

No. 12-57302

IN THE
**United States Court of Appeals
for the Ninth Circuit**

CINDY LEE GARCIA,

Plaintiff-Appellant,

v.

GOOGLE INC. AND YOUTUBE, LLC,

Defendants-Appellees,

On Appeal from the United States District Court
for the Central District of California, CV-12-8315-MWF (VBKx)
District Judge Michael W. Fitzgerald

**GOOGLE INC. AND YOUTUBE, LLC'S BRIEF IN RESPONSE TO
SUGGESTION OF REHEARING EN BANC**

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INTRODUCTION

Late last month, a divided panel of this Court silenced free speech based on a novel, and mistaken, theory of copyright law. The panel majority held that an actress who appeared in a film for all of five seconds likely had a separate copyright in her brief performance. And it ordered Google and YouTube to scrub her appearance—and thus, effectively, the film—from their networks altogether.

The U.S. Copyright Office has since illuminated how wrong the panel majority's view of the law was: Just days ago, the Office rejected the very copyright claim at issue in this case, explaining that federal law does not allow “a

copyright claim by an individual actor or actress in his or her performance contained within a motion picture.” ADD46-47. Although the panel lacked the authoritative guidance of the Copyright Office when it ruled, the en banc Court is not so hamstrung. It should grant rehearing and follow the Copyright Office’s lead.

Make no mistake why rehearing is warranted: The panel’s refusal to stay its sprawling injunction sets a dangerous precedent that gives copyright plaintiffs ammunition to seek immediate takedowns of protected speech. That is a drastic change to the status quo and a “question of exceptional importance” worthy of en banc review. Fed. R. App. P. 35(a)(2). Moreover, the panel’s refusal to issue a stay also is wrong on the merits—a critical point given the importance of the underlying questions in this case. Fed. R. App. P. 35(a). A stay should have issued because Google and YouTube are at least “ ‘reasonably likely,’ ” *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011), to succeed in challenging both the panel’s injunction and its copyright analysis.

First, as for the injunction: This Circuit has held that mandatory injunctions may issue only if the facts and law “clearly favor” the movant, *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994), and that injunctions gagging speech require movants to hit a threshold that is higher still, *see Overstreet v. United Bhd. of Carpenters & Joiners of Am.*, 409 F.3d 1199, 1208 n.13 (9th Cir. 2005). The majority here ignored those limitations and imposed a speech-silencing injunction

despite conceding that the case’s merits are “*fairly debatable*,” ADD10 (emphasis added)—a concession irreconcilable with the “clearly favor” test. Indeed, the majority went further and held that the District Court abused its discretion. Google and YouTube are “reasonably likely,” *Leiva-Perez*, 640 F.3d at 967, to obtain en banc review and reversal of that decision because only that disposition will “maintain uniformity of the court’s decisions.” Fed. R. App. P. 35(a)(1).

Second, as for the copyright analysis: The majority’s holding is contrary to the Copyright Act and breaks with precedent of this Court, the Supreme Court, and other circuits. It also contradicts the expert judgment of the Copyright Office, which has since ruled that “*Ms. Garcia has no separable claim to copyright authorship in her performance*.” ADD47 (emphasis added). And it has triggered deep concern in the film and video industries—industries centered in this Circuit—because it empowers even minor players in films to wrest away control of those films’ distribution. Google and YouTube are at least “reasonably likely” to obtain review and reversal of that decision, too. *Leiva-Perez*, 640 F.3d at 967.

Indeed, even Plaintiff agrees that this is a critically important case: She told the panel that its ruling on the copyright question would “impact the entire entertainment industry.” Opening Br. 29. She was right. The panel’s refusal to grant a stay pending a rehearing petition—a refusal that is bound up with the panel’s serious overreach on the merits—calls out for en banc review and reversal.

BACKGROUND

The Video. YouTube is a video-sharing website on which individual users upload, share, and view videos. In July 2012, one user, defendant Mark Basseley Youssef, uploaded a 13-minute-and-51-second video entitled “Innocence of Muslims” to YouTube.com. ER64, ER893. As described in Plaintiff’s Complaint, the video portrays the Prophet Mohammed, the founder of Islam, “as a child molester, sexual deviant, and barbarian.” ER64.

Plaintiff Cindy Lee Garcia is an actress who appears in “Innocence of Muslims” for five seconds. ER69, ER193.¹ Garcia did not produce the film or write the script she performed; Youssef did. ER65. Nor did Garcia direct her performance; Alan Roberts, a professional director Youssef hired, did. ER241. Garcia’s creative contribution—at most—was to deliver lines written by Youssef and to “seem[] concerned” while doing so, just as Youssef’s script dictated. ER85.

Garcia says she believed she was participating in a shoot for an action film called “Desert Warrior.” ER69. She claims, however, that Youssef overdubbed her lines during post-production to make it look as if Garcia’s character referred to Mohammed as a child molester. *Id.*

¹ Because of the panel’s take-down order, “Innocence of Muslims” is no longer on YouTube. However, if the Court wishes to view the film, it is available at many other sites on the Internet. Google will not list the URLs in this public document, but would be happy to file a representative list under seal at the Court’s request.

Reaction. An Arabic version of the video became famous in the Muslim world after it was broadcast on Egyptian television, sparking protests and violence. ER64; ER247. Both the video and the protests surrounding it were the subject of extensive English- and Arabic-language coverage. *See* ER247. The video prompted public dialogue on- and off-line, including numerous responsive essays and videos critiquing “Innocence of Muslims” and its message. Others embraced that message, including one backer who saw it as “highlight[ing] discrimination against Christians” by Muslims. Tamim Elyan, *Egyptian Backer of Prophet Film Says Sorry About Deaths*, Reuters, Sept. 12, 2012²; ER247.

“Innocence of Muslims” drew even more attention when the Obama Administration cited it as the flashpoint for the 2012 attack on the U.S. consulate in Benghazi, Libya. ER64. Former U.S. Ambassador Susan Rice’s statements defending that claim are considered to have played a role in her decision to withdraw her name from consideration for Secretary of State. Congress also questioned then-Secretary of State Hillary Clinton about the film at hearings on the Benghazi attacks. Appellees’ Motion for Judicial Notice ¶¶ 1-3.

² Available at <http://www.reuters.com/article/2012/09/12/us-libya-ambassador-egypt-promoter-idUSBRE88B18R20120912>.

In the wake of the international protests, multiple countries—including Brazil,³ Turkey,⁴ Singapore,⁵ and Jordan⁶—ordered YouTube to take the video down. In the United States, things played out differently (until the panel’s order last month). Although the Obama Administration asked YouTube to evaluate whether “Innocence of Muslims” violated YouTube’s terms of use, YouTube determined that the video did not and left it accessible on its platform. *See* ER64; *see also* Claire Miller, *Google Has No Plans to Rethink Video Status*, N.Y. Times, Sept. 14, 2012⁷; Google, *Transparency Report* (detailing government inquiries).⁸

Garcia’s Lawsuits. Garcia asserts that following the international outcry surrounding the film, she received death threats from outraged Muslims. ER197.

³ *Brazil Court Orders YouTube to Remove Anti-Islam Film*, Reuters, Sept. 26, 2012, available at <http://uk.reuters.com/article/2012/09/26/uk-protests-brazil-idUKBRE88P05G20120926>.

⁴ *Turkey to Block “Innocence of Muslims” On YouTube*, The Associated Press, Sept. 26, 2012, available at http://www.huffingtonpost.com/2012/09/26/turkey-innocence-muslims-youtube_n_1915514.html.

⁵ *Google Blocks Singapore Access to Anti-Islam Film*, Agence France-Presse, Sept. 21, 2012, available at <http://sg.news.yahoo.com/singapore-asks-google-block-access-islam-film-054710633.html>.

⁶ Mohammad Ghazal, *Google Blocks Access to Anti-Islam Film Trailer in Jordan*, The Jordan Times, Sept. 22, 2012, available at <http://jordantimes.com/google-blocks-access-to-anti-islam-film-trailer-in-jordan>.

⁷ Available at http://www.nytimes.com/2012/09/15/world/middleeast/google-wont-rethink-anti-islam-videos-status.html?_r=0.

⁸ Available at <http://www.google.com/transparencyreport/removals/government/US/?p=2012-12>.

In response, Garcia—in her own words—“went public” to speak out against the film. ER196.

In addition to combating Youssef’s speech with her own counter-speech, Garcia also sued. On September 19, 2012, Garcia filed an action against Youssef, Google, and YouTube in California state court and sought an *ex parte* temporary restraining order requiring “Innocence of Muslims” to be taken down from Google and YouTube’s networks. ER645-661. The court denied her application, holding that she had not shown any likelihood of success on her claims. ER662-663.

Garcia voluntarily dismissed her state-court suit, ER664-667, and brought suit in federal court. ER1-62. As amended, Garcia’s Complaint asserted copyright claims against Google and YouTube for allegedly infringing on Garcia’s copyright. ER63-122. She sought a temporary restraining order requiring YouTube to remove the film. ER135-170. The District Court denied the request on the ground that “the alleged infringement seems to have commenced almost three months ago” and converted her application to a motion for a preliminary injunction. ER601-602.

Briefing on Garcia’s motion proceeded in the normal course. During the briefing, YouTube and Google obtained from Youssef a release apparently signed by Garcia releasing all of her rights—including copyrights—in her performance. ER791-801. Garcia challenged the veracity of the release. ER818. In light of the

factual dispute, the District Court elected not to consider the release in adjudicating Garcia's preliminary-injunction application. ER891.

On November 30, 2012, the District Court denied Garcia's motion, finding she had proven neither irreparable harm nor likelihood of success on the merits. ER892-94. The court concluded that because the video had been available on YouTube for months, had been widely disseminated elsewhere on the web, and had received relentless media coverage, Garcia had not shown how a preliminary injunction "would prevent any alleged harm." ER893. In addition, it concluded that Garcia was unlikely to succeed on the merits for two reasons: she had not shown that she was the "author" of her performance, as the Copyright Act requires; and even if she were an author, she had granted the film's author an implied license to integrate her performance into the film. ER894. Garcia appealed.

Proceedings on appeal. In this Court, Garcia again did not seek expedited briefing or argument. The case was argued and submitted on June 26, 2013, before Chief Judge Kozinski and Judges Gould and N.R. Smith.

On February 19, 2014—nearly eight months after the appellate argument and over 19 months after Youssef first uploaded "Innocence of Muslims" to YouTube—the panel issued a sweeping order that was at that point unaccompanied by any written opinion. The panel directed Google and YouTube to take down "all copies" of the video "from YouTube.com and from any other platforms under

Google’s control” within 24 hours and to “take all reasonable steps to prevent further uploads of ‘Innocence of Muslims’ to those platforms.” ADD39. The panel’s order also specifically prohibited Google from disclosing the existence of the order until the merits opinion issued. *Id.*

Google sought an emergency stay, which the panel denied. ADD41. The pre-opinion takedown order and gag, it stated, were necessary to “prevent a rush to copy and proliferate the film before Google can comply with the order.” *Id.*

The Panel Opinion. The panel issued its opinion seven days after its injunction order. Over an 18-page dissent, the majority held that the District Court had abused its discretion in declining to issue a preliminary injunction. ADD1-19.

The majority wrote that, based on her five-second, overdubbed appearance in the film, Garcia “may have a copyright.” ADD10. From that equivocal premise, it held that she was likely to succeed, even though it conceded that the question was “fairly debatable” and “rarely litigated.” ADD7-10. The majority also held that Garcia likely would suffer irreparable harm absent an injunction. ADD15-18.

Judge Smith dissented. Emphasizing that mandatory injunctions should be denied “unless ‘the facts and law *clearly favor* the moving party,’ ” Judge Smith found the outcome insufficiently clear to grant an injunction that bans speech—much less to conclude that the District Court abused its discretion. ADD20 (citation omitted). He also rejected the majority’s copyright analysis, concluding

that Garcia's acting performance was not a "work" and that, even if it were, she was not its "author." He wrote that the majority's contrary holding "decline[d] to apply the most relevant precedent in this circuit on the question before it"—*Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000)—and "read[] the authorship requirement out of the Copyright Act and the Constitution." ADD26.

Post-Opinion Proceedings. Google and YouTube again moved for a stay. The panel denied the motion, but modified its injunction such that it "does not preclude the posting or display of any version of 'Innocence of Muslims' that does not include Cindy Lee Garcia's performance." ADD43. Days later, a judge of this Court *sua sponte* called for a vote on whether to rehear the stay motion en banc.

Garcia's Copyright Application. While this lawsuit was pending, Garcia also was pursuing her copyright on another front. On September 25, 2012, she filed an application with the U.S. Copyright Office in order to comply with 17 U.S.C. § 411(a), which requires such an application as a prerequisite to any copyright infringement suit. On December 18, 2012, however, the Copyright Office wrote to Garcia's lawyer and informed her that, barring further information from Garcia, Garcia was not entitled to register a copyright. ADD44. "For copyright registration purposes, a motion picture is a single integrated work," it wrote. "Assuming Ms. Garcia's contribution was limited to her acting performance, we cannot register her performance apart from the motion picture."

Id. The Copyright Office informed Garcia’s lawyer that unless she could provide further information about Garcia’s role, her application would be rejected. *Id.* Garcia responded by asking the Copyright Office to delay its adjudication of her application until after the panel ruled in this case. ADD45.

On March 6, 2014, the Copyright Office issued a letter rejecting Garcia’s application. ADD46.⁹ It explained that “the U.S. Copyright Office * * * views dramatic performances in motion pictures to be only part of the integrated work—the motion picture” and that the Office’s “longstanding practices *do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture.*” ADD46-47 (emphasis added). The Office also explained why it was inappropriate for it to delay its ruling during the pendency of this case. Citing 17 U.S.C. § 411(a), it wrote that “Congress expressly envisioned that registration decisions by the Register of Copyrights would precede adjudication in the courts” so that the courts have the benefit of the Copyright Office’s decision and so that the Office can intervene to defend that decision. *Id.* When applicants institute lawsuits prior to the Copyright Office’s decision, it explained, “the Register’s statutory right to intervene in an action instituted pursuant to a refusal to register is nullified.” *Id.*

⁹ The Office’s registration decision and accompanying materials are agency records appropriate for judicial notice. Google and YouTube have filed a motion asking the Court to take judicial notice of these materials.

REASONS WHY REHEARING EN BANC SHOULD BE GRANTED

I. THE PANEL’S DENIAL OF A STAY IMPLICATES QUESTIONS OF EXCEPTIONAL IMPORTANCE THAT SHOULD BE CONSIDERED BY THE EN BANC COURT.

The Court will consider in due course whether to rehear the panel’s merits opinion en banc. But the panel’s refusal even to briefly stay its mandatory injunction separately presents “question[s] of exceptional importance” that warrant the en banc Court’s consideration now. Fed. R. App. P. 35(a)(2).

The panel’s order requires Google and YouTube to take down and keep down Garcia’s performance in “Innocence of Muslims” from all its platforms worldwide. ADD43. And it requires them to do so before they have even had a chance to seek en banc review. *Id.* As far as we are aware, the panel’s order is unprecedented in a copyright case. In the normal course, a timely rehearing petition stays the mandate—and thus the effectiveness of any relief a panel orders—until disposition of the petition. Fed. R. App. 41(d)(1).

The panel claimed that its pre-mandate removal order was the only way to “prevent a rush to copy and proliferate the film before Google can comply” with the injunction. ADD41. That claim is unpersuasive. “Innocence of Muslims” remains available on non-YouTube sites notwithstanding the panel’s take-down order and Google’s compliance with it. *See supra* at 4 n.1. Those who wish to proliferate the film have ample copies to work from. The panel’s order thus

gagged YouTube's constitutionally protected speech on a matter of deep public importance, *see infra* at 39, without even achieving a cognizable benefit.

The panel's refusal to stay the effect of its order pending further review also creates a dangerous precedent. The panel's rush-to-proliferate justification presumably applies to *any* video that has been thought (in a "fairly debatable" sense) to infringe an author's copyright. Under the panel's new rule, any copyright plaintiff would have grounds to request an immediate takedown of potentially infringing materials, even if his adversaries sought further review. That would stand Rule 41(d)(1) on its head. This Court should rehear the stay denial en banc and grant the stay.

II. THE PANEL SHOULD HAVE GRANTED A STAY PENDING DISPOSITION OF GOOGLE AND YOUTUBE'S REHEARING PETITION.

The panel did not explain why it denied a stay of its injunction pending a petition for rehearing. However, it presumably applied the four stay factors—likelihood of success, irreparable harm to Google and YouTube, balance of equities, and the public interest—and determined that a stay was not warranted. That determination itself warrants en banc review and reversal. The panel's decision to grant a mandatory injunction gagging speech breaks with this Court's decisions and those of the Supreme Court. Its copyright analysis likewise is at odds with authority and with the copyright statute. And the remaining factors

favor a stay. The panel should have held that Google and YouTube are “ ‘reasonably likely’ ” to succeed in challenging its decision, *Leiva-Perez*, 640 F.3d at 967,¹⁰ and thus should have stayed its order.

To be clear: Based on her allegations, Garcia is a sympathetic plaintiff, and she may have claims against Youssef or others on fraud, contract, or other theories. But the matter before this Court involves only one type of claim: “a copyright action.” ADD16. Copyright cannot be repurposed to provide the relief she seeks.

A. Google And YouTube Are Likely To Prevail On Rehearing En Banc Because The Panel Broke With Precedent When It Entered A Mandatory Injunction Gagging Speech.

The majority’s decision reshapes this Court’s rules for issuing mandatory preliminary injunctions. Even a typical preliminary injunction must clear a high hurdle, for it “is an extraordinary remedy never awarded as of right,” demanding a “clear showing that the plaintiff is entitled to relief.” *Winter v. NRDC*, 555 U.S. 7, 22, 24 (2008). But here, binding Circuit law required the panel to ratchet up that already-high bar three times more: First, because the injunction is mandatory, the panel had to conclude that the law and facts “clearly favor” Garcia. Second, because the injunction gags speech, the panel had to conclude that Garcia had made a “particularly strong showing” of likely success and harm. And third, the

¹⁰ We analogize to the standard for stays pending petitions for certiorari because this Court does not appear to have a standard for stays pending a rehearing petition.

panel had to conclude that the District Court abused its discretion in finding that Garcia had not cleared these extraordinary hurdles.

It would be hard to invent a procedural posture less favorable for reversing a district court's decision. And that is precisely why the panel's decision declining to stay its injunction is so well-suited for en banc review: The panel majority conceded that the merits are "fairly debatable"—and yet it reversed the district court and granted a mandatory injunction restricting speech anyway. That decision amounts to a clean break from precedent. A plaintiff with a "fairly debatable" case obviously has not shown that the law and facts "clearly favor" her; nor has she made a "particularly strong showing" of likely success. Moreover, district courts' denials of injunction motions should not be deemed abuses of discretion in "fairly debatable" cases. The panel should have stayed its injunction pending further review.

1. Mandatory injunctions are "particularly disfavored under the law of this Circuit." *Stanley*, 13 F.3d at 1320. That is because such injunctions " 'go[] well beyond simply maintaining the status quo *pendente lite*' "; they require the enjoined party to take affirmative action. *Id.* (citation omitted). As a result, the Court has insisted that mandatory-injunction requests should be "denied unless the facts and law *clearly favor* the moving party." *Id.* (emphasis added). This Court has reaffirmed that rule verbatim in case after case. *See, e.g., Park Vill. Apartment*

Tenants Ass'n v. Mortimer Howard Trust, 636 F.3d 1150, 1160 (9th Cir. 2011); *Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa County*, 550 F.3d 770, 776 (9th Cir. 2008). Nor does this Court stand alone. See *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975-976 (10th Cir. 2004) (en banc) (same); *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 24 (2d Cir. 2004) (same); *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994) (same); *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976) (same).

Applying the “clearly favor” test, this Court has held that mandatory injunctions may not issue in “doubtful cases.” *Park Vill.*, 636 F.3d at 1160. But the panel majority fled from that rule here. On a key merits question—whether Garcia has a copyright in her brief performance—the majority conceded that the case is “fairly debatable.” ADD10. When the law supporting a claim is only “fairly debatable,” it does not “clearly favor” that claim.

Nor was the majority’s “fairly debatable” concession a glancing misstatement. Throughout its opinion, the majority acknowledged that some dispositive issues were close, presented open questions, or have not yet been litigated. The majority recognized, for example, that the question whether an actor obtains a copyright is “rarely litigated,” and it cited zero cases resolving that question on the merits as it did. ADD7. It recognized that a key factual question—whether Garcia signed away any rights she had in the film—is contested

and unresolved. ADD12 n.6. And it recognized that a potentially dispositive *legal* question—whether Garcia can meet the requirement that the performance be “fixed * * * by or under the authority of the author,” 17 U.S.C. § 101—likewise remains unresolved.¹¹ ADD7 n.4. Yet it imposed a sweeping speech-restraining injunction without settling any of these matters, and without giving the district court the chance to evaluate them on remand. *Cf. Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 1000 (9th Cir. 2011) (remanding for further findings rather than granting injunction where district court applied wrong legal framework).

The majority did not acknowledge this Circuit’s mandatory-injunction precedent, even though it was the lead point in Judge Smith’s dissent. *See* ADD19. The majority’s silence is telling. Judge Smith correctly explained that the “*Stanley* standard counseling extreme caution when considering granting a mandatory preliminary injunction is premised on principles of judicial restraint,” and that the majority “abandon[ed] restraint” in this case. ADD37.

2. The majority’s mandatory injunction is all the more troubling because it gags speech. This Court has held that “where * * * there is at least some risk that constitutionally protected speech will be enjoined, only a particularly strong showing of likely success, and of harm to the defendant as well, could suffice” to

¹¹ The majority claimed that “neither party raised” this issue. But Google and YouTube argued in their merits brief that to qualify as an “author” entitled to copyright protection, one must be “the person who translates an idea into a fixed, tangible expression.” Br. 16 (citation omitted).

justify an injunction. *Overstreet*, 409 F.3d at 1208 n.13; *accord Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002). And the Court has made clear that that “particularly strong showing” is “a higher bar than usual[ly] is set for those seeking injunctive relief.” *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 957-58 (9th Cir. 2010).

Here, there is clearly a “risk that constitutionally protected speech will be enjoined.” *Overstreet*, 409 F.3d at 1208 n.13. Films are protected speech, *infra* at 38, and that protection applies to media platforms like Google and YouTube that host films just as it does to a film’s creator, *see Preferred Commc’ns, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1410 n.10 (9th Cir. 1985). The panel should have required Garcia to clear the “higher bar” applicable in free-speech cases.

The majority discounted this concern, stating that “the First Amendment doesn’t protect copyright infringement.” ADD18 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 219-220 (2003)). But that truism does not resolve the issue. The question at this juncture is *whether* there has been a copyright violation at all. As the dissent recognized—and the majority acknowledged—“the case at bar does not present copyright infringement *per se*,” but instead a mere possibility of infringement of five seconds in a 14-minute work. ADD37; *id.* at 10. That distinction matters. It is one thing to ban speech that violates a law; it is quite

another to ban speech that has been *alleged* to violate a law, before that determination has even been made.

If the Court were to conclude that constitutionally protected speech may sometimes be enjoined based on the mere possibility of copyright infringement, it should require that possibility to be a very strong one. That, after all, is the point of *Overstreet*: When probability is at play, First Amendment concerns mean the Court cannot simply rely on more-likely-than-not preponderance standards. In not requiring Garcia to make a “particularly strong showing of likely success,” *Overstreet*, 409 F.3d at 1208 n.13, the panel contravened Circuit precedent.

3. These two factors standing alone would be enough to have denied Garcia’s preliminary-injunction request, and therefore to warrant a stay of the panel’s injunction. But here, the majority had a third hurdle to clear. Because the District Court denied Garcia’s motion for a preliminary injunction, the majority could only reverse that decision under a higher standard still: that the District Court abused its discretion. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1097-98 (9th Cir. 2000). As this Court has emphasized time and again, it will not reverse a district court’s preliminary-injunction decision “simply because the appellate court would have arrived at a different result if it applied the law to the facts of the case.” *Sports Form, Inc. v. United Press Int’l, Inc.*, 686 F.2d 750 (9th Cir. 1982); *accord, e.g., Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012).

The majority failed to heed that limitation. For instance, it brushed aside the District Court's conclusion (at ER893) that Garcia was dilatory in seeking a preliminary injunction, undermining her claim of harm. ADD15-16. The majority likewise paid no heed to the District Court's conclusion that removing Garcia's performance from YouTube would not prevent the harms of which she complained. *Id.* Instead, the majority reached its own conclusions as if it were evaluating the record in the first instance.

As the dissent recognized, ADD34-35, that freewheeling approach conflicts with this Circuit's settled practice. Because "[t]he assignment of weights to particular harms is a matter for district courts to decide," *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010), a district court's harm-related findings constitute an abuse of discretion "only if 'illogical, implausible, or without support in inferences that may be drawn' " from the record. *McCormack v. Hiedeman*, 694 F.3d 1004, 1017 (9th Cir. 2012) (citation omitted). In overruling the District Court's irreparable-harm conclusions by "substitut[ing] its own explanation" of why the record favors Garcia, ADD34, the majority deviated from this Court's guidance. Moreover, given that the majority acknowledged that its own rule was "fairly debatable," ADD10, it could not at the same time "say that the district court abused its discretion" in concluding otherwise. *United States v.*

Parish, 308 F.3d 1025, 1031 (9th Cir. 2002); accord *Meadows v. Dominican Republic*, 817 F.2d 517, 521 (9th Cir. 1987).

B. Google And YouTube Are Likely To Prevail On Rehearing En Banc Because The Panel’s Copyright Analysis Went Astray And Created Unworkable Rules.

The panel also should have entered a stay for a second reason: Google and YouTube are (at least) reasonably likely to succeed in showing that the panel erred in its copyright analysis. As the U.S. Copyright Office has now explained, Garcia has no claim for infringement of her five-second performance because she owns no copyright in that performance. But even if she did have a copyright, Garcia still would have no claim for infringement because she granted Youssef an implied license to use any copyrighted material.

1. The Copyright Office Disagrees With The Panel Majority On The Merits, And Its Position Is Entitled To Significant Weight.

The Copyright Office has succinctly explained the primary flaw in the panel majority’s opinion: Garcia has no copyright in her brief performance because her performance was never a stand-alone, but was instead indisputably intended to be merged into a unitary whole. Ex. 1 at 10. As the Office explained—and as we set forth in more detail below—“[w]hile a novelist, playwright, or screenwriter may create distinct works that are later adapted or incorporated into a motion picture, * * * an actor or actress’s performance in the making of a motion picture is an integrated part of the resulting work, the motion picture as a whole.” *Id.* The

Office explained that that view is supported by the text of the Copyright Act as well as by the Act's legislative history, which states that movies typically are a single joint work. *Id.* (citing H.R. Rep. 94-1476 at 120). It concluded that letting Garcia register a copyright in her five-second performance would contradict "[t]he U.S. Copyright Office's longstanding practices." *Id.*

The Copyright Office's refusal carries significant weight. The Office's refusal to register a copyright is "entitled to judicial deference if reasonable." *Batjac Prods. Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1230 (9th Cir. 1998) (quotation marks omitted). Indeed, Congress strove to ensure that the Office's registration decisions are taken into account by the courts: Once the Office rejects an application, the claimant can only sue on the purported copyright "if" she has served the Office with the complaint. 17 U.S.C. § 411(a). (Google and YouTube have no knowledge of Garcia having done so here.) At that point, the Office has the statutory right to intervene to defend its refusal, *see id.*—a right violated here because judicial determination preceded the Office's decision.

The Copyright Office's refusal, in short, underscores that the majority's opinion is worse than "fairly debatable"; it is wrong. We explain why in more detail below.

2. Garcia Owns No Copyright.

Garcia’s claim to a copyright fails for a number of independent reasons. First and foremost, she never owned a copyright in her performance.

a. Garcia’s performance is not a separately copyrightable “work.”

“Innocence of Muslims” is a copyrightable “work.” But Garcia has emphatically disclaimed any ownership interest in that work, even as a joint author. *See* ADD6 (“Garcia doesn’t claim a copyright interest in ‘Innocence of Muslims’ itself”). Instead, Garcia claims—and the panel majority held—that she has a copyright in “her own performance within the film” that is distinct from the copyright in the film as a whole. ADD7. That is incorrect.

i. Not every performance is a “work” protected by a copyright. Rather, copyright protection extends only to “original *works* of authorship[.]” 17 U.S.C. § 102(a) (emphasis added). The term “work” is ubiquitous in the Copyright Act, and the way it is used confirms—over and over again—that there can be no copyright unless the expression qualifies as a “work.” *See id.* § 102(a)(1)-(8) (“[w]orks of authorship include” eight specific categories of “works”); *id.* § 201(a) (“[c]opyright in a work protected under this title vests initially in the author or authors of the work”); *id.* § 101.

The statutory text demonstrates that a fleeting five-second appearance on screen generally would not constitute a separate copyrightable “work.”¹² The first indication comes from Section 102. That provision defines “[w]orks of authorship” to “include” “motion pictures and other audiovisual works.” 17 U.S.C. § 102(a)(6). The clear implication is that it is the motion picture as a whole—not its constituent parts—that constitutes a copyrightable “work.” That inference is confirmed by other provisions of Section 102. *See, e.g., id.* § 102(a)(7) (“sound recording” is one “work[] of authorship,” even though songs usually embody multiple people’s creative efforts);¹³ *id.* § 102(a)(2) (same with “musical works”); *id.* § 102(a)(3) (same with “dramatic works”).

To be sure, Section 102 states that the universe of copyrightable works “include[s]” the eight listed categories, *id.* § 102, and “[t]he terms ‘including’ and ‘such as’ are illustrative and not limitive,” *id.* § 101. Nonetheless, the listed

¹² This is not to say that an actor’s contributions could never be such that the actor would be the author (or a co-author) of the *film as a whole*. They could. *See infra* at 32. But, as noted previously, Garcia has expressly disclaimed co-authorship of “Innocence of Muslims” as a whole.

¹³ For this reason, the panel erred when it stated (without citation) that “Sinéad O’Connor can claim a copyright in her performance of ‘Nothing Compares 2 U’ even though the song was written by Prince.” ADD9 n.5. Neither O’Connor nor anyone else could claim a copyright in her “performance.” Rather, such a copyright would be limited to a “sound recording[]” or an “audiovisual work[]” capturing O’Connor’s performance, and, without more information, it is not possible to say whether O’Connor or someone else (such as the director or producer), or both, would own the copyright to such a work. 17 U.S.C. § 102(a)(6) & (a)(7); *see also Nimmer on Copyright* § 2.10.

categories share certain characteristics, and those shared characteristics illuminate the meaning of the general term “works of authorship.” *See Microsoft v. Commissioner*, 311 F.3d 1178, 1184 (9th Cir. 2002) (words in a list must be judged by the company they keep). An acting performance such as Garcia’s is not remotely similar to anything in Section 102’s illustrative list. It is not a work.¹⁴

ii. The copyright concept of the “joint work” confirms that “Innocence of Muslims” is a single work. Motion pictures are quintessential collaborative efforts. *See Seger & Whetmore, From Script to Screen: The Collaborative Art of Filmmaking* (2004). In copyright law, such collaborative efforts are called “joint works.” 17 U.S.C. § 101. The statute defines a joint work as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” *Id.* And the committee reports on the Copyright Act expressly includes “*motion picture[s]*” among their examples of such joint works. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 120 (1976) (emphasis added); *accord* S. Rep. No. 473, 94th cong., 1st Sess. 103-04 (1975). So it was here. Despite the controversy over its message, Youssef’s film

¹⁴ There are, of course, situations in which a larger copyrighted work is comprised of freestanding pieces that are themselves separately copyrighted works. *See* 17 U.S.C. § 101 (defining “collective work”). But “Innocence of Muslims” is not sensibly analogized to a short-story collection or any other collective work. Rather, like the vast majority of motion pictures, it is a single “work.”

was typical in how it was made: Everyone understood that their contributions would be part of a unitary whole. That unitary whole was a single work.

That explains why Garcia, and the panel, had to twist copyright law into new shapes to reach the outcome they sought. Youssef was at least a joint author of “Innocence of Muslims.” And critically, as a joint author, *he had the right to post the movie to You Tube and to license others to do so. See Oddo v. Ries*, 743 F.2d 630, 633 (9th Cir. 1984). To prevail, therefore, Garcia could not accept that a movie is a single work and argue that she was a joint author. Instead, she had to ask this Court to go where no court had ever gone, and the panel agreed. It created a new species of copyrighted work: the performance that was created as a contribution to a unitary whole and yet somehow is separately copyrightable. There is no such creature, as the Copyright Office’s rejection letter to Garcia explains. The majority was wrong to imagine that movies are nothing more than dozens—if not hundreds—of separately copyrighted “works” hopefully stitched together by contracts and implied licenses. As this Court said in *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*: “A motion picture is a work to which many contribute; however, those contributions ultimately merge to create a unitary whole.” 531 F.3d 962, 975 (9th Cir. 2008).

iii. The panel majority’s approach would trigger bizarre real-world consequences. For one thing, under Garcia’s theory—that she has a copyright in

her performance, but is not a joint author—it is possible for a director to own the copyright to scattered bits and pieces, but not all, of his or her own film. Francis Ford Coppola, for example, might own the copyright to “The Godfather”—minus a six-second piece here, and a 30-second piece there, and a two-minute portion at the end. Federal law does not make Swiss cheese of copyrights in this way.

For another, it is black-letter law that one co-author has no ability to prevent another from using or licensing a joint work in ways that she finds objectionable. *Oddo*, 743 F.2d at 633; 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 6.10[A][1][a] (1989). Thus even if Garcia and Youssef were co-authors of the entire film “Innocence of Muslims”—which Garcia admits is not the case—she would be powerless to prevent Youssef from uploading the film to YouTube or licensing others to do so. Yet under the majority’s approach, Garcia was granted precisely that power on the theory that she was the sole owner of *five seconds* of “Innocence of Muslims.” The majority’s unprecedented holding turns joint authorship law on its head.

It is no answer to say, as the panel’s amended order did, that Garcia’s “only” entitlement is to require Google to remove “any version of ‘Innocence of Muslims’ that * * * include[s] Cindy Lee Garcia’s performance.” ADD43. There will be many instances in which it simply is not feasible to remove a particular actor’s performance from a film—for example, where the actor appears in the background

of important scenes throughout the film. Moreover, it is bizarre to imagine a platform like YouTube as an editor of user content, and difficult in any event to imagine how it could excise a performance from a film without disturbing the rights of other copyright holders.

b. Garcia is not an “author.”

Even if Garcia’s performance were a separate copyrightable “work,” Garcia would not own a copyright here because she would not be the work’s author. That is so for two reasons. First, Garcia does not meet the authorship standard because she “had no creative control over the script or her performance.” ADD25 (Smith, J., dissenting). Second, any work here was a “work made for hire.”

i. The Supreme Court has defined an “author as the person to whom the work owes its origin and who superintended the whole work, the ‘master mind.’” *Aalmuhammed*, 202 F.3d at 1233 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1883)).¹⁵ This standard “requires more than a minimal

¹⁵ The panel majority dismissed *Aalmuhammed* on the ground that it “only discusses what is required for a contributor to a work to assert joint ownership over the *entire* work.” ADD8. Not so. As *Aalmuhammed* recognized, “[b]y statutory definition, a ‘joint work’ requires ‘two or more authors.’” 202 F.3d at 1232 (quoting 17 U.S.C. § 101). As a result, the *Aalmuhammed* court was required to—and in fact did—articulate “general principles of authorship that assist in analyzing Garcia’s interest in her acting performance.” ADD23 (Smith, J., dissenting). *Aalmuhammed* thus is relevant here. And it underscores the fundamental unworkability of the majority’s decision. In *Aalmuhammed*, after all, the plaintiff submitted evidence that he provided voice-overs and other contributions to the hit film *Malcolm X*. 202 F.3d at 1230. Under the majority’s view of things, that

creative or original contribution to the work.” *Id.* at 1233. Rather, an author is a person with “creative control.” *Id.* at 1232. By contrast, “the creator of a work at another’s direction, without contributing intellectual modification, is not an author.” *Kyjen Co., Inc. v. Vo-Toys, Inc.*, 223 F. Supp. 2d 1065, 1068 (C.D.Cal. 2002); *accord Lakedreams v. Taylor*, 932 F.2d 1103, 1108 (5th Cir. 1991) (artist was not an “author” because “[w]hile the final artwork may have been slightly different from the text and drawings initially given to [him],” the project’s directors “directed the changes themselves”).

This understanding of authorship is tied closely to the Copyright Act’s definition of fixation. The Act teaches that a work is “fixed” when it is placed in a tangible medium of expression “by or under the authority of the author.” 17 U.S.C. § 101. In other words, the “author” is the person with the power to control how the work is fixed. That control is wielded by the “master mind” of the work or the one who has “artistic control,” not an actress with a small role such as Garcia. *Aalmuhammed*, 202 F.3d at 1232.

Garcia cannot satisfy the creative-control standard for authorship because she “had no creative control over the script or her performance.” ADD25 (Smith, J., dissenting). “Garcia was not the originator of ideas or concepts. She simply acted out others’ ideas or script.” *Id.* In fact, Garcia’s own Complaint describes Youssef

means he could have sought an injunction *completely blocking distribution of Malcolm X* unless and until his contributions were stripped from the film.

as “the writer and producer of the Film,” who both “managed” and “was in charge of all aspects of production.” ER65. Youssef’s control extended all the way down; his script, for example, directed Garcia to “seem[] concerned” while delivering her lines. ER85. Garcia thus was at most “the creator of a work at another’s direction,” *Kyjen*, 223 F. Supp. 2d at 1068, and to the extent she deviated from her directions, Youssef “directed the changes” himself, *Lakedreams*, 932 F.2d at 1108. Garcia’s exceptionally minor contribution cannot qualify her as an “author.”

ii. Garcia also was not an author for a second reason: Any separately copyrightable work by Garcia would be a work made for hire, and in such cases “the employer or other person for whom the work was prepared is considered the author of the work.” 17 U.S.C. § 201(b).

As relevant here, a “work made for hire” is one “prepared by an employee within the scope of his or her employment.” *Id.* § 101. The Supreme Court has held that that phrase “should be understood in light of the general common law of agency.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 741 (1989). The controlling question is whether the hiring party had sufficient “right[s] to control the manner and means by which the product is accomplished” to make the worker an employee rather than an independent contractor. *Id.* at 751.

Here, Youssef had such control. As Judge Smith explained, “ ‘most contributions to a motion picture are created as works made for hire.’” ADD32

(citation omitted), and Garcia’s performance was no exception. Garcia conceded that “Youssef ‘managed all aspects of production,’ controlling both the manner and means of making the film, including the scenes featuring Garcia.” *Id.* In addition, “[t]he bulk of the other factors also suggest that Garcia is an employee,” including the fact that Youssef “provided the instrumentalities and tools, dictated the filming location,” and “decided when and how long Garcia worked[.]” *Id.* Thus “[t]he central factor of control and many other factors ‘weigh heavily’ for finding an employment relationship.” ADD33.

The majority’s contrary finding conflicts with long-standing Internal Revenue Service practice. Like the Copyright Act, the tax code uses a common-law test to determine who is an employee. *See Professional & Exec. Leasing v. Commissioner*, 862 F.2d 751, 753 (9th Cir. 1988). In applying that test, the Service has held for decades that a film actress—even one that “deliver[s] a few sentences of dialogue from a script written by a professional writer”—is “an employee” of the film producer. Rev. Rul. 57-155, 1957-1 C.B. 333 (1957); *see also* I.R.S. Tech. Mem. 8202020 (Sept. 30, 1981).¹⁶

¹⁶ Section 101 also contemplates that parties can agree in writing that a contribution will be a work for hire. In this case, Google submitted such a written agreement to the District Court, and Garcia contested its authenticity. *See supra* at 7-8. But rather than remand so the District Court could consider the effect of that key document, the panel majority plowed ahead and imposed its injunction, then refused to stay it. The panel should have remanded for the District Court to

c. *Even if Garcia were an author, she would at most be a joint author.*

Finally, even if Garcia's performance could constitute a separately copyrightable work, Garcia would be at most a co-author of that work. The majority disagreed because a work is joint only "if the authors involved in its creation *intend* that it be so." ADD7 n.3. And on the intent question, the majority viewed Garcia's assertions that she did not intend to merge her contributions with Youssef's as conclusive. *Id.*

But the "intention standard is not strictly subjective." *Thomson v. Larson*, 147 F.3d 195, 201 (2d Cir. 1998). Rather, it turns on "factual indicia" and objective signs. *Id.* And viewed objectively, Garcia intended to merge her contributions with Youssef's. She appeared on set, understood her creative contribution would be merged with Youssef's as scriptwriter and producer, and delivered her lines. ER193-194. That is enough to show that Garcia intended her contributions to merge with Youssef's into a unitary joint work.

To be sure, the better view is that Youssef hired Garcia to help create *Youssef's* work, such that she has no authorial role at all. This is established by the factual allegations in Garcia's own Complaint. *See supra* at 4, 31. But at minimum, there can be no credible suggestion that Youssef was simply helping

resolve this critical factual dispute *before* imposing an injunction silencing speech. *See Flexible Lifeline*, 654 F.3d at 1000.

Garcia create *her own* independent work. Thus the most Garcia could possibly assert even with respect to her own performance is co-author status. And that is fatal to her infringement claim because, as we have explained, Youssef as co-author would have every right to post Garcia's performance to YouTube without her permission. *Supra* at 26.

3. Garcia Granted Youssef An Implied License.

Even if Garcia owned a copyright, there still would be no infringement here because she granted Youssef an implied license to use the footage of her performance.

Although the Copyright Act provides that “[a] transfer of copyright ownership” must be in writing, 17 U.S.C. § 204(a), its definition of that term specifically exempts “a nonexclusive license” to use the work, *id.* § 101. Such a license “ ‘may be granted orally’ ” or may be “ ‘implied from conduct.’ ” *Effects Assoc. Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990) (citation omitted); *see also Asset Marketing Sys., Inc. v. Gagnon*, 542 F.3d 748, 755 (9th Cir. 2008).

The panel majority agreed that, at minimum, Garcia “granted Youssef an implied license” to use any copyrightable aspects of her performance. ADD13. It also recognized that “[a]ny such license must be construed broadly,” because otherwise “actors could leverage their individual contributions into de facto authorial control over the film.” ADD13-15. And yet the panel majority held that

Youssef exceeded the implied license's scope because his film "differ[ed] so radically from anything Garcia could have imagined when she was cast." *Id.*

In so holding, the majority put a limitation on Garcia's nonexclusive license that Garcia never did: that she consented to use of her performance for all purposes *except* ones she did not contemplate. But that is not the way contractual agreements work. Courts cannot give effect to licensors' "unexpressed intent." *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.3d 853, 857 (9th Cir. 1992). Although Garcia avers that she asked Youssef about the movie's content, she never claims that she expressed to Youssef—by words or conduct—that use of her performance was conditioned on that description of the content, or that Youssef could not exercise final authorial control over the finished product. *See* ER194-195. *See* ER194-195.

The majority's except-in-circumstances-the-actor-couldn't-have-imagined caveat on implied licenses creates a dangerous precedent. Many performers know little about the project in which they are appearing. Woody Allen famously gives his actors only their own lines. Jacob Bernstein, *Woody Allen Skips His Film's Premiere Party*, N.Y. Times, Jul. 24, 2013. Many other productions do not give full scripts to every extra and day player. Mark Litwak, *Do Your Actors Own Your Film?*, Independent Filmmaker Project (Mar. 3, 2014).¹⁷ And there are entire

¹⁷ Available at <http://www.ifp.org/resources/do-your-actors-own-your-film/>.

genres—mockumentaries, exposés—that involve misleading people about the nature of the project. See *Psenickska v. Twentieth Century Fox Film Corp.* 409 Fed. App’x 368 (2d Cir. 2009) (per curiam) (discussing the *Borat* mockumentary).

The majority also stated that this case is different because Youssef “lied to Garcia * * * and she agreed to perform in reliance on that lie.” ADD14. But here too, the case’s unusual facts obscure the difficulties of application such a test would invariably present. What sorts of lies count (or do not)? Are some lies too trivial, even if the plaintiff relied on them, and what metric are courts to use in conducting that assessment? How would reliance be proved?

The majority’s vague definition of the outer bounds of actors’ implied licenses will create mischief within the industry. And even if standards could be articulated, the majority’s entire framework “permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.” *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975).

4. The Majority’s Opinion Is Unworkable.

The panel majority’s rules are not just wrong; they are also unworkable. They would wreak havoc on movie studios, documentary filmmakers, and creative enterprises of all types by giving their most minor contributors potential control over their works. As commentators have noted, the majority’s decision means

“anyone whose expression appears in a film and who doesn’t have a signed work-for-hire agreement has a sufficiently plausible copyright claim to wave around the threat of an injunction to shut down distribution.” Jonathan Handel, *Hollywood Experts Divided on Implications of ‘Muslims’ Ruling*, *The Hollywood Reporter*, Feb. 28, 2014.¹⁸

The panel brushed aside this problem, asserting that copyright interests in the vast majority of films are covered by contract or the work-for-hire doctrine. ADD11. But that view fails to take account of the breathtaking transformation during the past decade in content creation—much of which takes place in a decentralized, bottom-up ecosystem. In an age of instant uploads, “every schmuck with a videocamera” really *can* hope to be “a movie mogul,” communicating with countless viewers. ADD13. Most of the millions of amateur filmmakers and their collaborators who upload videos to the Internet do not have bulletproof written agreements. That means anyone who happens to appear in even the most fleeting manner will now have a credible claim to demand payment and block distribution.

Indeed, even when it comes to larger-scale professional filmmakers, the majority’s assurances ring hollow. Many professional filmmakers try to obtain releases and assignments from participants. But perfection is impossible and long-term retention and location of these agreements is often difficult. The majority’s

¹⁸ Available at <http://www.hollywoodreporter.com/thr-esq/hollywood-experts-divided-implications-muslims-684607>.

approach opens the door to an extra in *Gone With the Wind*¹⁹ contacting Warner Brothers and demanding that it purge his performance from every copy of the film in its inventory unless it can find a work-for-hire agreement in its files.

Nor does the implied-license regime solve the problem, despite the majority's suggestion. ADD13-15. For one thing, a case-by-case implied-license regime means "actors can claim copyright and set up a fact dispute that will be hard to predict and expensive to resolve." Eric Goldman, *In Its "Innocence of Muslims" Ruling, the Ninth Circuit is Guilty of Judicial Activism*, Technology & Marketing Law Blog (Feb. 27, 2014).²⁰ Moreover, any "nonexclusive * * * license of copyright" is subject to termination 35 years after the initial grant. 17 U.S.C. § 203. If actors were to terminate their nonexclusive implied licenses, continuing distribution of older movies could be imperiled.

Finally, whatever may be said for a court's ability to resolve the fact-bound implied-license disputes that the panel majority's rule will invite, content hosts like YouTube are most certainly ill-suited to do so. How is YouTube (or any content host) to get to the bottom of what a person in a video "could have imagined when she was cast" or whether the filmmaker "lied to" her, much less whether the actor "agreed to perform in reliance on that lie?" ADD14. Under the panel majority's

¹⁹ Copyright protection lasts for the author's life plus 70 years. 17 U.S.C. § 302(a).

²⁰ Available at <http://blog.ericgoldman.org/archives/2014/02/in-its-innocence-of-muslims-ruling-the-ninth-circuit-is-guilty-of-judicial-activism-garcia-v-google.htm>.

approach, the only realistic choice would be to “err on the side of actors’ assertions” and defer to the copyright claim—and thus remove content that is not in fact that claimant’s to control. Goldman, *supra*. That is a threat to the marketplace of speech.

C. Google, YouTube, And The Public Interest Will Be Irreparably Harmed Unless The Panel’s Injunction Is Stayed.

The panel likewise should have recognized that Google, YouTube, and the American public will suffer irreparable harm if its sweeping injunction is not stayed. Even though “Innocence of Muslims” enjoys full First Amendment protection, *see Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 958 n.11 (9th Cir. 2009), *aff’d sub nom. Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729 (2011), the majority’s ruling forces Google and YouTube to remove it from their platforms. That alone satisfies the irreparable-harm prong because “ ‘[t]he loss of First Amendment freedoms, for even minimal periods, unquestionably constitutes irreparable injury.’ ” *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Staying the injunction also is in the public interest—a separate factor of the stay test. *See Flexible Lifeline*, 654 F.3d at 994. The Supreme Court has emphasized that the right to receive information exists “regardless of [the information’s] social worth” and is “fundamental to our free society.” *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). That right is at its apex where, as here, the

information bears on “matters of public concern”; such information “is at the heart of the First Amendment’s protection.” *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quotation marks omitted); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”) (quotation marks omitted).

“Innocence of Muslims” has featured prominently in recent public discourse regarding foreign policy and religion. It has been “the subject of extensive international debate about free expression online.” Andrew McDiarmid, *U.S. Court Fumbles First Amendment, Orders Global Takedown of ‘Innocence of Muslims,’* Feb. 27, 2014.²¹ In short, it has been “the subject of legitimate news interest,” *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004), and thus bears on matters of public concern. Even Garcia concedes this point. Garcia Reply Br. 4. And the panel’s gag order would eliminate the film from public view via Google-controlled platforms—an action akin to “the removal of books from the shelves of a [] library,” which the Supreme Court has held to “contract the spectrum of available knowledge” and thus undermine “the spirit of the First Amendment.” *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853,

²¹ Available at <https://www.cdt.org/blogs/andrew-mcdiarmid/2702us-court-fumbles-first-amendment-orders-global-takedown-%E2%80%98innocence-muslim>.

866-67 (1982). The public interest accordingly favors a stay of the panel's injunction.

Finally, should this ruling remain on the books, the task of trying to sort out who consented to what will chill speech. It is entirely possible that some distributors will err on the side of caution and take down anything that might potentially be a copyright violation under the panel's holding. *See supra* at 37-38. The threat to free speech from such reasoning is palpable.

D. Garcia Will Not Be Harmed By A Stay.

On the flip side, while Garcia's allegations understandably generate concern, it is unclear what harm she would suffer if the panel's injunction were stayed pending disposition of the impending rehearing petition.

To weigh against the irreparable harm Google and YouTube will suffer without a stay, the stay must “ ‘*substantially* injure the other parties interested in the proceeding.’ ” *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (emphasis added; citation omitted). Garcia has argued that a stay harms her because “as soon as the order or opinion [was] available to the public,” she was “free from the fatwa and terror she has endured since a fatwa was issued against her.” Garcia Opp. to Appellees' Mot. for Emergency Stay 9. But that assertion has no factual support. Garcia has not shown that the fatwa has been lifted by dint of the panel's take-down order. Nor has Garcia shown that delaying the video's removal from

YouTube and other Google platforms for a short period while the Court considers whether to take the case en banc will change her situation in any substantial way.

Garcia herself has implicitly recognized time is not of the essence in this matter. Throughout the more than 14 months this appeal has been pending, Garcia never sought an injunction pending appeal or even expedited briefing and argument. Garcia's willingness to let the appeal play out in the normal course proves that it would not "substantially injure" her to leave "Innocence of Muslims" available on YouTube while Google and YouTube seek en banc review.²²

Moreover, limiting public access to "Innocence of Muslims" will not sever Garcia's connection with the film and therefore will not redress her alleged injuries. That fact should have foreclosed the panel from issuing the injunction in the first place, *see Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011) (movant must show "sufficient causal connection" between the irreparable harm it alleges and the injunctive relief it seeks), and it also demonstrates why Garcia will not be harmed by a stay. The panel failed to recognize how widely the video has circulated outside of Google's platforms; it remains accessible on many sites. *Supra* n.1. Removing the video from Google platforms thus will not eliminate it

²² Should en banc rehearing on the merits be granted, Google and YouTube would seek a highly expedited briefing schedule.

from the Internet.²³ In addition, tens of thousands of web pages that do not contain Garcia's performance nonetheless document the video's contents and her relationship to the project: A search of Westlaw's "News" database reveals 445 articles mentioning Garcia by name and a Google search returns 959,000 hits.

As Judge Smith said at oral argument, the injunction is unlikely to mitigate any risks Garcia faces—it "won't put the toothpaste back in the tube." Oral Arg. at 30:45-30:47. That is yet another reason why the injunction never should have issued. *See Perfect 10*, 653 F.3d at 981. And it means Garcia cannot demonstrate that a short delay in implementing the panel's order "substantially" worsens her situation. *Lair*, 697 F.3d at 1203. The balance of equities favors Google and YouTube.

²³ The panel majority blamed Google for an absence of evidence on this point, ADD17, but the burden was on *Garcia* to show that the injunction she sought would remedy her alleged harm. *Perfect 10*, 653 F.3d at 982.

CONCLUSION

For the foregoing reasons, rehearing en banc should be granted and the panel's injunction stayed.

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I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 9,988 words.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 12, 2014.

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