

No. 15-10880

**IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT**

ROSA AND RAYMOND PARKS INSTITUTE,
Plaintiff-Appellant,

- v. -

TARGET CORPORATION,
Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Middle District of Alabama
Case No. 2:13-CV-00817-WKW-WC

**PROPOSED BRIEF OF *AMICI CURIAE*
LAW PROFESSORS IN SUPPORT OF
DEFENDANT-APPELLEE**

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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INTEREST OF *AMICI CURIAE*¹

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¹ No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief. Defendant Target consented to the filing of this brief, but Plaintiff Rosa & Raymond Parks Institute has not.

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Many of the *amici* have written specifically on the right of publicity; some of their works on this subject are noted in the margin.²

² Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 *Stan. L. Rev.* 1161 (2006); William T. Gallagher, *Strategic Intellectual Property Litigation, the Right of Publicity, and the Attenuation of Free Speech: Lessons from the Schwarzenegger Bobblehead Doll War (and Peace)*, 45 *Santa Clara L. Rev.* 581 (2005); Jon M. Garon, *Playing in the Virtual Arena: Avatars, Publicity, and Identity Reconceptualized Through Virtual Worlds and Computer Games*, 11 *Chap. L. Rev.* 465 (2008); Martin H. Redish & Kelsey B. Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 *Wm. & Mary L. Rev.* 1443 (2015); Jennifer E. Rothman, *The Inalienable Right of Publicity*, 100 *Geo. L.J.* 185 (2012); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 *U.C. Davis L. Rev.* 199 (2002); Rebecca Tushnet, *A Mask that Eats into the Face: Images and the Right of Publicity*, 38 *Colum. J.L. & Arts* 157 (2015); David S. Welkowitz, *Catching Smoke, Nailing Jell-O to a Wall: The Vanna White Case and the Limits of Celebrity Rights*, 3 *J. Intell. Prop. L.* 67 (1995); Davis S. Welkowitz & Tyler T. Ochoa, *The Terminator as Eraser: How Arnold Schwarzenegger Used the Right of Publicity to Terminate Non-Defamatory Political Speech*, 45 *Santa Clara L. Rev.* 651 (2005). The author of the brief is also the author of Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 *Hous. L. Rev.* 903 (2003), and coauthor of Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *Duke L.J.* 147 (1998).

Amici are concerned about the danger that unduly broad readings of the right of publicity, such as the one in this case, pose to the constitutionally secured right of freedom of speech.

SUMMARY OF ARGUMENT

1. Biographies are protected by the First Amendment, and do not infringe the subjects' right of publicity. This is the unanimous view of all the cases that have considered the issue, and of the Restatement (Third) of Unfair Competition, which Michigan courts are likely to find persuasive.

2. The Rosa Parks plaque in this case is likewise constitutionally protected, and does not infringe the right of publicity—both because of the First Amendment rights of its creators and sellers, and because of the First Amendment rights of its buyers.

Plaques such as the one in this case are bought and sold to be displayed, and displayed chiefly not for their aesthetic qualities but for their political message (here, support for the civil rights movement). Buyers use such plaques to communicate this message to guests who come to their homes. More importantly, buyers often use such plaques to teach their children important historical and political messages, and

to teach respect for the civil rights movement as a basic value in the household.

And allowing historically important figures and their assignees to claim a right of publicity in such plaques would do more than give them a share to the proceeds from sale of such plaques. It would give the right of publicity owners the power to veto those works they disapprove of, and to demand changes to how the figures are depicted in thousands of homes throughout the nation. Under the First Amendment, participants in our nation's history—even ones as respected as Rosa Parks—cannot have that sort of control over speech about them. That is even clearer as to those participants' assignees, after the participants' death.

The caselaw reflects that visual works that use a person's name or likeness as an element of the work are likewise protected by the First Amendment. Just as Tiger Woods had no right to stop the distribution of a painting that depicted three images of him together with smaller images of other golfers, *ETW Corp. v. Jireh*, 332 F.3d 915 (6th Cir. 2003), so the assignees of Rosa Parks have no right to stop the distribution of a plaque that includes her name and likeness.

Courts have read the right of publicity as limiting people’s use of others’ names and likenesses in commercial advertising, and possibly in merchandising that consists solely of the name or likeness. But the right does not—and cannot, consistently with the First Amendment—limit the distribution of the biographical books, biographical movie, and historical plaque involved in this case.

ARGUMENT

I. The biographies of Rosa Parks do not infringe the right of publicity

Biographical books and films about a historical figure are fully protected by the First Amendment. As the Restatement (Third) of Unfair Competition § 47 cmt. c states (paragraph breaks added),

The right of publicity as recognized by statute and common law is fundamentally constrained by the public and constitutional interest in freedom of expression. The use of a person’s identity primarily for the purpose of communicating information or expressing ideas is not generally actionable as a violation of the person’s right of publicity.

The scope of the activities embraced within this limitation on the right of publicity has been broadly construed. . . . The interest in freedom of expression also extends to use in entertainment and other creative works, including both fiction and nonfiction. . . .

[T]he right of publicity is not infringed by the dissemination of an unauthorized print or broadcast biography. . . . The fact that the publisher or other user seeks or is successful in obtaining a commercial advantage from an otherwise permitted use of another

er's identity does not render the appropriation actionable.

Many cases take this view, including one specifically applying Michigan law. *Ruffin-Steinback v. DePasse*, 82 F. Supp. 2d 723, 729 (E.D. Mich. 2000), *aff'd*, 267 F.3d 457, 462 (6th Cir. 2001) (“We conclude that the use of plaintiffs’ fictionalized likenesses in a work protected by the First Amendment and the advertising incidental to such uses did not give rise to a claim for relief under the plaintiffs’ rights of publicity for the reasons stated by the district court.”); *see also* *Bowens v. Aftermath Entertainment*, 2005 WL 900603, *7 (Mich. Ct. App. 2005) (nonprecedential) (citing *Ruffin-Steinback* with approval). Michigan courts view the Restatement (Third) of Unfair Competition as influential. *See, e.g.,* *Movie Mania Metro, Inc. v. GZ DVD’s Inc.*, 857 N.W.2d 677, 690 (Mich. Ct. App. 2014) (citing § 33 of that Restatement); *Janet Travis, Inc. v. Preka Holdings, L.L.C.*, 856 N.W.2d 206, 221 (Mich. Ct. App. 2014) (citing § 21 of that Restatement).

Moreover, the Michigan precedent that applies the right of publicity cites Restatement (Second) of Torts § 652C, which has been updated and incorporated in part into Restatement (Third) of Unfair Competition §§ 46, 47. *Battaglieri v. Mackinac Center for Public Policy*, 680

N.W.2d 915, 919 (Mich. Ct. App. 2004). As one court held about the similar adoption of the right of publicity by New Jersey, state courts’ “incorporation of the Second Restatement of Torts indicates that [their] analysis would likely align with that of the Third Restatement of Unfair Competition” as to the right of publicity. *Hebrew Univ. of Jerusalem v. General Motors LLC*, 903 F. Supp. 2d 932, 937 (C.D. Cal. 2012); *ETW*, 332 F.3d at 930 (likewise noting that Ohio courts had cited Restatement (Second) of Torts § 652C, and inferring from that those courts would follow Restatement (Third) of Unfair Competition § 47).

The protection of biography applies to both books and films.³ As a concurrence endorsed by a majority of the California Supreme Court

³ See, e.g., *Matthews v. Wozencraft*, 15 F.3d 432, 439-40 (5th Cir. 1994) (holding that a novel and film about an undercover police officer’s life story are protected by the First Amendment); *Moore v. Weinstein Co., LLC*, 545 F. App’x 405, 408 (6th Cir. 2013) (“[t]he right of publicity does not proscribe . . . ‘dissemination of an unauthorized print or broadcast biography’” (quoting Restatement)); *Montgomery v. Montgomery*, 160 S.W.3d 524, 530 (Ky. 2001) (concluding that defendant would have been free, “without either the consent or approval of Harold’s estate,” to “produce[] a film biography of [Harold] and promote[d] the film using Harold’s name and likeness without violating Harold’s estate’s right of publicity”) (footnotes omitted); *Seale v. Gramercy Pictures*, 949 F. Supp. 331 (E.D. Pa. 1996) (rejecting right of publicity claim brought against the makers of a book and film biography), *aff’d without op.*, 156 F.3d 1225 (3d Cir. 1998).

Justices noted in *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 461-62 (Cal. 1979) (Bird, C.J., concurring),

Whether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity.

This protection for biography would naturally also apply to photographs within biographical books and films; such photographs are commonplace and important elements of biographies. And it applies just as much to works aimed at children as to works aimed at adults. *See, e.g., Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2735-36 (2011) (concluding that materials aimed at children are generally as protected by the First Amendment as materials aimed at adults).

The Parks Institute argues that the District Court should not have concluded "that all of the items that Appellee sold were literary and First Amendment Protected without a determination or finding of the many, many, facts upon which reasonable people could differ." Parks Br. 21. But there are no factual questions that need to be determined

here; biographies are immune from right of publicity liability as a matter of law.

Indeed, under Michigan law, “[t]he question whether a publication is sufficiently a matter of public interest to be protected by the [First Amendment] privilege is ordinarily decided by the court as a question of law,” *Battaglieri*, 680 N.W.2d at 919-20. And this simply reflects the broader First Amendment principle that, “in cases raising First Amendment issues . . . an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression,’” rather than just deferring to a jury. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).⁴ Such decisions

⁴ *Bose* was a trade libel case, but the same principle also applies to speech restrictions more generally. *Street v. New York*, 394 U. S. 576, 592 (1969) (applying independent appellate review to determine whether speech qualified as fighting words); *Hess v. Indiana*, 414 U.S. 105, 108-109 (1973) (per curiam) (likewise, as to incitement); *Jenkins v. Georgia*, 418 U.S. 153, 159-161 (1974) (obscenity); *New York v. Ferber*, 458 U.S. 747, 774 n.28 (1982) (child pornography); *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 602 (2003) (fraud); *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (speech on matters of private concern that might lead to intentional infliction of emotional distress liability); *Flanigan’s Enterprises, Inc. of Ga. v. Fulton County*,

about whether speech is constitutionally protected—including protected against right of publicity liability, on the grounds that it is protected biography or historical reference—thus should not be delegated to juries.

II. The plaque commemorating the civil rights movement does not infringe the right of publicity

A. Precedents involving visual art suggest that the plaque does not infringe the right of publicity

The First Amendment protects relatively short and simple messages as well as books and films. *See, e.g., Cohen v. California*, 403 U.S. 15, 15-18 (1971) (holding that three words on a jacket are protected by the First Amendment). “The protections afforded by the First Amendment . . . have never been limited to newspapers and books.” *Cardtoons, Inc. v. Major League Baseball Players*, 95 F.3d 959, 969 (10th Cir. 1996) (holding that jocular baseball cards are protected by the First Amendment against a right of publicity challenge). Likewise, it protects visual images as much as text. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (“First Amendment

596 F.3d 1265, 1275-76 (11th Cir. 2010) (regulations of sexually oriented businesses).

doctrine does not disfavor nontraditional media of expression.”) Nothing about the medium of collage deprives it of First Amendment protection.⁵

Indeed, the Sixth Circuit—which embraces Michigan—has expressly rejected a right of publicity claim involving visual art that contained a plaintiff’s image as well as other images. That case is *ETW Corp. v. Jireh*, 332 F.3d 915 (6th Cir. 2003), in which the defendant sold prints that depict Tiger Woods. Woods’ company sued, and the Sixth Circuit held that the prints did not infringe Woods’ rights.

⁵ The First Amendment does not protect commercial advertising as much as it protects other speech. *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 68 (1983). Perhaps because of this, courts have usually been willing to apply the right of publicity to commercial advertising without expressing First Amendment concerns, *see, e.g., Carson v. Here’s Johnny Portable Toilets*, 698 F.2d 831, 837 (6th Cir. 1983), though even that has been controversial, *see id.* at 841 (Cornelia Kennedy, J., dissenting). The discussion in this brief focuses on speech that does not consist of commercial advertising, and is thus fully protected by the First Amendment. *See also* Restatement (Third) of Unfair Competition § 47 (noting that “advertising incidental to [nonactionable] uses” of a person’s likeness is itself not actionable); *Ruffin-Steinback v. DePasse*, 267 F.3d 457, 462 (6th Cir. 2001) (holding that “the use of plaintiffs’ fictionalized likenesses in a work protected by the First Amendment *and the advertising incidental to such uses* did not give rise to a claim for relief under the plaintiffs’ rights of publicity” (emphasis added)).



[A reproduction of the print involved in *ETW Corp. v. Jireh*.]

In *ETW*, the defendant's prints were at least as focused on Tiger Woods as this plaque is on Rosa Parks—indeed, probably more so. The prints contained three large images of Woods, not just one large and one tiny. They contained some smaller background images of other golfers, just as the plaque contained a smaller but substantial image of the Rev. Martin Luther King, Jr. They did not contain any words that suggest an overarching theme beyond just celebrating Woods (as this image did with the words “Civil Rights” and “Change”).

Yet the Sixth Circuit held that the prints were protected, using reasoning that would equally apply to this case. “There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment.” *Id.* at 931. “This tension becomes particularly acute when the person seeking to enforce the right is a . . . famous person whose . . . activities . . . are subject to constant scrutiny and comment in the public media.” *Id.*

The evidence in the record reveals that Rush’s [the artist’s] work consists of much more than a mere literal likeness of Woods. It is a panorama of Woods’s victory at the 1997 Masters Tournament, with all of the trappings of that tournament in full view These elements in themselves are sufficient to bring Rush’s work within the protection of the First Amendment.

Id. at 936.

“A piece of art that portrays a historic sporting event communicates and celebrates the value our culture attaches to such events. It would be ironic indeed if the presence of the image of the victorious athlete would deny the work First Amendment protection.” *Id.* “Rush has added a significant creative component of his own to Woods’s identity. Permitting Woods’s right of publicity to trump Rush’s right of freedom of expression would extinguish Rush’s right to profit from his creative enter-

prise.” *Id.* at 938. “After balancing the societal and personal interests embodied in the First Amendment against Woods’s property rights, we conclude that the effect of limiting Woods’s right of publicity in this case is negligible and significantly outweighed by society’s interest in freedom of artistic expression.” *Id.* All of this can equally be said about the plaque in this case.

Likewise, in *Comedy III Prods. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (2001), the California Supreme Court noted that even “reproductions of celebrity portraits” (with no accompanying material) “may well be entitled to First Amendment protection.” The court gave as examples Andy Warhol’s images of “Marilyn Monroe, Elizabeth Taylor, and Elvis Presley.” *Id.* “Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself.” *Id.*

Here, the message of the plaque is historic, celebratory, and political, not ironic. But it is no less constitutionally protected—it goes beyond the mere exploitation of a celebrity image, and becomes a form of politi-

cal comment and a means of expressing one's adherence to a political movement.

The *Comedy III* court did hold that simple line drawings of the Three Stooges infringed the right of publicity because they contained no “creative contribution”; the court viewed them as “literal, conventional depictions of The Three Stooges.” *Id.* at 143. But here the plaque contributes a good deal beyond just the literal, conventional depiction of Rosa Parks' image, just as the prints in *ETW* did.

To quote the Restatement (Third) of Unfair Competition § 47, “[t]he use of a person's identity primarily for the purpose of communicating information or expressing ideas is not generally actionable as a violation of the person's right of publicity.” And the plaque is indeed aimed at communicating information or expressing ideas, beyond just depicting a celebrity.

Indeed, the Restatement supports Target's case still further. The Restatement, like the *Comedy III* decision, takes the view that simple unadorned posters of celebrities are generally actionable. Restatement (Third) of Unfair Competition § 47 cmt. b. But it expressly notes that, “In some circumstances, however, the informational content of the par-

ticular merchandise or *its utility to purchasers* as a means of expression may justify the conclusion that the use is protected under the first amendment.” *Id.* (emphasis added).

“A candidate for public office, for example, cannot invoke the right of publicity to prohibit the distribution of posters or buttons bearing the candidate’s name or likeness, whether used to signify support or opposition.” *Id.*; see also *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444 (N.Y. Sup. 1968) (holding that such a poster was protected against a right of publicity claim). Likewise, the assignees of a major historical figure involved in American political life may not prohibit the distribution of plaques bearing the person’s name and likeness—alongside other historical materials—used to signify support for her.

B. Other right of publicity cases likewise suggest that the plaque does not infringe the right of publicity

Modern Michigan courts have not handed down any precedential right of publicity opinions dealing specifically with visual works.⁶ But

⁶ *Pallas v. Crowley, Milner & Co.*, 33 N.W.2d 911, 914 (Mich. 1948), *overruling in relevant part Atkinson v. John E. Doherty & Co.*, 80 N.W. 285 (Mich. 1899), held that a person could sue for the “unauthorized use of the plaintiff’s photographic likeness in a commercial advertisement” for cosmetics. The *Pallas* court stressed that “[i]n the case at bar there

the one right of publicity precedent (decided under the label “appropriation of likeness”) that they have handed down, *Battaglieri*, 680 N.W.2d at 919-20, supports Target’s position.

The court in *Battaglieri* noted that “courts that have recognized the appropriation tort have also uniformly held that the First Amendment bars appropriation liability for the use of a name or likeness in a publication that concerns matters that are newsworthy or of legitimate public concern.” *Id.* at 919. Even “a publication that has ‘commercial undertones’ may still be protected if it concerns a legitimate matter of public concern.” *Id.* at 920 (citation omitted).

“If a communication is about a matter of public interest and there is a real relationship between the plaintiff and the subject matter of the publication, the matter is privileged.” *Id.* at 919 (internal quotation marks and citation omitted). A speaker is only liable for uses that were “without a redeeming public interest, news, or historical value.” *Id.* (in-

is no involvement of freedom of speech or freedom of the press,” presumably because commercial advertising was viewed at the time as being constitutionally unprotected, *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Even today, such advertising is less constitutionally protected than other speech, *see supra* note 5, and the analysis in this brief does not consider the use of a person’s name or likeness in advertising.

ternal quotation marks omitted) (quoting *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 909-10 (D.N.J. 1986)).

The plaque in this case does have historical value, especially when it is understood as a means for buyers of the plaque to remind their children and their guests of the historical events that it commemorates. It is “of legitimate public concern”—indeed, of political, social, moral, and historical concern that has endured for decades, and is sure to endure for many more. And there certainly “is a real relationship between the plaintiff and the subject matter of the publication.”

Right of publicity law from other courts—relevant to the extent Michigan courts may find it influential as a state law matter and to the extent that it reflects federal First Amendment principles—also supports Target. There are three dominant approaches to the right of publicity adopted by different courts. *Battaglieri* seems to point in favor of the Michigan courts preferring the “relatedness” test. But under all three approaches, the plaque would not infringe the right of publicity.

1. The “relatedness” test

Second and Sixth Circuit decisions have applied the “relatedness” test. Under this test, the right of publicity does not bar the use of a ce-

lebrity's name and likeness in an expressive work's title—and certainly not the work's content—unless the use is “wholly unrelated’ to the [work] or was ‘simply a disguised commercial advertisement for the sale of goods or services.” *Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989).

In *Rogers*, the Second Circuit upheld filmmaker Federico Fellini's right to use Ginger Rogers' identity in a film about two fictional entertainers who patterned their act on Ginger Rogers and Fred Astaire. *Id.* at 1002-05. The court held that the title “Ginger and Fred” was “not a disguised advertisement for the sale of goods or services or a collateral commercial product,” because it was clearly related to the film's content, which dealt with the lives of the fictional dancing couple. *Id.* at 1004-05.

Under this test, the plaque's use of Rosa Parks' name and likeness is not an infringement. The name and likeness are directly related to the plaque's “Civil Rights” message, and they are not disguised advertisement for the sale of any other work. (Of course, the name and likeness help sell the work itself—but that was equally true of the title *Ginger and Fred*, which sold tickets to the movie.)

In a different case involving Rosa Parks, the Sixth Circuit did conclude (whether or not soundly) that defendants’ use of Parks’ name might well be unrelated to the underlying work, and might thus be infringing. In *Parks v. LaFace Records*, 329 F.3d 437, 450 (6th Cir. 2003), a musical group called OutKast released a song titled *Rosa Parks*—but, as OutKast admitted, the song was not about Parks, *id.* at 452-53. Indeed, the only reference to Rosa Parks or her life story within the song was a line stating “[e]verybody move to the back of the bus,” *id.* at 452, which had nothing to do with race discrimination or any other aspect of the civil rights movement.

The Sixth Circuit thus concluded that the song’s lyrics had “absolutely nothing that could conceivably, by any stretch of the imagination, be considered . . . a reference to courage, to sacrifice, to the civil rights movement or to any other quality with which Rosa Parks is identified,” *id.* at 453, so the relatedness test was not satisfied. Here, on the other hand, the plaque is all about the civil rights movement and about the qualities and experiences with which Rosa Parks is identified.

This “relatedness” test appears to be the one most consistent with the Michigan Court of Appeals’ precedent in *Battaglieri*. As noted

above, *Battaglieri* held that, “[i]f a communication is about a matter of public interest and there is a real relationship between the plaintiff and the subject matter of the publication, the matter is privileged” against right of publicity liability. 680 N.W.2d at 919 (citing *Haskell v. Stauffer Communications, Inc.*, 990 P.2d 163, 166 (Kan. Ct. App. 1999)). This “real relationship between the plaintiff and the subject matter” test fits well with the inquiry whether the use of plaintiff’s name was not “wholly unrelated” to the defendant’s work, *Rogers*, 875 F.2d at 1004 (internal quotation marks omitted).

2. The “directly promote[s] a product or service” test

The Florida Supreme Court has interpreted the Florida misappropriation statute, which is based on the right of publicity tort, as being limited to material that “directly promote[s] a product or service.” *Tyne v. Time Warner Entertainment Co.*, 901 So. 2d 802, 808, 810 (Fla. 2005). Films, baseball cards, and other works, the court concluded, were protected by the First Amendment. *See, e.g., id.* at 809 (favorably citing a baseball card case); *id.* at 810 (concluding that the various works that do not “promot[e] . . . a product or service” “should be protected by the First Amendment”). This essentially limits the right of publicity to

“commercial speech” in the First Amendment sense—commercial advertising and other speech that proposes “commercial transactions,” *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 68 (1983).

The Eighth Circuit’s “public domain” approach is largely consistent with this view. In *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 823 (8th Cir. 2007), the court upheld the right to use the names and biographical details of baseball players in a fantasy baseball game. “[T]he information used in CBC’s fantasy baseball games is all readily available in the public domain,” the court held, “and it would be strange law that a person would not have a first amendment right to use information that is available to everyone.” *Id.* at 823.

The court also noted that the use of the players’ names would not sap people’s incentive to become baseball players, or cause emotional harm to the players whose identities were used. *Id.* at 824. In practice, since a person’s name and likeness would generally be in the public domain, the *C.B.C.* approach thus limits the right of publicity to commercial advertising—commercial advertising, being less protected than other

speech, would not be subject to the First Amendment arguments that the *C.B.C.* opinion relies on.

For this reason, under the *C.B.C.* approach the plaque is likewise not an infringement. It uses information that is publicly available (Parks' name and likeness). Parks' identity has understandably commanded a substantial public interest. And the plaque creators' and sellers' actions neither undermine people's incentive to do good deeds nor risk causing emotional harm to the subjects of the plaque.

3. The “transformativeness” test

The California Supreme Court has developed a “transformativeness” test for right of publicity cases; the Sixth Circuit in *ETW* applied this test, too, 332 F.3d 934-36, 938, together with the relatedness test, *id.* at 936-37 nn.17-18. Under this test, first articulated in *Comedy III*, 21 P.3d at 808-11, a work does not infringe the right of publicity if “the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized.” *Id.* at 809. If this is so, then there is no infringement. An infringement occurs only if the “the depiction or imitation of the celebrity is the very sum and substance of the work in question,” *id.*; in *Comedy III* itself, the court ruled against *Saderup* only because it

concluded that Saderup’s charcoal drawings of the Three Stooges did not add any “significant transformative or creative contribution” to transform the Three Stooges print into “something more than mere celebrity likeness or imitation,” *id.* at 798, 811.⁷

Here, though, the plaque does not consist solely of Rosa Parks’ name and likeness; nor does it come across as purely a likeness of Rosa Parks. Instead, as noted in Part II.A, it uses Parks’ name and likeness as “one of the ‘raw materials’ from which an original work is synthesized,” adding also the image of Martin Luther King Jr., images of the bus involved in the Montgomery Bus Boycott, and other words referring to the civil rights movement more generally. The result is then “something more than mere celebrity likeness or imitation.” It is a commemoration of the

⁷ The result in *Martin Luther King, Jr. Center for Social Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982) (allowing right of publicity liability for sales of a bust of Martin Luther King, Jr., which did not include any transformative elements), *adopted as statement of Georgia law in Martin Luther King, Jr. Center for Social Change, Inc. v. Am. Heritage Prods., Inc.*, 694 F.2d 674 (11th Cir. 1983), appears consistent with the *Comedy III* decision. But the majority in the Georgia Supreme Court case did not discuss the First Amendment issue in any detail, likely because the defendants “ma[d]e no claim under [the] freedoms” “of speech and press,” 296 S.E.2d at 700.

civil rights movement generally, though one that incorporates, among other things, references to an iconic figure of that movement.

Hart v. Electronic Arts, Inc., 717 F.3d 141, 163-64 (3d Cir. 2013), and *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1275-79 (9th Cir. 2013), interpreted *Comedy III* as also allowing liability when a court perceives that an entertainer defendant closely imitated an entertainer plaintiff's performance. In both *Hart* and *In re NCAA*, the defendants were making video football games in which the players were based on plaintiffs. The Third Circuit relied on the conclusion that “[t]he digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game. This is not transformative” *Hart*, 717 F.3d at 166.

The Ninth Circuit likewise reasoned that users of defendant's games “manipulate the characters in the performance of the same activity for which they are known in real life—playing football.” *In re NCAA*, 724 F.3d at 1276. “[T]he game's setting is identical to where the public found [plaintiffs] during [their] collegiate career: on the football field.” *Id.* Similarly, a case on which *In re NCAA* heavily relied, *No Doubt v.*

Activision Publishing, Inc., 192 Cal. App. 4th 1018 (2011), involved a defendant video game maker that was deliberately imitating plaintiff rock musicians' performance.

Amici are skeptical about the results in *Hart*, *In re NCAA*, and *No Doubt*, and some of the *amici* are skeptical about the transformative use test more generally. Moreover, *In re NCAA* specifically “reserve[d] the question of whether the First Amendment furnishes a defense other than” the transformative use and news reporting defenses. *In re NCAA*, 724 F.3d at 1273 n.5. *In re NCAA* thus does not speak to whether, for instance, the right of publicity must provide latitude for historical references even in video games.

But in any event, the principles of *Hart*, *In re NCAA*, and *No Doubt* cannot apply to a situation such as this one, where plaintiff was a political and historical figure, not an entertainer—and where defendant is producing not video games but material that consumers use to make a political statement and to teach their children to endorse that political statement.

Indeed, when a California case arose in which a video game portrayed a historical figure, the court ruled in favor of the video game cre-

ators. In *Noriega v. Activision/Blizzard, Inc.*,⁸ the creators of the popular *Call of Duty* series used Manuel Noriega—the former dictator of Panama, who is now serving a prison sentence for conspiracy to distribute drugs—as a character in one of their video games. The court dismissed the claim, stressing that Noriega was “one of the more notable historical figures of the 1980’s,” *id.* at 3, and quoting the California Supreme Court’s *Guglielmi* decision for the proposition that “prominence invites creative comment,” *id.* And this is consistent with the Michigan Court of Appeals decision in *Battaglieri* (discussed above at p. 17), which makes clear that Michigan law does not allow right of publicity liability based on works that have “redeeming public interest . . . or historical value.” *Battaglieri*, 680 N.W.2d at 919.

More broadly, *Hart* cites favorably the Tiger Woods print case, *ETW*. See, e.g., *Hart*, 717 F.3d at 166 (“Cases such as *ETW* and *No Doubt*, both of which address realistic digital depictions of celebrities, point to the next step in our analysis: context.”). So does *No Doubt*, on which *In re NCAA* relied. 192 Cal. App. 4th at 1034 (quoting *ETW* as an example

⁸ No. BC 551747 (Cal. Super. Ct. Oct. 27, 2014), http://online.wsj.com/public/resources/documents/2014_1028_noriega.pdf. Plaintiffs did not appeal, and the decision is now final.

of how a print “convey[ing] a message about the significance of Woods’ achievement through images suggesting that Woods would eventually join the ranks of the world's best golfers” satisfied the transformative use test). For the reasons given in Part II.A, this means that *Hart* cuts in favor of Target in this case, just as the Sixth Circuit ruled in favor of the print maker in *ETW*.

CONCLUSION

The biographies and the plaque are both fully protected by the First Amendment against any right of publicity challenge. This is especially clear as to the biographies. But it is also true for the plaque, as cases such as *ETW* show; under any of the three most prominent tests enunciated by various courts, Target should prevail.

Respectfully submitted,

s/ Eugene Volokh

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July 16, 2015

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and the Rules of this Court, because it contains 6,008 words as determined by the Microsoft Word word-processing system used to prepare the brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word word-processing system in 14- point New Century Schoolbook font.

/s/ Eugene Volokh

Eugene Volokh

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2015, I electronically filed the foregoing through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. I further certify that the original and 6 copies of the foregoing were delivered to the Court by courier and that I caused the foregoing to be transmitted via electronic mail to the individuals listed below.

/s/ Eugene Volokh

Eugene Volokh