

No. 20-1123

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In the  
Supreme Court of the United States

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LENWOOD HAMILTON,  
*Petitioner,*

v.

LESTER SPEIGHT, ET AL.,  
*Respondents.*

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

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BRIEF IN OPPOSITION

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**QUESTION PRESENTED**

Whether the Third Circuit erred in holding that the First Amendment bars petitioner's right of publicity claims based on allegations that a character in respondents' video games—a futuristic soldier who fights an alien invasion—was inspired by petitioner's 1990s persona from a local Philadelphia wrestling circuit.

### **RULE 29.6 STATEMENT**

Respondent Microsoft Corporation is a publicly traded company with no parent corporation. No publicly traded company owns 10 percent or more of its stock.

Respondent Microsoft Studios is a trade name of Microsoft Corporation.

Respondent The Coalition is a trade name of Microsoft Canada Development Centre d/b/a Microsoft Vancouver (“MCDC”). MCDC is a wholly owned subsidiary of Microsoft Corporation and no publicly owned corporation owns 10 percent or more of its stock.

Respondent Epic Games, Inc. (“Epic”) has no parent corporation and is not a publicly held corporation or publicly held entity. Tencent Holdings Ltd., a publicly traded company, owns a subsidiary that owns 10% or more of Epic’s stock.

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## INTRODUCTION

Petitioner Lenwood Hamilton, a former college athlete who played in a single NFL game and ran a local Philadelphia-area wrestling circuit, claims that his 1990s wrestling persona is the basis for the Augustus “Cole Train” Cole character in the popular video game franchise *Gears of War*. Petitioner alleges that he and Cole—a futuristic soldier who battles the destructive Locust Horde on the fictional planet Sera—share certain physical characteristics and have similar voices. Petitioner brought suit claiming that respondents had violated his right of publicity under Pennsylvania law by allegedly basing the Cole character on his likeness and voice. Petitioner’s only evidence for this theory is his assertion that, in 1998, he had a single conversation with respondent Lester Speight, an actor hired in 2006 to provide the voice for Cole.

Petitioner’s claims have no support. The evidence on summary judgment shows that initial sketches of Cole were drawn in 2004 and 2005, and his primary appearance was complete before Speight was even hired in 2006. JA572-74 ¶¶ 3-16.<sup>1</sup> Speight himself denied he had any input into Cole’s appearance or storyline, with the exception that he suggested the game designers make Cole’s arms bigger. JA575 ¶¶ 20-23; Pet. App. 11a-12a. While the source art file for Cole included images of numerous celebrities and movie characters, it did not contain a single image of petitioner. JA572-73 ¶ 7. And all of the eight game designers who were deposed confirmed they had never

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<sup>1</sup> “JA” and “SA” refer to Third Circuit Joint Appendix and Supplemental Appendix in No. 19-3495, respectively. “Dkt.” refers to the docket in E.D. Pennsylvania No. 2:17-cv-00169-AB.

heard of petitioner or his wrestling company when developing the game. *See* JA585 ¶ 81.

Construing the facts most favorable to petitioner, both lower courts quickly disposed of petitioner's claims on pure legal grounds. They held that even if petitioner had been the inspiration for Cole, the First Amendment protects a creator who uses an individual's likeness as one of the raw materials in an original expressive work. As the Third Circuit explained, even "[i]f [petitioner] was the inspiration for Cole, the likeness has been 'so transformed that it has become primarily [respondents'] own expression.'" Pet. App. 6a.

That decision was correct and does not conflict with the decision of any other appellate court. Petitioner argues that appellate courts are split over the correct First Amendment test in right of publicity cases. That is overstated. Although lower courts have employed different formulations, they all engage in the same fundamental inquiry, balancing a creator's First Amendment rights against an individual's right of publicity. And, critically, no substantive conflict is implicated by the facts presented here. Even if petitioner could demonstrate that his likeness was *actually used*, his claims would fail under *any* of the existing legal formulations, and petitioner does not even try to argue otherwise.

Unable to identify any existing test under which he would prevail, petitioner instead proposes a novel legal rule that "there is *no* [First Amendment] protection for using a person's actual likeness without permission," subject to a few ill-defined exceptions. Pet. 2 (emphasis added). This approach—which no court anywhere has adopted—would radically cut back on core First Amendment rights. It has no

foothold in (and indeed is directly contrary to) this Court’s First Amendment jurisprudence and, if taken seriously, it would entirely prevent creators from using real people—or even similar likenesses—in their creative works, or even commentary concerning real people or characters inspired by them. Petitioner purports to carve out an exception to his test for the “implicit license people provide by going out into public or engaging in public acts.” Pet. 18-19. But this case would qualify for that exception—which means petitioner would lose even under his own rule.

This Court has repeatedly denied petitions for certiorari asserting the same conflict alleged here.<sup>2</sup> This petition should meet the same fate. Certiorari should be denied.

### STATEMENT OF THE CASE

1. Beginning in 2001 or 2002, respondent Epic Games developed the concept for what would become *Gears of War 1*, a violent cartoon-style fantasy video game. JA538. The game features “Delta Squad,” a group of imaginary and outlandish soldiers on the

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<sup>2</sup> See, e.g., *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625 (Ct. App. 2018), *cert. denied*, 139 S. Ct. 800 (2019); *Davis v. Elec. Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015), *cert. denied*, 577 U.S. 1215 (2016); *Stayart v. Google Inc.*, 710 F.3d 719 (7th Cir. 2013), *cert. denied*, 571 U.S. 825 (2013); *Toffoloni v. LFP Publ’g Grp., LLC*, 572 F.3d 1201 (11th Cir. 2009), *cert. denied*, 559 U.S. 988 (2010); *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007), *cert. denied*, 553 U.S. 1090 (2008); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003), *cert. denied*, 540 U.S. 1106 (2004); *Parks v. LaFace Recs.*, 329 F.3d 437 (6th Cir.), *cert. denied*, 540 U.S. 1074 (2003); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001), *cert. denied*, 534 U.S. 1078 (2002); *Brown v. Ames*, 201 F.3d 654 (5th Cir.), *cert. denied*, 531 U.S. 925 (2000).

fictional planet Sera, who fight a race of exotic, subterranean, reptilian humanoids called the “Locust Horde.” JA5-6, 244. Delta Squad and other surface-dwellers battle the Locust Horde using fantastical firearms controlled by players. *Id.*

Delta Squad includes (among others) a soldier named Augustus “Cole Train” Cole. *Id.* In 2004 or 2005, Epic developers and artists collaborated to create the initial sketches of Cole. JA572 ¶ 3 (citation omitted). He had a muscular physique, dark skin, and dark eyes. *Id.* More detailed sketches followed, with input from other Epic artists. *Id.* ¶ 4 (citing SA55). Cole grew into an archetype of the charismatic, slightly cocky athlete, whose demeanor is common to many public figures and athletes, including “The Rock” and Jamie Foxx’s character in the football drama “Any Given Sunday.” JA572-73 ¶¶ 5, 7. Ultimately, Cole was depicted as “a large, muscular, African American male who is a former professional athlete who played the fictional game thrashball, a highly fantastical and fictionalized sport that loosely imitates American football in some ways.” Pet. App. 11a. Cole primarily wears heavy armor on his torso and carries various weaponry. *Id.* at 22a.

In 2006, after completing Cole’s likeness, Epic hired respondent Lester Speight, a former football player, to provide Cole’s voice. Epic became aware of Speight through his performance as “Terry Tate: Office Linebacker” in a series of Reebok commercials, including a well-known commercial shown during the 2003 Super Bowl. JA574 ¶¶ 14-15; JA278 ¶ 11. Beyond his voice, Speight’s only contribution to the Cole character’s appearance was suggesting that the designers “make the Cole character’s arms bigger.”

Pet. App. 11a-12a; *see* JA6; JA574-75 ¶¶ 17, 20, 23; JA279 ¶ 13.

Epic published *Gears of War 1* in 2006, with *Gears of War 2* and *Gears of War 3* following over the next four years.<sup>3</sup> In general, Cole’s appearance did not change. But beginning with *Gears of War 3*, players had the ability to occasionally use alternative “skins” or avatars. JA576-77 ¶¶ 30-31 (citing JA279-80 ¶¶ 18-19); *see also* JA65-67, 70-71, 74-77, 80-81. For Cole, these skins included Superstar Cole, who wears a fedora, sunglasses, and a watch, and Thrashball Cole, depicting Cole’s background as a thrashball player for a fictional team called the Eagles. JA22-23; JA576-78 ¶¶ 27-34; Pet. App. 11-12a, 22a. At no point may a player play the game as Thrashball Cole. Pet. App. 11a; JA284.

2. In January 2017, petitioner filed this action against respondents claiming a violation of his right of publicity. Fundamentally, petitioner claims Cole’s appearance and voice are based on him—and, in particular, on his wrestling persona, “Hard Rock Hamilton.” Pet. App. 2a, 4a. Based on that theory, petitioner brought state-law claims for the unauthorized use of his name or likeness, misappropriation of publicity, invasion of privacy, and unjust enrichment. *Id.* at 4a, 7a n.1.<sup>4</sup>

Petitioner had played football in college and, in 1987, played one game as a replacement player for the Philadelphia Eagles during the NFL strike. JA176

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<sup>3</sup> In 2014, respondent Microsoft Corporation purchased the *Gears of War* franchise. JA578 ¶ 39.

<sup>4</sup> Petitioner also brought, then withdrew, a Lanham Act claim. Pet. App. 3a n.2.

¶ 18, JA580 ¶ 50; JA92 ¶¶ 11, 12. In the 1990s, petitioner formed a now-defunct “family-friendly professional wrestling” organization called Soul City Wrestling that hosted community wrestling events in parts of Philadelphia. Pet. App. 9a. There, petitioner debuted his Hard Rock Hamilton persona. JA580 ¶¶ 52-53 (citing JA92-93 ¶¶ 12-13, 16-17; JA338-39; JA201). In photographs provided by petitioner, Hard Rock Hamilton wears a tie, hat, collared shirt, formal vest, chain, and Chippendale cuffs. Pet. App. 25a, 30a; *see id.* at 22a,. Petitioner admitted that the Hard Rock character shared physical features and costume elements common to well-known celebrities and professional wrestlers. JA581-82 ¶ 58 (citing SA314-31; JA353-64).

In his lawsuit, petitioner claimed that the Cole character was based on his Hard Rock Hamilton wrestling persona and his one-game experience playing for the Philadelphia Eagles in 1987. JA45 ¶ 12. His only alleged link to the *Gears of Wars* franchise was through Speight. According to petitioner, in 1998, Speight met Hamilton at one wrestling match. JA47 ¶¶ 21-23. During that meeting, petitioner alleged, Speight discussed his plans for a “video game centering on violence.” *Id.* ¶ 23.

The case proceeded to discovery, and the parties produced voluminous documents. None of the creative files for the games referenced petitioner, his wrestling persona, or Soul City Wrestling. JA585 ¶¶ 79-81. The source art file for the Cole character contained images of numerous well-known celebrities, but not a single image of or reference to petitioner. JA572-73 ¶ 7. The eight Epic and Microsoft witnesses involved in developing the games and the Cole

character all testified in depositions that they had never heard of petitioner before this litigation. JA585 ¶ 81. Speight denied discussing the development of any video game with petitioner. JA584 ¶ 74. He also denied that he had substantive input into the Cole character, whose appearance had already been essentially completed when Speight was hired to provide his voice. JA574 ¶ 16; JA575 ¶ 20. And petitioner admitted that he never had any contact or communications with Epic or Microsoft throughout the relevant period. JA585 ¶ 78.

3. At the close of discovery, respondents moved for summary judgment. Respondents argued, first, that the record provided no basis from which a reasonable jury could find that the Cole character incorporates any protectable aspect of petitioner's persona, likeness, or voice. Mem. in Supp. Mot. Summ. J. 20-24, Dkt. No. 109-1. Second, and more fundamentally, respondents argued that even assuming that Cole had been based on petitioner, the First Amendment barred each of petitioner's claims. *Id.* at 13-19. Finally, respondents argued that Pennsylvania's right of publicity statute expressly exempts "expressive works" like the *Gears of War* video games; petitioner could not meet the statute's requirement that his "likeness" has "commercial value"; the Pennsylvania statute preempted petitioner's common law right of publicity claim; and petitioner's unjust enrichment claim failed since it did not arise out of a contract and was otherwise duplicative. *Id.* at 24-30 (quoting 42 Pa. Cons. Stat. § 8316(a)).

On September 26, 2019, the district court granted summary judgment for respondents. Pet. App. 7a-30a. The court did not reach the argument that no reasonable jury could find that the Cole character was

based on petitioner's likeness. The court reasoned that it was unnecessary to address this argument because even "where a defendant actually 'infringes on the right of publicity,' courts may look to 'whether the right to freedom of expression overpowers the right to publicity.'" *Id.* at 8a n.2 (quoting *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 150 n.12 (3d Cir. 2013), *cert. dismissed*, 573 U.S. 989 (2014)). Focusing solely on that question, the court held that respondents' "rights to expressive speech under the First Amendment outweigh [petitioner's] right to publicity, if any." *Id.* at 14a.

In reaching that conclusion, the district court first recognized that video games are "expressive speech protected by the First Amendment." *Id.* at 15a (citing *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011)). And the court explained that "[w]hen parties assert competing rights to publicity and free expression in situations like this, a court must 'balance the interests underlying the right of free expression against the interest in protecting the right of publicity.'" Pet. App. 15a-16a (quoting *Hart*, 717 F.3d at 149). To implement that balance, the court applied the "[t]ransformative [u]se [t]est" adopted by the Third Circuit and other courts to assess whether a plaintiff's "likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the [plaintiff] is the very sum and substance of the work in question." *Id.* at 16a (quoting *Hart*, 717 F.3d at 159-60). The court explained further that when "the product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness," the

First Amendment bars the claim. *Id.* (quoting *Hart*, 717 F.3d at 160).

Applying that test and considering the facts in the light most favorable to petitioner, the district court engaged in a fact-intensive comparison between petitioner’s Hard Rock Hamilton persona and Cole’s likenesses, biographical information, and personality, as well as the relevant contexts in which the Cole character appears. *Id.* at 20a-26a.

*First*, the district court held that, “although the Hard Rock Hamilton and the Cole characters’ likenesses certainly share some similarities, the Hard Rock Hamilton character’s identity is obviously not the ‘very sum and substance’ of the Cole character’s identity.” *Id.* at 21a (citation omitted). The court explained that the characters’ backgrounds, looks, and personalities significantly diverged. As for background, the only similarity was the fact that “Hard Rock Hamilton” formerly (and for a single game) played professional football for the Philadelphia Eagles, and the Cole character formerly played the fictional game of thrashball “for a fictional team named the Eagles.” *Id.* at 22a. Cole’s “most important biographical information—his name, August ‘Cole Train’ Cole—bears absolutely no resemblance to the Hard Rock Hamilton character’s name.” *Id.* at 21a. As for likeness, there were “broad similarities” such as “skin tone, race, body build, . . . hair style,” and voice. *Id.* at 12a, 22a. Everything else was different: Cole dressed in “futuristic, cartoonish heavy armor,” whereas Hard Rock Hamilton wore a “hat, jewelry, tie [and] cuffs.” *Id.* And petitioner admitted that “the Cole character’s persona is profoundly different from the persona of Hard Rock Hamilton.” *Id.*

The district court reached the same result for the alternative avatars—Superstar Cole and Thrashball Cole. *Id.* at 23a-24a. As the court explained, Superstar Cole is not a wrestler, has a “profoundly” different persona, and “wears sunglasses and a heavily-worn undershirt with a bracelet and a band of fabric around his forearm”—unlike Hard Rock Hamilton, who “wears a tie, collared shirt, formal vest, no sunglasses, and a chain.” *Id.* at 22a, 24a-25a. And “Thrashball Cole again bears a different name, is depicted playing a fictionalized sport” (that players cannot actually play in the game), “wears boots, dons only pads emblazoned with the number 83, and wears an outsized belt over dirtied football pants with visible stitching and what is ostensibly a cape.” *Id.* at 24a. “In contrast, Hamilton’s footwear is not visible; he wears a small belt with white football pants; he wears a full football jersey; and Hamilton never wore the number 83.” *Id.*

*Second*, the district court found the “context in which the Cole character appears and performs” to be “profoundly transformative.” *Id.* at 21a. As the court explained, “Hard Rock Hamilton performed as a professional wrestler in Soul City Wrestling on the planet Earth”; Cole is a futuristic soldier battling “formerly-subterranean reptilian humanoids on the fictional planet Sera as part of a broader military engagement stemming from a fictional energy source.” *Id.* at 25a-26a. This “profoundly transformative context,” the court concluded, was quite literally worlds apart from petitioner and his professional wrestling career on Earth. *Id.*

In the end, the district court held that “[i]f the Hard Rock Hamilton character influenced the creation of the Cole character at all, [it] was at most

one of the ‘raw materials’ from which the Cole character was synthesized: Hard Rock Hamilton is not the ‘very sum and substance of the’ Cole character.” *Id.* at 20a-21a (citation omitted). Because of that conclusion, the court did not reach respondents’ alternative and independent grounds for summary judgment.

4. The Third Circuit affirmed in an unpublished, unanimous five-page decision. Pet. App. 1a-6a.

Like the district court, the Third Circuit assumed for purposes of the appeal that respondents had incorporated petitioner’s persona. And, like the district court, the Third Circuit applied the “transformative use test” to assess whether the alleged use of petitioner’s persona, if credited, would be entitled to First Amendment protection. *Id.* at 3a-4a.

The Third Circuit accepted that there were certain “similarities” between petitioner and Cole, including “similar skin colors, facial features, hairstyles, builds, and voices.” *Id.* at 4a. But the court also emphasized “significant differences,” which made clear that “Hamilton was, at most, one of the ‘raw materials’ from which [Cole] was synthesized.” *Id.* (citation omitted). Cole, for instance, is a soldier who “fights a fantastic breed of creatures in a fictional world,” and has a persona that petitioner admits is foreign to him. *Id.* 4a-5a. Petitioner, by contrast, was never in the military and certainly does not fight aliens. *Id.* at 5a. Accordingly, the court held that the First Amendment bars all of petitioner’s claims because “[i]f Hamilton was the inspiration for Cole, the likeness has been ‘so transformed that it has become primarily [respondents’] own expression.’” *Id.* at 6a.

### REASONS FOR DENYING THE PETITION

The decision below does not conflict with any decision of this Court or any other court—and even if there were such a conflict, this case presents an exceedingly poor vehicle for deciding the question presented. This Court’s review is not warranted.

There is no circuit split that creates any substantive conflict, let alone one that would lead to a different outcome in this case. Although courts use different formulations when assessing the First Amendment’s limitations on right of publicity claims, all engage in the same fundamental balancing inquiry, weighing a creator’s First Amendment interests against an individual’s rights in his persona. And any divergence among appellate courts is not implicated here because petitioner does not and cannot identify *any* existing test under which he would prevail. Moreover, jurisprudence in this area continues to evolve in light of the Court’s recent First Amendment decisions applying strict scrutiny to content-based speech restrictions—and the Court should not short-circuit that percolation.

Petitioner’s proposed test is also radical and wrong. Petitioner invites this Court to adopt a framework in which “there is no protection for using a person’s actual likeness without permission.” Pet. 2. That novel approach—which petitioner makes little effort to define or describe and which has never been adopted by any court—is antithetical to the First Amendment.

In any event, review would not change the outcome in this case. Even without the First Amendment defense, petitioner’s claims would fail on numerous alternative grounds. Certiorari should be denied.

**I. THE ASSERTED CONFLICT IS  
OVERSTATED, NOT IMPLICATED HERE,  
AND NOT RIPE FOR REVIEW**

**A. There Is No Real Conflict That Merits  
Review**

Appellate courts uniformly agree that the First Amendment protects creative expression; individuals retain some ability to protect their persona from being used without authorization; and in cases in which these two rights are at odds, the judiciary must balance them. Courts have articulated different formulations as to how to perform this balancing, each applying this Court's guidance in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575-79 (1977) (holding that while a broadcasting company had a First Amendment right to report on entertainment, it could not simply televise the entirety of plaintiff's "human cannonball act" without permission). But in asserting an outcome-dispositive split, petitioner overstates the divergence among the courts.

More fundamentally, even if the Court saw fit to iron out any divergence in how appellate courts articulate the First Amendment balancing inquiry, this is not the case in which to do so. Petitioner does not even try to argue that he would prevail under any of the existing legal tests—and he clearly would not. This case is thus an especially poor vehicle for resolving the purported conflict.

1. The prevailing test in the appellate courts is the transformative use test adopted by the Third Circuit nearly a decade ago and applied in this case. *See, e.g., Hart*, 717 F.3d at 165-70 (adopting transformative use test), *cert. denied*, 573 U.S. 989

(2014); *Keller v. Elec. Arts Inc. (In re Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1276-79 (9th Cir. 2013) (same), *cert. dismissed*, 573 U.S. 989 (2014); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 934-37 (6th Cir. 2003) (applying transformative use test and ad hoc balancing). That test, first articulated by the Supreme Court of California in 2001, “is essentially a balancing test.” *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001), *cert. denied*, 534 U.S. 1078 (2002). Drawn from copyright law’s “fair use” doctrine, the test balances the state’s interest in “safeguard[ing] forms of intellectual property . . . as a means of protecting the fruits of a performing artist’s labor” against the right of free expression. *Id.* at 806-08. To do so, the test considers “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.* at 799. The test thus asks whether the expressive work “contains significant transformative elements,” *id.* at 808, or alternatively, whether “the depiction or imitation of the celebrity is the very sum and substance of the work,” *id.* at 809. If the former, the work is protected; if the latter, it is not. *Id.* at 808.

As the Third Circuit held, petitioner’s claims fail under the transformative use test. Even if the Cole character was somehow inspired by petitioner, that brash fictional warrior battling subterranean, reptilian humanoids on the fictional planet Sera was “profoundly transformative” of the 1990s-era, family-friendly wrestler from the Philadelphia suburbs. Pet. App. 25a-26a. “[N]o reasonable jury could conclude that [petitioner]—whether Lenwood or Hard Rock—is the ‘sum and substance’ of the Augustus Cole

character.” *Id.* at 4a (footnote omitted). Rather, even “[i]f [petitioner] was the inspiration for Cole, the likeness has been ‘so transformed that it has become primarily the defendant’s own expression.’” *Id.* at 6a.

Petitioner suggests that the Third Circuit created a “new version” of the transformative use test in this case. Pet. 16. But petitioner does not explain what in the court’s five-page, unpublished, non-precedential decision is “new.” The decision quotes the transformative use test directly from precedent. *See* Pet. App. 3a-4a. And to the extent petitioner claims that the Third Circuit misapplied the transformative use test in this case, arguments regarding application of a properly stated and fact-bound legal rule do not merit this Court’s review. *See* Sup. Ct. R. 10(a).

2. Petitioner argues that other courts apply different legal tests for balancing the right of publicity against First Amendment interests, but he significantly overstates the divergence.

Petitioner asserts (at 15-16) that the Eighth Circuit applies an ad hoc balancing test that conflicts with the transformative use test. He is mistaken. Although the Eighth Circuit has not adopted the transformative use test by name, it applies a “flexible case-by-case approach” that weighs a plaintiff’s economic interest in his persona against a defendant’s First Amendment rights. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1282; *see C.B.C Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823-24 (8th Cir. 2007), *cert. denied*, 553 U.S. 1090 (2008). The same is true of the Tenth Circuit. *See Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 970-76 (10th Cir. 1996; *see also In re NCAA Student-*

*Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1282 (describing these tests).

While perhaps less detailed, this approach is entirely consistent with the transformative use test and produces identical results. *See, e.g., ETW Corp.*, 332 F.3d at 936-38 & n.17 (applying both the Tenth Circuit's *Cardtoons* decision and the transformative use test to arrive at the same result); *Comedy III Prods.*, 21 P.3d at 809 (*Cardtoons* "is consistent with th[e] 'transformative' [use] test"). Notably, petitioner concedes (at 13) that the Tenth Circuit's balancing approach is "similar" to the transformative use test. And the Eighth Circuit has made clear that its approach is based on the Tenth Circuit's analysis. *See C.B.C. Distrib. & Mktg.*, 505 F.3d at 824 (relying heavily on *Cardtoons*).

Because the Eighth and Tenth Circuit's freeform balancing tests are functionally equivalent to the transformative use test, petitioner would lose under them as well. As in *C.B.C. Distribution & Marketing*, "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." 505 F.3d at 824. After all, there is no concern that *Gears* is "reap[ing]" the economic "rewards" of petitioner's identity. *Id.* Indeed, the Cole character does not share petitioner's name, alias, or any other unique identifier. And there is no evidence that petitioner's 1990s Hard Rock Hamilton persona has any present economic value, which is why petitioner dropped his Lanham Act claim. Petitioner's claims would fail in the Eighth and Tenth Circuits, just as they failed here.

3. Petitioner likewise contends that the "relatedness" test, set forth in the Second Circuit's

decision in *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989), diverges from the transformative use test. But the “*Rogers* test” is also fundamentally a balancing test. To the extent that the framing in *Rogers* is different, it is because that test is principally tailored to a different state interest—protecting consumers against confusion.

First developed in a case involving a Lanham Act claim, the *Rogers* test “was designed to protect consumers from the risk of consumer confusion,” not the misappropriation of a celebrity’s “talent and years of hard work.” See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1280-81. Balancing these interests against the right of free expression, *Rogers* held that the First Amendment protects the use of a person’s name in a film title unless that use is “‘wholly unrelated’ to the movie or [is] ‘simply a disguised commercial advertisement for the sale of goods or services.’” *Rogers*, 875 F.2d. at 1004.

Because the *Rogers* test is best suited to dealing with consumer confusion, courts often apply it when analyzing the *title* of a work to determine whether the seller is merely seeking to profit from consumers’ recognition of a famous name. See, e.g., *Rogers*, 875 F.2d at 1002-05 (analyzing whether movie titled “Ginger and Fred” traded on names of Ginger Rogers and Fred Astaire); *Parks v. LaFace Recs.*, 329 F.3d 437, 458 (6th Cir.) (assessing “Rosa Parks” song title), *cert. denied*, 540 U.S. 1074 (2003); *Hart*, 717 F.3d at 157 (noting that the Third Circuit has “expressed hesitation at extending the *Rogers* Test beyond the title of a work,” and “few other courts had done so at the time of our decision”). Indeed, courts that apply the transformative use test *also* apply the *Rogers* test

when a case involves allegations of consumer confusion under the Lanham Act. *See, e.g., Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1239, 1242-47 (9th Cir. 2013); *Parks*, 329 F.3d at 452-61. Therefore, any divergence is due to the different state interest being balanced.

Even if *Rogers* applied here, petitioner cannot prevail under the *Rogers* test any more than he could prevail under the transformative use test. If anything, the *Rogers* test is *more* protective of First Amendment rights. *Gears of War* is, of course, not a “disguised commercial advertisement for the sale of goods or services.” *Rogers*, 875 F.2d at 1004 (citation omitted). Nor is any inspiration provided by petitioner “wholly unrelated” to the Cole character or the expressive work as a whole. *Id.* (citation omitted). Accordingly, even if the Third Circuit had applied the *Rogers* test, the result would be the same.<sup>5</sup>

4. The only other “test” that petitioner identifies is the Missouri Supreme Court’s “predominant purpose” test. *See Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003), *cert. denied*, 540 U.S. 1106 (2004). Under that test, an expressive work receives First Amendment protection only where its “predominant purpose . . . is to make an expressive comment on or about a celebrity,” and not where it “predominantly exploits the commercial value of an

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<sup>5</sup> Petitioner also cites *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994), which endorsed the *Rogers* test and additionally suggested a “malice” standard could be applied to the expressive work’s allegedly false statements. However, in *Zacchini*, this Court “rul[ed] that the ‘actual malice’ standard does not apply to the tort of appropriation of a right of publicity.” *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988). And petitioner could not satisfy that standard in any event.

individual’s identity.” *Id.* at 374 (citation omitted). No other jurisdiction has adopted this test, and it has been severely criticized. *See Hart*, 717 F.3d at 154 (“[T]he 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.”). An outlier test adopted by a single state court nearly two decades ago does not give rise to a pressing split warranting this Court’s review.

Notably, petitioner would not prevail even under the Missouri Supreme Court’s test. *Gears of War* plainly does not “exploit[] the commercial value” of petitioner’s identity. *Doe*, 110 S.W.3d at 374 (citation omitted). There is no evidence that any game developer had even heard of petitioner before they created the character. JA585 ¶ 81. Nor is there evidence that petitioner still has commercial value in his 1990s local wrestling persona. Indeed, petitioner abandoned his Lanham Act claim—which would have required him to identify a commercial injury. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014) (“[T]he Lanham Act authorizes suit only for commercial injuries . . . .”); *see also* JA584 ¶ 67 (citing petitioner’s admissions that he “is unable to quantify the harm to his commercial interest and business reputation” and has no evidence of damages in his possession, custody, or control).

5. Not only does petitioner fail to explain how his claims could survive under any of these tests, he has not produced a single case—in any court—with analogous facts in which the court allowed a right of publicity claim to proceed. To the contrary, courts routinely reject similar claims by plaintiffs asserting that they are the inspiration for a fictional character in a creative work. *See, e.g., Polydoros v. Twentieth*

*Century Fox Film Corp.*, 79 Cal. Rptr. 2d 207, 211-12 (Ct. App. 1997) (rejecting claim based on similarities with character in *The Sandlot*); *Costanza v. Seinfeld*, 719 N.Y.S.2d 29, 30-31 (App. Div. 2001) (rejecting claim by plaintiff Michael Costanza based on character “George Costanza” in *Seinfeld*); *Aguilar v. Universal City Studios, Inc.*, 219 Cal. Rptr. 891, 892-95 (Ct. App. 1985) (rejecting claim based on similarities with movie character); *Duncan v. Universal Music Grp. Inc.*, No. 11-CV-5654, 2012 WL 1965398, at \*3 (E.D.N.Y. May 31, 2012) (same); *Polsby v. Spruill*, No. CIV. 96-1641 (TFH), 1997 WL 680550, at \*5-7 (D.D.C. Aug. 1, 1997) (dismissing claim that plaintiff was basis for character in novel), *aff’d*, No. 97-7148, 1998 WL 202285 (D.C. Cir. Mar. 11, 1998), *cert. denied*, 525 U.S. 1018 (1998); *Collier v. Murphy*, No. 02 C 2121, 2003 WL 1606637, at \*1 (N.D. Ill. Mar. 26, 2003) (dismissing claim that plaintiff’s likeness was used as basis for cartoon character).

### **B. The Asserted Conflict Is Not Ripe for Review**

Even if petitioner had identified a meaningful conflict of authority, it would not be ripe for review. The law in this area continues to evolve, and courts are only now beginning to integrate this Court’s most recent jurisprudence on content-based speech restrictions into their right of publicity analysis. Further percolation is warranted.

Over the last few years, this Court has made clear that all content-based restrictions are subject to strict scrutiny. *See Barr v. Am. Ass’n of Pol. Consultants, Inc.* (AAPC), 140 S. Ct. 2335, 2346 (2020); *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015). This includes any “law that ‘singles out specific subject

matter for differential treatment,” such as state right of publicity statutes. *See AAPC*, 140 S. Ct. at 2346 (citation omitted). Applying strict scrutiny, such laws “are presumptively unconstitutional and may be justified only if . . . they are narrowly tailored to serve compelling state interests.” *Reed*, 576 U.S. at 163.

Petitioner’s claims would fail under a straightforward application of this Court’s precedents in *Reed* and *AAPC*. There is no question that video games are entitled to full First Amendment protection. *See Brown*, 564 U.S. at 790. “Like the protected books, plays, and movies that preceded” it, *Gears of War* “communicate[s] ideas” and “social messages” through complex plots, character development, musical scores, and dialogue. *Id.* And as applied to the ideas expressed through *Gears of War*, Pennsylvania’s right of publicity statute is a content-based restriction on speech. That restriction is “presumptively unconstitutional” unless petitioner can show that application of the law is “narrowly tailored to serve [a] compelling state interest[.]” *Reed*, 576 U.S. at 163. Petitioner has made no effort to do so in this case.

Lower courts are starting to apply strict-scrutiny concepts more explicitly in the right of publicity context in the wake of this Court’s decisions. For example, in *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016), the Ninth Circuit considered a right of publicity claim brought by one of the soldiers depicted in the award-winning film *The Hurt Locker*. The court held that California’s right of publicity law represents a content-based restriction on speech, requiring the application of strict scrutiny. 813 F.3d at 903. Accordingly, application of the law “[could not] stand unless [the plaintiff] [could] show a compelling state

interest in preventing the defendants' speech." *Id.* at 906. The court cast its transformative use precedents as having identified compelling state interests in preventing defendants from "appropriat[ing] the economic value of a performance or persona or seek[ing] to capitalize off a celebrity's image in commercial advertisements." *Id.* at 905. Since those interests were not implicated in *Sarver*, the court held that the First Amendment protected the film's depiction of the plaintiff. *Id.* at 905-06.

Other courts have started to rely on *Sarver*'s analysis. *See, e.g., De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625, 638 (Ct. App. 2018) (discussing *Sarver* at length and concluding that the docudrama at issue in that case was "as constitutionally protected as" *The Hurt Locker*), *cert. denied*, 139 S. Ct. 800 (2019); *Brown v. Showtime Networks, Inc.*, 394 F. Supp. 3d 418, 437 (S.D.N.Y. 2019) (citing *Sarver* and holding that under "the First Amendment, a right of publicity cause of action may not be maintained against 'expressive works, whether factual or fictional'" (citation omitted)). But these more explicit discussions of *Reed* (and *AAPC*) are still quite new. If the Court is inclined to opine on how the First Amendment limits right of publicity claims, it should allow additional time for the lower courts to apply its most recent guidance.

## **II. PETITIONER'S PROPOSED RULE IS RADICAL AND WRONG**

Implicitly acknowledging that he cannot prevail under any existing test, petitioner urges this Court to grant review to adopt a brand new rule that petitioner never advanced below. According to petitioner, the established balancing approaches all leave speakers

“free to denigrate people’s individually cultivated identities without permission.” Pet. 23-24. Petitioner therefore asserts that the “time has come for this Court to provide a test” under which no person may use another’s likeness “without his or her permission” except for “certain” ad-hoc and ill-defined “exceptions,” such as “use that obviously does not misrepresent the individual” and “newsworthiness.” Pet. 18-19. This Court, however, is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And, in any event, the test petitioner proposes is entirely unworkable and plainly unconstitutional.

Requiring permission to speak is not permitted by the First Amendment. To hold otherwise would be anathema to this Court’s longstanding precedent. There are few “historic and traditional” exceptions from First Amendment protection, and use of a person’s persona without permission is not one. *United States v. Stevens*, 559 U.S. 460, 468-69 (2010); *see also United States v. Alvarez*, 567 U.S. 709, 717-18 (2012) (collecting cases). This Court has repeatedly and rightly refused to expand these categories or add a new one. *See, e.g., Alvarez*, 567 U.S. at 718; *Stevens*, 559 U.S. at 481-82; *Brown*, 564 U.S. at 804-05.

This would be an especially inappropriate context in which to do so. As explained above, right of publicity statutes are content-based regulations, which are “presumptively unconstitutional” unless they can survive strict scrutiny. *See Reed*, 576 U.S. at 163. Thus, any rule governing right of publicity claims must be limited so as to avoid unconstitutional applications of the tort. Petitioner’s “rule,” which “begin[s] at recognizing that a person’s face and voice may not be used without his or her permission,” Pet.

18, would not survive strict scrutiny. Taken literally, it would prohibit photographs, documentaries, and even some criticism of public figures.

Petitioner tries to rescue his rule by limiting it to portrayals the individual “does not like” or carving out vague and ill-defined exceptions, “such as newsworthiness, *de minimis* use (making an amusing meme), and use that obviously does not misrepresent the individual (such as parody and satire of the plaintiff’s public acts).” *Id.* at 18-19, 23. But this Court has repeatedly emphasized the importance of ensuring restrictions on speech are “well-defined.” *Stevens*, 559 U.S. at 468-69. 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) (citation omitted), thereby causing an “obvious chilling effect on free speech,” *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). Petitioner’s proposed exemptions are the opposite of “well-defined”: they are unintelligible and unworkable, and would chill core First Amendment expression.

Notably, petitioner would not prevail even under his own test. Petitioner carves out an exception for the “implicit license people provide by going out into public or engaging in public acts.” Pet. 18-19. Given petitioner’s apparent belief that the Cole character was based on his brief stint as a professional football player and his public wrestling appearances around Philadelphia as “Hard Rock Hamilton,” respondents would win even under petitioner’s own test. *Id.* at 3-5.

This leaves petitioner to fall back on parade-of-horribles hypotheticals, such as photoshopped

pornography. *Id.* at 22-23. But this case simply does not present such troubling hypotheticals. Right of publicity cases focus predominantly on a plaintiff's economic rights in his persona and have "little to do with protecting feelings or reputation." *Zacchini*, 433 U.S. at 573. Other torts—such as defamation, invasion of privacy, and false light—center on privacy and reputational concerns. *See id.*; *see also C.B.C. Distrib.*, 505 F.3d at 824 (citing decisions "indicat[ing] that the right of publicity is intended to promote only economic interests and that noneconomic interests are more directly served by so-called rights of privacy"); *Cardtoons*, 95 F.3d at 976 ("Publicity rights . . . are meant to protect against the loss of financial gain, not mental anguish."). To the extent petitioner's hypotheticals ever become reality, this Court can grant review in a case presenting those facts under the appropriate tort-law framework.<sup>6</sup>

### **III. THIS CASE IS A POOR VEHICLE FOR REVIEW BECAUSE PETITIONER'S CLAIMS WOULD INEVITABLY FAIL ON ALTERNATIVE GROUNDS**

Even if the First Amendment did not bar petitioner's claims, they would fail—at summary judgment—for other reasons. This Court should not devote its resources to resolving issues that will have

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<sup>6</sup> To the extent petitioner is worried that celebrities will be conscripted into fake product endorsements, Pet. 22-23, the Lanham Act provides an express statutory remedy for misrepresentations as to "sponsorship[] or approval of" goods or services "by another person." 15 U.S.C. § 1125(a)(1)(A). Petitioner, however, voluntarily withdrew his Lanham Act claim in this case.

no practical impact on the ultimate resolution of this case.

The heart of petitioner's case is his statutory right of publicity claim based on 42 Pa. Cons. Stat. § 8316. This statutory claim fails for at least three independent reasons.

*First*, Pennsylvania law expressly exempts “expressive work[s],” defined as “literary, dramatic, fictional, historical, audiovisual or musical work[s] regardless of the communications medium,” from liability. 42 Pa. Cons. Stat. § 8316(e). That exemption plainly covers highly imaginative, narrative-driven video games like *Gears of War*. See *Brown*, 564 U.S. at 790; *Dillinger, LLC v. Elec. Arts Inc.*, 795 F. Supp. 2d 829, 835-36 (S.D. Ind. 2011) (construing nearly identical provision in Indiana's right of publicity statute to exempt a video game).

*Second*, the statute requires that respondents have actual knowledge that they used petitioner's image. 42 Pa. Cons. Stat. § 8316(d). But neither Epic, nor Microsoft, nor any of the eight game designers deposed, had ever heard of petitioner before this dispute. JA585 ¶ 81. Instead, petitioner has identified just one ostensible connection between himself and the video game franchise—a single (disputed) conversation with Speight eight years before Speight was hired to voice Cole. And un rebutted testimony establishes that Speight had zero meaningful input into Cole's character design, beyond suggesting that his arms be bigger. JA574-75 ¶ 17, 23.

*Third*, Pennsylvania law requires petitioner to show that his “likeness” or voice has “[c]ommercial value,” 42 Pa. Cons. Stat. § 8316(e), which he cannot

do. *See Majorsky v. Douglas*, 58 A.3d 1250, 1263 (Pa. Super. Ct. 2012) (referencing statute), *cert. denied*, 571 U.S. 1127 (2014).

Petitioner's non-statutory claims fare no better. His common-law misappropriation and right of publicity claims are "subsumed" by the Pennsylvania statute. *See Facenda v. NFL Films, Inc.*, 488 F. Supp. 2d 491, 513 (E.D. Pa. 2007), *aff'd in part and vacated in part*, 542 F.3d 1007, 1013 n.2 (3d Cir. 2008) (accepting result in *dicta*). And even if they were not, they also fail because (again) petitioner has provided no evidence of commercial value in his identity or appropriation of any other value in his identity. Finally, petitioner's unjust enrichment claim fails because he lacks a contractual relationship with respondents. *See, e.g., Boring v. Google Inc.*, 362 F. App'x 273, 281-82 (3d Cir.), *cert. denied*, 562 U.S. 836 (2010). And to the extent his claim is not rooted in contract, it is simply duplicative of his other claims. *See, e.g., Ruffin-Steinback v. dePasse*, 267 F.3d 457, 462-63 (6th Cir. 2001).

This Court should not devote its scarce resources to adjudicating petitioner's brand new request for a novel rule that sharply curtails First Amendment rights. And it certainly should not do so in a case where that legal rule will make no difference, because petitioner's claims are ultimately doomed on other grounds.

**CONCLUSION**

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

Respectfully submitted,

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