellees in the proceedings below.

Respondent Joe Hand Promotions, Inc., a Pennsylvania corporation, was the Plaintiff and Appellant in the proceedings below.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Joe Hand Promotions, Inc. discloses the following. There is no parent or publicly held company owning 10% or more of Respondent's stock.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) reversing the district court's order and remanding for further proceedings is reported at 49 F.4th 1018. The Order of the court of appeals (Pet. App. 35a-36a) on denial of rehearing and rehearing en banc, No. 21-6088 (6th Cir.) (Nov. 4, 2022) is unreported. The Memorandum and Order of the district court (Pet. App. 19a-34a), No. 20-cv-00382 (E.D. Tenn.) (Oct. 20, 2021) is unreported.

JURISDICTION

The decision of the court of appeals was entered on September 21, 2022 (Pet. App. 1a) and a petition for rehearing was denied on November 4, 2022. Pet. App. 35a. This Court granted Petitioners a 60-day extension to file the Petition for Writ of Certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioners omit that the court of appeals' decision directed the district court to conduct further proceedings on remand consistent with the opinion. Pet. App. 18a. The interlocutory nature of this case "of itself alone furnishe[s] sufficient ground for the denial" of the Petition. *Hamilton-Brown Shoe Co.* v.

Wolf Bros. & Co., 240 U.S. 251, 258 (1916); *see also Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

2. Petitioners argue (Pet. 12-15) the court of appeals' decision is in conflict with another court of appeals as to the licensing of rights under the Copyright Act. That argument lacks merit because Petitioners have mischaracterized both decisions to manufacture a conflict where none exists.

3. Petitioners argue (Pet. 15-20) the court of appeals erred as to assignment of an accrued cause of action under the Copyright Act. That argument lacks merit because the court of appeals did not address the question at all. The court of appeals correctly reasoned it did not need to reach the question because the factual record resolved the issues on appeal. Petitioners (*id*. at 16) concede the court of appeals did not address the question and instead ask this Court to "confirm" "settled law." This request lacks merit. It does not warrant this Court exercising its certiorari jurisdiction.

4. Petitioners ask this Court to "confirm" (Pet. 20-25) "the historical division" between trial and appellate courts. This request lacks merit. Petitioners do not assert an error of law or fact. Even if they did, the filings needed to support their request were not included in the petition for rehearing en banc and are not in Petitioners' Appendix submitted to this Court. Under this Court's Rules 14.1(i) and 14.4, this is sufficient reason for this Court to deny the petition. In

any event, the request is without merit because the cases cited by Petitioners are inapposite. Petitioners' request does not warrant this Court exercising its certiorari jurisdiction.

The court of appeals provided a prompt, fair, and correct resolution of the issues on appeal, and the proceedings on remand should now go forward without further delay.

STATEMENT

1. Petitioners seek review of a decision of a court of appeals (Pet. App. 1a-18a) that reversed the order of the district court granting Petitioners' motion for summary judgment and remanded with instructions to grant Respondent's motion for partial summary judgment on the issue of copyright standing and for further proceedings consistent with the decision of the court of appeals.

2. The court of appeals noted the single "issue in this appeal is whether [Respondent] has a cause of action against [Petitioners] for livestreaming [a sporting event] without a commercial license." Pet. App. 7a. The court noted that "to sue [Petitioners] for copyright infringement, [Respondent] must own some interest in the copyright." *Ibid*. The court of appeals also noted that "[t]he exclusive rights in a copyrighted work are freely alienable," citing 17 U.S.C. § 201(d)(1) ("[T]he ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law."). Pet. App. 8a. The court of appeals also noted that

> the Copyright Act extends special treatment to live broadcasts. *See* [17 U.S.C.] § 411(c). When the copyrighted work 'consist[s] of sounds, images, or both, the first fixation of which is made simultaneously with its transmission'—that is, when the copyrighted work is a broadcast of a live event—then the Copyright Act allows an owner to sue for infringement of an unregistered copyright so long as the owner registers the copyright within three months of the live broadcast. *See* [17 U.S.C. § 411(c)].

Pet. App. 10a. The court of appeals cited this Court's decision in *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, — U.S. —, 139 S. Ct. 881, 888, 203 L. Ed. 2d. 147 (2019) in support. *Ibid*.

The court of appeals noted it need only resolve the question "did the November 21, 2017 Copyright Agreement between [third-party] Showtime and [Respondent] give [Respondent] the right to sue for copyright infringements occurring on August 26, 2017. We conclude that it did." *Ibid*. The court of appeals reasoned that "the Copyright Agreement gave [Respondent] an enforceable right to sue [Petitioners] because it formalized a series of earlier agreements[.]" Pet. App. 12a. The court of appeals so reasoned on the basis of record facts including but not limited to several agreements, including a June 20, 2017 Distribution Agreement. *Ibid*. The court reasoned that "the earlier agreements provide necessary context for the Copyright Agreement" (Pet. App. 14a) because "none of these agreements conflict with one another" and because "[v]iewing these agreements together, the Copyright Agreement merely intended to reiterate

that [Respondent's] existing exclusive right in the live [sporting event] remained intact even in the wake of [third-party] Showtime's formal Copyright Registration." *Id.* at 14a-15a.

The court of appeals rejected Petitioner's contention, and the district court's agreement, that the Copyright Agreement was "a sham." Pet. App. 16a. In rejecting Petitioners' contention and the district court's conclusion that "'[t]he exclusive right to perform [a sporting event] live is utterly meaningless once [a sporting event] has already occurred, and, thus, can never be performed 'live' again,'" the court of appeals noted the above facts and agreements in the record and applied the Copyright Act to them. Pet. App. 16a-17a. In rejecting Petitioners' argument that "the Copyright Agreement, as a factual matter, was not intended to be retroactive" (Pet. App. 17a), the court of appeals noted "there is no retroactivity issue" in the factual record. *Ibid.* In rejecting Petitioners' argument that "the Copyright Agreement gave [Respondent] a bare right to sue," the court of appeals noted that it need not address Petitioners' argument given the factual record. *Ibid.* The court of appeals noted that Petitioners were "viewing the Copyright Agreement in a vacuum and ignoring" record facts. *Ibid.*

3. The court of appeals denied (Pet. App. 35a-36a) Petitioners' petition for rehearing en banc. That order noted the original panel reviewed the petition for rehearing and concluded the issues raised in the petition were fully considered upon the original submission and decision of the case. *Ibid.* The order also noted that, upon circulation of the petition to the

full court, no judge had requested a vote for rehearing en banc. *Ibid.*[1]

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[1] In their petition for rehearing en banc, which Petitioners did not include in the Appendix submitted to this Court, Petitioners asserted only a factual challenge to a contract, contending "The Distribution Agreement does not provide . . . an exclusive license . . . a fact relied upon in this Court's Opinion." Petitioners also contended Respondent "waived or forfeited its right to make any argument concerning the Distribution Agreement, and therefore it should not be considered to support [Respondent's] position." The petition also contended that "[t]here remain issues of fact in this case[.]"

The petition for rehearing en banc did not assert any error of law. It asserted there was "a fact overlooked in this Court's Opinion" that constituted "the error of fact in this Court's Opinion." While the petition asserted the court of appeals erred as to whether Respondent had "waived or forfeited its right to make any argument concerning the Distribution Agreement," the petition acknowledged the court of appeals had discretion as a "general rule" and did not contend the court of appeals had abused its discretion. The petition for rehearing concluded with the contention that "[t]here remain issues of fact in this case[.]"

The petition for rehearing en banc did not raise the questions now raised in the Petition for Writ of Certiorari to this Court. It did not contend the court of appeals' decision was in conflict with another court of appeals. It did not contend the court of appeals erred in applying the Copyright Act. It did not contend the court of appeals erred with respect to "the historical division" between trial and appellate courts.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioners omit that the court of appeals' decision directed the district court to conduct further proceedings on remand consistent with the opinion. Pet. App. 18a. The interlocutory nature of this case "of itself alone furnishe[s] sufficient ground for the denial" of the Petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

2. Petitioners contend (Pet. 12-15) the court of appeals' decision creates a conflict with another court of appeals. That argument lacks merit and does not warrant further review.

a. Petitioners mischaracterize the court of appeals' decision, which simply applies controlling authority to the facts of this case. Petitioners omit the court of appeals correctly identified as controlling that "the Copyright Act extends special treatment to live broadcasts. *See* [17 U.S.C.] § 411(c)." Pet. App. 10. Petitioners also omit that the court of appeals, in correctly applying 17 U.S.C. § 411(c), noted that

"[w]hen the copyrighted work 'consist[s] of sounds, images, or both, the first fixation of which is made simultaneously with its transmission'—that is, when the copyrighted work is a broadcast of a live event—then the Copyright Act allows an owner to sue for infringement of an unregistered copyright so long as the owner registers the copyright within three months of the live broadcast." *Ibid*. Petitioners also omit that the court of appeals correctly cited this Court's decision in *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, — U.S. —, 139 S. Ct. 881, 888, 203 L. Ed. 2d. 147 (2019) in support. *Ibid*. Petitioners omit discussion of 17 U.S.C. § 411(c) in mischaracterizing the court of appeals' holding in an attempt to manufacture a conflict among two courts of appeals.

b. There is no textual basis in the court of appeals' decision to support Petitioners' assertion that the court of appeals held "rights in an idea can be exclusively licensed." (Pet. 12). This is because the court of appeals' decision did not address this at all, rather only the factual relationships between several agreements in the record. The court of appeals correctly reasoned that "the Copyright Agreement gave [Respondent] an enforceable right to sue [Petitioners] because it formalized a series of earlier agreements" in the record. Pet. App. 12a.

c. There is likewise no textual basis in the court of appeals' decision to support Petitioners' assertion that the court of appeals held "[t]he [Copyright] Act provide[s] for a pre-fixation transfer of exclusive rights." Pet. App. 14. Again, the court of appeals simply and correctly reasoned that the several agreements in the record gave Respondent an

enforceable right to sue Petitioners on the particular facts of this case under 17 U.S.C. § 411(c). Pet. App. 14a-15a.

d. Moreover, there is no textual basis in the asserted conflicting decision to support Petitioners' view of that case, either. The language Petitioners cite in *Video Views Inc.* v. *Studio 21, Ltd.*, 925 F.2d 1010, 1018 (7th Cir. 1991), abrogated in part by *Fogerty* v. *Fantasy*, *Inc.*, 510 U.S. 517 (1994) and *Budget Cinema, Inc.* v. *Watertower Assocs.*, 81 F.3d 729 (7th Cir. 1996) is dicta. Pet. App. 14a (quoting *Video Views*, 925 F.2d at 1018). Moreover, Petitioners omit text in the dicta as well as textual emphasis supplied by the court of appeals in that case. *Ibid.* In *Video Views, Inc.*, 925 F.2d 1010, the court of appeals merely observed, as context prior to its analysis, that "[i]t is clear that a licensing agreement cannot *create* property rights enforceable under the copyright laws." (emphasis in original). *Ibid*. Indeed, the court of appeals' decision in *Video Views, Inc.*, 925 F.2d 1010 did not address the issues decided by the court of appeals here. To the extent *Video Views* is cited by other courts at all, it is for inapposite issues of willful infringement under 17 U.S.C. § 504(c)(2), attorney's fees under 17 U.S.C. § 505, and determinations of whether a performance is public. *Ibid*. None of these are at issue here. The decision of the court of appeals is correct and no further review is warranted.

3. Petitioners contend (Pet. 15-20) the court of appeals allowed the bare assignment of an accrued cause of action under the Copyright Act. Petitioners omit the court of appeals made no such holding.

a. Petitioners concede (Pet. 16) "the Sixth Circuit chose not to directly address [the bare right to sue] issue[.]" Petitioners do not assert this was error. *Ibid.* Indeed, the court of appeals correctly reasoned

> Because the Copyright Agreement merely codified earlier transfers . . . we need not address [Petitioners'] arguments that the Copyright Agreement gave [Respondent] a bare right to sue . . . . The Copyright Agreement simply reaffirmed that [Respondent] held an exclusive right . . . . By viewing the Copyright Agreement in a vacuum and ignoring the parties' earlier agreements and conduct, [Petitioners] ignore [the record as to] the contract.

Pet. App. 17a. Because the court of appeals did not reach the question that petitioners now raise, it would be unwarranted for this Court to take up that contention here. Contrary to Petitioners' suggestion, this Court's ordinary practice is "not [to] decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); accord *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam). Moreover, Petitioners did not raise this issue in their petition for rehearing en banc with the court of appeals.

b. Petitioners nonetheless contend this Court should exercise its certiorari jurisdiction in this case to "confirm" a point of law that the court of appeals correctly did not reach. Pet. App. 16. To support their contention, petitioners assert that they perceive an

"effective" conflict (*id.* at 16) in the courts of appeals on the issue of a bare right to sue. However, Petitioners concede there is no such conflict because the issue is "settled law" and because "there does not appear to be any court of appeals opinion that interprets the [Copyright Act] otherwise." Pet. App. 17.

For these reasons, this Court's review is unwarranted. The court of appeals did not reach the question. The courts of appeals are not divided on the question. Indeed, this Court has denied review on this question. *See*, *e.g.*, *DRK Photo* v. *McGraw-Hill Global Educ. Holdings*, *LLC*, — U.S. —, 138 S. Ct. 1559, 200 L. Ed. 2d 744 (No. 17-1170) (denying review where petitioner asserted a perceived conflict among the courts of appeals on the issue of a bare right to sue). No further review is warranted.

4. Petitioners contend (Pet. App. 20-25) this Court should "confirm the historical division of responsibilities between federal courts of appeals and district courts" and "find" that the courts of appeals may not "rely on evidence in the record[.]" *Id.* at 20. This contention is without merit.

a. Petitioners' contention depends upon their view of the parties' filings. However, Petitioners did not include the filings in their petition for rehearing en banc or in the Appendix Petitioners submitted to this Court. Pet. App. 1a-98a. Under this Court's Rules 14.1(i) and 14.4, this is sufficient reason for this Court to deny the petition.

b. In any event, Petitioners' contention lacks merit. Petitioners concede "the Distribution Agreement was

placed in the record by [Respondent][.]" Pet. App. 22. In addition, Petitioners' citation to *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291 (1982) (Pet. 20) is inapposite. As Petitioners concede, that case involved the clearly erroneous standard of review, not the de novo standard of review the court of appeals correctly applied here. *Ibid.* Likewise, Petitioners' citation to *Grogan* v. *Kumar*, 873 F.3d 273, 277 (5th Cir. 2017) is inapposite. The court of appeals in that case limited its decision to "the present record." *Id.* Petitioners' citation to *Adler* v. *Wal-Mart Stores*, 144 F.3d 664, 672 (10th Cir. 1998) contradicts their contention. The court of appeals in that case confirmed that facts in "exhibits incorporated" into the record are properly before the courts. *Id.* Again, Petitioners concede the agreement here was "placed in the record by [Respondent][.]" Pet. App. 22.

c. While Petitioners assert the court of appeals "was in error" (Pet. App. 23), they do not explain what the error was, and they do not cite a case from any court to support a conclusion that the court of appeals erred. Pet. App. 20-25. Petitioners assert policy considerations (Pet. App. 23) but concede they are inapposite because they would only apply to "this one instance." *Ibid.*

d. Petitioners concede the Distribution Agreement was not determinative to the court of appeals' decision. Pet. App. 24. Indeed, the court of appeals correctly reasoned that the Copyright Agreement, and not the Distribution Agreement, was the basis for the court of appeals' decision on the particular facts of this case. Both the text of the court of appeals' decision and the

factual record before it confirm that its decision was correct. No further review is warranted.

5. Without support, Petitioners contend, in the last sentence of their petition, that there are multiple "novel copyright issues" in this case. Pet. App. 25. To the contrary, Petitioners' own concessions establish the court of appeals in this case neither addressed any novel issues under the Copyright Act nor committed any error. No further review is warranted. The proceedings on remand should now go forward. There is no reason for further delay.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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