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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
15 **COUNTY OF ALAMEDA**

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STEVEN RENDEROS, VALERIA THAIS  
SUÁREZ ROJAS, REYNA MALDONADO,  
LISA KNOX, MIJENTE SUPPORT  
COMMITTEE, and NORCAL RESIST FUND,

Plaintiffs,

v.

CLEARVIEW AI, INC., ALAMEDA COUNTY  
DISTRICT ATTORNEY, ALAMEDA POLICE  
DEPARTMENT, EL SEGUNDO POLICE  
DEPARTMENT, ANTIOCH POLICE  
DEPARTMENT, and DOES 1-10,

Defendants.

Case No.: RG21096898

**APPLICATION TO FILE AMICI  
CURIAE BRIEF OF SCIENCE,  
LEGAL, AND TECHNOLOGY  
SCHOLARS IN SUPPORT OF  
PLAINTIFFS' OPPOSITION TO  
SPECIAL MOTION TO STRIKE  
PURSUANT TO CALIFORNIA CODE  
OF CIVIL PROCEDURE § 425.16;  
AMICI CURIAE BRIEF OF  
SCIENCE, LEGAL, AND  
TECHNOLOGY SCHOLARS**

Judge: Honorable Evelio Grillo  
Date: October 18, 2022  
Time: 10:00 a.m.  
Dept.: 21  
Reservation: 300937855727

29

Case No.: RG21096898

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

2 *Amici Curiae* Science, Legal, and Technology Scholars respectfully submit this  
3 Application, seeking leave to file the attached *Amici Curiae* Brief in Support of Plaintiffs'  
4 Opposition to Special Motion to Strike Pursuant to California Code of Civil Procedure §  
5 425.16 (Anti-SLAPP Motion) filed by Defendant Clearview AI, Inc. to strike Plaintiffs'  
6 Complaint without leave to amend pursuant to California Code of Civil Procedure § 425.16,  
7 set to be heard on October 18, 2022, at 10:00 a.m. in Department 21 of the above-entitled  
8 court.

9 California's anti-SLAPP statute allows courts to strike causes of action that abuse the  
10 judicial process by chilling participation in matters of public significance. § 425.16. It is not  
11 enough to simply claim a complaint targets speech connected with a public issue; to grant the  
12 motion, a court must also find the complaint legally insufficient. *Navellier v. Sletten*, 29 Cal.  
13 4th 82, 88–89 (2002); *id.* at 89 ("Only a cause of action that satisfies both prongs of the anti-  
14 SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal  
15 merit—is a SLAPP, subject to being stricken").

16 Clearview moves to strike Plaintiffs' complaint, characterizing its non-consensual  
17 commercial mass appropriation of billions of individual images and identities as First  
18 Amendment-protected speech that concerns a public issue under §§ 425.16(e)(2) and (4).  
19 Def's Mot. in Supp. of Special Mot. to Strike at 7–9. Yet it also claims to purposefully keep  
20 its appropriation, identification, and matching activities inside of a "black "box" that is  
21 entirely proprietary, secret, and as far away from any public debate as possible. On the merits  
22 of Plaintiffs' right of publicity (ROP) claim, Clearview avoids all relevant California court  
23 precedent, opting instead to cite a single non-precedential federal district court order based  
24 on inapposite facts.

25 *Amici* seek leave of the Court to submit the attached brief to ameliorate Clearview's  
26 lacking analysis, explaining how the ROP clearly applies to Clearview's conduct in this case  
27 and applying the ROP elements to Clearview's facial recognition app. As scholars in the  
28 sciences, law, and technology, *Amici* are well-positioned provide additional background,

1 history, and context on the technology and legal doctrines at issue. Specifically, *Amici* seek to aid  
2 the Court in understanding how the ROP has evolved over time to incorporate new appropriation  
3 methods and business models, especially those—like Clearview's—that utilize new technologies  
4 at mass scale.

5  
6 **THE PROPOSED *AMICI* BRIEF WOULD ASSIST THE COURT**  
7 **IN DECIDING THIS MATTER**

8 *Amici* respectfully content that this brief would assist the Court in deciding this matter.  
9 (*Cf.* Calif. Rule of Court 8.200(c)(2) (rule for amicus briefs in the Courts of Appeal).) While such  
10 a brief at this stage may be unusual, it is not unprecedented. *See California Attorneys v.*  
11 *Schwarzenegger*, 174 Cal. App. 4th 424, 431 (2009) ("Attorney General . . . filed an amicus curiae  
12 brief in the trial court"); *Union Bank of California v. Superior Court*, 130 Cal. App. 4th 378, 386  
13 (2005) ("The OCC subsequently filed an amicus curiae brief in the trial court in support of Union  
14 Bank's request for reconsideration.").

15 *Amici* are scholars and experts in intellectual property law, privacy, science and  
16 technology studies, critical data studies, new media technologies, the criminal legal system, and  
17 racial justice, among other fields. Several *amici* have participated as *amicus* in cases involving  
18 intellectual property rights in digital technologies or challenging digital surveillance technologies.  
19 Most *amici* engage in research, writing, and teaching concerning similar issues to those raised in  
20 this case: balancing protected speech and unlawful surveillance, the impacts of surveillance  
21 technologies on marginalized communities and political activism, the accumulation and  
22 construction of data used to train machine-learning algorithms such as those utilized by  
23 Clearview's app, so-called "black box" machine-learning processes, issues of consent in new  
24 media technologies, and the ways in which intellectual property rights protect individuals from  
25 exploitation ushered in by emergent technologies, especially surveillance and biometric  
26 technologies.


27 No party or counsel for a party in the pending matter authored this brief in whole or in part  
28 or made a monetary contribution intended to fund the preparation or submission of this brief.

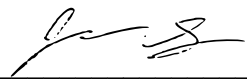
1 (Cf. Calif. Rule of Court 8.200(c)(2)) (rule for amicus brief in the Court of Appeal). *Amici*  
2 respectfully contend that submission of this brief would not prejudice any of the parties. This  
3 brief is being filed in advance of Clearview's Reply to Plaintiffs' Opposition. As a result,  
4 Clearview will have ample opportunity to respond to the arguments in this amicus brief.

5  
6 **INTEREST OF AMICI CURIAE**

7 *Amici* science, legal, and technology scholars are affiliated with a variety of institutions,  
8 including non-profit institutions for higher education. Several *amici* hail from nationally-  
9 recognized graduate school programs in law, communication and media studies, and science and  
10 technology studies. As experts in a bevy of areas impacted by this case, *amici* have a professional  
11 interest in cultivating informed public discourse on issues relating to surveillance and biometric  
12 technologies, including legal limitations on certain applications like facial recognition. *Amici*  
13 hope to bring their expertise to bear on the unique legal issues involved in this case.

14  
15 Dated: September 19, 2022

16  
17 By:  .....  
18 MELODI DINCER  
19 Counsel for Amici Curiae Science, Legal,  
20 and Technology Scholars

21 By:  .....  
22 JASON SCHULTZ  
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LISA KNOX, MIJENTE SUPPORT  
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OPPOSITION TO SPECIAL  
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1           **I.       INTRODUCTION<sup>1</sup>**

2           For over a century, the right of publicity (ROP) has protected individuals from unwanted  
3 commercial exploitation of their identities. Originating around the turn of the twentieth century  
4 in response to the newest image-appropriation technologies of the time, including portrait  
5 photography, mass-production packaging, and a ubiquitous printing press, the ROP has  
6 continued to evolve to cover each new wave of technologies enabling companies to exploit  
7 peoples' identities as part of their business models.

8           The latest example of such a technology is Clearview AI's facial recognition (FR)  
9 application. Clearview boasts that the primary economic value of its app stems from  
10 commercially exploiting its massive facial image database, filled with millions of individual  
11 likenesses and identities that it appropriated without sufficient consent. Clearview's uses of  
12 likeness and identity go beyond amassing a database, extending to training its algorithm,  
13 matching identities to new images, and displaying results to customers. Without the capacity to  
14 appropriate and commercially exploit millions of likenesses and identities, Clearview's system  
15 would fail to function as a commercial product.

16           Despite this, Clearview attempts to avoid ROP liability by arguing (1) that it cannot be  
17 liable because humans rarely witness its acts of misappropriation and (2) that its app and  
18 business strategy are forms of protected speech. Both arguments are misplaced.

19           First, Plaintiffs' ROP claim is consistent with those upheld by the courts for over a  
20 century. As new visual appropriation technologies have evolved, the ROP has responded by  
21 imposing liability on each new capacity to commercially exploit individuals' identities and by  
22 requiring informed consent. Clearview does not deny that it commercially exploits Plaintiffs'  
23 images or identities with its new technology. Nor does it deny that it failed to gain Plaintiffs'  
24 consent. Instead, it argues it does not violate the ROP because most of its appropriating acts

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26  
27 <sup>1</sup> *Amici* Counsel wish to thank NYU Technology Law and Policy Clinic alumnae Rupali  
28 Srivastava and Elly Brinkley, and Research Assistants Chanique Vassell, Claire Ewing-Nelson,  
and Rodrigo Canalli for their contributions to this brief.

1 occur within a technological “black box” hidden from its customers. California courts, however,  
2 analyze the validity of ROP claims based on the evidence of defendant’s alleged acts of  
3 appropriation, regardless of who witnesses them. *See, e.g., No Doubt v. Activision Publ’g, Inc.*,  
4 122 Cal. Rptr. 3d 397, 402 (Ct. App. 2011) (finding appropriation based on both internal  
5 proprietary production and public distribution stages of defendant’s musical video game); *see*  
6 *also* Restatement (Third) of Unfair Competition § 47 (Am. L. Inst. 1995) (defining  
7 misappropriation to include “use[ ] in connection with services rendered by the user”).

8         Second, Clearview’s app and business model do not appropriate images and identities as  
9 a form of speech in connection with a public issue. Clearview is not a news publisher,  
10 investigative body, or search engine provider. It is a visual surveillance company that  
11 appropriates facial images for the precise and exclusive purpose of creating and operating its  
12 commercial surveillance services, using proprietary software that it attempts to keep as far from  
13 public scrutiny as possible. Moreover, even if some downstream users of Clearview’s product  
14 could claim a protected speech interest, such protection would apply only to those users and  
15 would not excuse any of Clearview’s predicate ROP violations.

## 16           **II.     FACTUAL BACKGROUND**

17         Plaintiffs challenge the development and use of a facial recognition application by  
18 Defendant Clearview AI, Inc. Among other things, they claim Clearview violated their common  
19 law right against appropriation of likeness, or ROP, and seek to enjoin Clearview from trading in  
20 their likenesses. *See* Compl. ¶¶ 1, 76–81.

21         On June 21, 2022, Clearview filed a Special Motion to Strike Pursuant to California Civil  
22 Code of Procedure § 425.16 (anti-SLAPP Motion) and an accompanying Memorandum.  
23 Clearview argues this suit seeks to silence its protected speech by targeting the proprietary FR  
24 app it developed. Clearview contends that selective downstream uses of its app by law  
25 enforcement customers converts its entire app and business model, including all predicate acts of  
26 scraping, training, and developing the app, into speech concerning a public issue. Mem. in Supp.  
27 of Special Mot. to Strike at 7–9. Later, in an underdeveloped section, Clearview concludes the  
28 ROP claim is legally insufficient because no human personally witnesses its acts of

1 appropriation, and that its private commercial surveillance tools are somehow akin to public  
2 search engines like Google. *Id.* at 12–13. On June 27, 2022, Clearview also filed a Demurrer.

### 3 III. ARGUMENT

#### 4 A. CALIFORNIA'S RIGHT OF PUBLICITY PROTECTS 5 INDIVIDUALS FROM CLEARVIEW'S NONCONSENSUAL 6 COMMERCIAL APPROPRIATION OF THEIR IMAGES AND 7 IDENTITIES

8 From its earliest days, the ROP has sought to protect individuals from novel technologies  
9 used to commercially exploit their images and identities. *See, e.g., Roberson v. Rochester*  
10 *Golding Box Co.*, 64 N.E. 442 (N.Y. 1902) (rejecting liability for 25,000 lithographic print  
11 advertisements depicting plaintiff's image without consent, subsequently spurring enactment of  
12 New York's ROP statute in light of the concerning modern capacities for such violations);  
13 *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190 (1905) (imposing liability for use of  
14 plaintiff's portrait photo in new "mass market" newspaper distribution advertisements); *Melvin v.*  
15 *Reid*, 297 P.91 (Cal. Ct. App. 1931) (imposing liability for misappropriation of plaintiff's life  
16 story in a movie released under the new "Hollywood" system of nationwide film distribution).  
17 As technological advances at the turn of the twentieth century cleared the way for new forms of  
18 mass appropriation over the next century, courts came to understand the ROP as enshrining a  
19 right "to control and protect one's public image" in a society where "images were being  
20 manipulated—reproduced, miscontextualized, misrepresented, and distorted—by distant,  
21 powerful, seemingly unassailable forces of mass commerce and communication." Samantha  
22 Barbas, *Laws of Image: Privacy and Publicity in America* 80 (Stanford Univ. Press 2015); *see*  
23 *also* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*,  
24 130 *Yale L.J.* 86 (2020) (identifying four distinct ROP interests: the right of performance, the  
25 right of commercial value, the right of control, and the right of dignity).

26 This right of control applied not only to personal photographs used in advertising and life  
27 stories incorporated into films, but also to misappropriations by new technologies evoking  
28 different elements of identity, including in television, tabloids, baseball cards, animatronic robots,  
websites, and video game avatars. *See, e.g., James v. Screen Gems, Inc.*, 174 Cal. App. 2d 651  
(1959) (television); *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983)

1 (tabloid); *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) (baseball  
2 cards); *Wendt v. Host Intern'l*, 125 F.3d 806 (9th Cir. 1997) (animatronic robots); *Gionfriddo v.*  
3 *Major League Baseball*, 94 Cal. App. 4th 400 (2001) (website); *No Doubt v. Activision Publ'g,*  
4 *Inc.*, 122 Cal. Rptr. 3d 397 (Ct. App. 2011) (musical video game avatars); *Hart v. Elec. Arts,*  
5 *Inc.*, 717 F.3d 141 (3d Cir. 2013) (sports video game avatars). Importantly, the ROP covered the  
6 nonconsensual use of images and identities in both the development and subsequent distribution  
7 of appropriating products and services. *See, e.g., No Doubt*, 122 Cal Rptr. 3d at 402.

8         These evolutionary moments for the ROP made sense in light of these new technologies  
9 and their capacity to enable mass appropriation of images and identities. For example, in the  
10 1890s, advances in printing and photochemical technologies led publishers to inundate modern  
11 society with mass-circulation magazines and newspapers, increasingly adorned with images of  
12 people in advertisements and photographs accompanying stories. Barbas, *supra*, at 10, 48. As the  
13 demand for more and more images grew, supply remained stagnant; popular mass photography  
14 and a commercial modeling industry were still decades away. *Id.* at 49. At the same time,  
15 ordinary people were flocking to portrait photography studios for personal memories and  
16 keepsakes. As photographers soon realized, their archives of portrait negatives and prints had  
17 subsequent commercial value. Soon, a tremendous black market emerged for these images, with  
18 photographers regularly supplying images without the consent of their subjects, most of whom  
19 were ordinary people “whose images were fungible and ubiquitous and who would be  
20 unlikely . . . to take action against [appropriators].” *Id.* at 50. But these developments inspired a  
21 “feeling of entitlement to [their] image[s],” and people began to assert their right to control those  
22 images under the ROP. *Id.* at 101. This may sound familiar because it is. These historic cases  
23 involved ordinary people’s “physiognom[ies] . . . pirated to tout another person’s business[.]” *Id.*  
24 at 56. The present case against Clearview involves the same type of appropriation, taken from  
25 internet websites instead of portrait photographers’ studios.

26         The elements of California’s common law ROP track this approach, requiring a showing  
27 that: (1) a defendant used the person’s image or identity; (2) the appropriated image or identity  
28 was used to the violator’s advantage, “commercially or otherwise”; (3) a lack of consent; and (4)

1 injury. *Stewart v. Rolling Stone LLC*, 105 Cal. Rptr. 3d 98, 111 (Ct. App. 2010), as modified on  
2 denial of reh’g (Feb. 24, 2010) (quoting *Eastwood v. Sup. Ct.*, 198 Cal. Rptr. 342, 347 (Ct. App.  
3 1983)). As noted below, Clearview’s development and deployment of its facial recognition (FR)  
4 app satisfy all four elements.

5  
6 1. According to its own description, Clearview directly uses  
7 individuals' images and identities to build and operate its facial  
8 recognition (FR) app.

9 To determine whether an alleged violator “uses” an image or identity under the ROP, a  
10 court simply looks to whether the defendant was responsible for the alleged use. *See Fleet v.*  
11 *CBS, Inc.*, 50 Cal. App. 4th 1911, 1918 (1996) (citing Restatement (Third) of Unfair Competition  
12 § 46 (Am. L. Inst. 1995)). “Use” is often obvious where a defendant took the direct action that  
13 violated the ROP.

14 In California, the ROP “does not require that appropriations of identity be accomplished  
15 through particular means to be actionable.” *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395,  
16 1398 (9th Cir. 1997); see also *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983);  
17 *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397 (Ct. App. 2011). Courts apply the  
18 ROP to appropriations based on characteristics that have some clearly recognizable association  
19 with a particular person, even in the absence of their name or image. *See White, id.*

20 Part of California’s broad ROP protections is the idea that an identity can be appropriated  
21 no matter how it is used. In several cases, courts applied the ROP to appropriations of identity  
22 where the identity itself was or was a part of the product, rather than in an advertisement for a  
23 separate product. *See, e.g., Comedy III Prods. v. Saderup*, 25 Cal. 4th 387, 395 (2001) (ROP  
24 applied to drawings of the Three Stooges sold on t-shirts and prints); *Zacchini v. Scripps-*  
25 *Howard Broadcasting Co.*, 433 U.S. 562 (1977) (ROP applied to broadcast of daredevil’s act);  
26 *Lugosi v. Universal Pictures*, 25 Cal.3d 813, 823 (1979) (ROP applied to film and merchandise  
27  
28

1 using actor’s name and likeness); *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 651 (1959)  
2 (ROP applied to TV show portraying the life and likeness of a celebrity).<sup>2</sup>

3 Clearview uses the actual images of individuals, their likenesses, and their identities  
4 throughout the FR process. To understand how thoroughly Clearview does so, it helps to  
5 understand how FR works generally. FR is a type of machine learning application that enables  
6 computers to recognize unknown faces. Machine learning is the process through which a  
7 computer learns how to identify a novel input by analyzing large amounts of prior data and  
8 extracting relevant patterns from it. *See generally* Rene Y. Choi et al., *Introduction to Machine*  
9 *Learning, Neural Networks, and Deep Learning*, 9 *Translational Vision Sci. & Tech.* 14 (Feb.  
10 27, 2020). That glut of data, called training data, allows the machine to “learn” what the desired  
11 result is; the more training data a system contains, the more likely it will produce meaningful  
12 patterns and correct results. FR products and services utilize this approach for visual information,  
13 attempting to train computers to “see” images, including images of people and their faces. *See*  
14 Junyi Chai, Hao Zeng, Anming Li, & Eric W.T. Ngai, *Deep Learning in Computer Vision: A*  
15 *Critical Review of Emerging Techniques and Application Scenarios*, 6 *Machine Learning with*  
16 *Applications* (Dec. 15, 2021). FR systems learn to “see” a face by scanning input images and  
17 drawing patterns from certain features, such as the distance between one’s eyes or the  
18 configuration of one’s cheek bones.

19  
20  
21 <sup>2</sup> Clearview bases the entirety of its misappropriation argument on a single federal district court  
22 decision. *See* Def.’s Demurrer, at 11–12. In that decision, which is neither persuasive nor binding  
23 authority here, the court wrongly concluded that the ROP requires an appropriation to advertise a  
24 separate product, based solely on the Restatement (Second) of Torts’ definition of  
25 “appropriation.” *See Brooks v. Thomson Reuters Corp.*, No. 21-cv-01418-EMC, at \*5–6, 7–8  
26 (N.D. Cal. Aug. 16, 2021). But this has never been a requirement under California law, which  
27 recognizes that any unauthorized appropriation of identity for someone else’s advantage is  
28 actionable, without more. *See Comedy III Prods. v. Saderup*, 25 Cal. 4th 387, 394–96 (2001)  
(finding misappropriation where identity was used directly in the product and not to advertise a  
separate product); *see also* Restatement (Third) of Unfair Competition § 47 (Am. L. Inst. 1995)  
(“The name, likeness, and other indicia of a person’s identity are used [for appropriation of  
commercial value of identity] if they are used in advertising the user’s goods or services, or are  
placed on merchandise marketed by the user, *or are used in connection with services rendered by*  
*the user.*”) (emphasis added).

1 In building its FR system, Clearview first scraped billions of images of peoples’ faces  
2 from the internet without consent, a clear and intentional use of those images. Second, it then  
3 purposefully used those images to train its FR system, which “create[d] facial vectors . . .  
4 consist[ing] of a numerical coordinate generated from a given face as it appears in a particular  
5 photograph.” Decl. of Thomas Mulcaire in Supp. of Special Mot. to Strike ¶ 34. These facial  
6 vectors are the training data that teach the system what to look for in new “probe” images that  
7 Clearview’s customers upload. When customers upload probe images, Clearview’s app then  
8 combs through the database of facial vectors to find a match. *See id.* ¶ 37; *see also* Kashmir Hill,  
9 *The Secretive Company that Might End Privacy as We Know It*, N.Y. Times (Jan. 18, 2020),  
10 <https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html>  
11 (describing Clearview’s “vast directory that cluster[s] all the photos with similar vectors into  
12 ‘neighborhoods’” and enables the FR algorithm to “convert[] the face into a vector and then  
13 show[] all the scraped photos stored in that vector’s neighborhood”) [hereinafter “Hill, *End*  
14 *Privacy*”]. Finally, if successful, the app displays any matching images associated with those  
15 facial vectors—a third use. Mulcaire Decl. ¶ 38. Thus, Clearview uses individuals’ images in at  
16 least three ways for ROP purposes: to construct and enhance its massive database via scraping, to  
17 train its FR system for improved accuracy, to match with new probe images, and to output in  
18 response to a successful match.

19 *i. Clearview uses individuals' images to construct and*  
20 *enhance its massive facial image database.*

21 The basis of Clearview’s app and its richest resource is the massive database of faces,  
22 built from images harvested from across the internet. Clearview holds over 20 billion images of  
23 people’s faces in its database, which it hopes to grow to 100 billion images by 2023—equal to  
24 about 14 photos for each person on Earth. *See* Drew Harwell, *Facial Recognition Firm*  
25 *Clearview AI Tells Investors It’s Seeking Massive Expansion Beyond Law Enforcement*, Wash.  
26 Post (Feb. 16, 2022), [https://www.washingtonpost.com/technology/2022/02/16/clearview-](https://www.washingtonpost.com/technology/2022/02/16/clearview-expansion-facial-recognition/)  
27 [expansion-facial-recognition/](https://www.washingtonpost.com/technology/2022/02/16/clearview-expansion-facial-recognition/) [hereinafter, Harwell, *Massive Expansion*]. Soon, “almost  
28 everyone in the world will be identifiable” by Clearview’s FR system. *Id.* This vast database

1 powers Clearview’s app and separates it from competitors. “With the largest dataset,” Clearview  
2 recognizes it “will always have an advantage in training an accurate algorithm.” *Id.*

3  
4 *ii. Clearview uses individuals' images to create facial vectors*  
5 *that train its FR algorithm to accurately identify*  
6 *individuals and that enable the algorithm to identify*  
7 *individuals from a probe image.*

8 In the same way that nineteenth-century mass technologies created a new market of  
9 appropriated images for human audiences, machine learning technologies like FR have created a  
10 new market of appropriated images for both machine and human audiences. Clearview uses the  
11 scraped images in its database to train its FR algorithm with likenesses and facial vectors drawn  
12 from those images, increasing its accuracy and commercial viability. Without prior images that  
13 have been labeled with unique identities, Clearview’s app would have no way to compare and  
14 recognize novel inputs.

15 Clearview’s FR system also uses the millions of identities contained in the database each  
16 time it peruses through various facial vector neighborhoods, searching for a specific face. Even if  
17 the app only outputs a single positive identity match in response to a probe image, Clearview  
18 uses every individual image and identity each time its algorithm crunches a probe image into a  
19 facial vector and compares it to the sea of facial vectors in the database.

20 Without denying these uses, Clearview argues that any alleged ROP violations occur in a  
21 “black box,” shielding its appropriation of images and identities from human observation. *See*  
22 *Def.’s MPA in Supp. of Mot. to Strike at 12; see also Mulcaire Decl. ¶¶ 30–42.* But the lack of a  
23 “human in the loop” does not negate Clearview’s use of images and identities to perfect its FR  
24 algorithm. Today’s emergent mass technologies increasingly rely on machine learning, and FR is  
25 a primary example of how the decades-old field of computer vision has advanced to the point  
26 where computers—not humans—are the primary audiences for our images. While most people  
27 assume that humans look at images, “and that the relationship between human viewers and  
28 images is the most important moment to analyze,” computer vision enables an algorithm to “see”  
digital images without human intervention, facilitating “the automation of vision on an enormous  
scale.” Trevor Paglen, *Invisible Images (Your Pictures Are Looking at You)*, *The New Inquiry*



1 (Dec. 8, 2016), <https://thenewinquiry.com/invisible-images-your-pictures-are-looking-at-you/>.  
2 Today, the “majority of images are now made by machines for other machines [to see].” A  
3 primary example of this shift is “the trillions of images that humans share on digital platforms.”  
4 When people upload their images online, they “feed[] an array of immensely powerful artificial  
5 intelligence systems information about how to identify people.” *Id.* Thus, whether the audience is  
6 ultimately a machine or a human or both makes no difference for this Court’s ROP analysis: use  
7 for commercial gain is the key test of Clearview’s conduct.

8 *iii. Clearview uses individuals' images to display a facial*  
9 *recognition match to the end user of its app.*

10 Finally, and most obviously, Clearview uses individuals’ identities when it produces a  
11 match. When the app identifies an individual, it provides a gallery of images that align with the  
12 facial vectors in the input photo. The result page also includes links to where those photos  
13 appeared originally, meaning the sites from which Clearview scraped the image. *See Hill, End*  
14 *Privacy, supra.* The result is the individual’s identity—that is the point of the product. Its use of  
15 identity in this way is far from incidental. *Cf.* Def.’s Demurrer at 11 n.4. It is the intended  
16 outcome of Clearview’s FR app and the app’s main selling point.

17 2. Clearview appropriates individuals' identities by capturing incorporating,  
18 and commercially exploiting their unique facial attributes and identities  
from their facial images.

19 Clearview not only appropriated the images of peoples’ faces which comprise its massive  
20 face database, but it also appropriated their identities by constructing facial vectors that can  
21 uniquely identify a particular individual. The ROP allows broad liability for the appropriation of  
22 any characteristic that has a clearly recognizable association with an individual. *See, e.g.,*  
23 *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (unauthorized television  
24 broadcast of plaintiff’s unique human-cannonball performance); *In re NCAA Student-Athlete*  
25 *Name & Likeness Litig.*, 724 F.3d 1268 (9th Cir. 2012) (unauthorized use of college football  
26 players’ traits in video game avatars); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397–  
27 99 (9th Cir. 1993) (unauthorized use of a robot possessing traits uniquely and recognizably  
28 associated with Vanna White in an advertisement); *Wendt v. Host Intern’l*, 125 F.3d 806 (9th

1 Cir. 1997) (unauthorized use of animatronic look-a-likes in airport bars); *Midler v. Ford Motor*  
2 *Co.*, 849 F.2d 460 (9th Cir. 1988) (unauthorized use of a “sound-alike” of Bette Midler’s unique  
3 voice in an advertisement); *Motschenbacher v. R.J. Reynolds Tobacco*, 498 F.2d 821, 827 (9th  
4 Cir. 1974) (unauthorized use of a photograph in a TV commercial of the plaintiff driving a red  
5 race car uniquely associated with him); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698  
6 F.2d 831 (6th Cir. 1983) (unauthorized use in marketing of a portable toilet with Johnny  
7 Carson’s recognizable *Tonight Show* introduction); *Brophy v. Almanzar*, No. SAC 17-01885-  
8 CJC(JPRx), 2019 U.S. Dist. LEXIS 233894, at \*23–24 (C.D. Cal. Aug. 22, 2019) (unauthorized  
9 display of plaintiff’s “unique and recognizable” back tattoo); *No Doubt v. Activision Publ’g,*  
10 *Inc.*, 122 Cal. Rptr. 3d 397 (Ct. App. 2011) (unauthorized avatar depiction of rock band used to  
11 play others’ songs).

12 Clearview’s FR algorithm constructs recognizable associations based on the facial vector  
13 of everyone in its vast system—the facial vectors must map onto an individual’s unique identity  
14 accurately for the app to have any value. More faces mean more accuracy, more accuracy means  
15 more value provided to customers, more value entices more customers, and more customers  
16 mean more profit overall. Clearview’s entire business strategy is to profit off its mass  
17 appropriation of identities, and those identities are the lifeblood of its commercial success.

18 Clearview attempts to sidestep its liability for violating Plaintiffs’ ROP by arguing that it  
19 has not itself appropriated or used any images or identities, but rather like a search engine,  
20 merely points to third-party uses, citing *Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484 AHM  
21 (SHx), 2010 WL 9479060, at \*13 (C.D. Cal. July 30, 2010) (finding Google’s hosting of third-  
22 party websites that displayed plaintiffs’ names and likenesses did not constitute “use” for ROP  
23 purposes). *See* Def.’s Mem. in Supp. of Special Mot. to Strike at 12 (“Clearview’s app operates  
24 like a typical search engine such as Google”); Def.’s Demurrer at 10–11. Even if the Perfect 10  
25 decision were binding precedent (which it is not), it is inapposite. Clearview offers a  
26 comprehensive app that packages its own data, scraped and manipulated into machine-readable  
27 shorthand via facial vectors, into a profitable product—an accurate FR technology. Clearview’s  
28 app does not incidentally return personal images or identities. It was specifically designed to

1 identify an individual from a new image. That Clearview may have designed its app to appear  
2 like a search engine to its customers does not magically convert its powerful FR technology into  
3 a search engine. Clearview openly promotes its FR product as a FR product—not a search engine  
4 that thrives on others’ content, but a massive, closed universe of identities that only Clearview  
5 customers can access by paying. And Clearview admits that it has purposefully scrapped and  
6 ingested billions of individuals’ images and identities into its database, used those images and  
7 identities to train its FR algorithm, to perform “matches,” and as outputs to its customers. Such  
8 uses are hardly the work of third parties.

9  
10 3. Placing one's images on the internet is not consent for Clearview to  
commercially appropriate such images or identities into its FR app.

11 Clearview does not attempt to argue it had consent from the millions of individuals whose  
12 images and identities it exploits in its FR app, and it would be extremely difficult to do so.  
13 Consent must be knowing and use-specific. *See, e.g., Cohen v. Facebook, Inc.*, 798 F. Supp. 2d  
14 1090, 1095 (N.D. Cal. 2011) (holding users did not consent to commercial use of their identities  
15 by using a Facebook service whose terms of use were too ambiguous to find consent); *see also*  
16 *Pratt v. Everalbum, Inc.*, 283 F. Supp. 3d 664, 667 (N.D. Ill. 2017) (“[O]ne can consent to the use  
17 of his or her identity for one purpose but not another.”); *No Doubt v. Activision Publ’g, Inc.*, 192  
18 Cal. App. 4th 1018 (2011) (holding plaintiff band members’ consent to have look-a-like avatars  
19 play their songs in a video game did not establish consent to have those avatars play songs by  
20 other bands). Consent cannot be implied from users’ conduct of uploading images to various  
21 websites in accordance with those sites’ terms of use where Clearview later scraped those images  
22 without seeking their consent. *See, e.g., Mem. Op. and Order, ACLU v. Clearview AI, Inc.*, No. 20  
23 CH 4353, at \*11 (Ill. Cir. Ct. Cook Cty 2021) (“We must distinguish between the publicly-  
24 available photos Clearview harvested and what Clearview does with them. . . . The fact that  
25 something had been made public does not mean anyone can do with it as they please.”).

26 While courts recognize implied consent in ROP claims, Clearview’s actions stretch  
27 implied consent to its breaking point. Clearview all but admits its prior appropriations were  
28 nonconsensual, and this Court should not find otherwise. *See Clearview AI, Clearview AI*

1 *Launches Clearview Consent Company's First Consent Based Product for Commercial Use*  
2 (May 25, 2022), [https://www.clearview.ai/clearview-ai-launches-clearview-consent-companys-](https://www.clearview.ai/clearview-ai-launches-clearview-consent-companys-first-consent-based-product-for-commercial-use)  
3 [first-consent-based-product-for-commercial-use](https://www.clearview.ai/clearview-ai-launches-clearview-consent-companys-first-consent-based-product-for-commercial-use) (announcing the company's "first consent based  
4 product" that is "separate and apart from the company's database of 20+ billion facial images,  
5 the largest such database in the world").

6           4.       The ROP uniquely addresses the harms suffered by every individual  
7                   whose identity Clearview harvested and misappropriated for profit.

8           Clearview's actions reach the heart of the ROP's purpose—to preserve control over the  
9 use of a person's identity from commercial exploitation, especially by purveyors of mass  
10 technologies. *See* Post & Rothman, *supra*, at 116–21 (discussing the right of control). The ROP  
11 enshrines autonomy over how one's unique identity is used and perceived by others, and  
12 commercial exploitation of that identity undermines the ability to define oneself freely. The  
13 ROP's emphasis on the inherent value of identity prevents the unjust enrichment of others who  
14 might otherwise appropriate that value. This "theft of good will" is exploitative because it steals  
15 the individual's opportunity to reap the reward of their own self-value. *Zacchini v. Scripps-*  
16 *Howard Broadcasting Co.*, 433 U.S. 563, 576 (1977). It further robs them of the ability to  
17 determine who can use their identity, and for which purposes.

18           Clearview trades in identity and has profited immensely by misappropriating scores of  
19 peoples' identities for commercial gain. *See* Kashmir Hill, *Clearview AI Raises \$30 Million from*  
20 *Investors Despite Legal Troubles*, N.Y. Times (July 21, 2021),  
21 <https://www.nytimes.com/2021/07/21/technology/clearview-ai-valuation.html> (noting Clearview  
22 had raised over \$38 million and was valued at \$130 million). Despite the fallout from its conduct,  
23 Clearview has indicated its desire to expand its FR capabilities beyond law enforcement in a  
24 recently leaked presentation intended for its investors, signaling a function creep that could  
25 further erode peoples' control over their identities. Harwell, *Massive Expansion, supra*; *see* Bert-  
26 Jaap Koops, *The Concept of Function Creep*, 13 L., Innovation & Tech. 1, 29–56 (2021).

27           As one court has already determined, the ROP may be one way to ensure Clearview  
28 compensates people for the economic value of their identities. *See In re Clearview AI, Inc.*

1 *Consumer Privacy Litig.*, No. 21-cv-0135, 2022 WL 444135, at \*10 (N.D. Ill. Feb. 14, 2022)  
2 (finding plaintiffs plausibly alleged common law California ROP claim). In addition to unjustly  
3 enriching Clearview, the company’s ongoing ROP violations undermine individuals’ autonomy  
4 and their right to decide whether their images and identities should be used to build a mass  
5 surveillance technology, one to which many people object. *See, e.g.*, Fight for the Future, *Ban*  
6 *Facial Recognition: Interactive Map* (2022), <https://www.banfacialrecognition.com/map>  
7 (gathering FR bans); Facial Recognition and Biometric Technology Moratorium Act of 2021,  
8 H.R. 3907, 117th Cong. § 1 (2021); Ethical Use of Facial Recognition Act, S. 3284, 116th Cong.  
9 § 2 (2020); National Biometric Information Privacy Act of 2020, S. 4400, 116th Cong. § 2  
10 (2020); Fourth Amendment Is Not For Sale Act, S. 1265, 117th Cong. § 1 (2021).

11 By upholding a viable ROP claim, this Court protects the same autonomy interests the  
12 right has historically covered: control over the use of one’s identity by another for profit.  
13 Clearview’s app exacts a mass harm on an immense population of people affected by its  
14 harvesting of their images without consent. Clearview provides a quintessential example of the  
15 “theft of good will” that attends the use of something for nothing.

16 **B. CALIFORNIA'S ANTI-SLAPP STATUTE DOES NOT PERMIT**  
17 **CLEARVIEW TO AVOID A VALID ROP CLAIM**

18 The anti-SLAPP statute applies only to legal claims “that arise[] from protected  
19 speech . . . and lack[] even minimal merit.” *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002)  
20 (emphasis in original). Courts must avoid the “fallacy that the anti-SLAPP statute allows a  
21 defendant to escape the consequences of wrongful conduct by asserting a spurious First  
22 Amendment defense.” *Id.* at 93. As discussed above, this case raises an ROP claim with far more  
23 than minimal merit. Moreover, Clearview’s portrayal of its proprietary FR product as protected  
24 speech fails as well. Clearview cannot hide behind its customers’ downstream choices of how to  
25 use its app to excuse the misappropriations of image and identity that occur throughout the app’s  
26 operation.

27 Clearview argues that its FR app is speech “identifying potential criminals” that is  
28 “squarely in the public interest.” Def.’s Mem. in Supp. of Special Mot. at 8. In support of this,

1 however, Clearview only cites a few examples of ways that a few of its customers choose to use  
2 its app. *See id.* at 8 (describing uses of app to identify perpetrators of the January 6th U.S.  
3 Capitol attack, child sex traffickers and terrorists, and Russian occupiers of Ukraine). But how its  
4 customers choose to use its FR app cannot overcome Clearview’s misappropriation of images  
5 and identities in its creation, design, and operation. For one thing, almost all commercial FR  
6 companies, like Clearview, train their FR algorithms completely under the veil of corporate  
7 secrecy and as far away from public discussion as possible. The only part of the process that is  
8 shared are the outputs of matched faces to customers; those matches are the commercial products  
9 that customers purchase in the first place—such “speech” is worlds away from expressive  
10 activities of protest or petition traditionally shielded under § 425.16. Clearview’s argument  
11 allows *potential* public-interest uses to swallow its overall premise, which is appropriating  
12 images and identities belonging to millions of people who never consented to that use. Not even  
13 news publishers, who traditionally enjoy broad speech protections, have license “to invade the  
14 rights and liberties of others.” *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670  
15 (1991).

16 Further, Clearview does not provide even its law enforcement customers with any  
17 services during the early stages of the FR process. Clearview cherry-picks specific instances of  
18 police uses of its app to identify individuals involved in certain investigations. But even if those  
19 instances were protected by statute, the development and production of the app itself remains  
20 unprotected. When Clearview initially scraped billions of facial images from the internet, and  
21 when Clearview uses these images to construct facial vectors and train its algorithm on those  
22 constructions, it runs afoul of the ROP. The company’s subsequent interactions with law  
23 enforcement customers, even if they are somehow public-interest oriented, cannot excuse these  
24 violations of law that predicated the app’s success. Even if some downstream uses of  
25 Clearview’s app are protected speech, Clearview’s prior conduct cannot be so neatly excused.

26 At most, Clearview engages in conduct that “may conceivably have indirect consequences  
27 for an issue of public concern,” depending on who uses its product and how. *Rand Res., LLC v.*  
28 *City of Carson*, 6 Cal. 5th 610, 625 (2019). And yet, Clearview’s speech is ostensibly performed

1 in a “black box” that obscures the very substance of the speech at issue. It can only assume  
2 protected speech from its customers’ identities generally. This is not enough to garner anti-  
3 SLAPP immunity. *See id.* (“At a sufficiently high level of generalization, any conduct can  
4 appear rationally related to a broader issue of public importance.”).

5 If § 425.16 insulates this case from review, the ROP will no longer apply to the autonomy  
6 harms it was crafted to prevent. A company can appropriate billions of individuals’ images and  
7 identities without consent, enmesh those identities in its product, license that product widely,  
8 profit lavishly, and continue with business as usual. As new products emerge that similarly  
9 undermine one’s ability to control who can use their identity and how, individuals will have less  
10 legal recourse than their ancestors had a century ago. Courts must avoid this dangerous outcome  
11 by preserving valid ROP claims against technologies, like Clearview’s, that are increasingly  
12 intricate, intrusive, and inescapable.

13 **IV. CONCLUSION**

14 Faced with these facts, this Court should reject the anti-SLAPP Motion and find  
15 Plaintiffs have alleged a legally valid ROP claim at this early stage.

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**Dated this 19th of September, 2022.**



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- 3 Harry Lewis  
Gordon McKay Research Professor of Computer Science
- 4 Harvard University
- 5 Dustin Marlan  
Assistant Professor of Law
- 6 Director, Intellectual Property Clinic  
University of North Carolina School of Law
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- 8 Christopher J. Morten  
Associate Clinical Professor of Law
- 9 Columbia Law School
- 10 Safiya Noble  
Professor of Gender Studies and African American Studies
- 11 Co-Founder and Faculty Director, UCLA Center for Critical Internet Inquiry  
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- 13 Catherine Powell  
Professor of Law
- 14 Fordham Law School
- 15 Jessica Silbey  
Professor of Law
- 16 Boston University School of Law
- 17 Vincent M. Southerland  
Assistant Professor of Clinical Law
- 18 Director, Criminal Defense and Reentry Clinic  
Faculty Co-Director, Center on Race, Inequality, and the Law
- 19 New York University School of Law
- 20 Jonathan Sterne  
James McGill Professor of Culture and Technology
- 21 McGill University
- 22 Zahra Takhshid  
Assistant Professor
- 23 University of Denver Sturm College of Law  
Faculty Associate, Berkman Klein Center for Internet and Society at Harvard University
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- 25 Dr. Rachael Tatman  
Scholar of Machine-Learning Ethics & Intermittent Lecturer in Information University
- 26 of Michigan
- 27 Fred Turner  
Harry & Norman Chandler Professor of Communication
- 28 Stanford University

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3

4 Soshana Zuboff  
Charles Edward Wilson Professor Emerita  
5 Harvard Business School  
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