No. 20-1123

In The

Supreme Court of the United States

LENWOOD HAMILTON,

Petitioner,

v.

LESTER SPEIGHT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Cases

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Rogers v. Grimaldi,
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Statutes

17 U.S.C. § 107 17

17 U.S.C. § 107(1) 18

Other Authorities

Ashley Messenger, *Rethinking the Right of Publicity In the Context of Social Media*,
24 Widener L. Rev. 259 (2018)..... 7, 8, 14, 15

Augmented Reality (def.), *Lexico* (Oxford Languages),
https://www.lexico.com/en/definition/augmented_reality. 23

Caitlin Kowalke, *When Individual Rights Should Tackle Unfair Commercialization: How the Transformative Use Test Should be Tailored to Meet Evolving Technological Needs in Right of Publicity Cases*, 8 Cybaris®, an Intell. Prop. L. Rev. 87 (2017)..... . 2, 9, 10, 14, 15, 19

Deepfake (def.), *Lexico* (Oxford Languages), https://www.lexico.com/en/definition/deepfake 24

Ent. Software Ass'n, *2020 Essential Facts About the Video Game Industry* 3 (2020), https://tinyurl.com/1jtegvms 20, 21

Gaetano Dimita et al., *Image Rights, Creativity and Video Games*, 15 J. Intell. Prop. L. & Prac. 185 (2020) 14, 15

Hall Koss, *What Does the Future of the Gaming Industry Look Like?*, Built-In, May 19, 2020, https://tinyurl.com/5b52sfxb. 23

History.com eds., *Video Game History* (updated June 10, 2019), https://tinyurl.com/4v3su98j 22

Joseph Guttman, Note, *It's In the Game: Redefining the Transformative Use Test for the Video Game Arena*, 31 Cardozo Arts & Ent. L. J. 215 (2012) 8, 14

K.J. Greene, *Intellectual Property Expansion, The Good, the Bad, and the Right of Publicity*, 11 Chapman L. Rev. 521 (2008) 2, 19

Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. Pitt. L. Rev. 225 (2005) 2, 19

Matt Gardner, *What's The Future Of Gaming? Industry Professors Tell Us What To Expect*, Forbes, June 11, 2020, https://tinyurl.com/o2hnlete..... 23

Matthew D. Bunker & Emily Erickson, *Transformative Variations: The Uses and Abuses of the Transformative Use Doctrine in Right of Publicity Law*, 14 Wash. J. L. Tech. & Arts 138 (2019)..... 9, 14

PlayStation 4, *Firewall Zero Hour – VR Immersion 101*, publ. Aug. 1, 2018 (last visited Feb. 19, 2021), https://youtu.be/zXFJ-pDpOiE 22

PlayStation VR, *Firewall Zero Hour – Launch Trailer*, publ. Aug. 30, 2018 (last visited Feb. 19, 2021), https://youtu.be/6d0AB2opmkE..... 23

Restatement (Second) of Torts § 652C (Am. L. Inst. 1977) 7, 19

Restatement (Third) of Unfair Competition §§ 46-49 (Am. L. Inst. 1995)..... 7

Restatement (Third) of Unfair Competition § 47 (Am. L. Inst. 1995)..... 11

Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right[s] of Publicity*, 130 Yale L.J. 86 (2020) 2, 7, 13, 19, 20

Sharon D. Nelson & John W. Simek, *96 Percent of Deepfake Videos Are Women Engaged In Sexual Acts*, Mar. 25, 2020, https://tinyurl.com/4j75fz85 24

Stanley Pierre-Louis, *U.S. Video Game Industry Fuels Connection, Employment and Economic Growth*, Ent. Software Ass'n, https://tinyurl.com/y166r98k (last visited February 19, 2021). 21

Vain's Vids, *Top 5 Cole Train Moments*, publ. Nov. 16, 2016 (last visited Feb. 19, 2021), https://youtu.be/fydgyOvAOAU 5

Virtual Reality (def.), *Lexico* (Oxford Languages), https://www.lexico.com/definition/virtual_reality 23

William K. Ford, *So Are Games Coffee Mugs or What? Games and the Right of Publicity Revisited*, 19 UIC Rev. Intell. Prop. L. 178 (2020) 2, 4, 7, 10, 14

INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation is a national, nonprofit, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts.

The Atlantic Legal Foundation strongly supports the First Amendment right to free speech, including freedom of expression. But the cutting-edge First Amendment question presented by this appeal is an issue that this Court needs to address: Whether, or under what circumstances, a commercial entity can invoke the First Amendment as a defense to claims that it has violated an individual's state-law "right of

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[1] Petitioner's and Respondents' counsel of record were provided timely notice in accordance with Supreme Court Rule 37.2(a), and have consented to the filing of this brief. In accordance with Supreme Court Rule 37.6, *amicus curiae* Atlantic Legal Foundation certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

publicity" by incorporating, without permission, his exact likeness into a very human-looking video game avatar (i.e., character) who has a radically different, extremely violent, persona.

The right of publicity is "simply the inherent right of every human being to control the commercial use of his or her identity." William K. Ford, *So Are Games Coffee Mugs or What? Games and the Right of Publicity Revisited*, 19 UIC Rev. Intell. Prop. L. 178, 180 (2020). "The application of the right of publicity is broad, and while celebrities typically exercise the right, it is available to all individuals." Caitlin Kowalke, *When Individual Rights Should Tackle Unfair Commercialization: How the Transformative Use Test Should be Tailored to Meet Evolving Technological Needs in Right of Publicity Cases*, 8 Cybaris®, an Intell. Prop. L. Rev. 87, 92 (2017). "[T]he interests that states typically intend to vindicate by providing rights of publicity to individuals," are not only economic, but also "non-monetary interests," including "protecting natural rights." *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007). These natural rights have been described as the right of dignity, *see* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right[s] of Publicity*, 130 Yale L.J. 86, 121, 165 (2020), the right of personhood, *see* K.J. Greene, *Intellectual Property Expansion*, *The Good, the Bad, and the Right of Publicity*, 11 Chapman L. Rev. 521, 538 (2008), and an individual's interest in autonomous self-definition, *see* Mark P. McKenna, *The Right of Publicity and*

Autonomous Self-Definition, 67 U. Pitt. L. Rev. 225, 229 (2005).

Audiovisual manipulation technology, which enables the transplantation of a real person's face, voice, and physique into immersive, ultra-realistic, extraordinarily gory video games (and even worse, into pornography), has advanced rapidly in the decade since the Court decided *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011) (invalidating a California "violent video games" statute on First Amendment grounds). Justice Alito's admonition in *Brown* about the need to consider the implications of new technology when applying traditional constitutional principles resonates now more than ever. Commenting on "a potentially serious social problem: the effect of exceptionally violent video games on minors," Justice Alito stated as follows:

> In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. . . . There are reasons to suspect that the experience of playing violent video games just might be very different from reading a

> book, listening to the radio, or watching a movie or a television show.

Id. at 806 (Alito, J., concurring in the judgment).

The Petition in this appeal calls upon the Court to address the relationship between state-law rights of publicity and the First Amendment in an increasingly common type of litigation whose high-tech context was unimaginable when the Court considered the right of publicity more than four decades ago in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (holding that the First Amendment did not bar a right of publicity suit involving a television news broadcast of an entire, videotaped, daredevil stunt). The Third Circuit's opinion in the present appeal is the latest in a growing body of inconsistent case law involving right of publicity claims relating to widely used, super-realistic, single or multiplayer video games. *See* Ford, *supra* at 191 (table listing right-of-publicity video game decisions since 2013).

Review should be granted so that the Court can provide much-needed, Twenty-First Century guidance on this subject, which is certain to continue sparking litigation as entertainment software developers, and even ordinary individuals, are able to use digital technology to profit from, or engage in mischief with, the identities and personas of both public and non-public figures without their permission.

SUMMARY OF ARGUMENT

This case is about high-tech identity theft—not stealing a person's name, or Social Security or credit card number, but something even more sinister: development, promotion, sale, and use of "personal

entertainment software," i.e., a video game, that transforms a real-life person, without his consent, into a look-alike but brutal video game warrior. Subject to the following warning from the Entertainment Software Review Board—

—a video visit with *Gears of War* Delta Squad solider Augustus "Cole Train" Cole, whose face, voice, and physique almost mirror Petitioner Lenwood Hamilton, *see* Pet. at 4-5, is worth a thousand words:

- https://youtu.be/fydgyOvAOAU.[2]

This video illustrates continually advancing audiovisual manipulation technology in the form of a very popular video game that features computer-generated but real-looking, moving, and sounding human characters. For decades courts, legal scholars, and practitioners have struggled to devise tests to weigh, in various contexts, an individual's right of publicity against freedom of expression in a fair and predictable manner. The absence of modern or specific Supreme Court guidance on this subject has caused federal and state courts to develop a number of highly

[2] Vain's Vids, *Top 5 Cole Train Moments*, publ. Nov. 16, 2016 (last visited Feb. 19, 2021)

subjective, conflicting or inconsistent tests, each of which has drawn judicial and scholarly criticism. "These tests — the relatedness test, the predominant purpose test, the transformative use test, and the ad-hoc balancing test — take different approaches and, as a result, reach different conclusions." Alexis Nicole Lilly, Note, *Raising the Stakes: The Battle Between the First Amendment and Athlete's Publicity Rights In the Wake of Murphy v. NCAA*, 9 Am. U. Bus. L. Rev. 103, 114 (2020).

The Third Circuit utilized here a version of the "transformative use test," which it first adapted in *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013) from the California Supreme Court's opinion in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387 (2001). This test, derived from the fair use doctrine in copyright law, focuses only on balancing economic interests. It ignores additional important interests, such as the right to privacy and other dignitary rights, which state-law right of publicity statutes and common law seek to vindicate as well as economic interests.

The Court not only should grant certiorari in this case to address the question of how the right of publicity should be balanced with freedom of expression in the increasingly common context of high-tech audiovisual image manipulation, but also should adopt a well-defined test that takes into account all of the economic *and* non-economic interests implicated by the right of publicity as well as by the First Amendment. Any such test should avoid encouraging transformation of an individual's persona

as a way to justify appropriation of his or her physical identity.

ARGUMENT

The Court Should Grant Review To Clarify the Relationship Between an Individual's State-Law Right of Publicity and First Amendment Freedom of Expression

A. Lower courts sharply disagree about the appropriate balancing test

"An action based on the right of publicity is a state-law claim." *C.B.C.*, 505 F.3d at 822 (citing *Zacchini*, 433 U.S. at 566). "The right of publicity is broadly defined as a state-law tort designed to prevent unauthorized uses of a person's identity that typically involve appropriations of a person's name, likeness, or voice." Post & Rothman, *supra* at 89. Two Restatements recognize the right of publicity. *See* Restatement (Third) of Unfair Competition §§ 46-49 ("Right of Publicity") (Am. L. Inst. 1995); Restatement (Second) of Torts § 652C ("Appropriation of Name or Likeness") (Am. L. Inst. 1977). Nonetheless, the specific contours of each state's right of publicity law, either in statutory or common law form, differ. Indeed, the right of publicity is "commonly described as confusing and even a mess." Ford, *supra* at 180; *see also* Ashley Messenger, *Rethinking the Right of Publicity In the Context of Social Media*, 24 Widener L. Rev. 259 (2018) ("Right of publicity law is famously a mess."). Judicial "[i]nterpretations of the claim vary from state to state," *id.*, and from court to court, depending on various judges' views of the scope of First Amendment freedom of expression.

Zacchini is this Court's only prior opinion on the relationship between a state-law right of publicity and the First Amendment. That decades-old case, however, has done little to promote uniformity of decision in right of publicity cases, and in any event, does not come close to addressing the situation at issue here. *See* Messenger, *supra* at 259 (*Zacchini*, "which was an interpretation of a particular state statute as applied to an unusual set of facts, provides practitioners and judges little guidance with respect to the contours of the claim").

In *Zacchini* a local TV news program videotaped and broadcast, without consent, the plaintiff's entire 15-second "human cannonball" act. The Court granted certiorari to consider "whether the First and Fourteenth Amendments immunized [the TV station] from damages for its alleged infringement of [the plaintiff's] state-law 'right of publicity.'" *Zacchini*, 433 U.S. at 565. The Court held that the First Amendment right to freedom of expression did not bar the plaintiff from proceeding with an action for violation of his right of publicity, explaining that the *Zacchini* case—unlike the situation here—"involve[d] not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the *very activity by which the entertainer acquired his reputation* in the first place." *Id.* at 577 (emphasis added).

Because "*Zacchini* deals with an exact copy of a performance . . . it is therefore not directly applicable to most modern day right of publicity cases." Joseph Guttman, Note, *It's In the Game: Redefining the Transformative Use Test for the Video Game Arena*, 31

Cardozo Arts & Ent. L. J. 215, 219 (2012); *see also* Matthew D. Bunker & Emily Erickson, *Transformative Variations: The Uses and Abuses of the Transformative Use Doctrine in Right of Publicity Law*, 14 Wash. J. L. Tech. & Arts 138, 157 n.95 (2019) ("*Zacchini* is regarded by some commentators as *sui generis*").

In contrast to the actual performance videotaped in *Zacchini*, the present case, as the Third Circuit emphasized, involves a fictional, look-alike character, Augustus "Cole Train" Cole, whose "persona is alien" to Petitioner Hamilton. App. 5a. Hamilton asserts that Cole Train, his abhorrent video game counterpart, a vicious, heartless soldier who ferociously battles monstrous creatures on another planet, "is ignorant, he's boisterous and he shoots people, he cusses people out, *that's not me. . . . [a]nd it's totally against what I believe in*." *Id.* In fact, the record indicates that Hamilton "attracted positive attention from Philadelphia media and elected officials" after he created "Soul City Wrestling, a 'family-friendly' organization where he performed as 'Hard Rock Hamilton' [and] hoped to spread a message to kids about drug awareness, and the importance of getting an education." App. 2a.

"As a matter of strict legal precedent, *Zacchini* remains the only guiding principle for lower courts in considering right of publicity cases." Kowalke, *supra* at 94. In *Zacchini*, however, "the Court failed to establish any specific test or standard to implement in future right of publicity cases." *Id.* at 95. "As right of publicity claims have increased, due to advancements in technology and increase in media coverage . . .

state and federal courts have developed inconsistent standards, which have created a wide discrepancy in how right of publicity cases are decided." *Id.* at 94, 95. "Depending on how one counts them," lower courts have devised "four or five different judicial approaches or tests for reconciling the First Amendment with the right of publicity." Ford, *supra* at 182.

The Petition highlights several of the First Amendment tests and approaches that various federal circuits and state appellate courts have devised and utilized in right of publicity cases. *See* Pet. at 9-19. Each of these tests, including the "transformative use test" adopted by the Third Circuit, continues to be the subject of judicial and scholarly debate. For example, in *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013), which court of appeals and district court relied on as controlling precedent here, the Third Circuit, holding that a series of collegiate football video games violated a college football player's right of publicity, discussed three tests "of particular note: the commercial-interest-based Predominant Use Test, the trademark-based *Rogers* Test, and the copyright-based Transformative Use Test." *Id.* at 153.

● In *Hart* the Third Circuit declined to adopt the "predominant use test," which originated in *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (holding that the First Amendment did not bar professional hockey player Tony Twist's right of publicity suit relating to a comic book villain with the same name). *See Hart,* 717 F.3d at 153-54. Under the Missouri Supreme Court's predominant use test, "'[i]f a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held

to violate the right of publicity and not be protected by the First Amendment, even if there is some "expressive" content in it that might qualify as "speech" in other circumstances." *Id.* at 154 (quoting *TCI Cablevision*, 110 S.W.3d at 374). But "'[i]f, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.'" *Id.*

According to the Third Circuit, "the Predominant Use Test is subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics. These two roles cannot co-exist." *Id.*; *see also C.B.C.*, 505 F.3d at 823-24 ("fantasy baseball"-related right of publicity case arising under Missouri law but relying on an ad hoc balancing test, rather than the Missouri Supreme Court's predominant use test).

● In the Third Circuit's view, the more popular "*Rogers* relatedness test" fares no better. *See Hart*, 717 F.3d at 154-58. That test originated in *Rogers v. Grimaldi*, 875 F.2d 994, 1005 (2d Cir. 1989) (holding that the First Amendment barred a right of publicity claim brought by Ginger Rogers in connection with a film, "Ginger and Fred," which was not about her or Fred Astaire, and whose title was not "wholly unrelated to the movie or was simply a disguised commercial advertisement for the sale of goods and services") (internal quotation marks omitted). This test is supported by Restatement (Third) of Unfair Competition § 47 (Am. L. Inst. 1995). *See Parks* v. *Laface Records*, 329 F.3d 437, 461 (6th Cir. 2003)

(involving a record company's use of civil rights icon Rosa Parks' name as the title of a profane rap song).

The Third Circuit, however, was "concerned that [the *Rogers* relatedness] test is a blunt instrument, 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." *Hart*, 717 F.3d at 157. Nonetheless, the Sixth Circuit applied the *Rogers* relatedness test in *Parks*, 329 F.3d at 459-61; *cf. Matthews* v. *Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994) (citing *Rogers* favorably in a misappropriation/invasion of privacy suit involving publication of a novel). Other courts, however, have criticized the relatedness test. *See, e.g.*, *TCI Cablevision*, 110 S.W.3d at 374 (explaining that "many uses of a person's name and identity have both expressive and commercial components").

- The Third Circuit in *Hart* adopted a version of the "transformative use test," based on the California Supreme Court's decision in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387 (2001), "which imported the concept of 'transformative' use from copyright law into the right of publicity." *Hart*, 717 F.3d at 158. *Comedy III* "concerned an artist's production and sale of t-shirts and prints bearing a charcoal drawing of the Three Stooges." *Id.* at 159. Because the California Supreme Court "could 'discern no significant transformative or creative contribution,'" on the part of the t-shirt artist, it concluded that the Three Stooges' portraits violated rights of publicity. *Id.* at 160 (quoting *Comedy III*, 25 Cal.4th at 409). In so holding, the state supreme court

indicated that "when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it also is less likely to interfere with the economic interest protected by the right of publicity." *Comedy III*, 25 Cal.4th at 405. But "[w]hen artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist." *Id*.

According to the Third Circuit, the "Transformative Use Test appears to strike the best balance because it provides courts with a flexible—yet uniformly applicable—analytical framework." *Hart*, 717 F.3d at 163; *see also Keller v. Electronic Arts, Inc.*, 724 F.3d 1268, 1271 (9th Cir. 2013) (holding that under the transformative use test, use of a college football player's likeness in collegiate football video games (the same video game series as in *Hart*) was not entitled to First Amendment protection because the game "literally recreat[ed] [the plaintiff] in the very setting in which he has achieved renown").

Numerous scholarly articles that discuss, and often criticize, these three tests, and also ad hoc balancing approaches, underscore the lack of a fair, workable, predictable, and nationally uniform test for balancing state-law rights of publicity with First Amendment freedom of expression in a variety of contexts, including use of real-life individuals' faces, voices, and bodies in video games. *See, e.g.*, Post & Rothman, *supra* at 89 ("courts have failed to articulate any single

First Amendment test adequate to encompass the many distinct legal interests that the contemporary right of publicity jams together"); Gaetano Dimita et al., *Image Rights, Creativity and Video Games*, 15 J. Intell. Prop. L. & Prac., 185, 188 (2020) ("all three tests fail to provide clear enough guidance to the legal practitioner"); Messenger, *supra* at 266 ("there is no clear, consistent standard"); Ford, *supra* at 199 ("the transformative use test has run into problems . . . when courts have applied it to less traditional forms of media—mainly games"); Bunker & Erickson, *supra* at 161 ("Transformative use analysis has proven problematic in publicity law."); Kowalke, *supra* at 96, ([S]imilar to objections over the predominant use test . . . the necessary judgment of creative relevance concerning any given work [in the *Rogers* relatedness test] is far too subjective a measurement to create cohesive standards"); *id.* at 97 ("While the transformative use test has been successfully utilized in many right of publicity cases, it too relies upon somewhat murky guidelines for application. If courts wish to continue use of this test, they will need to develop more definite standards . . . ."); Lilly, *supra* at 114 (arguing that an "ad hoc balancing test presents the fairest and most accurate way to balance each party's interest"); Guttman, *supra* at 248 ("More than eight tests exist, each favoring different ideas and different factors. . . . Even the most popular test [the transformative use test] is unequipped to deal with modern issues such as video games.").

Due to the absence of clear guidance from this Court, "[o]ver time, federal and state courts have developed inconsistent standards, which have created

a wide discrepancy in how right of publicity cases are decided." Kowalke, *supra* at 94; *see also* Messenger, *supra* at 266 ("Because these tests give different weight to different factors, the outcome of a case could easily be very different depending on the jurisdiction in which the case is filed."); Dimita, *supra* at 188 ("If considered on their own, these tests present meaningful limits and may lead to very different, and therefore often unpredictable, results, which in turn creates uncertainty around what should constitute a sanctionable image rights' violation, and what shouldn't."). In short, "the time has come for the U.S. Supreme Court to develop an instructive standard for courts to consistently apply to right of publicity cases that also implicate First Amendment considerations." *Kowalke*, *supra* at 93.

B. The Court should reject any balancing test that justifies high-tech identity theft by encouraging deleterious transformation of an individual's persona

The tremendous popularity of video games with lifelike characters that possess faces, voices, and physiques closely resembling real-life entertainers, athletes, and even ordinary people, makes the need for this Court's guidance on how courts should balance the right of publicity with freedom of expression acute. The need for an equitable, nationally uniform test is even more compelling where, as here, a video game like *Gears of War* incorporates an individual's likeness while transmogrifying his or her persona, and by so doing, denigrates or diminishes that individual's self-identity, personal dignity, and reputation, as well as causing economic harm.

The Third Circuit relied on its 2013 decision in *Hart*, which adapted the California Supreme Court's transformative use test to factual circumstances quite different from the situation here. *Hart* involved the *NCAA Football* video game franchise, whose "success owes to its focus on realism." *Hart*, 717 F.3d at 146. As in *Keller*, the plaintiff, a college football player, alleged that the video game "violated his right of publicity by . . . misappropriation of [his] likeness and identity to enhance the commercial value of *NCAA Football*." *Id.* at 147. The Third Circuit explained that *NCAA Football* video games utilize "over 100 virtual [collegiate] teams . . . populated by digital avatars that resemble their real-life counterparts and share their vital and biographical information." *Id.* at 146. After rejecting the predominant use and *Rogers* relatedness tests, *id.* at 153-58, the court of appeals applied the transformative use test and concluded that the *NCAA Football* "games at issue . . . do not sufficiently transform Appellant's identity to escape the right of identity claim." *Id.* at 170.

The district court acknowledged that the present case is "different from *Hart* . . . where the digital avatar of plaintiff and Rutgers football star quarterback Ryan Hart appeared in-game in the context of playing as a Rutgers football star quarterback during simulated Rutgers football games in the Rutgers football stadium." App. 25a (citing *Hart*, 717 F.3d at 166). The district court emphasized that "[i]n the *Gears of War* games, the Cole character does not—and cannot—'do[] what the actual' Hard Rock Hamilton does." *Id.* "Players use the Cole character to battle formerly-subterranean reptilian

humanoids on the fictional planet Sera as part of a broader military engagement stemming from a fictional energy source." App. 26a. Indeed, the district court seized upon "[t]hese differences" as the basis for holding that they represent "such a profoundly transformative change in relevant context that even taking Hamilton's characterizations of the likeness between the Cole character and Hard Rock Hamilton in the light most favorable to Hamilton, *Gears of War* is protected by the First Amendment under the Transformative Use standard." App. 26a. The Third Circuit agreed. *See* App. 4a.

To the contrary, the fact that the Hamilton look-alike "Cole character's persona is profoundly different" from, App. 22a—and so "alien to"—Hamilton himself, App. 5a, is *precisely why* the transformative use test, at least in its present form, should not be utilized to determine whether a video game company is entitled to First Amendment protection in a right of publicity suit. A balancing test should not enable, and even incentivize, video game companies to engage in what is tantamount to stealing an individual's face, voice, and body, i.e., his or her personal identity, and then profiting from incorporation of those features into a lifelike character whose repugnant persona clashes with the persona of the identity theft victim.

The transformative use test applied by the Third Circuit in *Hart* and the Ninth Circuit in *Keller* is derived from the "fair use" defense applicable in copyright infringement suits and codified at 17 U.S.C. § 107. *See Hart*, 717 F.3d at 158-60; *Keller*, 724 F.3d at 1273-74; *see generally Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (discussing the

copyright infringement fair use defense). The first fair use factor—"the purpose and character of the use," 17 U.S.C. § 107(1)—asks "whether and to what extent the new work is 'transformative.'" *Comedy III*, 25 Cal.4th at 404. According to the California Supreme Court's opinion in *Comedy III*, this first fair use factor for defending against copyright infringement claims—the "inquiry into whether a work is 'transformative'"—"does seem particularly pertinent to the task of reconciling the rights of free expression and publicity." *Id.*

Given its copyright-based roots, it is not surprising that the transformative use test only takes into account "the economic interest protected by the right of publicity." *Id.* at 405; *see also id.* at 403 ("the right of publicity is essentially an economic right"); *Hart*, 717 F.3d at 158 n.23 (same); *id.* at 159 (the California Supreme Court "explained that works containing 'significant transformative elements' are less likely to interfere with the economic interests implicated by the right of publicity"). These economic interests primarily "protect the property interest that an individual gains and enjoys in his identity through his labor and effort," and "encourage further development of this property interest." *Id.* at 151. The transformative use test's singular focus on weighing these important economic interests against freedom of expression under the circumstances of a particular case fails to take into account the *additional* purposes that the right of publicity serves.

First, as *Hart* acknowledges, "[t]he right of publicity grew out of the right to privacy torts, specifically, from the tort of invasion of privacy by

appropriation." *Hart*, 717 F.3d at 150 (internal quotation marks omitted); *see also* Restatement (Second) of Torts § 652C ("One who appropriates for his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.").

Second, although ignored by the Third Circuit, there are "non-monetary interests that publicity rights are sometimes thought to advance." *C.B.C.*, 505 F.3d at 824. "Multiple rationales support the right of publicity's protection of an individual's interest in his or her own identity. Many rationales have a moral basis . . . ." Kowalke, *supra* at 92. For example, Post & Rothman, *supra* at 92, postulate a "right of control" and a "right of dignity"—plaintiffs' interests in "protecting the autonomy of their personality" and "maintaining the dignity of their person"—as additional "distinct interests that the right of publicity typically seeks to vindicate." *See also* Greene, *supra* at 543 ("freedom of expression . . . concerns . . . must be tempered by personhood interests of a dignitary nature"); McKenna, *supra* at 229 (because "unauthorized uses of a person's identity in connection with products and services" impose "both emotional and economic" costs, an individual has an "interest in autonomous self-definition"); *cf. Kelley v. Johnson*, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting) ("the liberty guarantee of the Fourteenth Amendment . . . encompass[es] . . . the values of privacy, self-identity, autonomy, and integrity"). And particularly apropos here, "[t]he *right of dignity* prohibits appropriations of identity that are highly offensive, which means appropriations that are inconsistent with forms of

respect essential to the integrity of personality." Post & Rothman, *supra* at 165.

The transformative use test's shortcomings, along with those of the other right of publicity/freedom of expression balancing tests that federal and state courts have struggled to devise and apply, or criticized, are a strong reason why this Court should provide lower courts and litigants with the guidance that they need. This case affords the Court an excellent and timely opportunity to do so.

C. Continual technological advancements make this Court's review essential

The importance of the question presented by this appeal is underscored both by video games' enormous popularity throughout the United States and the world, and the continuous evolution of video game technology.

According to the Entertainment Software Association's most recent *Essential Facts* report, "[t]here are more than 214 million video game players across the United States, three quarters of all U.S. households have at least one person who plays video games, and 64 percent of U.S. adults and 70 percent of those under 18 regularly play video games." Ent. Software Ass'n, *2020 Essential Facts About the Video Game Industry* 3.[3] Further, "65 percent of video game players say they play with others online or in person," using personal computers, game consoles, or handheld or mobile devices. *Id.* at 3, 8. "Adult video game

[3] Available at https://tinyurl.com/1jtegvms.

players spend . . . 6.6 hours a week playing with others online [and] 4.3 hours a week playing with others in person." *Id.* at 6. "Shooter games," such as *Gears of War*, are one of the most popular video game genres. *Id.* at 8.

The *Essential Facts* report not only asserts that "video games have become the leading form of entertainment," but also that multiplayer online video games "have become an important touchstone for keeping audiences around the world connected while staying at home" during the coronavirus pandemic. *Id.* at 3. In fact, an article by the Association's President & CEO on the organization's website indicates that "one in three people on the planet play video games." Stanley Pierre-Louis, *U.S. Video Game Industry Fuels Connection, Employment and Economic Growth*.[4] Mr. Pierre-Louis further advises that as "a part of the fabric of American culture and a cornerstone of entertainment," the "U.S. video game industry generates $ 90.3 billion in annual economic output . . . ." *Id.*

The widespread marketing and use of video games such as *Gears of War*, incorporating computer-generated images that replicate the faces, voices, and bodies of real-life people, is not the only reason why the relationship between the right of publicity and the First Amendment is a timely and compelling issue. Equally important, evolving digital technology continues to conflate video games and reality in a way that essentially places players *inside* a video game and

[4] https://tinyurl.com/y166r98k (last visited February 19, 2021).

enables them to *become* video game characters, including characters whose physical features have been appropriated from real people.

More specifically, video game developers currently "have their sights set on virtual reality gaming, a technology that has the potential to change the way players experience video games." History.com eds., *Video Game History* (updated June 10, 2019).[5] Consider, for example, what the industry calls a "first-person VR shooter game": Rather than watching and controlling a soldier like Augustus "Cole Train" Cole on a television or computer screen, a player can don a VR headset, grab a hand-held VR "aim controller," and virtually become that soldier—stepping into the soldier's three-dimensional combat-zone environment, and fighting "hostiles" while seeing through his eyes, running with his legs, shooting with his hands and heavy-duty weapons, and communicating to comrades with his voice. Promotional videos for VR shooter games such as PlayStation 4's *Firewall Zero Hour* provide some idea of what it is like to participate in this fully immersive type of virtual reality video game experience:

- https://youtu.be/zXFJ-pDpOiE[6]

- https://youtu.be/6d0AB2opmkE[7]

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[5] https://tinyurl.com/4v3su98j.

[6] PlayStation 4, *Firewall Zero Hour – VR Immersion 101*, publ. Aug. 1 2018 (last visited Feb. 19, 2021).

[7] PlayStation VR, *Firewall Zero Hour – Launch Trailer*, publ. Aug. 30, 2018 (last visited Feb. 19, 2021).

According to industry experts, virtual reality is only the beginning of what the future holds for first-person video games. The next step apparently will be a combination of virtual reality and augmented reality.[8] *See, e.g.*, Matt Gardner, *What's The Future Of Gaming? Industry Professors Tell Us What To Expect*, Forbes, June 11, 2020 (predicting that future video games not only will use artificial intelligence to "enhance the virtual characters" by making them even "more realistic," but also will enable players to experience "mixed reality. . . 'combining virtual and augmented reality technology'");[9] Hall Koss, *What Does the Future of the Gaming Industry Look Like?*, Built-In, May 19, 2020 (discussing "the rise of hyperreality," which "blends together virtual reality and physical reality . . . hyperreality game players will notice that what they see in their headsets actually corresponds to the physical space of the room [but] can reach for a virtual object and feel it").[10]

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[8] "Virtual reality" is "the computer-generated simulation of a three-dimensional image or environment that can be interacted with in a seemingly real or physical way by a person using special electronic equipment, such as a helmet with a screen inside or gloves fitted with sensors." *Lexico* (Oxford Languages), https://www.lexico.com/definition/virtual_reality. "Augmented reality" is defined as "[a] technology that superimposes a computer-generated image on a user's view of the real world, thus providing a composite view." *Lexico* (Oxford Languages), https://www.lexico.com/en/definition/augmented_reality.

[9] Available at https://tinyurl.com/o2hnlete.

[10] Available at https://tinyurl.com/5b52sfxb.

In video games like these, untold numbers of players in the United States and around the world—not just the video game developer—would be appropriating the personhood and undermining the dignity of any individual whose face, voice, and other physical features have been incorporated without consent into an offensive video game character. To make matters worse, the right of publicity implications of audiovisual manipulation technology are not limited to video games. For example, there now are a multitude of X-rated, easily accessible "deepfakes."[11] Almost all "fake videos across the Internet are of women, mostly celebrities, whose images are used in sexual fantasy deepfakes without their consent." Sharon D. Nelson & John W. Simek, *96 Percent of Deepfake Videos Are Women Engaged In Sexual Acts*, Slaw, Mar. 25, 2020.[12] "Revenge porn (targeting ex-girlfriends/wives) has also been taken to a whole new level with the use of deepfake videos." *Id.* "[W]e are quite sure those women . . . feel physically violated by these images. . . . To think that a real woman somewhere would have to cope with seeing herself manipulated by a user in this manner is nauseating." *Id.*

This Court needs to address how the new wave of right of publicity claims driven by new technology,

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[11] A "deepfake is "[a] video of a person in which their face or body has been digitally altered so that they appear to be someone else, typically used maliciously or to spread false information." *Lexico* (Oxford Languages), https://www.lexico.com/en/definition/deepfake.

[12] Available at https://tinyurl.com/4j75fz85.

such as the unauthorized use of the Petitioner's face, voice, and physique in *Gears of War*, should be weighed against freedom of expression.

CONCLUSION

The Court should grant the Petition For a Writ of Certiorari.

Respectfully submitted,

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March 2021