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No. ____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ELECTRONIC ARTS INC.,
Petitioner,

v.

RYAN HART, INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment protects a speaker against a state-law right-of-publicity claim that challenges the realistic use of a person's name or likeness in an expressive work.

PARTIES TO THE PROCEEDING

The Defendant-Appellee below, who is the Petitioner before this Court, is Electronic Arts Inc.

The Plaintiff-Appellant below, who is the Respondent before this Court, is Ryan Hart, individually and on behalf of all others similarly situated.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states that it has no parent corporation and no publicly held corporation owns ten percent or more of Petitioner's stock.

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OPINIONS BELOW

The opinion of the Third Circuit reversing the grant of summary judgment by the United States District Court for the District of New Jersey and remanding the case is reported at 717 F.3d 141 and reproduced at Petition to the Appendix ("Pet. App.") 1a. The order of the Third Circuit denying Petitioner's subsequent motion for rehearing is unreported and reproduced at Pet. App. 174a.

An initial opinion of the District Court granting Petitioner's motion to dismiss is reported at 740 F. Supp. 2d 658 and reproduced at Pet. App. 147a. The opinion of the District Court granting summary judgment for Petitioner is reported at 808 F. Supp. 2d 757 and reproduced at Pet. App. 72a.

JURISDICTION

The Third Circuit issued its opinion on May 21, 2013. On June 25, 2013, the original panel and the *en banc* Third Circuit denied rehearing, with two judges dissenting from the *en banc* denial. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to

assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend I.

STATEMENT OF THE CASE

This case involves the collision of the First Amendment and the state-law “right of publicity” tort, an issue that has engendered conflict and disarray among the lower courts. The right of publicity is a modern tort, first recognized in 1953.¹ Generally used by celebrities, it accords persons an economic right in their names and likenesses, so they may “profit from the full commercial value of their identities.” *Cardtoons L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 968 (10th Cir. 1996).

In recent years, right-of-publicity suits have proliferated, targeting a variety of speech and speakers, including musicians who named famous people in their lyrics; filmmakers who produced movies documenting the lives of celebrities and historical figures; authors who wrote “unauthorized biographies”; magazines and greeting-card manufacturers who used celebrity images; video-game makers who used celebrity images in constructing virtual worlds; and artists who depicted celebrities in their artworks.²

¹ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

² See, e.g., *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (OutKast song lyrics); *Valentine v. C.B.S., Inc.*, 698 F.2d 430 (11th Cir. 1983) (Bob Dylan song lyrics); *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (feature movie and book about the Black Panther Party); *Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d 723 (E.D. Mich. 2000), *aff’d*, 267 F.3d 457 (6th Cir. 2001) (television miniseries about the Temptations); *Tyne v. Time Warner Entm’t*

Courts have struggled to reconcile this new tort with the protections afforded by the First Amendment. This Court's only contribution came nearly forty years ago in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), in which the Court held that the First Amendment did not bar a right-of-publicity claim against a television station that broadcast an entertainer's entire human-cannonball act. According to the Court, broadcasting Zacchini's entire act posed a "substantial threat to the economic value of that performance," and the Court contrasted the use of a performer's "entire act" with the broadcast of a person's name or picture in media. *Id.* at 574-76. Thus, *Zacchini* offers little or no guidance in cases involving mere *depictions* of individuals, as opposed to appropriation of their actual performances in full. Indeed, the Court was careful to cabin its decision: "[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media

Co., L.P., 901 So. 2d 802 (Fla. 2005) (movie about a shipwreck); *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (book about a police officer); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (magazine using image of Dustin Hoffman); *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010) (greeting card using image of Paris Hilton); *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47 (2006) (video game); *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018 (2011) (video game); *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982) (bust of Martin Luther King, Jr.); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003) (lithograph of Tiger Woods); John Broder, *Schwarzenegger Files Suit Against Bobblehead Maker*, N.Y. Times, May 18, 2004, at <http://www.nytimes.com/2004/05/18/national/18arnold.html>.

when they broadcast a performer's entire act without his consent." *Id.* at 574-75.

The expressive work at issue in this case is Petitioner's college football video game, which was alleged to include a realistic depiction of former college football player Respondent Ryan Hart. The Third Circuit (and the Ninth Circuit, in an essentially identical case also before this Court on petition for writ of certiorari)³ held that the First Amendment offered no defense to Hart's right-of-publicity claim, because the game's depiction of Hart was *too realistic* and showed him engaged in the same activity—college football—in which he had gained his fame.

The Third and Ninth Circuits recognized that Petitioner's video game was an expressive work, under this Court's holding in *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011). Nonetheless, they held that the game's depiction of the plaintiffs did not enjoy First Amendment protection. According to the Third and Ninth Circuits, the depiction of a person's image or likeness in an expressive work enjoys First Amendment protection against a right-of-publicity claim only if the depiction sufficiently alters or "transforms" the plaintiff's image or likeness. That rule is constitutionally perverse: it affords First Amendment protection only to fanciful or distorted portrayals, not accurate or realistic ones. The rule also

³ *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Names & Likeness Litig.)*, No. 10-15387, 724 F.3d 1268, U.S. App. LEXIS 15649 (9th Cir. July 31, 2013).

chills expression, both because it is hard to predict what a court will decide is sufficiently “transformative,” and because such an inquiry inevitably requires a court to make a subjective judgment about whether a depiction is “artistic,” thus warranting protection, or “literal,” and thus subject to liability.

The test adopted by these two circuits, moreover, conflicts with various other tests adopted by other circuits and state supreme courts, which do not focus on transformation at all. Some of these courts engage in case-by-case balancing of First Amendment interests and right-of-publicity interests—an approach that raises its own constitutional problems. Others give appropriate respect to the First Amendment by confining the right-of-publicity tort to circumstances in which the challenged depiction falsely claims a celebrity commercial endorsement or is unrelated to any other expression and thus gratuitous.

The lower courts’ various and conflicting constitutional tests have resulted in numerous irreconcilable outcomes. For example, the Sixth Circuit has held that the First Amendment protects the inclusion of a professional golfer’s realistic image, prominently displayed in a painted montage including other golfers, *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003), but the Third and Ninth Circuits now have held that the First Amendment does *not* protect an accurate digital depiction of a former college football player in a video game. As the judicial confusion has mounted, scholars, writers, and artists

have begun to recognize a major threat to free expression.⁴ This Court's guidance is urgently needed.

A. Factual Background

Petitioner Electronic Arts' enormously popular *NCAA Football* video game series, first unveiled in 1993, artistically creates a fictional interactive college football gaming experience. In each annual edition of *NCAA Football*, users can play individual games or entire seasons, selecting from among thousands of unnamed virtual players and over 100 virtual college teams. Pet. App. 4a. The virtual football games occur in virtual stadiums filled with virtual fans, coaches, cheerleaders, mascots, and referees, all meticulously crafted by Electronic Arts' video game designers.

The virtual players ("avatars") are clothed in their teams' uniforms and logos. The unnamed avatars are identified only by position and jersey number (*e.g.*, QB

⁴ See, *e.g.*, Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 Stan. L. Rev. 1161 (2006); F. Jay Dougherty, *All the World's Not a Stooge: The 'Transformativeness' Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 Colum. J.L. & Arts 1 (2003); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903 (2003); Diane Leenheer Zimmerman, *Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C. L. Rev. 1503 (2009); Adam Liptak, *When it May Not Pay To be Famous*, N.Y. Times, June 1, 2013, available at <http://www.nytimes.com/2013/06/02/sunday-review/between-the-first-amendment-and-right-of-publicity.html>; Andrea Peterson, *U.S. Court Limits How Art Can Imitate Life*, Wash. Post, Aug. 2, 2013, available at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/02/us-court-limits-how-art-can-imitate-life/>.

#7) but are meant to evoke real players. Thus, for example, an avatar may have an appearance (*e.g.*, height, weight, skin-tone, and throwing arm) and biographical information (*e.g.*, class year) that match those of a real player. *Id.* at 5a.

Within this realistic setting, the game fosters the user's creativity and interactivity. As Judge Ambro put it in his dissenting opinion in this case, "*NCAA Football* involves myriad original graphics, videos, sound effects, and game scenarios. . . . Users are not reenacting real games, but rather are directing the avatars in invented games and seasons." Pet. App. 69a. The game also includes a mode in which the user "coaches" a college team for up to thirty seasons to develop a school's football program over time. *Id.* at 4a. Another mode allows users to control a single virtual player from high school through college, directing the virtual player's choices regarding practices, academics, and social life—all of which affect the virtual player's performance in a game. *Id.* at 4a-5a. "At its essence, EA's *NCAA Football* is a work of interactive historical fiction." *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Names & Likeness Litig.)*, No. 10-15387, 724 F.3d 1268, ___, U.S. App. LEXIS 15649, at *48 (9th Cir. July 31, 2013) (Thomas, J. dissenting).

B. Procedural Background

1. Respondent Ryan Hart played quarterback for Rutgers University from 2002 to 2005. Pet. App. 2a. In June 2009, Hart filed this putative class action lawsuit against Electronic Arts in New Jersey state court, alleging violation of the right of publicity and other claims, and seeking hundreds of millions of dollars in

damages on behalf of the putative class and an injunction prohibiting the use of players' identities in the future and mandating the destruction of all copies of *NCAA Football* in Electronic Arts' possession. C.A. App. 93, 104-05. Electronic Arts removed the lawsuit to the United States District Court for the District of New Jersey on diversity grounds, pursuant to 28 U.S.C. § 1332. Pet. App. 6a.

Hart's right-of-publicity claim was based on the alleged use of his biographical information and likeness in the 2004, 2005, 2006, and 2009 editions of *NCAA Football*. *Id.* at 6a, 57a. Specifically, he claimed that two aspects of the game were tortious: First, the game included an animated avatar of a quarterback wearing a Rutgers uniform with Hart's physical and biographical attributes and career statistics, though not his name or photographic image. Second, in the 2009 edition, a photograph of Hart appeared in a montage when users selected Rutgers as their team. *Id.* at 57a.

In September 2011, the District Court granted summary judgment for Electronic Arts, holding that the First Amendment barred Hart's right-of-publicity claim. *Id.* at 146a.

2. In May 2013, the Third Circuit reversed and remanded. *Id.* at 59a. The court acknowledged that, under this Court's decision in *Brown*, 131 S. Ct. 2729, video games receive "the full force of First Amendment protections." Pet. App. 9a-10a. Nevertheless, the court rejected Petitioner's First Amendment defense. *Id.* at 58a-59a.

The Third Circuit surveyed the myriad legal standards that courts have applied in different

jurisdictions to determine whether the First Amendment bars a right-of-publicity claim. Among them is the test announced in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), under which an expressive work enjoys First Amendment protection against a right-of-publicity claim, unless the use of the individual's likeness is unrelated to the work or merely serves to create a false impression that the individual has endorsed the product. *See* Pet. App. 23a-31a.

The Third Circuit rejected the *Rogers* test on the ground that it was too protective of speech. In the court's view, it was "unfit for widespread application in cases that require a carefully calibrated balancing of two fundamental protections: the right of free expression and the right to control, manage, and profit from one's own identity." *Id.* at 30a.

The court also rejected the Missouri Supreme Court's "predominant use" test, enunciated in *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003). That test asks whether the "predominant purpose" of expressive speech "is to make an expressive comment on or about a celebrity," or instead whether expressive speech "predominantly exploits the commercial value of an individual's identity." Pet. App. 21a-22a (quoting *Doe*, 110 S.W.3d at 374) (quotation marks omitted).

The Third Circuit settled on a version of the transformative-use test, which it derived from *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001). The Third Circuit's transformative-use test "singular[ly] focus[es] on whether the work sufficiently transforms the celebrity's identity or likeness." Pet. App. 43a. In the Third Circuit's view, that test

“appears to strike the best balance” between the interests protected by the right of publicity and the interests protected by the First Amendment “because it provides courts with a flexible—yet uniformly applicable—analytical framework.” *Id.* at 42a.

Applying this test, the Third Circuit held that the First Amendment did not protect *NCAA Football* against Hart’s right-of-publicity claim because the game did not sufficiently “transform” Respondent’s likeness. *See id.* at 58a. The court noted that the avatar matched Hart “in terms of hair color, hair style, and skin tone,” and that the avatar’s “accessories mimic those worn by [Hart] during his time as a Rutgers player.” *Id.* at 49a. The court also emphasized the biographical information associated with the avatar, which “accurately tracks [Hart’s] vital and biographical details.” *Id.* The court summarized:

The digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game. This is not transformative; the various digitized sights and sounds in the video game do not alter or transform [Hart’s] identity in a significant way.

Id. at 50a.

At the same time, the court concluded that the use of an actual photo of Hart as part of a montage within the video game *was* protected by the First Amendment because the image appeared fleetingly and because “the context of [Hart’s] photograph—the montage—imbues

the image with additional meaning beyond simply being a representation of the player.” *Id.* at 58a.

Judge Ambro issued a forceful dissent. He observed that the majority misapplied the transformative-use test in its “narrow focus on an individual’s likeness, rather than how that likeness is incorporated into and transformed by the work as a whole.” *Id.* at 65a. He explained that “[t]o determine whether an individual’s identity has been ‘transformed,’ . . . it is necessary to review the likeness in the context of the work in its entirety, rather than focusing only on the individual’s likeness.” *Id.* at 62a. And here, he found, Hart’s “likeness is transformed by the artistry necessary to create a digitally rendered avatar within the imaginative and interactive world” of the video game. *Id.* at 70a.

Judge Ambro further pointed out that “[t]he protection afforded by the First Amendment to those who weave celebrities into their creative works and sell those works for profit applies equally to video games,” *id.* at 67a (citing *Brown*, 131 S. Ct. at 2733), and that the “use of real-life likeness as ‘characters’ in . . . *NCAA Football* . . . should be as protected as portrayals (fictional or nonfictional) of individuals in movies and books,” *id.* By focusing on Hart’s likeness without regard to the context of the game as a whole, the majority in effect created “a medium-specific metric that provides less protection to video games than other expressive works,” contrary to this Court’s decision in *Brown*. *Id.* at 68a-69a.

On June 25, 2013, the Third Circuit denied Electronic Arts' petition for rehearing and rehearing *en banc*, with two judges dissenting. *Id.* at 175a.

REASONS FOR GRANTING THE PETITION

This Court's review is urgently needed to resolve conflicting authority concerning First Amendment protection against right-of-publicity claims. Since its invention in the second half of the twentieth century,⁵ the right of publicity increasingly has been used in litigation against creators of expressive works—including filmmakers, authors, musicians, and others—whose expression includes the depiction of a real person. In this case, the Third Circuit applied a transformative-use test that makes First Amendment protection depend upon whether the depiction distorts

⁵ The precise formulation of the tort varies from state to state. See J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 6.6-6.133 (2d ed. 2000) (describing varying state-law formulations). For example, some states, such as New Jersey, see Pet. App. 15a, follow the *Restatement (Second) of Torts* (1977), which provides that “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy.” *Id.* at § 652C. Other states follow the more narrow formulation of the *Restatement (Third) of Unfair Competition* (1995), under which “[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability.” See *id.* § 46 (emphasis added). The phrase “for purposes of trade” means “used in advertising the user's goods or services, or . . . placed on merchandise marketed by the user,” and “does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.” *Id.* § 47.

reality enough to be deemed “transformative.” The more accurate and realistic the depiction, the greater the likelihood of liability. Other courts use a different legal test, extending First Amendment protection to expressive depictions of people regardless of whether they are realistic or “transformed,” unless those uses amount to commercial endorsements. Still other courts engage in case-by-case balancing of First Amendment interests against the economic interests protected by the right of publicity.

This disarray and conflict has real-world consequences: without this Court’s guidance, artists, musicians, and other content creators will be unsure what standards apply to their expression and, in particular, whether the realistic depiction of real individuals is tortious. If the realistic portrayal of a person in an expressive work can strip the work of First Amendment protection, then countless creative works are at risk of suit, including films like *The Social Network*, *42*, *A Beautiful Mind*, and *All the President’s Men*; documentaries like Ken Burns’ *Baseball* and *Jazz*; works of historical fiction like E.L. Doctorow’s *Ragtime* and Thomas Pynchon’s *Gravity’s Rainbow*; and “unauthorized biographies” like those by Kitty Kelley. All of these works realistically portray actual individuals in the contexts that made them famous and use their biographical details. The effect of this uncertainty is to chill protected expression, all in the name of a tort with questionable underlying purposes. This Court should grant review to resolve the conflicts and provide clear direction.

I. The Lower Courts Are In Disarray Concerning the First Amendment Limits on Right-of-Publicity Claims.

A. The Third and Ninth Circuits' Transformative-Use Test Protects an Expressive Work Only if the Plaintiff's Likeness Is "Transformed."

This case is the first time a court other than the Ninth Circuit or a California state court has adopted transformative use as the definitive test separating protected expressive speech from unprotected expressive speech. The Third Circuit held that, to enjoy First Amendment protection against a right-of-publicity claim, an expressive depiction must "sufficiently transform[] the celebrity's identity or likeness." Pet. App. 43a. The Ninth Circuit in *Keller*, likewise adopted this version of the transformative-use test, *see Keller*, 2013 U.S. App. LEXIS 15649, at *43-44, and held that *NCAA Football* failed that test because it "realistically portrays college football players in the context of college football games." *Id.* at *28.

The transformative-use test was first articulated in 2001, when the California Supreme Court addressed a right-of-publicity claim based on a charcoal drawing of The Three Stooges. *Comedy III*, 21 P.3d at 799. That court borrowed from copyright fair-use doctrine and adopted what it described as "essentially a balancing test . . . based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." *Id.* Applying that test to the facts at hand,

the court found the Three Stooges drawing, sold as a lithograph and on t-shirts, to be insufficiently transformative. *Id.* at 811. It explained that the artist's "undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame." *Id.*

In so holding, the California Supreme Court distinguished the drawing at issue from Andy Warhol's portraits of celebrities such as Marilyn Monroe, Elizabeth Taylor, and Elvis Presley. It explained: "Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself." *Id.* Underscoring the unpredictability of its test, the court acknowledged that the difference between works that enjoy constitutional protections (like Warhol's depictions of Marilyn Monroe) and those that do not (like the Three Stooges sketch) will "sometimes be subtle." *Id.*⁶

B. The Constitutional Test Adopted Below Is Inconsistent With Tests Applied By Other Courts.

Other circuits and state supreme courts have adopted a different constitutional approach, applying

⁶ See Aaron Moss, *When It Comes to the Right of Publicity, Yes, Doubt* (February 18, 2011) http://www.lawlawlandblog.com/2011/02/when_it_comes_to_the_right_of.html (displaying the Marilyn Monroe painting and the Three Stooges sketch side by side).

different First Amendment tests that do not depend on a depiction's transformative character—albeit tests that themselves conflict with one another.

1. Four Circuits and Two State Supreme Courts Have Held that the First Amendment Protects Non-Commercial Speech Depicting Well-Known People, Even if the Depiction Is Not “Transformed.”

The Second, Fifth, Sixth, and Eleventh Circuits, along with the Florida and Kentucky Supreme Courts, all have held that the First Amendment protects the depiction of an individual within an expressive work, unless the depiction amounts to an unauthorized commercial endorsement or is unrelated to any other expression and thus gratuitous.

In *Rogers*, the Second Circuit considered a federal Lanham Act claim and a state right-of-publicity claim brought by Ginger Rogers against the makers of a Federico Fellini film entitled “Ginger and Fred”—a film not about Ginger Rogers and Fred Astaire, but instead about a fictional Italian duo who imitated them, becoming known in Italy as “Ginger and Fred.” 875 F.2d at 996-97. The Second Circuit ruled in favor of the filmmaker, holding first that the First Amendment protects the use of a person's name in a film title from a Lanham Act claim unless the use was “‘wholly unrelated’ to the movie or was ‘simply a disguised commercial advertisement for the sale of goods or services.’” *Id.* at 1004; *see id.* at 998-1000. The court then applied essentially the same standard in rejecting Rogers' right-of-publicity claim under Oregon law. *Id.* at 1004-05.

Other courts have applied the *Rogers* standard or a similar test in describing the First Amendment limits to right-of-publicity claims. For example, in *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994), the Fifth Circuit cited *Rogers* in concluding that the First Amendment barred a right-of-publicity claim based on a fictionalized, but accurate, account of an undercover police officer's experiences. Similarly, in *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003), the Sixth Circuit adopted *Rogers* and remanded for a factual determination concerning whether the use of the plaintiff's name in a song title was a "disguised commercial advertisement" that would remove it from First Amendment protection.⁷ And in *Valentine v. C.B.S., Inc.*, 698 F.2d 430 (11th Cir. 1983), the Eleventh Circuit construed the Florida right-of-publicity statute to allow the use of a person's name except "to directly promote a product or service," in order to avoid "grave questions" about the constitutionality of any broader interpretation. *Id.* at 433.

The Kentucky Supreme Court also has adopted this constitutional line, holding that a right-of-publicity

⁷ Shortly after *Parks*, the Sixth Circuit decided *ETW*, which involved a right-of-publicity claim challenging an artist's use of Tiger Woods' image in a painting celebrating Woods' golfing achievements. 332 F.3d at 918-19. The Third Circuit below stated that *ETW* applied the transformative-use test. Pet. App. 28a-29a. In fact, *ETW* confirmed that, in *Parks*, the Sixth Circuit had "applied the *Rogers* test to . . . right-of-publicity claims," *ETW*, 332 F.3d at 936 n.17. After applying that test to the facts before it, *ETW* went on to analyze the case under a case-specific balancing of interests, *id.* at 937-38 (citing *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996)), and the transformative-use test, *id.* at 938, as well.

claim may proceed only if the “use of a person’s name or likeness or other interest[s]” “is not sufficiently related to the underlying work, or, if the otherwise constitutionally-protected work is simply disguised commercial advertisement for the sale of goods or services.” *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001) (footnote omitted; internal quotation marks omitted). And the Florida Supreme Court recently adopted a similar rule, stating that, in light of First Amendment constraints, the state’s right of publicity does not bar the use of a name or likeness except to “directly promote a product or service.” *Tyne v. Time Warner Entm’t Co. L.P.*, 901 So. 2d 802, 810 (Fla. 2005); *see also Bullard v. MRA Holding, LLC*, 740 S.E.2d 622, 627 (Ga. 2013) (holding that the use of the plaintiff’s image on the cover of a *College Girls Gone Wild* video was actionable under Georgia’s right of publicity, and did not violate the defendant’s “freedoms of speech and press” because the image was used “as a part of an advertisement”) (quotation marks omitted).

The *Restatement (Third) of Unfair Competition* encourages the adoption of this test as well, explaining that the right of publicity is “fundamentally constrained by the public and constitutional interest in freedom of expression,” and the First Amendment ought to provide a defense against a right-of-publicity claim unless “the name or likeness is used solely to attract attention to a work that is not related to the identified person.” *Restatement (Third) of Unfair Competition*, § 47 cmt. c (1995).

2. Other Courts Engage in Case-Specific Balancing.

Still other courts engage in various forms of balancing, weighing the expressive interests protected by the First Amendment against the economic interests protected by the right of publicity based on the particular facts of the case before them. In so doing, none of these courts has focused on whether a likeness has been sufficiently “transformed.”

Thus, in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, LP*, 505 F.3d 818 (8th Cir. 2007), the Eighth Circuit held that the First Amendment protected fantasy baseball products that used the names of real players, their biographical data, and their performance statistics. In reaching that conclusion, the court emphasized “the public value of information about the game of baseball and its players,” *id.* at 823, noted that “the information used in CBC’s fantasy baseball games is all readily available in the public domain,” *id.*, and reasoned that “it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone,” *id.* By contrast, it continued, “the facts in this case barely, if at all implicate the interests that states typically intend to vindicate by providing rights of publicity to individuals.” *Id.* at 824. Specifically, the court reasoned that publicity rights to one’s name and performance statistics were not needed to encourage baseball players to play the sport, and that there was little risk of consumer confusion, because the defendant’s game included all players. *Id.*

The Third Circuit below attempted to harmonize its outcome with *C.B.C.* on the ground that *C.B.C.* did not involve “[t]he presence of a digital avatar that recreates [the players] in a digital medium.” Pet. App. 48a n.37. That distinction is not persuasive: if the First Amendment protects the use of someone’s name and publicly available performance and biographical data, then it also protects the creation of an avatar reflecting publicly available information about a player’s appearance and playing style. Indeed, the Eighth Circuit itself made clear that *C.B.C.*’s expressive interests would have been no different had it used actual photos of the players, *see* 505 F.3d at 823; nor would the use of photos have changed the court’s balancing of interests.

The Tenth Circuit in *Cardtoons* likewise applied a case-specific balancing test to reject a right-of-publicity claim against the creator of parody baseball cards featuring recognizable caricatures of real baseball players. 95 F.3d at 962-63. The court held that the trading cards were expressive speech “subject to full First Amendment protection,” *id.* at 970, and emphasized that “[c]elebrities . . . are an important element of the shared communicative resources of our cultural domain,” and that “[r]estricting the use of celebrity identities restricts the communication of ideas.” *Id.* at 972. It further held that these interests outweighed any purported justification for the right of publicity. *See id.* at 973-76.

In *Doe*, the Missouri Supreme Court took a markedly different approach, holding that speech receives First Amendment protection against a right-of-publicity claim only if its “*predominant* purpose . . .

is to make an expressive comment on or about a celebrity.” 110 S.W.3d at 374 (quotation marks omitted) (emphasis added). If, on the other hand, the speech “predominantly exploits the commercial value of an individual’s identity,” it is subject to liability under the right of publicity, “even if there is some ‘expressive’ content in it.” *Id.* (quotation marks omitted). In devising that test, the court specifically rejected the transformative-use test. *Id.*⁸

II. This Case Presents an Ideal Vehicle For Addressing the Constitutional Question.

Plainly, the lower courts need guidance from this Court delineating the scope of First Amendment protection against a right-of-publicity claim. This case presents an excellent vehicle for providing such guidance. The Third Circuit not only acknowledged the wide-ranging circuit conflict on the issue, but also recognized that its decision to apply the transformative-use test, as opposed to the more speech-protective *Rogers* test, was outcome-determinative.

The court acknowledged that the *NCAA Football* video game is an expressive work, Pet. App. 9a-10a, and that Petitioner’s alleged use of Hart’s likeness and

⁸ Other courts, applying state common law or statutory exceptions designed to accommodate constitutional concerns, have drawn the line between protected and unprotected celebrity depictions by focusing on whether the publication is “newsworthy” or in the “public interest.” See, e.g., *Toffoloni v. LFP Publ’g Group, LLC*, 572 F.3d 1201, 1208 (11th Cir. 2009) (applying Georgia law); *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793-94 (1995) (applying California law).

biographical information plainly was related to the work and not merely a “disguised commercial advertisement for the sale of goods or services.” *Rogers*, 875 F.2d at 1004-05; see Pet. App. 30a-31a. Accordingly, if the Third Circuit had applied *Rogers* and limited the right of publicity to situations involving a false suggestion of commercial endorsement or purely gratuitous depictions unrelated to other expression, Electronic Arts would have prevailed. The Third Circuit declined to do so, however, because it believed that *Rogers* did not give sufficient weight to “the right to control, manage, and profit from one’s own identity” as against a speaker’s First Amendment rights. Pet. App. 30a.

The Ninth Circuit’s opinions in two other lawsuits, also involving claims challenging the depiction of football players in Electronic Arts football video games, illustrate how the choice of test is outcome-determinative. In *Keller*, involving a right-of-publicity claim against *NCAA Football* essentially identical to Respondent’s, the Ninth Circuit adopted the same the transformative-use test as the Third Circuit and rejected Electronic Arts’ First Amendment defense. *Keller*, 2013 U.S. App. LEXIS, at *26-27. Yet on the same day, the same Ninth Circuit panel issued an opinion in *Brown v. Electronic Arts Inc*, No. 09-56675, 724 F.3d 1235, U.S. App. LEXIS 15647 (9th Cir. July 31, 2013), in which it held that former NFL star Jim Brown’s Lanham Act claim, based on the use of Brown’s likeness in Electronic Arts’ *Madden NFL*, was barred by the First Amendment. Because the *Brown* case involved a Lanham Act claim, the panel applied the *Rogers* test. *Id.* at *13. As these two decisions

illustrate, the choice of test made all the constitutional difference.

III. The Third Circuit's Holding Is Wrong and Conflicts with This Court's First Amendment Jurisprudence.

This Court's review also is warranted because the Third Circuit's decision—which allows a state to impose tort liability for non-commercial expression that portrays a person realistically—is both wrong and dangerous. The decision cannot be squared with this Court's precedents, and it threatens to chill the exercise of First Amendment rights.

A. The Adopted Transformative-Use Test Does Not Adequately Respect First Amendment Rights.

The Third and Ninth's Circuits' transformative-use test does not properly limit the right of publicity so that it becomes consistent with the First Amendment.

The right of publicity penalizes fully protected and valuable speech based on its content: the tort proscribes expression because it includes another's name or likeness within its content. *Bartnicki v. Vopper*, 532 U.S. 514, 521 (2001).⁹ This Court repeatedly has held, however, that “[c]ontent-based regulations” of speech “are presumptively invalid” and must be subjected to strict constitutional scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992);

⁹ See also *Volokh*, *supra* n.4 at 912 n.35 (2003) (“The right of publicity is clearly content-based: It prohibits the unlicensed use of particular content (people’s name or likenesses).”).

accord, e.g., *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (“[A]s a general matter . . . government has no power to restrict expression because of . . . its content.”) (quotation marks omitted; bracket in original); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (holding unconstitutional a statute prohibiting accurate depictions of U.S. currency unless for educational, historic, or newsworthy purposes because those determinations “cannot help but be based on the content of the photograph and the message it delivers”).

The limited exceptions to this rule consist of a few “historic and traditional categories” of expression, *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (quotation marks omitted), which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *R.A.V.*, 505 U.S. at 383 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). These include obscenity, defamation, fraud, fighting words, true threats, and speech integral to criminal conduct, see *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (collecting cases), and “represent ‘well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Brown*, 131 S. Ct. at 2733 (quoting *Chaplinsky*, 315 U.S. at 571-72). This Court repeatedly has refused to expand these well-defined and historical categories or to add new categories of speech that the government may proscribe. See, e.g., *Alvarez*, 132 S. Ct. at 2544; *Stevens*, 559 U.S. at 482; *Brown*, 131 S. Ct. at 2741.

An expressive work does not fall into any of these traditional exceptions merely because it includes a portrayal of an actual person. To the contrary, the right-of-publicity tort penalizing such speech is a modern innovation, not recognized in New Jersey itself until 1967. See *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967). As a leading commentator has put it, the right of publicity is “still a relatively raw and brash newcomer,” 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* (2d ed. 2000).

Because the right of publicity penalizes speech based on its content and does not fall into one of the recognized exceptions to full First Amendment protection, it is invalid, unless its application can be limited so as to avoid unconstitutional applications of the tort. *Brown*, 131 S. Ct. at 2738 (“It is rare that a regulation restricting speech because of its content will ever be permissible.” (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000))); *id.* (explaining that content-based regulations of speech are impermissible unless they can survive strict scrutiny). The transformative-use test applied here does not do that.

To the contrary, a test that protects fanciful depictions of a person but imposes liability for realistic depictions cannot be a suitable First Amendment standard. Realistic depictions within expressive works do not constitute a category of speech, like defamation or obscenity, that warrants anything less than full First Amendment protection against content-based restrictions. Indeed, many valuable works, including

biographies, documentaries, and historical fiction, include realistic portrayals or references to real people.

A transformative-use test also does not sufficiently limit the right of publicity to circumstances where its application can survive strict scrutiny. There is no compelling state interest in stamping out realistic portrayals of people. According to the Third Circuit, the right of publicity serves both to protect "the property interest that an individual gains and enjoys in his identity through his labor and effort" and to "encourage further development of this property interest." Pet. App. 16a.¹⁰ However, neither of those interests is sufficiently compelling to justify penalizing non-commercial expression.¹¹ A person's appearance

¹⁰ The Third Circuit, in the course of justifying the transformative-use test, compared the right of publicity to copyright law. Pet. App. 33a. That analogy is strained. Copyright protects *expression* and does so for the purpose of preserving incentives to create new expressive works. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). However, a person's likeness, or biographical facts about a person, are not *expression*; rather, they are facts, and facts do not warrant any copyright protection. "This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991).

¹¹ Many question the validity of the justifications for the right of publicity altogether. See, e.g., Dogan & Lemley, *supra* note 4, at 1188 ("Even if celebrities would make such an additional investment, it is not at all clear that society should want to encourage fame for fame's sake."); Michael Madow, *Private Ownership of Public Image: Popular Culture & Publicity Rights*, 81 Cal. L. Rev. 127, 238 (1993) ("[T]he standard justifications are not nearly as compelling as is commonly supposed."); Volokh, *supra* note 4, at 911 ("If the law's goal is encouraging the

and biography—here, for example, Hart’s height, weight, throwing arm, and visor—are facts in the public domain. The First Amendment does not allow the state to control or penalize another’s use of facts. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *C.B.C.*, 505 F.3d at 823 (“[T]he information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone.”).

Indeed, the transformative-use test as applied here is particularly perverse, because it assumes that the state has a *stronger* interest in penalizing *accurate* speech than in penalizing speech that is “transformative.” That has things backwards: this Court has repeatedly held that truthful and accurate expression warrants maximum First Amendment protection. Cf. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.”); *The Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (criticizing a Florida law making it unlawful to publicize the name of the victim of a sexual offense because it “punish[ed] truthful publication”); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (prohibiting false light liability even for false speech on “matters of public interest in the absence of proof that

production of new works, the right of publicity will likely disserve the interest more than it serves it.”).

the defendant published the report with knowledge of its falsity or in reckless disregard of the truth”).

B. The Transformative-Use Test Will Chill Protected Speech Because It Is Overbroad and Unpredictable.

The Third Circuit’s decision is not only wrong but also dangerous. Its transformative-use test is too vague and unpredictable, and too susceptible to a court’s subjective artistic judgments, to be a workable First Amendment standard.

This Court repeatedly has emphasized the importance of ensuring that restrictions on the content of speech are “well-defined.” *Stevens*, 559 U.S. at 468. Predictability is important because speakers otherwise will “steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked,” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)), thereby causing an “obvious chilling effect on free speech,” *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997).

The Third Circuit’s transformative-use test fails these requirements. If taken literally, the transformative-use test would allow states to subject biographers, filmmakers, singers, photographers, and other artists to tort liability whenever they include realistic images of, or references to, famous people. Yet many expressive works routinely use a real person’s actual name or likeness, including, for example, films like *The Social Network*, *Moneyball*, 42, and *The King’s Speech*; documentaries like Ken Burns’ critically acclaimed series on the history of baseball; and best-selling biographies, like those by Kitty Kelley.

Indeed, a key element of the artistry in these works is the realism or accuracy of the portrayal. For example, the genius of Daniel Day-Lewis' portrayal of Abraham Lincoln was his ability to imitate, with great realism, the likeness, mannerisms, and attributes of the president doing what Lincoln actually did. It would be disturbing if the artistic success of such a portrayal were precisely what would make it actionable. Cf. *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1359 (D.N.J. 1981) (rejecting Elvis impersonator's First Amendment defense to a right-of-publicity claim brought by Presley's estate; "entertainment that is merely a copy or imitation, even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant value as pure entertainment" (cited with approval by the Third Circuit, see Pet. App. 46a)).

To avoid absurd and dangerous outcomes, courts applying the transformative-use test will have little choice but to draw distinctions among expressive works reflecting their own subjective judgments about whether a particular work is sufficiently "artistic" or "creative" that it warrants protection. Thus, the California Supreme Court in *Comedy III* determined that a sketch of The Three Stooges was not creative enough to receive First Amendment protection, but an Andy Warhol portrait of Marilyn Monroe did deserve such protection because it presented "a form of ironic social comment on the dehumanization of celebrity itself." 21 P.3d at 811. Courts should not place themselves in the role of art critic and make First Amendment freedoms turn on subjective judgments of this kind. Cf. *Bleistein v. Donaldson Lithographing*

Co., 188 U.S. 239, 251 (1903) (Holmes, J.) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

A legal regime turning on such “subtle” distinctions among expressive works, *Comedy III*, 21 P.3d at 812, is inherently unpredictable and will chill expression. This case presents a good example of such unpredictability. The Third Circuit concluded that an avatar portraying a college football player in an animated and interactive fictional college football game was actionable because the player’s image was not sufficiently transformed; yet, in the same decision, the court held that placement, in a later edition of the same video game, of an actual *photograph* of Respondent in a montage of other photographs of Rutgers football players was not actionable, because the context made the depiction transformative. Pet. App. 57a-58a (citing *ETW*, 332 F.3d at 938).

It is hard rationally to reconcile these two rulings. According to the dissent, the majority simply treated video games as less worthy of constitutional protection than other types of expressive works, such as photomontages—despite this Court’s clear preclusion of such a First Amendment double standard in *Brown*. Pet. App. 65a, 68a-69a (Ambro, J., dissenting) (expressing concern about “a medium-specific metric that provides less protection to video games than other expressive works”). The majority did not respond to Judge Ambro’s concerns at all, except to claim that it faithfully followed *Brown*’s admonition that video

games “enjoy the full force of First Amendment protections.” Pet. App. 9a-10a (majority opinion).

Speakers need certainty about whether their speech will subject them to liability, or they will self-censor. The transformative-use test cannot provide that predictability.

C. Case-Specific Balancing Is Equally Problematic.

Decisions calling for ad hoc balancing of First Amendment interests and the interests protected by the right of publicity present just as many constitutional problems. *See, e.g., Cardtoons*, 95 F.3d at 973-76; *C.B.C.*, 505 F.3d at 824. This Court has rejected any notion of a “free-floating test for First Amendment coverage.” *Stevens*, 559 U.S. at 470; *see also Brown*, 131 S. Ct. at 2734. As this Court has explained, “[t]he First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.” *Stevens*, 559 U.S. at 470.

Moreover, here, ad hoc balancing requires a court to weigh apples against oranges. There is no principled way to determine, case by case, whether the *economic* interest of a person in preventing a given portrayal outweighs the *social* value of a given expressive work. The two interests being compared are too different to

enable judges to reach consistent and predictable results.

D. The *Rogers* Test Confines the Right of Publicity to Circumstances Where Its Application Does Not Violate the First Amendment.

Unlike the transformative-use test and case-by-case balancing, the *Rogers* test confines the right-of-publicity tort to situations in which speakers have used a depiction of, or reference to, a celebrity to sell something—either by falsely claiming a celebrity commercial endorsement or by including a celebrity image in a publication gratuitously, just to attract attention.

Confined to these circumstances, the right of publicity does not raise constitutional concerns. Speech that falsely claims a commercial endorsement is akin to the category of fraudulent speech that the government has long regulated without any First Amendment concerns. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (noting that fraudulent speech generally falls outside the protections of the First Amendment). And the gratuitous use of a celebrity's image to attract attention, unrelated to any expressive content in the work, likewise falls outside First Amendment protection altogether. Thus confined, the right-of-publicity tort raises little constitutional concern.

* * *

This Court's review is sorely needed. Because so many expressive works are distributed nationwide, the rule created by the Third and Ninth Circuits effectively

has set the constitutional rule for the rest of the country. But that rule makes no sense constitutionally. Moreover, the rule is so vague and unpredictable in its application that speakers will not know whether their speech is constitutionally protected or tortious. Given the potentially ruinous financial consequences of guessing wrong (here, Respondent seeks hundreds of millions of dollars on behalf of a class that could have thousands of members), speakers will go too far in their self-censorship. Unless and until this Court intervenes, a great deal of valuable and protected expression will be chilled.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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