

No. 20-1123

IN THE
Supreme Court of the United States

LENWOOD HAMILTON, A/K/A HARD
ROCK OR SKIP HAMILTON,
Petitioner,

v.

LESTER SPEIGHT, A/K/A RASTA THE
URBAN WARRIOR, A/K/A AUGUSTUS
“COLE TRAIN” COLE; EPIC GAMES,
INC.; MICROSOFT, INC., A/K/A
MICROSOFT CORP.; MICROSOFT
STUDIOS; THE COALITION,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
REASONS FOR GRANTING THE WRIT.....	2
I. THE CIRCUITS' AND STATE COURTS' VARIOUS METHODS OF "BALANCING" INTERESTS ARE UNIFORM NEITHER IN WHAT THEY BALANCE OR THE WEIGHT OF EACH FACTOR.	2
II. THIS CASE PRESENTS A RECURRING QUESTION OF GROWING AND EXCEP- TIONAL IMPORTANCE.....	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page(s)
<i>C.B.C. Distrib & Mktg. v. Major League Baseball Advanced, L.P., 505 F.3d 818 (8th Cir. 2007)</i>	4
<i>Cartoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959 (10th Cir. 1996)</i>	4
<i>Comedy III Productions, Inc. v. Gary Saderup, Inc., 106 Cal. Rptr. 2d 126 (Cal. 2001)</i>	6, 8
<i>Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003)</i>	3, 8
<i>Hart v. Elec. Arts Inc., 717 F.3d 141 (3d Cir. 2013)</i>	5
<i>Kirby v. Sega of Am., 50 Cal. Rptr. 3d 607 (Cal. App. 2 Dist. 2006)</i>	11
<i>Matthews v. Wozencraft, 15 F.3d 432 (5th Cir. 1994)</i>	3
<i>No Doubt v. Activision Publishing, Inc., 122 Cal.Rptr.3d 397 (Cal. Ct. App. Div. 4 2011)</i>	3, 6, 7
<i>Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003)</i>	3
<i>Zacchini v. Scripps-Howard Broacasting Co., 433 U.S. 562 (1977)</i>	3

Other Authorities

- Federal Bureau of Investigation, Cyber Division, *Malicious Actors Almost Certainly Will Leverage Synthetic Content for Cyber and Foreign Influence Operations*, Private Industry Notification No. 210310-001 (March 10, 2021).....10
- Nick Graham, *Deepfake deception: the emerging threat of deepfake attack*, JDSupra (May 24, 2021).....9
- Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. Pitt. L. Rev. 225, 232 n.25 (Fall 2005).....11
- Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L.J. 86, 127 (October, 2020).....4
- Mark Sanukonoko, *Deepfake nudes change the face of cyber threats, revenge porn and scams*, 9 News Australia (May 1, 2021).....10

INTRODUCTION

The Respondents acknowledge that different jurisdictions have developed numerous tests for determining whether the First Amendment restricts a right of publicity claim. They acknowledge that the problem is recurring to the point that this Court receives a petition on the issue every few years. They acknowledge the facts that render this case a suitable vehicle for this Court to provide guidance on the issue: the district court and the Third Circuit “held that even though [Hamilton] 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.” BIO at 2. Moreover, they concede that Hamilton’s moral objection to the portrayal of his face and voice became a factor weighing against his claims in the Third Circuit. The Petition thus squarely presents the tension between a video game “creator’s” asserted First Amendment right to use a person’s likeness and an individual’s privacy, dignity, pecuniary, and other interests against having the “creator” use his face and voice.

The First Amendment necessarily restricts the scope of states’ right of publicity doctrines, and the myriad tests resulting in different First Amendment outcomes has left the doctrine a complete mess. Only a ruling from this Court can harmonize the First Amendment’s reach in right of publicity cases. Respondents have offered nothing to counter that. Instead, they wrongly claim that no test would have reached a different outcome in this case, and they misrepresent the rule Hamilton seeks. The Petition did not provide the specific test that best suits the First Amendment’s impact on right of publicity

claims. It provided broad outlines of the necessary considerations for context. Respondents' straw man attack should not distract from the issue here. Nor should Respondents' assertions of factual disputes distract from the issue here. Speight helped develop the game after talking to Hamilton about such a game a few years before. Then, *Gears of War* was released with the Cole character experts clearly established is based on Hamilton's face and voice.

The parties agree the Third Circuit ruled with the presumption that Respondents used Hamilton's face and voice without his permission. The Third Circuit ruled, based on binding Third Circuit precedent, that Respondents had a First Amendment right to do so largely *because* Hamilton morally objected to their depiction of him. The same principle will apply in myriad contexts—with examples provided in the Petition and the Atlantic Legal Foundation's amicus brief—to the detriment of celebrities and private citizens alike. The Court should grant the writ and offer the guidance courts desperately need.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS' AND STATE COURTS' VARIOUS METHODS OF "BALANCING" INTERESTS ARE UNIFORM NEITHER IN WHAT THEY BALANCE OR THE WEIGHT OF EACH FACTOR.

Respondents' attempt to harmonize the various tests courts use to determine the First Amendment's impact in right of publicity cases reduces to the flawed notion that each court using the word "balancing" means they use the same test. But even Respondents cannot hold that theory together, admitting that "[c]ourts 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)." BIO at 13. Put another way, this Court has provided so little guidance, courts have relied on the same case to articulate different "balancing" tests. Hamilton agrees.

1. The circuit and state courts' varied tests are not nearly as close as Respondents claim. Each test cites *Zacchini*, but then diverges from other tests, just as Justice Powell predicted in his *Zacchini* concurrence. 433 U.S. at 581. The Third Circuit and California have adopted different versions of the transformative use test. Petition at 13-14. The Second and Sixth Circuits have applied the "relatedness test." Petition at 11-12. The Fifth Circuit applied an "actual malice" test. Petition at 12. And the Supreme Court of Missouri applied the "predominant use" test. Petition at 15. Other courts have applied different methods to resolve right of publicity claims. Petition at 15-16.

Respondents claim *almost* all are versions of the same test, BIO at 15-18, but that is simply untrue. The transformative use test focuses on how the likeness itself is modified. *No Doubt v. Activision Publishing, Inc.*, 122 Cal.Rptr.3d 397, 410 (Cal. Ct. App. Div. 4 2011). The relatedness test focuses on the connection between the likeness and the message from the viewer's standpoint. *Parks v. LaFace Records*, 329 F.3d 437, 458 (6th Cir. 2003). The "actual malice" test focuses on the reputational injury to the plaintiff. *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994). And the "predominant use" test focuses on the role commercial advantage played in the defendant's decision to exploit the likeness. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 372 (Mo. 2003).

That is why academics have pilloried the current state of First Amendment law as applied to the right of publicity, recognizing that “[j]udicial analysis of this conflict is notoriously incoherent and inconsistent.” Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L.J. 86, 127 (October, 2020). The Academy agrees the tests have little in common, and Respondents do not provide a single scholarly article or case claiming—or even suggesting—the courts are in harmony. Such an assertion would be conceptually unsound.

Respondents attempt to draw connections among the tests, but they fail. As noted in the Petition at 13, the Tenth Circuit’s test is “similar” to the transformative use test, but it is not the same, as Respondent concedes, BIO at 15-16. The Tenth Circuit relies heavily on the “creator’s” expressive intent. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 973 (10th Cir. 1996) (evaluating expression right by referring to creator’s intent to parody, rather than actual manipulation of the likeness). And contrary to Respondents’ claim, BIO at 15, the Eighth Circuit’s case-by-case weighing is far different from the transformative use test. The court considers non-economic rights, “including protecting natural rights, rewarding celebrity labors, and avoiding emotional harm.” *C.B.C. Distrib & Mktg. v. Major League Baseball Advanced, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007). The Tenth and Eight Circuits’ tests are far from “functionally equivalent” to the transformative use test. See BIO at 16.

Respondents concede that the Second Circuit’s “relatedness test” “is principally tailored to a different state interest—protecting consumers against

confusion.” BIO at 17. But they do not explain how that renders it the same test. And they concede the “predominant use” test is different from the transformative use test. BIO at 19. Indeed, Respondents are so lost to support their assertion that the tests all are the same that they try to dismiss the Fifth Circuit’s test by stating it *conflicts* with this Court’s precedent. BIO at 18 n.5. That, of course, is more evidence that the Court should step in to offer guidance lower courts can use.

2. Here, the varied tests would yield significantly different results and require different evidence. Even the Third Circuit’s and California’s versions of the transformative use test yield different results. The Third Circuit’s test, articulated in *Hart v. Elec. Arts Inc.*, 717 F.3d 141 (3d Cir. 2013) provided swift dismissal. Pet. App. 4a-5a. Meanwhile, as noted in the Petition at 17, the traditional transformative use concept—adopted by California—recognizes the greater interest one has in his or her actual likeness and the diminished value a “creator” has in using someone’s likeness when it is not commenting on that person.

The courts here acknowledged the connection between Hamilton and Speight and the expert testimony, which ultimately led them to apply the facts in the light most favorable to Hamilton and assume Respondents used Hamilton’s face and voice.¹

¹ The Brief in Opposition heavily relies on facts in dispute taken in the light most favorable to Respondents. Hamilton does not concede that the game developers did not use Hamilton’s face and voice for the Cole character, nor does he concede the underlying factual assertions about when and how the developers created the character’s look and sound, nor any of the myriad other disputed factual assertions on which Respondents

Pet. App. 4a, 11a, & 12a. The evidence Respondents used Hamilton’s face and voice is compelling, see Petition at 4-5, and the likelihood that this coincidentally arose with Speight, Hamilton’s former co-worker, having input into the look and voice is obviously small.

In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the California Supreme Court “emphasize[d] that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism.” 106 Cal. Rptr. 2d 126, 141 (Cal. 2001) (internal citations omitted). *All* of these involve using a celebrity’s likeness for commentary on the celebrity. None of them involve using one’s likeness without his permission because he looks and sounds cool and will help sell video games.

In *No Doubt*, a game called *Band Hero* allowed players to create music and play it with in-game avatars. Cal. Rptr. 3d at 401. The defendants entered into an agreement with a band, No Doubt, to license its likeness and songs. *Id.* But the game allowed a feature, not addressed in the agreement, that allowed the No Doubt likenesses to be used to play *other* bands’ songs, “including songs that No Doubt

rely. Given the courts’ decisions below, Respondents’ factual disputes are irrelevant to the questions presented, and the purported grounds for dismissal in their kitchen-sink motion for summary judgment, see BIO at 25-27, is not a sound reason to deny review. Hamilton’s response below establishes that Respondents’ assertions of statutory inapplicability and attacks on Hamilton’s common law claims lack merit. *Hamilton v. Speight*, No. 17-cv-00169, Dkt. 113 (E.D. Pa. March 2, 2019).

maintain[ed] it never would have performed.” *Id.* at 402. They further objected that the female lead singer, Gwen Stefani, “could be made to sing in a male voice” and male band members “could be manipulated to sing songs in female voices.” *Id.* Moreover, individual members could be removed from the band and placed in different bands. *Id.* These *differences* were the basis for the claims, as there was no dispute the defendants had the right to use No Doubt’s members’ likenesses to sing No Doubt songs. *Id.* The differences here are similar to the differences in *No Doubt*. Thus, Hamilton’s claims could proceed under the California transformative use test, but not under the Third Circuit’s.

It is unclear whether Hamilton’s claim would survive under the relatedness test because the parties developed evidence related to the Third Circuit’s transformative use test and Respondents have not articulated how using Hamilton’s face and voice were related to their expression. However, it is unlikely they could state such an interest. For similar reasons, Hamilton’s claims likely would survive the predominant use test, given Respondents’ use of Hamilton’s face and voice is commercial in nature and not expressive.

Ultimately, it is irrelevant whether Hamilton’s claims would have succeeded under one test or another because all of them are inadequate. The right of publicity grew from the right to privacy, yet none of these tests properly accounts for the privacy and dignity interests of victims.

3. Thus, the Court should grant the writ, state an appropriate rule that allows states to protect individuals from “creators” using their faces and

voices—their actual likenesses—without permission, except under settled circumstances in which the Court already has recognized First Amendment protection, such as lampooning or reporting news. Respondents misrepresent Hamilton’s argument by asserting the Petition attempted to state a particular test. BIO at 22-23. The Petition merely noted some general parameters around which a test should be formed at the merits stage. Petition at 18-19. Those parameters involve protecting private rights while allowing a fair use of someone’s likeness under circumstances that fall into settled categories of recognized protected speech. There is nothing “radical” about that. Nor would it “prohibit photographs, documentaries, and even some criticism of public figures.” BIO at 24.

Meanwhile, Respondents skip the first step of any First Amendment free speech inquiry—determining whether the defendant has engaged in protected speech—when they claim that any right of publicity claim is a content-based restriction that must survive strict scrutiny. BIO at 20. Fortunately, the courts have not been so radical in their approaches. Most of the various tests the lower courts have adopted explicitly ask whether the speech at issue is expressive, and thus protected. E.g. *Comedy III*, 106 Cal. Rptr. 2d at 144; *TCI Cablevision*, 110 S.W.3d at 372.

Here, Respondents’ use of Hamilton’s face and voice does not fall into any recognized category of traditionally protected speech. There is *nothing* in the record suggesting Respondents used Hamilton’s face and voice as a commentary on him or his celebrity status. And while video games are protected in a general sense as an artform, Respondents do not assert, nor can they, that *everything* in a video game

is inherently protected speech. Respondents concede artistic works cannot escape a defamation or false light claim simply by being expressive in some sense. BIO at 25. The same is true in the right of publicity realm.

II. THIS CASE PRESENTS A RECURRING QUESTION OF GROWING AND EXCEPTIONAL IMPORTANCE.

The consequences of this Court’s lack of guidance are wide-reaching. As the Petition noted and the Respondents do not refute, some courts’ failure to acknowledge the dignity and privacy interests underlying the right of publicity have created an environment where the Third Circuit’s test renders a right of publicity claim *less* viable when a plaintiff has a moral objection to how a “creator” uses his or her actual face and voice. At the same time, the right of publicity is becoming more and more important for both celebrities and private individuals as deepfakes become more and more prevalent and realistic. Petition at 22. Respondents do not refute that point either.

Deepfakes are becoming more of a problem that ultimately will require enforcement of both civil and criminal laws. Nick Graham, *Deepfake deception: the emerging threat of deepfake attack*, JDSupra (May 24, 2021) (“whilst deepfakes can be used productively, particularly in the media sector, the potential for fraud is massive and cannot be ignored”).² Indeed, the FBI issued a Private Industry Notification warning companies of upcoming widespread use of deepfakes

² Available at: <https://www.jdsupra.com/legalnews/deepfake-deception-the-emerging-threat-6130002/>

in March. Federal Bureau of Investigation, Cyber Division, *Malicious Actors Almost Certainly Will Leverage Synthetic Content for Cyber and Foreign Influence Operations*, Private Industry Notification No. 210310-001 (March 10, 2021).³ The people whose faces and voices are used without permission are victims too, particularly when they are exploited to their own harm. See, e.g., Mark Sanukonoko, *Deepfake nudes change the face of cyber threats, revenge porn and scams*, 9 News Australia (May 1, 2021) (“Research by Sensity, a company specialising in detecting online visual threats and cyber scams, recently uncovered a pornographic deepfake ecosystem where more than 100,000 innocent women had been stripped naked by deepfake technology.”).⁴ Here, Respondents’ deepfake of Petitioner Lenwood Hamilton—his face and voice—which get more and more realistic with each new version of *Gears of War*—exploits Hamilton and demeans his dignity by depicting him as the opposite image of a Black man he wants to project. And the Third Circuit found a *constitutional right* to do that.

According to Respondents, courts are now trending toward rulings that individuals have *no* right against other people using their faces and voices in “expressive” works. BIO at 22. *That* is radical and wrong. It further underscores that “the lack of guidance from this Court will lead to an extreme lack of protection for people’s privacy and dignity under

³ Available at <https://www.ic3.gov/Media/News/2021/210310-2.pdf>

⁴ Available at <https://www.9news.com.au/national/deepfake-nude-how-rise-of-bots-and-ai-could-make-you-a-victim/5d834b26-db9e-4cfe-8541-298dd3f64d01>

the guise of a free speech right.” Petition 20. As the Atlantic Legal Foundation points out, the technology only gets stronger, and soon, virtual reality will take over. Atlantic Legal Foundation Amicus Br. at 23. And if courts do not consider the non-monetary interests people have in their likenesses, the landscape will only get worse. See *id.* at 19-20.

Respondents do not squarely address the implications of the courts’ rulings in right of publicity cases. They assert that “other torts—such as defamation, invasion of privacy, and false light” will resolve the privacy concerns with the myriad issues that arise from the various tests in the privacy context. That is not so. As noted in the Petition, the complaint here alleged a right of privacy claim, misappropriation of likeness, and unjust enrichment. Pet. 6. Courts and legislatures often lump several claims together with the right of publicity. E.g. *Kirby v. Sega of Am.*, 50 Cal. Rptr. 3d 607, 612 (Cal. App. 2 Dist. 2006). Indeed, in New York, the statutory right of privacy law preempts common law right of publicity claims, Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. Pitt. L. Rev. 225, 232 n.25 (Fall 2005), and here, Respondents claim Hamilton’s common law claims are “subsumed” by the right of publicity statute. BIO at 27. Respondents cannot pretend the courts approach right of publicity cases narrowly. They do not. Hamilton’s claims encompass the myriad private rights involved in the right of publicity that will affect the misappropriated likeness of a celebrity, an ex-girlfriend, or an elderly gentleman unwittingly placed in an erectile dysfunction ad. Petition 21-23. And the Court should grant the writ to provide needed guidance on the First Amendment’s role in limiting the right of publicity.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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