No. 09-625

IN THE
Supreme Court of the United States

LFP PUBLISHING GROUP, LLC,
D/B/A HUSTLER MAGAZINE,
PETITIONER,

v.

MAUREEN TOFFOLONI, AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF NANCY E. BENOIT,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE SOCIETY FOR PROFESSIONAL JOURNALISTS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

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[1] Pursuant to Sup. Ct. R. 37, counsel for the *amici curiae* declare that they authored this brief in total with no assistance from the parties and that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Counsel for petitioners consent to the filing of this brief. Due to *amici*'s confusion over the briefing schedule, amici gave counsel for Respondent only six days notice prior to the filing of this brief. However, the Court, with Petitioner's consent, previously granted Respondent a thirty-day extension for a response, thus giving Respondent more than thirty-six days notice of this brief before its brief is due.

This case concerns an issue critical to the press and the public in general: whether a court may use the constitutional right of privacy of the Fourteenth Amendment to defeat the First Amendment rights of publishers in a right-of-publicity case. *Amici* represent news reporters, editors, and publishers that struggle with daily editorial decisions and face the threat of potential liability. These journalists need clear First Amendment standards in order to disseminate the widest variety of information the public is entitled to receive.

SUMMARY OF ARGUMENT

This Court should grant Petitioner's petition for certiorari to articulate the proper First Amendment standard for newsworthiness with regard to misappropriation claims, and to reconcile the conflicting opinions of various Courts of Appeal. These claims uniquely impinge upon journalists' and the public's constitutional rights because they are routinely brought by plaintiffs who disapprove of certain editorial content, and have included suits against newspaper and magazine publishers,[2] television news outlets,[3] and documentary filmmakers.[4]

The Court should clarify that deference to the First Amendment should be strictly maintained in "right-of-publicity" claims against news gatherers

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[2] *See, e.g., Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 415, 423 (Cal. Ct. App. 1983) (*National Enquirer* sued for misappropriation by actor Clint Eastwood for featuring his name and photograph on its cover and advertisements for an article about him); *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 792-793, 794, 797 (Cal. Ct. App. 1995) (football player unsuccessfully sued newspaper for reproducing poster-sized pages of the paper to celebrate the San Francisco 49er's four recent NFL championships).

[3] *Baugh v. CBS. Inc.*, 828 F. Supp. 745 (N.D. Cal. 1993) (Plaintiffs who were shown on a weekly news magazine, "Street Stories" sued the network for airing footage of police response to plaintiffs' 911 call.)

[4] *See Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 540, 543, 546 (Cal. Ct. App. 1993) (Famous surfer sued documentary filmmaker for misappropriation and other claims, but the court determined the film was on a matter of public interest).

and publications. Taken out of the context of nude, non-obscene photographs, the Eleventh Circuit opinion's limitations on newsworthiness make no sense, as it goes well beyond photographs that appear in magazines such as Petitioner's to affect all news-gathering.

The opinion, which allows the First Amendment of the Constitution to be trumped by a common law state tort claim, is in conflict with other Courts of Appeal that have held that to comply with the First Amendment, the newsworthiness exception to the right-of-publicity tort must be broadly construed if the publication is not for a *purely* commercial purpose.

The Eleventh Circuit opinion directly affects the media and journalists who disseminate information to the public. The court's reversal of the proper dismissal of the claim in the lower court threatens to chill all speech, particularly regarding the deceased. The court has created the prospect of open-ended privacy tort liability for publications and newscasts regarding the deceased, who for more than a century have been consistently held not to have privacy rights. More generally, the Eleventh Circuit has presented an unclear standard that will inevitably lead to confusion within the Circuit and among the other federal circuits that must be resolved by this Court.

ARGUMENT

I. The Eleventh Circuit's Overbroad Articulation of the Contours of the Right of Publicity Will Chill News Reporting by Essentially Allowing Posthumous Claims for All Invasion of Privacy Torts.

In perhaps aiming to offer some type of redress to a plaintiff who suffered embarrassment, the *Toffoloni* opinion seems to have, possibly inadvertently, confused the right of publicity with the very distinct right to privacy. Regardless, this conflation of what should be separate standards is highly problematic. The Court should elucidate the fundamental constitutional distinctions between torts prohibiting the invasion of a right of privacy and the right-of-publicity tort rooted in a devisable proprietary interest. The Eleventh Circuit appears to have used the right-of-publicity tort to redress very different privacy harms that were alleged because the late Ms. Benoit was pictured nude against the wishes of her mother, Ms. Toffoloni. The type of personal "injury" that deals with embarrassment or public disclosure is not the kind that may be remedied with a right-of-publicity claim, as underlying jurisprudence demonstrates.

Georgia, like many other states, has recognized a state tort claim for violations of a person's "right of publicity," arising from "the appropriation of another's name and likeness … without consent and for the financial gain of the appropriator." *Martin Luther King, Jr. Ctr. For Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982). Indeed, Georgia courts have enforced the rights of private citizens, as well as entertainers like Ms. Benoit,

not to have their names and photographs used for the financial gain of the user without their consent, where such use is not authorized as an exercise of freedom of the press. *Id.* at 703.

This tort has its original roots in the 1890 law review article "The Right to Privacy," in which Samuel Warren and Louis Brandeis set forth the argument that let to recognition of privacy torts in American jurisprudence. 4 Harv. L. Rev 193 (1890). Notably, the authors were careful from the theory's earliest beginnings to articulate the right in a way that would honor the First Amendment, stating that this privacy right would "not prohibit any publication of matter which is of public or general interest." *Id.* at 214. This is the reasoning underlying the common law "newsworthiness" exception to right-of-publicity torts and privacy torts, which bars liability if a court determines that information is of public interest.

From the Warren/Brandeis article came the development of the common law privacy torts, most commonly divided into four separate causes of action: *intrusion* into a plaintiff's seclusion or private affairs; public *disclosure of embarrassing private facts*; publicity which places the plaintiff in a *false light*; and *appropriation,* for the defendant's advantage, of plaintiff's name or likeness. *See* William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 398-407 (1960).

Particularly, the fourth misappropriation/right of publicity cause of action has been continuously articulated as being conceptually distinct from the other three. The Georgia Court of Appeals specifically found them easily distinguishable in the *Cabaniss* case, which first described the state's cause of action for right of publicity. *Cabaniss v. Hipsley*, 151

S.E.2d 496 (Ga. Ct. App. 1966). The court's opinion cited Prosser's assertion that "the interest protected is not so much a mental as a *proprietary* one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity." 48 Cal. L. Rev. at 406 (emphasis added). The court went on to say:

> Recognizing, as we do, the fundamental distinction between causes of action involving injury to feelings, sensibilities or reputation and those involving an appropriation of rights in the nature of property rights for commercial exploitation, it must necessarily follow that there is a fundamental distinction between the two classes of cases….

Cabaniss at 504.

This "fundamental distinction" is particularly clear with regard to the ability of a cause of action to accrue after a potential plaintiff's death. It is only because an improper appropriation of the right to publicity is analogous to the impairment of a property right and is meant to avoid "unjust enrichment of the defendants," that the publicity rights may continue to exist after death. Restatement (Second) of Torts § 652I (1977). As such, the theory underlying the right of publicity is in sharp contrast to that of the other invasion of privacy torts. The Restatement Second of Torts states, with support from the Fifth,[5]

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[5] *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962).

Sixth,[6] Seventh,[7] and Tenth[8] Circuits, as well as state appellate court decisions, "there is no action for the invasion of the privacy of one already deceased, in the absence of statute." *Id.* at cmt. b.

The Southern District of New York recently affirmed this reasoning, dismissing plaintiff's causes of action for injury to reputation and invasion of the right to privacy for lack of standing because there was an invasion of the deceased's privacy, and under the applicable state law, a relative of the deceased had no claim for that invasion. *Conradt v. NBC Universal, Inc.,* 536 F. Supp. 2d 380 (S.D.N.Y. 2008).

Publishers have relied on the ability to be free from "invasion of privacy" claims when discussing a person's death – which is very often newsworthy and of public concern, as in the case of Ms. Benoit. Arguably, the most in-depth and groundbreaking reporting on many subjects is disseminated when stories involve reporting on previously private aspects of the lives of the deceased. Stories of crime, from the mundane to the epic, such as Truman Capote's *In Cold Blood*, almost always delve into the past for investigatory purposes and to give context. The Eleventh Circuit ruling brings the ability to fully report all news into question, as its holding had no lan-

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[6] *Young v. That Was The Week That Was*, 423 F.2d 265 (6th Cir. 1970).

[7] *Maritote v. Desilu Productions, Inc.*, 345 F.2d 418 (7th Cir. 1965) (cert. denied).

[8] *Gruschus v. Curtis Pub. Co.,* 342 F.2d 775 (10th Cir. 1965).

guage linking its opinion to the specific features of the case.

The Court should clarify this and reiterate the fundamental distinctions between the torts that prohibit the invasion of privacy and the right-of-publicity tort based in a proprietary interest — the only one that may be asserted on behalf of the dead.

II. Because of these deeply rooted distinct analytical frameworks, the Eleventh Circuit erred in reasoning that the interests underlying Georgia's common law right of publicity are *freely interchangeable* with the Fourteenth Amendment right to be free from government intrusion into the private sphere.

In articulating the contours of the right of publicity under Georgia law, the Eleventh Circuit failed to cite *any* opinion that interpreted the right to publicity, specifically, and not one of the other privacy torts — especially problematic because of the crucial constitutional implications at bar.

In stating that the right of publicity must attach to information that is "not open to public observation" and is appropriated for the commercial benefit of another, the court cited *Virgil v. Time Inc.*, a Ninth Circuit case that addressed the tort of public disclosure of embarrassing private facts about the plaintiff — a tort which would not be available to the relative of a deceased plaintiff. 527 F.2d 1122 (9th Cir. 1975).

The Eleventh Circuit also noted the Supreme Court of Georgia's admonishment that defendants

not to be "guilty of an abuse of [the First Amendment] privilege by invading the legal rights of others" in the 1905 case of *Pavesich*, which was not particularly relevant to an analysis of the facts surrounding the article about Ms. Benoit, as the *Pavesich* case dealt with a private citizen's photograph in pure, undisputed commercial advertisement. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 81 (Ga. 1905). Furthermore, the case dealt only abstractly with the right of publicity because the tort had not yet been recognized by law. *See Martin Luther King, Jr. Ctr. For Soc. Change, Inc.*, 296 S.E.2d at 702. (explaining *Cabaniss*'s subsequent recognition of the right-of-publicity tort).

Most problematically of all, the Eleventh Circuit, without citing any legal authority, states:

> Both the rights to freedom of speech and freedom of the press, as guaranteed by the First Amendment, and the right to privacy, as guaranteed by the Due Process Clause, are fundamental constitutional rights. *The Constitution directs no hierarchy between them.* Thus, courts are required to engage in a fact-sensitive balancing, with an eye toward that which is reasonable and that which resonates with our community morals. . . .

Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201, 1207-08 (11th Cir. 2009) (emphasis added).

The court got it wrong. This case did not involve a plaintiff's "constitutional right" of privacy to be

balanced against the defendant's First Amendment rights,[9] rather it involved a plaintiff's right to file a claim in order to redress an alleged tortious violation of the deceased's right to publicity. Therefore, the proper balancing would be between one potential state tort claim and the fundamental rights of the First Amendment — a far different analysis than the one undertaken by the Eleventh Circuit.

The analysis failed to note that *Pavesich* was the Georgia Supreme Court's first attempt at recognizing a cause of action for invasion of privacy. It surveyed the entire field of privacy interests, including those interests in freedom from *government* intrusion into the home. Protection from state interference with privacy is, of course, the root of the due process and Fourteenth Amendment privacy interests, and those constitutional guarantees are not relevant in the civil context. This fundamental right has been defined as "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley v. Georgia,* 394 U.S. 557, 564 (1969); *see also Griswold v. Connecticut,* 381 U.S. 479 (1965).

The court's imprecise analysis here would inadvertently allow any family member to assert *any* privacy tort claim on behalf of a deceased relative because of their personal preferences about publica-

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[9] Even when such a right exists, "where . . . one is a public personage, an actual participant in a public event, or where some newsworthy incident affecting him is taking place, the right of privacy is not absolute, but limited." *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354 (N.Y. 1952).

tions' editorial content under the guise of a violation of the relative's "right to publicity."

The effects of this opinion are much more far reaching than just applying to magazines that publish nudity. It would prevent media outlets from covering matters of public interest involving anyone living or dead, even a public figure like Ms. Benoit, because it would prompt future courts to weigh *equally* any individual's privacy rights against a publication's First Amendment rights. This is completely contrary to what privacy jurisprudence has contemplated over its relatively short history.

III. The Eleventh Circuit Misinterpreted The Meaning of Newsworthiness and Made Unconstitutional Intrusions Into the First Amendment rights of Publications to Have Full Control Over Editorial Content.

A. Even if the Court Found the Photographs Infringed on the Devisable Right of Publicity, the Eleventh Circuit's Articulation of the "Newsworthiness" Violates the First Amendment and Conflicts With Other Circuits.

With regard to the newsworthiness exception to right-of-publicity claims, the term "newsworthiness" is something of a misnomer because as courts have recognized, judges "should be chary of deciding what is and what is not news." *Harper & Rowe v. Nation Enterprises*, 471 U.S. 539, 561 (1985). The exception to the tort is for *non-commercial editorial use*. The proper role of a court in making the newsworthiness determination is not to judge the degree of value or interest to the public but whether it is or is not a

purely commercial communication to the public, as "the scope of the privilege extends to almost all reporting of recent events…." *Eastwood,* 198 Cal. Rptr. at 349-50.

The Eleventh Circuit's interpretation of the newsworthiness standard poses a significant risk to news organizations' reporting and photojournalism. The "newsworthiness" exception has traditionally been given — and to comply with the First Amendment, must be given — broad deference. The "newsworthiness" inquiry undertaken by the other Circuits has consistently turned on whether the speech is purely commercial and this Court should grant review to reconcile the standard with that of other Circuits.

Indeed, in the 1905 case relied on by the Eleven Circuit opinion at issue, the Georgia Supreme Court in *Pavesich* broadly articulated the theory of a newsworthiness exception, and explicitly pointed out the fundamental differences between commentary and advertising:

> "What we have ruled cannot be in any sense construed as an abridgment of the liberty of speech and of the press as guarantied [sic] in the Constitution . . . [C]ertain it is that one who merely for advertising purposes, and from mercenary motives, publishes the likeness of another without his consent, cannot be said, in so doing, to have exercised the right to publish his sentiments."

50 S.E. at 80.

Of course, the newsworthiness-public interest privilege is limited to uses which have a "reasonable relationship" to a matter of public interest, and do not represent a "mere disguised commercialization." David Elder, *Privacy Torts* § 6:9 (2002). But this "reasonable relationship" standard has traditionally been given very broad latitude. Courts have not approached the newsworthiness of a publication as an element to be proved or disproved; but whether the speech falls in a category that is strictly commercial and whether the report is true. *See, e.g., Dworkin v. Hustler Magazine, Inc.,* 867 F.2d 1188, 1197-98 (9th Cir. 1989); *Eastwood*, 149 Cal. App. 3d 409 (Cal. Ct. App. 1983).

Although it can be difficult to define "commercial speech," this Court has written that the "core notion" of commercial speech is that it "*does no more* than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 66 (1983) (emphasis added). Furthermore, that "[t]here are commonsense differences between speech that does no more than propose a commercial transaction and other varieties," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 771 n. 24 (1976) (quotations and citation omitted).

Specifically, with regard to First Amendment rights of organizations that sell "expressive" materials, the Ninth Circuit has stated that "any commercial aspects are inextricably entwined with expressive elements, and so they cannot be separated out from the fully protected whole." *Hoffman*, 255 F.3d 1180, 1185 (9th Cir. 2001) (quotations omitted; discussed more fully *infra* at III.C.).

Tellingly, the Ninth Circuit has found that with regard to the *very same publication* at issue in this petition, the magazine's inclusion of certain features "solely or primarily to increase the circulation of its magazine and therefore its profits" did not transform it into a purely commercial or advertising use and thus the material was privileged under the newsworthiness exception to the right of publicity. *Dworkin* at 1197-98. This is directly contrary to the Eleventh Circuit ruling in this case.

B. This Court Has Explicitly Held That Governmental or Judicial Intrusion Into the Editorial Print Process is Unconstitutional and Particularly Repugnant to First Amendment Interests.

In *F.C.C. v. League of Women Voters of California*, this Court wrote: "The expression of editorial opinion on matters of public importance … as we have repeatedly explained … is entitled to *the most exacting degree of First Amendment protection.* 468 U.S. 364 (1984).[10] And particularly with regard to print media, which has always been the expressive medium given the strongest First Amendment pro-

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[10] "The unrestricted distribution of newspapers and magazines . . . is at the heart of the First Amendment." *Lewis v. Time Inc.*, 83 F.R.D. 455, 465 (E.D.Cal.1979), aff'd 710 F.2d 549 (9th Cir. 1983); *Cf. Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) ("We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.").

tection,[11] the Court found unconstitutional the "intrusion into the function of editors in choosing what material goes into a [publication] and in deciding on the size and content of the paper and the treatment of public issues…" *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 241-42 (1974).

This reasoning absolutely extends to the publication of visual art elements, as this Court in *Reagan v. Time Inc.* held that government approval of a photograph is an impermissible content-based discrimination in violation of the First Amendment, specifically noting that "the Government simply has no business second-guessing editorial judgments as to the communicative value of illustrations...." *Regan v. Time Inc.*, 468 U.S. 641, 679 n.16 (1984).

The Eleventh Circuit's overbroad holding has eviscerated the media's formerly robust First Amendment protection from the right-of-publicity tort. By engaging in a judicial dissection of the editorial piece on Ms. Benoit to determine which portions were sufficiently "newsworthy" (a misreading of the proper standard), the Eleventh Circuit has infringed the First Amendment rights of editorial decision making of all news outlets that publish photographs of any person. Because news outlets will now fear liability for invading the "privacy" of anyone, living or

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[11] *See, e.g., Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 653 (distinguishing cable providers' diminished First Amendment rights from the more robust First Amendment rights of print media) ("[T]he First Amendment protects the editorial independence of the press.").

dead, subject to an extremely vague "newsworthiness" analysis, the Eleventh Circuit opinion violates the First Amendment rights of journalists, editors, and other creators of media. This functional government intrusion into journalists' editorial decision-making in *Toffoloni* is unconstitutional.

C. The Ninth Circuit's Analysis in *Hoffman* Illustrates the Proper Standard for "Newsworthiness" and Directly Contradicts the Eleventh Circuit Opinion.

The Ninth Circuit in *Hoffman* addressed a public figure's claim for invasion of his right of publicity and set forth a newsworthiness analysis that would be both properly deferential to the First Amendment and widely applicable. The court held that a magazine article that featured a famous actor's altered photograph to showcase a designer gown was non-commercial speech because the article did not have the *sole purpose* of selling a particular product — the clothing pictured. *See* 255 F.3d at 1185.

In contrast, the Eleventh Circuit's analysis dissected the elements of the magazine article and accompanying photos and analyzed them individually. The court concluded that while the text of the article was newsworthy, the photographs were not, and thus this transformed the entire piece into a commercial use of the photographs. In its analysis, the court analyzed text from the cover, text from the table of contents, the article's title, the length of text on each page, and the ratio of photographs to text. *See Toffoloni*, 572 F.3d at 1209. Then the court made the sweeping statement that the "heart" of the article was not the biography of Ms. Benoit, but the photo-

graphs, and thus it was a commercial, non-newsworthy use — an overbroad assessment that has no corresponding legal authority. *Id.*

In *Hoffman*, the Ninth Circuit stated that just because an article featuring a photograph of actor Dustin Hoffman as his movie character "Tootsie," and had elements that vaguely proposed that the reader purchase the outfit featured on the image of Hoffman, this did not transform the photograph into pure commercial speech. *See* 255 F.3d at 1185.

The court wrote that because the altered photograph was not within an advertisement, and instead advanced more than just a commercial message, "common sense tells us this is not a simple advertisement." *Id.* Furthermore, the court acknowledged that although magazines use articles and photos to "draw attention to the for-profit magazine in which it appears," it does not mean that such articles "fall outside of the protection of the First Amendment because it may help to sell copies." *Id.*

The Ninth Circuit's opinion demonstrated the proper breadth of the "newsworthiness" exception with regard to editorial content, viewed as a whole, in direct contrast with the Eleventh Circuit's opinion in *Toffoloni*, which threatens to subject any publication that contains illustrated articles to an overly intrusive analysis of every element of its product. The Eleventh Circuit opinion calls into question every news article that has a photograph of a person, fully-clothed or not, into question as a potential violation of that person's right of publicity. Because a newsworthiness analysis that does not rest on the distinction between the purely commercial and not purely commercial does not give proper deference to the

First Amendment, the Court should not allow the Eleventh Circuit's arbitrary limitations on the "newsworthiness" exception to remain in place.

CONCLUSION

The combination of the flawed reasoning for denying defendant's newsworthiness exception to the Georgia right of publicity in this case and the Eleventh Circuit's improper deference to the constitutionally protected right of editorial selection results in an unconstitutional chilling effect on all publications. If permitted to stand, this verdict threatens news organizations in the Eleventh Circuit and throughout the country and exposes them to the threat of similar legally unsupportable liability. *Amicus* therefore respectfully requests that this Court grant Petitioner's petition for certiorari.

APPENDIX A

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