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No. 22-9908

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In The

**Supreme Court of the United States**

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**FAKEBLOCK, INC. and MAEBY FÜNKE**

*Petitioners,*

v.

**LUCILLE AUSTERO**

*Respondent.*

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*On Writ of Certiorari to the  
United States  
Court of Appeals  
for the Fifteenth Circuit*

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**BRIEF FOR RESPONDENT**

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Team 15  
*Counsel for Respondent  
November 20, 2023*

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## **QUESTIONS PRESENTED**

1. Whether a social media company is liable under Section 230 of the Communications Decency Act of 1996 for violating a celebrity's state-law right of publicity by appropriating that celebrity's identity.
2. Whether an AI model created using a celebrity's voice, appearance, and talents, and posted to a social media platform for commercial gain, infringes on that celebrity's right of publicity, or is the model protected expression under the First Amendment.

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## OPINIONS BELOW

The opinion of the United States District Court for the District of Newport Beach is unpublished and may be found at *Austero v. FakeBlock, Inc.*, D.C. No. 18-cv-5309 (D. Newport Beach).<sup>1</sup> The opinion of the United States Court of Appeals for the Fifteenth Circuit is unpublished and may be found at *Austero v. FakeBlock, Inc.*, C.A. No. 20-9804 (15th Cir. 2022).

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered final judgment on this matter on October 17, 2022. (R. 1a.) Petitioner then filed a writ of certiorari, and this Court granted certiorari. Order Granting Cert., Oct. 9, 2023, No. 22-9908. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix contains the pertinent text of the following constitutional and statutory provisions relevant to this case: United States Constitutional Amendment I and 47 U.S.C. § 230.

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<sup>1</sup> It is unclear from the Fifteen Circuit Court of Appeals' opinion in what year the district court granted summary judgment for Petitioners. However, the case was initially filed on August 24, 2018.

## STATEMENT OF THE CASE

### A. Procedural History

On May 29, 2018, Petitioner Maebly Fünke (“Petitioner Fünke”) posted a video entitled *Moonie Bares All* to the social media platform known as FakeBlock. (R. 5a.) The video depicted an AI-generated model that closely resembled Respondent, Lucille Austero (“Austero”). (R. 2a.) On August 24, 2018, Austero sued FakeBlock, Inc. (“FakeBlock”) in the District Court for the District of Newport Beach seeking an injunction to require FakeBlock to remove the video from its website. (R. 6a.) Subsequently, Austero amended her pleadings. (*Id.*) The amended pleadings added Petitioner Fünke as a defendant and alleged that Petitioners Fünke and FakeBlock violated Austero’s common-law right to publicity. (*Id.*)

After the parties concluded discovery, both FakeBlock and Fünke moved for summary judgment, arguing that, as a matter of law, Austero did not have a viable claim for infringement of her right to publicity. (R. 7a.) Both FakeBlock and Fünke also asserted that *Moonie Bares All* is protected by the First Amendment. (*Id.*) Moreover, FakeBlock asserted an affirmative defense of immunity under Section 230 of the Communications Decency Act (“Section 230”). (*Id.*) The district court denied FakeBlock’s immunity claim but granted summary judgment to both FakeBlock and Fünke on the merits of Austero’s right of publicity claim. (*Id.*) The district court then entered final judgment on behalf of both FakeBlock and Fünke. (*Id.*)

Austero appealed to the Fifteenth Circuit Court of Appeals. (*Id.*) While FakeBlock did not cross appeal, it urged the Fifteenth Circuit to affirm summary judgment on its immunity claim. (*Id.*) The Fifteenth Circuit affirmed in part and

reversed in part the district court’s order on summary judgment. (R. 2a.) The court affirmed the district court, holding that FakeBlock did not have immunity under Section 230. (*Id.*) Moreover, the Fifteenth Circuit reversed the district court, holding that Petitioners FakeBlock and Fünke had infringed upon Austero’s common-law right of publicity. (*Id.*) The court also held that Petitioners had not proven their affirmative defense under the First Amendment. (R. 39a.)

Following Petitioners’ appeal of the Fifteenth Circuit’s ruling, this Court granted certiorari to address (1) whether an internet social media company has immunity, under the Communications Decency Act of 1996, 47 U.S.C. § 230, from state-law claims alleging infringement upon a celebrity’s right of publicity, and (2) whether a computer-generated artificial intelligence model that resembles a real-life celebrity infringes upon that celebrity’s right of publicity or, conversely, is protected under the First Amendment. Order Granting Cert., Oct. 9, 2023, No. 22-9908.

## **B. Statement of the Facts**

Respondent, Lucille Austero, is a multi-talented entertainer known around the world for her acting, dancing, and singing. (R. 3a.) Before her retirement a few years ago, Austero had acted in twenty-two films, been on Broadway and TV, and had recorded seven studio albums. (*Id.*) Over the course of her career, Austero has won an Oscar, Emmy, and four Tony awards—putting her into a select group of entertainers. (R. 3a, 25a.)

Following the “La Habra” earthquake in 2014 and Newport Beach’s inclusion as the nation’s fifty-first state, Austero decided to run for public office as a

representative in the United States Congress. (R. 3a.) During the 2018 election, Austero ran against Lindsay Bluth for one of Newport Beach’s House seats. (*Id.*)

Petitioner Fünke, who is also Bluth’s daughter, is a programmer and digital artist with a specific interest in creating realistic AI-generated human models. (*Id.*) During the 2018 election cycle, Fünke put her talents to use by creating a short film entitled *Moonie Bares All*. (R. 2a.) The video featured a realistic AI-generated model named “Moonie” that closely resembled not only Austero’s appearance, but also her talent. (R. 4a.) Petitioner Fünke created Moonie using a program she developed specifically to generate realistic AI models. (*Id.*)

To create Moonie’s appearance, voice, and talent, Fünke’s software analyzed Austero’s acting roles and studio albums. (*Id.*) The software captured all of Austero’s widely accessible singing performances. (R. 27a.) Notably, Fünke had previously demonstrated the software’s capabilities when she created a realistic model of herself that she used to fraudulently raise money for fake charities. (R. 4a.)

In *Moonie Bares All*, Moonie is the same height as Austero, 5’4”, shares the same body style and proportions, has the same skin and hair color, and sports the same signature pixie haircut. (R. 4a, 25a.) Moonie wears an outfit that is identical to the outfit Austero wore in *Cabaret*—one of her most memorable movies. (R. 25a.) The model strips off her clothes just as Austero had done in her film *Tell Me That You Love Me, Junie Moon*. (*Id.*) The AI model’s name, Moonie, may even be a nod to the title of that same film. (*Id.*) The tap dance Moonie performs in the film is exceptionally similar to Austero’s 1992 performance at the Radio Music City Hall. (*Id.*)

As the film begins, Moonie dances for 45 seconds and then loses her balance and when she recovers, she begins to strip off her clothes. (R. 5a.) The now nude, but pixelated, Moonie sings, in a voice similar to Austero's, an altered version of the song "New York, New York" from the musical and film *On the Town*. (*Id.*) This song is not the same "New York, New York" Austero sang in the film of the same name. (R. 26a.) Throughout the song, Moonie sings in slurred words and disparages the citizens and voters of Newport Beach. (*Id.*) The song also generally refers to Austero's wealth and substance use. (*Id.*)

Despite Moonie and Austero's similarities, there are slight differences between the two. (R. 23a.) Austero's pixie haircut features spiky hair, whereas Moonie's hair is flat across her head. (*Id.*) Austero has a beauty mark on her left cheek and Moonie does not. (*Id.*) Moonie's nose has a prominent downward tip, but Austero's nose does not. (R. 24a.) Moonie's mouth is disproportionately large for her head. (*Id.*) Austero's smile usually displays her teeth, while Moonie's does not. (*Id.*) Moonie's left hand only has four fingers and displays signs of inconsistent aging. (*Id.*) Moonie's eyes are particularly wideset, and her right eye is unnaturally slanted. (*Id.*)

On May 29, 2018, Petitioner Fünke posted *Moonie Bares All* to FakeBlock, a startup social media platform. (R. 5a.) Fünke's post was also accompanied by text reading "VOTE 4 LINDSAY BLUTH" and provided a link to Bluth's campaign website. (R. 6a) Fünke, at the time, was not only an investor in FakeBlock, but was also one of the company's three corporate officers. (R. 5a, 6a.) As the director of investor relations, Fünke was responsible for attracting new investors to the company

and for advertising the site. (R. 42a.) FakeBlock was still in beta-testing mode, and only the company's three officers were able to post videos to FakeBlock. (R. 5a.)

Petitioner Fünke testified that she posted *Moonie Bares All* to FakeBlock for three reasons. (R. 4a, 6a.) First, Petitioner Fünke wanted to draw attention to FakeBlock because she was an investor in the new site. (R. 6a.) Second, Fünke wanted to use Moonie to demonstrate and advertise to potential licensees that her software could create realistic-looking human models. (R. 4a.) Finally, Petitioner Fünke wanted to reveal Austero's "darker side" as a political candidate in an effort to aid her mother's campaign. (*Id.*)

*Moonie Bares All* proved to be a hit and drew significant attention on the internet. (R. 6a.) Subsequently, on August 24, 2018, Austero filed suit against FakeBlock in the District Court of Newport Beach, seeking an injunction to require FakeBlock to remove the video. (*Id.*) On August 27, 2018, just three days after Austero filed suit but before the district court had ruled, FakeBlock's CEO, known internally as Mr. Manager, George Maharis, removed the video from the site and fired Petitioner Fünke. (R. 5a n.3, 6a.)

Austero subsequently lost the election to Lindsay Bluth. (R. 6a.) After the election, Austero amended her pleadings. (*Id.*) The amended pleadings added Petitioner Fünke as a defendant and alleged that Petitioners Fünke and FakeBlock violated Austero's common-law right to publicity. (*Id.*)



## SUMMARY OF THE ARGUMENT

**This Court should affirm the decision of the Fifteenth Circuit because Petitioner FakeBlock is not immune under Section 230 of the Communications Decency Act.** First, while Section 230 generally provides broad immunity for online platforms, § 230(e)(2)'s intellectual property exception applies to both federal and state intellectual property laws. Second, Austero's right of publicity claim is one pertaining to intellectual property, and thus falls under § 230(e)(2)'s exception. Third, and alternatively, FakeBlock is liable for the content at issue under § 230(c)(1) because it was not posted by a third-party, but rather, is FakeBlock's own speech. Therefore, the United States Court of Appeals for the Fifteenth Circuit did not err when it ruled that Petitioner FakeBlock is not immune under Section 230 from Austero's state-law right of publicity claim.

**This Court should affirm the decision of the Fifteenth Circuit because Austero's identity is protected by her right of publicity, and *Moonie Bares All* does not sufficiently transform Austero's identity to be afforded First Amendment protection.** First, the right of publicity in Newport Beach extends to more than just name and likeness and protects Austero's appearance, voice, and talents from appropriation. Second, *Moonie Bares All* does not contain enough added creative elements to transform the short film into anything other than a mere imitation of Austero's identity and, accordingly, is not worthy of First Amendment protection. Therefore, the United States Court of Appeals for the Fifteenth Circuit did not err in finding that *Moonie Bares All* did infringe upon Austero's right of

publicity. The court also did not err in holding that *Moonie Bares All* does not deserve First Amendment protection as a matter of law.

## ARGUMENT

### I. FAKEBLOCK DOES NOT HAVE IMMUNITY, UNDER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT, FROM AUSTERO'S STATE-LAW RIGHT OF PUBLICITY CLAIM.

This court should affirm the Fifteenth Circuit's opinion below because FakeBlock does not have immunity from Austero's state-law right of publicity claim under Section 230 of the Communications Decency Act of 1996 ("Section 230"). 47 U.S.C. § 230. FakeBlock does not have immunity because Austero's claim falls within the intellectual property exception to Section 230's general waiver of liability found in § 230(e)(2). 47 U.S.C. § 230(e)(2). Alternatively, FakeBlock also does not have immunity under Section 230 because *Moonie Bares All* is not third-party content, but rather, is FakeBlock's own speech, for which it remains liable. *See Universal Commc'ns Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007).

Section 230, enacted in the early days of the internet, provides online platforms with a broad waiver of liability for content posted by third parties. *See, e.g. Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1046-47 (9th Cir. 2019) Congress enacted Section 230 to further two important policy goals: (1) to promote "the continued development of the Internet" and "the vibrant and competitive [online] free market," and, (2) to "deter and punish" unwanted and illegal content online. 47 U.S.C. §§ 230(b)(1), (5); *see also Hepp v. Facebook*, 14 F.4th 204, 208 (3d Cir. 2021)

“In essence, Congress fostered a largely unregulated free market online while snuffing out certain objectionable content.”)

Congress enacted Section 230 in part as a reaction to a decision in the early 1990s by the New York Supreme Court that held online platforms liable as publishers of third-party content. See *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). By enacting Section 230, Congress overruled *Stratton Oakmont* and refused to classify online platforms as publishers of third-party content. *Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir. 2003).

Since its enactment, courts have consistently held that Section 230 provides websites with broad immunity. See, e.g. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); *Lycos*, 478 F.3d at 418-19; *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016). However, Section 230 immunity is not absolute. Importantly, § 230(e)(2) clarifies that Section 230’s broad waiver of liability does not “limit or expand any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2). Additionally, while Section 230 largely insulates online platforms from liability for content posted by third parties, websites remain liable for their own content. *Lycos*, 478 F.3d at 419.

Here, because § 230(e)(2)’s intellectual property exception applies to both federal and state intellectual property laws, and because Austero’s right of publicity claim is one “pertaining to intellectual property,” FakeBlock is not immune under Section 230. Alternatively, FakeBlock is also not immune, notwithstanding §

230(e)(2), because *Moonie Bares All* was not posted to FakeBlock by a third-party content provider, but rather, is FakeBlock’s own content.

**A. Section 230(e)(2)’s Exception for Intellectual Property Claims Includes State-Law Intellectual Property Claims.**

FakeBlock is not immune from Austero’s right of publicity claim because § 230(e)(2) excludes intellectual property claims from Section 230’s general waiver of liability. Accordingly, online platforms remain liable for all content that violates intellectual property laws. *See Lycos*, 478 F.3d at 422-23 (citing 47 U.S.C. § 230(e)(2)).

FakeBlock argues that § 230(e)(2)’s exception for intellectual property claims only applies to *federal* intellectual property laws. This argument is incorrect for three reasons. First, the plain language of the statute is clear and unambiguous—Section 230 immunity does not limit “*any* law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2) (emphasis added). Second, explicit references to “state” and “federal” law elsewhere in the statute indicate that if Congress had intended to limit § 230(e)(2)’s exception only to *federal* intellectual property laws, it could have, and would have, done so in the text of the statute. Third, public policy concerns about the practical applications of a reading of § 230(e)(2) that includes state-law intellectual property claims do not outweigh the text of the statute.

**1. The plain language of the text is clear and unambiguous: “any law pertaining to intellectual property” includes both federal and state intellectual property laws.**

The primary goal of statutory interpretation is to “determine and give effect to Congress’s intent.” (R. 12a.) When interpreting a statute, courts must first look to the language of the text itself. (R. 12a;) *see also Ross v. Blake*, 578 U.S. 632, 638

(2016). Where the language of the text is clear and unambiguous, the analysis must end. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) (“This Court has explained many times over many years that, when the meaning of the statute’s terms is plain, our job is at an end.”)

Section 230(e)(2)’s carve-out for intellectual property claims reads: “Nothing in this section shall be construed to limit or expand *any law* pertaining to intellectual property.” 47 U.S.C. § 230(e)(2) (emphasis added). Because it is a “fundamental canon of statutory construction [that] unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning,” here, the words “*any law*” do not, as FakeBlock argues, mean “*any federal law*.” *See Perrin v. United States*, 444 U.S. 37, 42 (1979).

The use of “any” as a modifier before “law” plainly indicates that Congress intended to include not only federal, but also state intellectual property laws. *See Harrison v. PPG Indus.*, 446 U.S. 578, 589 (1980) (reading “any other final action” in the Clean Air Act “to mean exactly what it says, namely, *any other* final action”); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (“Read naturally the word ‘any’ has an expansive meaning . . . .”); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218-19 (2008) (holding that “any other law enforcement officer” in Federal Tort Claims Act “suggests a broad meaning” and “mean[s] literally what it says.”).

Simply put, courts must presume that Congress says what it means, and means what it says. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Because § 230(e)(2) states that “*any law*,” and not, as FakeBlock reads it, only *federal*

law, “pertaining to intellectual property” is included in the carve-out, the meaning of the text is clear and unambiguous. If Congress intended for § 230(e)(2)’s exception to apply only to federal intellectual property laws, it could have, *and would have*, said so. Absent the word “federal” in the statute, it would be improper for this Court to insert it where it does not appear.

**2. References to “State” and “Federal” law elsewhere in the statute indicate that Congress intended § 230(e)(2) to be construed broadly.**

When Congress includes specific language in one section of a statute but omits that same language in another section of the same statute, courts should presume that Congress acted “intentionally and purposefully.” *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (quoting *Bates v. United States*, 552 U.S. 23, 29-30 (1997)). Here, references to “State law” and “Federal” law elsewhere in Section 230 indicate that Congress intended § 230(e)(2)’s exception to include *all* intellectual property laws.

In the original version of Section 230, Congress made clear whether federal, state, or local law applies in three other places in subsection (e). *See* 47 U.S.C. § 230(e)(1) (“Nothing in this section shall be construed to impair the enforcement of [specific federal criminal statutes] or any other *Federal* criminal statute.”); 47 U.S.C. § 230(e)(3) (“Nothing in this section shall be construed to prevent any *State* from enforcing any *State* law that is consistent with this section . . . No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”); 47 U.S.C. § 230(e)(4) (“Nothing in this section shall be construed to limit the application of the [specific federal statute] or any similar *State* law.”). Additionally, when Congress amended Section 230 in 2018 to clarify that

Section 230 does not shield platforms from enforcement of Federal and State laws prohibiting sex trafficking, it again explicitly referenced state law twice. *See Hepp*, 14 F.4th at 210.

Multiple explicit references to both State and Federal law throughout other subsections of Section 230 confirm that Congress knew how to differentiate between the two but chose not to do so in § 230(e)(2). *See Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 300 (D.N.H. 2008) (“[W]here Congress wished to distinguish between state and federal law in § 230, it knew how to do so.”); *Atl. Rec. Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009) (“It is therefore clear from the statute that if Congress wanted the phrase ‘any law pertaining to intellectual property’ to actually mean ‘any federal law pertaining to intellectual property,’ it knew how to make that clear, but chose not to.”)

Additionally, there is no basis to assert, as FakeBlock does, that federal law is the default throughout Section 230. While it is true that § 230(e)(3) specifically addresses Section 230’s effect on “State law,” it does not follow that “any law” in Section 230(e)(2) really means, any *federal* law. On the contrary, if that were so, references to “Federal” law elsewhere in the statute would be mere surplusage. Because courts must construe statutes so that no word is rendered superfluous, federal law cannot be the default throughout Section 230 and “any law” in § 230(e)(2) cannot not mean “any federal law.” *See Duncan*, 533 U.S. at 174 (2001).

**3. Policy concerns about varying state-law right of publicity claims do not outweigh the plain language of the statute.**

Further, FakeBlock’s concerns about the public policy implications of § 230(e)(2)’s plain language do not outweigh the text of the statute. On the contrary, a reading of § 230(e)(2) that includes state-law intellectual property claims supports Congress’s stated policy goals because protections for such claims are critical to maintaining a competitive free market. *See, e.g. Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575-77 (1977) (explaining the economic theory underlying the need for the right of publicity).

In one of the earliest circuit court cases to directly address § 230(e)(2)’s intellectual property carve-out, the Ninth Circuit in *Perfect 10* held that to include state-law intellectual property claims in § 230(e)(2)’s scope would “be contrary to Congress’s expressed goal of insulating the development of the Internet from various state-law regimes.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007). The dissent below, agreeing with the reasoning in *Perfect 10*, argued firmly that it is necessary to go beyond the natural reading of the text because the text is “only the starting point in proper statutory construction.” (R. 48a.) However, this Court has explained time and again that where the plain language of the text is clear and unambiguous, as it is here, “judicial inquiry is complete except, ‘in rare and exceptional circumstances’” *Rubin v. United States*, 449 U.S. 424, 430 (1981) (quoting *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978)); *see also Germain*, 503 U.S. 253-54. This is not a rare or exceptional circumstance that warrants an interpretation of the text



that would essentially rewrite the statute. That is not this Court’s role, and this Court should decline to do so here.

However, even if this Court does look beyond the plain language of the text, the policy concerns raised by FakeBlock, the dissent below, and the court in *Perfect 10* likewise fail because state-law right of publicity claims in fact support the “continued development” of a “vibrant and competitive [online] free market.” 47 U.S.C. §§ 230(b)(1)-(2). As this Court in *Zacchini* explained, the purpose of right to publicity laws is to encourage entertainers to develop their trade by protecting their “proprietary interest” in their talents. 433 U.S. at 573; *see also Hepp*, 14 F.4th at 211. Publicity laws allow celebrities and entertainers to benefit from their hard work by enabling them to lend their endorsement to certain products, services, or companies. Without sufficient protections for publicity rights, entertainers will no longer be incentivized to develop and hone their crafts because they will no longer be able to reap the rewards of their labor. In this way, state-law publicity rights play a vital role in maintaining a competitive free market.

Further, a reading of § 230(e)(2) that includes state intellectual property laws would not create an untenable situation for websites. While these websites may not have had the manpower to comply with varying state-law right of publicity schemes in 1996, that argument it is no longer compelling. Today, nearly thirty years after Section 230’s enactment, social media platforms are some of the most powerful companies in the world. These platforms have the ability not only to affect a celebrity’s publicity rights in the U.S., but to affect the outcome of an election half-

way across the world.<sup>2</sup> To suggest that permitting individuals to pursue state-law right of publicity claims will somehow lead to the collapse of the internet by “eviscerate[ing] the immunity system” set forth in Section 230 is simply anachronistic and out of touch. (R. 49a.)

Tellingly, over sixteen years have passed since the First Circuit’s decision in *Lycos* and over fourteen years have passed since the court’s decision in *Atlantic Recording* (a decision handed down in the Southern District of New York, encompassing one of the world’s most important entertainment hubs, New York City). Since *Atlantic Recording*, there have been only two cases involving state-law intellectual property claims implicating § 230.<sup>3</sup> The internet, in the First Circuit and the Southern District of New York, is far from eviscerated. It is alive and well and showing no signs of stalling any time soon.

As Justice Thomas has noted, “Courts have long emphasized nontextual arguments when interpreting § 230, leaving questionable precedent in their wake.” *Malwarebytes, Inc. v. Enigma Software Grp., USA, LLC*, 141 S. Ct. 13, 14 (2020) (denying certiorari). Here, policy considerations that are not only unsupported, but that in fact *contradict* the plain language of the statute, cannot outweigh the text. *See BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532 (2021) (“[E]ven the most formidable policy arguments cannot overcome a clear statutory directive.”)

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<sup>2</sup> See Sheera Frenkel and Davey Alba, *In India, Facebook Grapples With an Amplified Version of Its Problems*, New York Times, <https://www.nytimes.com/2021/10/23/technology/facebook-india-misinformation.html> (Nov. 9, 2021)

<sup>3</sup> See John Paul A. Galgano, *Tackling the Intangible: Why the Supreme Court Needs to Define Intellectual Property and What Facebook Stands to Lose (or Win)*, 37 Notre Dame J.L. Ethics & Pub. Pol’y 323 (2023).

(internal quotations omitted). The Ninth Circuit in *Perfect 10* improperly prioritized its interpretation of Congress’s policy goals over the natural reading of the text, and in turn engaged in judicial legislating. Instead of following the Ninth Circuit’s flawed reasoning, this Court should follow the Third Circuit in *Hepp* and find that “policy concerns cannot displace the text.” *See Hepp*, 14 F.4th at 211.

Thus, because § 230(e)(2) contains clear, unambiguous, and broad language, and because public policy concerns, however compelling, cannot outweigh a clear directive from the text of the statute, this Court should hold that § 230(e)(2) applies to both federal and state-law intellectual property law claims.

**B. Austero’s Claim for Infringement of Her Right of Publicity Is a Claim “Pertaining to Intellectual Property” Under § 230(e)(2).**

Further, FakeBlock also does not have immunity because Austero’s right of publicity claim, “pertain[s] to intellectual property” under § 230(e)(2). 47 U.S.C. § 230(e)(2). Newport Beach recognizes a common-law cause of action for infringement of the right to publicity, as stated in the RESTATEMENT (SECOND) OF TORTS SECTION 652C, which reads: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”

The expansive language of §230(e)(2) indicates that Congress did not intend for the exception to apply only to “core” federal intellectual property rights like trademark, patent, and copyright, but instead for it to apply more broadly. Additionally, while the right of publicity did originate from the right of privacy, both its history and its current application make clear that it is an intellectual property right designed to protect commercially valuable products of human intellect. Here,

Austero seeks to hold FakeBlock liable, not for damaging her reputation, or for hurting her feelings, but instead for the unauthorized use of her identity for its own benefit. Therefore, Austero has properly stated a claim “pertaining to intellectual property” under § 230(e)(2).

**1. The broad language of § 230(e)(2) indicates that Congress intended for it to apply to a wide range of claims.**

The sweeping language of § 230(e)(2), which states that “any law pertaining to intellectual property” falls within its scope, indicates that Congress did not intend for it to apply solely to so-called “core” intellectual property rights, such as trademark, copyright, and patent. 47 U.S.C. § 230(e)(2). Specifically, the words “pertaining to” have an expansive meaning and indicate that Congress intended § 230(e)(2) to apply quite broadly. *C.f. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (construing the words “relating to” broadly). Further, just as the modifier “any” indicates the inclusion of state-law intellectual property claims, it also indicates Congress’s intent for all, and not some, intellectual property claims to be included within § 230(e)(2)’s exception. *See Harrison*, 446 U.S. at 589 (reading “any other final action” in the Clean Air Act “to mean exactly what it says, namely, *any other* final action”); *Gonzales*, 520 U.S. at 5 (1997) (“Read naturally the word ‘any’ has an expansive meaning . . . .”); *Ali*, 552 U.S. at 218-19 (holding that “any other law enforcement officer” in Federal Tort Claims Act “suggests a broad meaning” and “mean[s] literally what it says”).

Additionally, while Congress did not define “intellectual property” in Section 230, it does not follow that the term should be construed so narrowly as to exclude

the right of publicity. Notably, the Third Circuit in *Hepp* engaged in an extensive analysis of various dictionary definitions of “intellectual property,” focusing on *Black’s Law Dictionary*, to hold that the right of publicity is indeed a form of intellectual property. *See Hepp*, 14 F.4th at 212-14. *Black’s* defines “intellectual property” as: “A category of intangible rights protecting commercially valuable products of the human intellect.” *See Intellectual Property*, BLACK’S LAW DICTIONARY (11th ed. 2019). *Black’s* goes on to explain that “The category comprises primarily trademark, copyright, and patent rights, but also includes trade-secret rights, **publicity rights**, moral rights, and rights against unfair competition.” *Id.* (emphasis added). Therefore, as the court in *Hepp* aptly reasoned, under this definition, it is clear that not only is “intellectual property” not limited to so-called “core” intellectual property claims, but that publicity rights are indeed a form of intellectual property.

**2. Both the history and the current application of the right to publicity indicate that it is an intellectual property right that protects the commercially valuable product of human intellect.**

While the right of publicity did originate from the right of privacy, its current application is that of a property right. J. Thomas McCarthy, *THE RIGHTS OF PUBLICITY & PRIVACY* § 1:23 (2d ed. 2023) (explaining that the right of publicity originates from the tort of invasion of privacy by appropriation.) The term “right of publicity” was first coined by the Second Circuit in *Haelan Lab’s, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). There, a chewing gum company that had obtained the exclusive rights to use images of certain baseball players on trading cards sued a rival gum company that used images of those same players on their trading cards. *Id.* at 867. The court held that “in addition to and **independent of** that right of privacy

. . . a man has a right in the publicity value of his photograph . . . [t]his right might be called a ‘**right of publicity**.’” *Id.* at 868 (emphasis added).

In 1977, this Court endorsed the Second Circuit’s interpretation of the right of publicity in *Zacchini*, holding that “the State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual.” 433 U.S. at 573. This Court went on to note that the right of publicity “is closely analogous to the goals of patent and copyright law, focusing on the right to the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.” *Id.*

However, the rationale underlying the right of publicity stretches back even further. In 1907, a New Jersey state court recognized the need for such a right when it held that a company could not use the name or likeness of Thomas Edison to promote its products. *See Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 394 (N.J. Ch. 1907). Even then, the court conceptualized this right as a property interest, stating “it is difficult to understand why the peculiar cast of one’s features is not . . . one’s property, and why its pecuniary value . . . does not belong to its owner, rather than to the person seeking to make an unauthorized use of it.” *Id.*

Following this Court’s decision in *Zacchini*, many courts have upheld the distinction between the right to privacy and the right to protect the commercial value of identity through publicity. *See Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983) (“[T]he right of privacy and the right of publicity protect fundamentally different interests and must be analyzed separately.”); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 967 (10th Cir. 1996) (“While

the right was originally intertwined with the right of privacy, courts soon came to recognize a distinction between the personal right to be left alone and the business right to use one's identity in commerce."); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003) ("The right of publicity is, somewhat paradoxically, an outgrowth of the right of privacy.")

Further, numerous courts have acknowledged, both before and after Section 230's enactment, that the right to publicity is in fact an intellectual property right. *See Cardtoons* 95 F.3d at 967 ("Like trademark and copyright, the right to publicity involves a cognizable property interest."); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323 (11th Cir. 2006) ("[T]here appears to be no dispute that the right of publicity is an intellectual property right."); *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1179 (9th Cir. 2015) ("[T]he right of publicity . . . 'primarily protects a form of intellectual property that society deems to have social utility.'") (quoting *Keller v. Elec. Arts Inc.*, 724 F. 3d 1268, 1280 (9th Cir. 2013)); *ETW Corp.*, 332 F.3d at 928 ("The right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her identity."). Notably, even the comments to the Restatement explain that "the right created by [§ 652C] is in the nature of a property right," specifically noting that an individual's publicity rights can be exclusively licensed to a third-party. RESTATEMENT (SECOND) OF TORTS § 652C cmt. a.

Thus, while the right of publicity may have originated from the right of privacy, both its history and its current application show that it is an intellectual property right, and as such, falls squarely within § 230(e)(2)'s exception.

Moreover, the dissent below cites the district court in *Backpage.com* to argue that “a person’s image is not a ‘product of the human intellect.’” *See Doe ex rel. Roe v. Backpage.com*, 104 F. Supp. 3d 149, 163 n.3 (D. Mass. 2015) (citation omitted). However, *Moonie Bares All* is much more than simply an image of Austero. On the contrary, through generative AI software, FakeBlock disseminated a lengthy video that functionally replicates Austero’s entire identity and notable pieces of her accomplished career—a career she spent her entire life creating using her own intellect. (R. 24a.) Accordingly, her identity as a celebrity is a “commercially valuable product of [her] human intellect” and her right of publicity claim is one pertaining to intellectual property.

**C. Alternatively, FakeBlock Is Also Not Immune from Austero’s Claim Under Section 230(c)(1) Because *Moonie Bares All* Is Not Third-Party Content, But Instead Is FakeBlock’s Own Speech.**

Alternatively, even if this Court finds that § 230(e)(2) only applies to federal intellectual property laws, or that Austero’s right of publicity claim is not one “pertaining to intellectual property,” FakeBlock is still not immune from Austero’s right of publicity claim because *Moonie Bares All* was not posted to FakeBlock by a third-party, but rather, is FakeBlock’s own content.

Under section 230(c)(1) online platforms are only immune from liability for claims based on content provided by “another information content provider”—i.e., a third party. 47 U.S.C. § 230(c)(1). Accordingly, “an interactive computer service



provider remains liable for its own speech.” *Lycos*, 478 F.3d at 419. Here, *Moonie Bares All* was created, uploaded, and shared to FakeBlock, and only FakeBlock, by one of the company’s three corporate officers, Petitioner Fünke. (R. 42a.) When Fünke uploaded the video, she was acting in her corporate capacity, as director of investor relations, because she wanted to increase web traffic to FakeBlock and attract additional investors to the company. (R. 42a.) Therefore, because Fünke was acting as an agent of FakeBlock when she posted *Moonie Bares All* to the platform, the video is FakeBlock’s own content for which it remains liable under § 230(c)(1).

**1. Section 230(f) defines and differentiates between an “interactive computer service” provider and an “information content provider.”**

Section 230(f)(2) defines “[i]nteractive computer service” provider as “any information service, system, or access software . . . that provides or enables computer access . . . to a computer server, including specifically a service or system that provides access to the Internet . . . .” 47 U.S.C. § 230(f)(2). While this definition “includes a wide range of cyberspace service[s],” it most commonly applies to websites. *Batzel*, 333 F.3d at 1030 n.15; *see also Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008).

Conversely, § 230(f)(3) defines “information content provider” as “any person or entity that is responsible, *in whole or in part*, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3) (emphasis added). An “information content provider” need not be the sole party responsible for the creation of the content but can be “responsible for the development of the content only in part.” *LeadClick*, 883 F.3d at 174.

Further, under Section 230, a “website operator can be *both* a service provider and a content provider.” *Roommates*, 521 F.3d at 1162 (emphasis added). If a website “passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content.” *Id.* However, “as to content that it creates itself, or is ‘responsible, in whole or in part’ for creating or developing, the website is also a content provider.” *Id.* (quoting 47 U.S.C. § 230(f)(3)).

As the majority below correctly explained, Section 230(c)(1) grants FakeBlock immunity from Austero’s right of publicity claim only if “(1) FakeBlock qualifies as a provider of an interactive computer service, (2) Austero’s claim is based on information provided by another ‘information content provider,’ and (3) Austero’s claim would treat FakeBlock as the ‘publisher or speaker’ of that information.” (R.10a.) Here, Austero does not dispute that FakeBlock is an interactive computer service provider as defined by the statute and that she seeks to hold FakeBlock liable as the publisher or speaker of the video. However, as to the second requirement, *Moonie Bares All* was not posted by another information content provider but, rather, was content provided by FakeBlock itself, through its corporate officer Petitioner Fünke.

**2. Websites are only immune under § 230(c)(1) if they are passive intermediaries and do not create or develop, in whole or in part, the information at issue.**

Courts have routinely found that websites are only immune under § 230(c)(1) where they are simply acting as “intermediaries” or “passive transmitter[s] of information provided by others.” *Zeran*, 129 F.3d at 330 (holding that AOL was immune under Section 230 where it was acting solely as an intermediary); *Carafano*

*v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1120-21 (9th Cir. 2003) (holding that an online dating website was immune under Section 230 where it simply “facilitated the expression” of content, but the “selection of the content was left exclusively to the user”); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20 (1st Cir. 2016) (holding that an online classified ad website was immune under section 230 from claims that it “facilitate[ed] illegal conduct through its posting rules”).

However, where a website has “created or developed the particular information at issue,” it becomes liable under Section 230. *Carafano*, 339 F.3d. at 1125; *see also Roommates*, 521 F.3d at 1169-70 (holding that a roommate-matching website was not immune under Section 230 and became “much more than a passive transmitter of information” when it required users to answer questions, populated possible answers in a drop-down menu, and used the answers to engage in illegal conduct). This standard has come to be known as the “material contribution test.” *See Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 412 (6th Cir. 2014).

Thus, a website can only receive Section 230(c)(1) immunity where it is not materially involved in the creation or development of the content at issue. *Id.* at 409. When a website does contribute, in whole or in part, to the development of the content underlying a claim, the website is no longer a passive intermediary, and falls outside the scope of Section 230 immunity. *Id.* Here, because Petitioner Fünke was acting in her corporate capacity when she uploaded *Moonie Bares all*, FakeBlock is responsible, at least in part, for the development of the content and is not entitled to § 230(c)(1) immunity.

**3. Here, FakeBlock was not a passive intermediary because Petitioner Fünke created, uploaded, and shared *Moonie Bares All* to FakeBlock in her capacity as a corporate officer.**

Here, FakeBlock is not simply a passive intermediary, but rather is responsible for the development and posting of *Moonie Bares All* because when Petitioner Fünke shared the video to FakeBlock, she was acting in her corporate capacity. Indeed, courts have consistently made clear that “corporations can ‘act only through agents and employees.’” *Tracinda Corp., v. DaimlerChrysler AG*, 502 F.3d 212, 225 (3d Cir. 2007) (quoting *Bel-Ray Co., Inc, v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999)). Accordingly, when Fünke posted *Moonie Bares All*, FakeBlock became both an internet service provider and an information content provider under § 230(f).

Under Section 230, a website may still be liable for content posted by an agent or employee if that person is authorized to post on the website’s behalf or posts the content within the scope of their employment. *See Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 274 (S.D.N.Y. 2016) (holding that a website was not immune under Section 230 because it implied to users that an agent was authorized to post on its behalf); *see also Montanino v. New York City Dep’t of Sanitation*, 2023 WL 6614687 (N.Y. Sup. Ct. Oct. 5, 2023) (holding that an employer was immune under Section 230 because the employee’s conduct was outside the scope of his employment).

Here, FakeBlock is not acting simply as a passive internet service provider. On the contrary, *Moonie Bares All* was thought of, created, and uploaded to FakeBlock by one of FakeBlock’s three corporate officers while she was acting in her corporate capacity. (R. 2a). Fünke posted the video to FakeBlock, and only FakeBlock. (R. 42a.)

As director of investor relations, Fünke was responsible for advertising the website and attracting new investors. (R. 42a.) As she testified at deposition, Fünke posted the video to FakeBlock to attract more web traffic to the site. (R. 6a, 42a.) Accordingly, at the summary judgment stage where all reasonable inferences must be drawn in Austero’s favor, these facts support a reasonable inference that Fünke was acting in her corporate capacity when she uploaded *Moonie Bares All* to FakeBlock. See *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021).

Additionally, the fact that, at the time Fünke uploaded *Moonie Bares All*, FakeBlock’s three corporate officers were the *only people* with the authority and ability to upload videos to the site further demonstrates that the video in question was FakeBlock’s own content. (R. 5a.) While FakeBlock remained in beta-testing mode and retained sole authority to post videos it was far from an intermediary, or a passive transmitter of information. It was more akin to a personal blog where an individual blogger would no doubt be liable for content posted to their website.<sup>4</sup>

Unlike the dating website in *Carafano* or the classified ad website in *Backpage.com*, here, FakeBlock did not simply “facilitate[] the expression” of *Moonie Bares All*. Instead, FakeBlock’s “connection” to the infringing conduct at issue was “direct and palpable.” See *Roommates*, 521 F.3d at 1169. Simply put, when she uploaded the video to FakeBlock, Petitioner Fünke was not acting as a third-party user. At the time, she was an agent of the company, acting in her corporate capacity.

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<sup>4</sup> See *Section 230 Protections: How does Section 230 apply to bloggers?*, Electronic Frontier Foundation, <https://www.eff.org/issues/bloggers/legal/liability/230>.

Thus, *Moonie Bares All* is FakeBlock's own content, and FakeBlock is not immune under § 230(c).

For these reasons this Court should affirm the Fifteenth Circuit below and hold that FakeBlock is not immune under Section 230.

## **II. Petitioners Posting the AI-Generated *Moonie Bares All* Video onto FakeBlock Violated Lucille Austero's Right to Publicity, and There is no Valid First Amendment Defense to Petitioners' Conduct.**

This Court should affirm the Fifteenth Circuit's opinion below because Petitioners violated Austero's right to publicity by posting *Moonie Bares All*, which featured a realistic AI-generated model that looked, danced, and sang like Austero, onto FakeBlock's website. Likewise, Petitioner's First Amendment defense is inappropriate here because Austero's property interest in profiting from her likeness outweighs Petitioner's interest in producing imitative works for commercial gain. Should this sort of imitative expression be awarded the highest First Amendment protection, this Court risks upsetting the entire concept of celebrity in the United States. *See Comedy III v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001) (explaining that should literal depictions of celebrities receive First Amendment protection, the court could not "perceive how the right of publicity would remain a viable right[.]").

### **A. Petitioners Appropriated Austero's Identity for Their Own Benefit by Posting a Realistic AI-Generated Model That Depicted Austero in the Short Film *Moonie Bares All*.**

The people of Newport Beach enjoy the common-law right to publicity as stated in the RESTATEMENT (SECOND) OF TORTS SECTION 652C: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." Courts have taken an expansive view of this right

concluding that a “celebrity’s identity may be appropriated in many ways.” *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983). “If the celebrity’s identity is commercially exploited, there has been an invasion of his right whether or not his ‘name or likeness’ is used.” *Id.* at 835.

This expanded view supports the goals underlying the right to publicity: (1) to allow an “individual to reap the reward of his endeavors . . .” and (2) “prevent[] unjust enrichment by the theft of good will.” *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573, 576 (1977). Beyond these goals, the state is motivated to ensure broad protection under the right to publicity because the state has an interest in encouraging artists to “make the investment required to produce a performance of interest to the public.” *Id.* at 576.

**1. The right to publicity should be applied broadly to any identifiable aspect of a person’s identity or persona to enable the right’s primary goals.**

Any person in Newport Beach, and “especially a . . . celebrity” enjoys the ability to “control the commercial value and exploitation of [their]” identity. *See Presley’s Estate v. Russen*, 513 F. Supp 1339, 1353 (D.N.J. 1981). While the right to publicity does protect a person’s name or likeness as stated in section 652C, the right also protects a person from the “appropriation of the very activity by which the entertainer acquired his reputation in the first place.” *See Zacchini*, 433 U.S. at 576.

In *Zacchini*, the only case in which this Court has examined the right to publicity, a performer’s entire act was broadcast on the local news. *Zacchini*, 433 U.S. at 564. This Court, in holding that the First Amendment did not protect the news station from the plaintiff’s right to publicity claim, stated that broadcasting *Zacchini*’s

entire act amounted to the “appropriation of the very activity by which the entertainer acquired his reputation in the first place.” *Id.* at 576. There, this Court recognized that a performance is the product of the “[performer]’s own talents and energy, the end result of much time, effort, and expense.” *Id.* at 575. A performer, through those “talents and energy,” gains economic value “in the right of exclusive control over the publicity given to [their] performance.” *Id.* This Court supported the proposition that the right to publicity extends beyond “name or likeness” because the decision was rendered based on the appropriation of the petitioner’s “performance” and “activity” that built his valuable reputation. *See id.* at 573 n.10 (“Petitioner . . . relies on the much narrower claim that respondent televised an entire act that he’d ordinarily get paid to perform.”).

Other courts have explicitly taken an expansive view of the right to publicity that protects various aspects of someone’s identity beyond name or likeness. The Sixth Circuit, in *Carson*, stated that “a celebrity’s legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes.” 698 F.2d at 836. In that case, the court found that the respondent had appropriated talk-show host Johnny Carson’s famous slogan by selling “Here’s Johnny”-branded portable toilets. *See id.* at 833. There, the “Here’s Johnny” name for the portable toilets was selected because “of its identification with Carson.” *Id.* at 836. To the Sixth Circuit, when a “celebrity’s identity is commercially exploited” in any identifiable way they have a valid infringement claim “whether or not [their] ‘name or likeness’ is used.” *Id.* at 835.



Similarly, the Ninth Circuit has also viewed the right to publicity as expanding beyond someone's name and likeness. In *Midler v. Ford Motor Co.*, the court held that Bette Midler, a famous actress and Grammy winning singer, had pleaded facts "sufficient to defeat summary judgment" when the defendant had imitated her voice for a car commercial. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988). Defendants, after not securing Midler for the advertisement, hired a singer and instructed her to "sound as much as possible like Bette Midler" while singing one of Midler's songs. *Id.* The song was subsequently used in the advertisement to which "a number of people" reported believing that Midler was the actual singer. *Id.* at 462. There, in finding for Midler, the court reasoned, under the common-law right to publicity, that "when a distinctive voice of a professional singer is widely known and deliberately imitated to sell a product, the sellers have appropriated what is not theirs and have committed a tort . . . ." *Id.* at 463.

The Ninth Circuit has applied the right to publicity to a celebrity's role to which the celebrity is closely associated. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992). There, the court held that an animatronic styled like Vanna White and shown "in the process of turning a block letter on a board-game" raised an issue of fact sufficient to defeat summary judgment. *Id.* In finding for White, the court first stated that "the right of publicity is not limited to the appropriation of name or likeness." *Id.* at 1398. In fact, it was "not important *how* the defendant ha[d] appropriated the plaintiff's identity, but *whether* the defendant ha[d] done so." *Id.*

The right of publicity has similarly been extended to numerous cases involving video games and imitations where a person’s abilities, general look, and attributes are all replicated to capitalize on their identity. *See Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013) (“The digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums[.]”); *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 3d 397, 410-11 (Cal. Ct. App. 2011) (finding a viable right to publicity claim when a video game depicted “avatars perform[ing] rock songs, the same activity by which the band achieved and maintain[ed] its fame”); *Presley’s Estate*, 513 F. Supp at 1359-61 (finding that the plaintiff was likely to succeed on the merits for a right to publicity claim involving the defendant’s “live theatrical presentation or concert designed to imitate a performance of the late Elvis Presley”); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 304 (D.N.H. 2008) (finding that the right to publicity extends to “identifiable aspects of [one’s] persona” and identity).

These decisions all echo the Supreme Court in *Zacchini* as they allow the “individual to reap the reward of [their] endeavors” by protecting the very “activity” that made them famous in first place. *See Zacchini*, 433 U.S. at 573, 576.

**2. Petitioners’ commercial exploitation of Austero’s identity violates her right to publicity.**

The Third, Sixth, Ninth, and now Fifteenth Circuit all agree that the right to publicity extends beyond simply protecting a person’s “name or likeness.” To protect the goals underlying the right to publicity that this Court identified in *Zacchini*, it must also extend this right to any identifiable aspect of a person’s identity. *See*

*Zacchini*, 433 U.S. at 573, 576 (explaining that the right to publicity has two goals: (1) to allow an “individual to reap the reward of his endeavors . . .” and (2) “prevent[] unjust enrichment by the theft of good will.”) In this case, Petitioners appropriated to their own benefit nearly every identifiable aspect of Austero’s identity including her voice, her talent as a dancer and actor, and her looks.

There is no question that Austero is famous and that her identity can produce economic value for her as it has done throughout her life. Austero has appeared in twenty-two movies, produced seven studio albums, been on Broadway, and has acted on TV. (R. 3a.) Austero’s talents and efforts have won her an Oscar, Emmy, and four Tony awards. (R.3a, 25a). Focusing on Austero’s talents is particularly important to this analysis because Petitioners’ video “appropriated the very activity by which [Austero] acquired [her] reputation in the first place.” *See Zacchini*, 433 U.S. at 576.

Austero is a talented actress, singer, and dancer. Petitioners’ *Moonie Bares All* short film uses an AI-generated model, “Moonie,” that looks like Austero, to act, sing, and dance. (R. 25a.) Importantly, Petitioners’ AI-model was trained using Austero’s “multiple albums and acting roles . . . .” (4a.) Petitioner Fünke used Austero’s talents and appearance to create Moonie with the goal of making a “realistic-looking simulacra” of Austero. (R. 4a.) Moonie was then placed in a short film where she acted, sang, and danced all in a manner that imitates Austero’s famous performances. *See Presley’s Estate*, 513 F. Supp at 1361 (“To some degree, the defendant has appropriated the ‘very activity [live stage show] by which [Presley initially] acquired his reputation[.]’”). Austero’s situation here mirrors a number of cases where it was not

important how the celebrity's identity was appropriated but "whether [Petitioner] ha[d] done so." *See White*, 971 F.2d at 1398.

Here, Moonie's voice was used as a "sound-alike" of Austero's just as the advertising company had done in *Midler*. *See Midler*, 849 F.2d at 461-62. While the situation in *Midler* is different in that no human was used to mimic Austero's voice, Austero's "distinctive voice . . . [was] deliberately imitated" in Petitioners' film. *See id.* at 463. Petitioner used Austero's "widely available vocal performances over the years . . ." to create Moonie's singing voice. (R. 27a.) There is no indication from the record that anything other than Austero's voice was used to create Moonie's voice. (*See* R. 4a, 27a.) Expert testimony supports the claim that Moonie's voice "*could very well be* [Austero's] *current* voice digitally raised by one octave." (*See* R. 26a.) Moonie's voice being higher than Austero's also makes sense because Austero's previous singing voice, prior to vocal cord surgery in 1997, was higher than her current singing voice. (*Id.*) Moonie ha[d] at the very least been trained on some of Austero's performances pre-1997, such as the 1992 performance at the Radio City Music Hall. (R. 25a.)

Just as in *Midler*, the claim is that Austero's voice was appropriated for gain by Petitioners, and the song itself is not part of the analysis. *See Midler*, 849 F.2d at 463 ("To impersonate her voice is to pirate her identity."). Petitioner Fünke, however she created the voice, needed Moonie's voice to be identifiable as Austero's voice for multiple reasons independent of which song Moonie sang. First, for Petitioner Fünke's program to create a realistic "simulacr[um]" of a person, the model would necessarily have to be identifiable as that person. (*See* 4a.) By showing that the software can

mimic an existing celebrity's voice, Petitioner Fünke was also showing off the "software's capabilities to potential licensees." (*See id.*)

Likewise, Petitioner Fünke needed various aspects of Moonie to be identifiable with Austero because Petitioner used the video to bolster her mother's campaign, which she signaled by posting the video with text stating, "VOTE 4 LINDSAY BLUTH." (R. 6a.) Being that Austero was running against Bluth, Petitioner Fünke needed Moonie to sound like Austero to draw the comparison. Even though the benefit to Petitioner was not pecuniary in that sense, the common-law right to publicity provides that as long as Petitioner made use of Austero's identity "for [their] own purpose and benefit" a violation occurred. *See* RESTATEMENT (SECOND) TORTS § 652C cmt. b. To get value or benefit from Moonie's voice based on Petitioner Fünke's stated goals above, the voice would necessarily have to imitate Austero. Austero's voice, just like in *Midler*, is only worth imitating because it is expected to bring value to Petitioner. *See Midler*, 849 F.2d at 464 ("Why did they studiously acquire a sound-alike and instruct her to imitate Midler if Midler's voice was not of value to them?").

Along with Austero's voice, Moonie also appropriated Austero's talent as a dancer. Moonie performs a tap dance that is "remarkably similar" to Austero's 1992 performance at the Radio City Music Hall. (R. 25a.) Austero is known specifically for her ability as a tap dancer as shown by her "famous" tap-dancing performance in *Cabaret* and her four Tony awards. (*Id.*) Petitioner Fünke needed Moonie to perform a dance that is associated with Austero because Fünke necessarily needed Moonie to be identifiable to draw in "potential licensees" of the software. (*See* R.4a.) This is not

unlike the video game cases that found imitating the football playing abilities and style of the players mediated in favor of finding a violation of the right to publicity because the imitations had appropriated the very thing the players were famous for—just as is the case here. *See, e.g. Hart*, 717 F.3d at 166 (“The digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums[.]”).

Petitioner Fünke also appropriated Austero’s identity by dressing Moonie in the identical costume that Austero famously wore for her role in *Cabaret*, and by styling her hair and body similar to Austero’s. (R. 25a.) In *White*, the animatronic featured in the advertisement resembled Vanna White in her role on *Wheel of Fortune*. *White*, 971 F.2d at 1399. Since the animatronic was styled like White in dress and hair, and was depicted doing what White is famous for, turning over the letter on the *Wheel of Fortune* board, the court found that White’s identity had been appropriated. *Id.* So too is the case here. Moonie was dressed and styled in a way where she was identifiable as Austero. (R. 25a.) Petitioner Fünke did this because she needed Moonie to be readily identifiable as Austero in order to benefit Bluth’s campaign. (R. 6a.) Petitioner Fünke cannot benefit Bluth’s campaign with *Moonie Bares All* unless it is clear that Moonie is meant to be Austero—the person running against Bluth.

This entire situation is closely analogous to cases involving Elvis impersonators. In *Presley*, the district court found that a stage show meant to imitate Elvis’s past performances violated the entertainer’s right to publicity. *See Presley’s*

*Estate*, 513 F. Supp. at 1361. There the court reasoned that even though the defendant’s “production had some value” that did not diminish the conclusion that the “primary purpose of defendant’s activity is to appropriate the commercial value of the likeness of Elvis Presley.” *Id.* at 1360. The show in that case starred “an individual who closely resemble[d] Presley and who imitates the appearance, dress, and characteristic performing style of Elvis Presley.” *Id.* at 1359. The facts in *Presley* mirror the facts in this case. Petitioner Fünke used an AI-model that closely resembled Austero, imitated her voice, appearance, and her “characteristic performing style.” *See id.*; (R. 25a.) The stage show in *Presley* used an amalgamation of indefinable aspects of Elvis’s identity “primarily to commercially exploit the likeness of Elvis Presley.” *See id.* Petitioner Fünke also used a similar combination of identifiable aspects of Austero’s identity for their own benefit. (R. 6a.)

While much of the disagreement here centers around Moonie singing an entirely different “New York, New York” than the version Austero is famous for singing, this fact alone is not fatal to Austero’s right to publicity claim. In *Hart*, the plaintiff’s right to publicity claim survived summary judgment despite users having the choice to alter certain aspects of a football player’s appearance, as well as the choice to pit two teams against each other that had never played before. *Hart*, 717 F.3d at 146 (“Once a user chooses two college teams to compete against each other, the video game assigns a stadium for the match-up[.]”)

Similarly, in *No Doubt*, the plaintiffs could move forward with their right to publicity claim despite the fact that “the band can be made to perform songs it would

never perform . . . .” *No Doubt*, 122 Cal. Rptr. 3d at 410. Here, the fact that Moonie sang the wrong song is similar to *Hart* and *No Doubt* because in all three cases the performers could still be identified despite differences between the imitation’s behavior and the celebrity’s behavior. Austero need only show the “appropriation of the very activity by which [she] acquired [her] reputation” and not that Petitioners depicted her in a totally realistic and factual situation. *See Zacchini*, 433 U.S. at 576.

For these reasons, this Court should find that the common-law right to publicity extends beyond name and likeness and protects Austero’s identity as a whole from being appropriated.

**B. The First Amendment Protections Afforded to Petitioners’ Short Film Do Not Overcome Austero’s Intellectual Property Interests Inherent in her Right to Publicity.**

There is no question that entertainment, and even purely commercial speech, receive First Amendment protection. *Zacchini*, 433 U.S. at 578. The issue instead is whether Petitioners’ First Amendment interest in *Moonie Bares All* is greater than Austero’s interest in her sole right to use her identity for economic gain. This Court has previously noted the inherent tensions between the right to publicity and the First Amendment. *See id.* To properly assess whether Petitioner Fünke’s creation is protected by the First Amendment, this Court must “balance the interests underlying the right to free expression against the interest in protecting the right of publicity.” *Hart*, 717 F.3d at 149. Petitioners in this case did nothing more than place a realistic imitation of Austero into a short film to profit from her identity. On balance, without additional artistic expression, *Moonie Bares All* infringes on Austero’s identity at the cost to her right of publicity.



**1. Sufficiently transformed works of art can receive the highest First Amendment protection.**

The Third, Sixth, and Ninth Circuits have all accepted the “Transformative Use Test” as a way to balance the interests between the First Amendment and a celebrity’s right of publicity. Courts have found this to be the best test to “strike the balance [between the two rights] because it provides courts with a flexible . . . analytical framework.” *Id.* at 163. This test originated in *Comedy III Productions, Inc. v. Gary Saderup, Inc.* and asks whether a work is sufficiently “transformed into something more than a mere celebrity likeness or imitation.” 21 P.3d 797, 799 (Cal. 2001). That court distilled five factors to determine if a work has been sufficiently transformed:

- (1) if “the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question[;]”
- (2) the work is protected if it is “primarily the defendant’s own expression”—as long as that expression is “something other than the likeness of the celebrity[;]”
- (3) “whether the literal and imitative or the creative elements predominate in the work[;]”
- (4) whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted[;]”
- (5) whether “an artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame.”

*Id.* at 809-10.

In *Comedy III*, the California Supreme Court applied the Transformative Use Test and found that an artist selling lithographs and t-shirts with “literal, conventional depictions of The Three Stooges” did not deserve First Amendment

protection as a matter of law. *See id.* at 809-811. The court could “discern no significant transformative or creative contribution” to the literal depictions of The Three Stooges and the economic value of the “work derive[d] primarily from the fame of the celebrities depicted.” *Id.* at 811. There, the court went so far as to say that should literal depictions of celebrities receive First Amendment protection, it could not “perceive how the right of publicity would remain a viable right . . . .” *Id.*

The Ninth Circuit applied the Transformative Use Test in *Hilton v. Hallmark Cards* to a greeting card depicting Paris Hilton as a waitress in a scene similar to an episode of her show *The Simple Life*. 599 F.3d 894, 899-900 (9th Cir. 2010). There, the greeting card placed Hilton’s “over-sized head” onto a “cartoon drawing of a generic female body.” *Id.* at 911. Other differences in the greeting card included Hilton wearing a different uniform, “the style of restaurant [was] different[,]” and she serve[d] different food. *Id.* The card did use Hilton’s signature catchphrase, “that’s hot,” consistent with how she would use it in the show. *Id.* Despite those changes, the circuit court found “enough doubt as to whether Hallmark’s card [was] transformative . . . .” and found the card was not “entitled to the defense as a matter of law.” *Id.*

Litigation involving video games has also produced transformative use cases. In *Hart*, users could play *NCAA Football* using “digital avatars [that] closely resemble[d] the genuine article.” *Hart*, 717 F.3d at 166. The digital avatars matched their real-life counterparts, college football players, “in terms of hair color, hair style and skin tone.” *Id.* The game also mimicked the “accessories” regularly worn by the players, like a visor on their helmet or a wristband, and

“accurately track[ed] [the player’s] vital and biographical details.” *Id.* The *NCAA Football* game sought “to create a realistic depiction of college football for the users . . . includ[ing] the realistic representation of players.” *Id.* at 168. There, appellees did not sufficiently “transform” the player’s likeness despite users’ ability to alter the player’s “basic biographical information” and appearance through “additional hair style, faces, [and] accessories.” *Id.* These changes were “merely trivial variation[s]” to the players’ likeness or biographical data and did not “imbue[] [the avatar] with some added creativity” that would be enough to satisfy the Transformative Use Test. *Id.* at 168-69. Ultimately, the court found that “the digital Ryan Hart does what the actual Ryan Hart did” and that appellee could not show that it deserved First Amendment protection as a matter of law. *Id.* at 166, 170.

Underlying the reasoning in *Hart* is the analysis set out in *No Doubt*. There, the California Court of Appeal held that appellee was not entitled to the transformative use defense because “the expressive elements of the game remain[ed] ‘manifestly subordinated to the overall goal of creating a conventional’” depiction of No Doubt to exploit the band’s celebrity. *No Doubt*, 192 Cal. Rptr. 3d at 411 (quoting *Comedy III*, 21 P.3d at 808). There the appellee claimed that No Doubt’s identity was so transformed as to gain First Amendment protection because the band was “surrounded by unique, creative elements, including [] fanciful venues such as outer space . . . and performing songs that No Doubt avowedly would never perform in real life.” *Id.* at 410. The court rejected this reasoning stating that the “other creative elements” of the game “do[] not transform the avatars into anything other than exact

depictions of No Doubt’s members doing exactly what they do as celebrities.” *Id.* at 411 (citing *Hilton*, 599 F.3d at 911). None of the video game’s creative elements elevated the “depictions of No Doubt to something more than ‘conventional, more or less fungible, images . . .’” of the band. *Id.* Also weighing on the court’s decision to rule the First Amendment defense inapplicable was the fact that the appellee’s “use of life-like depictions of No Doubt” was motivated by a “commercial interest in using the band’s fame to market [the game].” *Id.*

There are also right to publicity cases that fall on the other side of the transformative use coin, where the work of art did receive First Amendment protection. In *Winter v. DC Comics*, two musicians, Johnny and Edgar Winter, lost their right to publicity claim on First Amendment grounds because the court could “readily ascertain that” the comic book characters were “not just conventional depictions of plaintiffs but contain[ed] significant expressive content other than plaintiffs’ mere likeness.” 69 P.3d 471, 479 (Cal. 2003). There, the plaintiffs’ likenesses appeared in the comic book *Jonah Hex* as two “half-human and half-worm” creatures named the “Autumn Brothers.” *Id.* at 476, 479. The court found that the purpose behind the distortions to the Winter Brothers was to “lampoon, parody, or caricature” and that the drawings in the comic would be “unsatisfactory as a substitute for conventional depictions” should fans want to purchase pictures of the musicians. *Id.* at 479. The depictions there were so transformed as to not “threaten plaintiffs’ right of publicity.” *Id.*

Other cases have fallen in the middle between life-like depictions of celebrities and fanciful ones. *In ETW Corp. v. Jireh Pub., Inc.*, the Sixth Circuit in applying the Transformative Use Test found that a painting depicting Tiger Woods, after his win at the 1997 Masters Tournament, was sufficiently transformed to deserve First Amendment protection. 332 F.3d 915, 938. In the painting, there were “three different views of Woods in different poses” and included likenesses of “famous golfers of the past looking down on Woods.” *Id.* at 918. There, the court found that the artist had added “significant transformative elements” to Woods’s identity because the “work consist[ed] of a collage of images” that artistically depicted a “historic event in sports history” and conveyed a “message about the significance of Woods’s achievement . . . .” *Id.* at 938. In balancing the interests, the court noted that Woods could still profit off his identity from “appearances and endorsements,” and it was “not at all clear” whether the artwork would “reduce the commercial value of his likeness.” *Id.*

**2. *Moonie Bares All* did not sufficiently transform Austero’s identity and should not be given first amendment protection when balancing the interests.**

Here, the Fifteenth Circuit properly held, at the summary judgment stage, that Petitioners’ short film did not sufficiently transform Austero’s identity to warrant First Amendment protection as a matter of law. (R. 39a.) It is readily conceded that short films like *Moonie Bares All* deserve First Amendment protection. *See Brown v. Ent. Merch. Ass’n*, 564 U.S. 786, 790 (2011). But those “rights are not absolute” and must be balanced against the right of publicity. *See Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1271 (9th Cir. 2013) (citing *Zacchini*, 433 U.S. at 574-75). Under the Transformative Use Test, which seeks to balance the right of publicity against the

First Amendment, Petitioners here failed to sufficiently transform Austero’s identity and primarily sought to exploit her celebrity for their own benefit.

Petitioner did not use Austero’s identity as the “raw materials” to create Moonie—to the contrary, Austero’s identity is the very “sum and substance” of Moonie. *See Comedy III*, 21 P.3d at 809 (setting out the first factor in the Transformative Use Test); (R. 37a.) While Petitioner Fünke claims that Austero was used as the “starting point” for Moonie’s voice and appearance, (R. 4a,) there is no indication in the record that Moonie was created using anyone else’s identity.

Indeed, the Fifteenth Circuit agrees that Austero’s identity was “the very sum and substance” of Moonie. (R. 37a.) Using only Austero’s identity to create Moonie is similar to the situation in *Hart* in which the Third Circuit found that in *NCAA Football* “realistic depictions of the players are the ‘sum and substance’ of the[] digital facsimiles” users controlled in the game. *See Hart*, 717 F.3d at 168. There, the digital avatars in question looked like the players, played on the same teams, had the same biographical information and attributes, and played in the same style as the imitated football player. *Id.* at 146, 146 n.6. In *Hart*, the “digital avatar [w]as an in-game recreation of [the] Appellant,” just as Moonie was an in-film recreation of Austero. *See id.* at 165; (R. 4a) (“[Petitioner] wanted to create a realistic-looking simulacra[.]”). In both cases, the imitations were created solely from identifiable aspects of Hart and Austero’s identity, respectively, without any indication of additional “raw materials” added to synthesize an original work. *See Comedy III*, 21 P.3d at 809.

As to the Transformative Use Test’s second and third factor, *Moonie Bares All* was not “primarily the [Petitioner’s] own expression” nor did the “creative elements predominate” the short film. *See id.* Beyond using a realistic looking AI-generated model, that acts, sings, and dances like Austero, Petitioner Fünke’s short film was effectively a mash-up of various roles and performances from Austero’s career. Moonie wore the same outfit Austero famously wore in *Cabaret*, does a tap dance “remarkably similar” to Austero’s 1992 Radio City Music Hall performance, stripped off her clothes as Austero had done in *Tell Me That You Love Me*, *Junie Moon*, and sang a song that people attribute to Austero. (R. 25a.) However, it is true that Austero has never sung the version of “New York, New York” that appeared in the short film and the song contained altered lyrics. (R. 26a.) All of these elements, barring the song, were “literal and imitative” of Austero looks, talents, and roles. In that sense, *Moonie Bares All* is simply an “exact depiction[]” of Austero “doing exactly what [she] [did] as [a] celebrit[y].” *See No Doubt*, 122 Cal. Rptr. 3d at 411.

While *Moonie Bares All* may have been a “Frankenstein monster” of various identifiable roles, performances, and aspects of Austero’s identity, the simple act of stitching them together in a short film is not enough for the “creative elements to predominate.” *See Comedy III*, 21 P.3d at 809. The facts here mirror the situation in *Presley’s Estate*. There, a stage show designed as a tribute to Elvis, used an Elvis impersonator to sing, perform, and act like Elvis. *See Presley’s Estate*, 513 F. Supp. at 1359. There, the show was not a re-creation of any single real show Elvis performed in; instead, it was “designed to imitate [the] famous entertainer’s own past stage

performances . . . .” *Id.* The same is true for *Moonie Bares All*—the film showed an imitation of Austero’s past performances using an AI-model that looks, acts, and sings like Austero. (R. 25a.) In both cases, the creative elements are secondary to the “literal and imitative” and, therefore, do not warrant First Amendment protection. *See id.* (“However, entertainment that is merely a copy or imitation, even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant value as pure entertainment.”).

Only the song Moonie sung could be considered “creative,” but the existence of one factor in the face of many does not mean that the “creative elements predominate the work” or that *Moonie Bares All* is “primarily the [Petitioner’s] own expression.” In fact, the court in *No Doubt* approached a similar question when applying the Transformative Use Test to the video game *Band Hero*. *See No Doubt*, 192 Cal. Rptr. 3d at 410. There, the digital bandmembers created to imitate No Doubt could be “manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing,” but those creative elements were not enough to afford the video game First Amendment protection. *Id.* at 411. The same is true for *Moonie Bares All*. Even though Moonie sings a different version of “New York, New York,” just as the band could be made to sing different songs in *No Doubt*, the short film is still nothing more than an “exact depiction[] of [Austero] doing exactly what [she] [did] as [a] celebrit[y].” *See Id.; Zacchini*, 433 U.S. at 576 (finding a violation of performer’s right of publicity “involving . . . the appropriation of the very activity by which the entertainer acquired his reputation in the first place”).



Also, as to factors two and three, the dissimilarities that exist between Moonie and Austero’s likeness, like slightly different facial features and the lack of five fingers on one hand, are not because of Petitioners’ creative efforts in transforming Austero. (See R. 23-24a.) Instead, the dissimilarities here are “hallmarks of AI-generated models.” (*Id.*) Petitioners’ own expert indicated that “AI image-generating software sometimes causes visual anomalies during the creation process.” (R. 23a n.5.) These anomalies, better known as AI hallucinations, happen when the AI-tool “perceives patterns or objects nonexistent or imperceptible to human observers” and this creates “outputs that are inaccurate.”<sup>5</sup>

AI hallucinations are seen as a problem that can be prevented within the AI-community through the use of “high-quality training data” and continual testing and refinement of the AI software.<sup>6</sup> Here, the dissimilarities between Moonie and Austero are products of the AI software hallucinating, as indicated by Petitioners’ expert, and not because of any creative decision or input that Petitioner Fünke made. (R. 23a n.5.) It is not the case where Petitioner Fünke trained the model to specifically look different by using inputs from many sources. The factual record indicates that only Austero’s performances were used to create *Moonie Bares All*. (R. 4a.) Here, with regard to Moonie’s dissimilar appearance, there is no “creative element” at all that “predominates the work” because those differences were not created through the process of artistic expression and decision. See *Comedy III*, 21 P.3d at 809. Even if

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<sup>5</sup>*What are AI Hallucinations?*, IBM, <https://www.ibm.com/topics/ai-hallucinations> (last visited Nov. 10, 2023).

<sup>6</sup> *Id.*

the dissimilarities were creative elements, the slight variations would not be enough to outweigh the “literal and imitative” elements that predominate over *Moonie Bares All*. See *Hilton*, 599 F.3d at 911 (“Despite these differences, however, the basic setting is the same: we see Paris Hilton, born to privilege, working as a waitress.”).

Petitioners’ allegation that Moonie’s voice is transformative is also problematic. It is unclear from the record exactly how Moonie’s voice was “purposefully digitally altered.” (R. 27a.) In fact, based on the record, Moonie’s voice may not have been altered at all and instead the AI software is using Austero’s previous singing voice that was higher pitched prior to vocal-cord surgery. (R. 26a.) Moonie’s voice “*could very well be* [Austero’s] *current* voice digitally raised by one octave.” (*Id.*) Prior to vocal-chord surgery in 1997, Austero was “classified as a soprano” and now she would be considered an alto or mezzo soprano. (*Id.*) The difference between a soprano and an alto is one octave.<sup>7</sup> It is also a fact that Moonie was trained using Austero’s pre-1997 performances because Moonie imitates a performance from 1992. (R. 25a.) Moonie’s voice is likely the AI software re-creating Austero’s previous singing voice and is therefore a “literal and imitative” element and not a creative one. See *Comedy III*, 21 P.3d at 809.

**3. The creative elements in *Moonie Bares All* are “manifestly subordinate” to the goal of exploiting Austero’s identity for Petitioners’ benefit.**

Conceding that there are some creative elements in *Moonie Bares All*, most notably the altered song, those elements are “manifestly subordinate to the overall

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<sup>7</sup> Robert Hutchinson, *Music Theory for the 21st-Century Classroom*, Univ. Puget Sound, <https://musictheory.pugetsound.edu/mt21c/RulesOfSpacing.html> (last visited Nov. 10, 2023).

goal of creating a conventional” imitation of Austero in order to exploit her fame. *See Comedy III* at 810. Likewise, the economic value derived from the *Moonie Bares All* is primarily derived from Austero’s talents and fame. *See id.* Petitioner Fünke has admitted that her desire to create *Moonie Bares All* was to drive traffic to FakeBlock and, more importantly, to attract potential licensees who want to use her software. (R. 4a, 6a.)

By showing off her software’s capabilities to mimic a famous person and all of their talents, Petitioner Fünke is “selling the idea that her software might be used to create a realistic portrayal of celebrities . . . so that other movie producers might create their own substitutes for *Cabaret*.” (R. 37a.) Just as in *Hart* and *No Doubt*, Petitioner Fünke was motivated by the “commercial interest in using [Austero’s] fame to market” her software. *See No Doubt* at 411; *Hart*, 717 F.3d at 168 (finding that realism in *NCAA Football* is an economic incentive for using digital avatars that mimic real life players). Ultimately, any creative expression added to *Moonie Bares All* is subordinate to Petitioner’s goal of creating a conventional imitation of Austero because without Austero’s likeness and talent, Petitioner Fünke’s software would not be as marketable. (*See 37a.*)

After assessing the Transformative Use Test’s factors, there is nothing to suggest that Petitioner Fünke meant to do anything other than create a short film that depicted a literal recreation of Austero for Petitioner’s own benefit. The facts here are totally distinguishable from a case like *Winter* where the court found that the Winter Brother’s identity had been so transformed when elements of their

likenesses were used to create “half-human and half-worm” characters that appeared in a comic book set in fictional version of the Old West. *See Winter*, 69 P.3d at 476. Here, there is no “significant expressive content” added to *Moonie Bares All* that would transform Moonie into anything other than a “conventional depiction” of Austero. *See id.* *Moonie Bares All* remains a realistic imitation, even crossing the uncanny valley, (R. 30a,) of Austero doing the “very activity by which [she] acquired [her] reputation in the first place.” *See Zacchini*, 433 U.S. at 577.

This case is somewhat analogous to *ETW Corp.*, where a painting of Tiger Woods was found to have First Amendment protection, however, the reasoning from that case is inapplicable to the facts here. Importantly, the court there found that it was “not at all clear” that the painting would “reduce the commercial value of [Woods’] likeness.” *ETW Corp.*, 332 F.3d at 938. Here, recreating Austero’s likeness and talents, and then making Moonie perform those talents, is more likely to “reduce the commercial value” of Austero’s likeness because people licensing the software from Petitioner Fünke can “create their own substitutes” of Austero’s identity. (R. 37a.) Those substitutes can then be used to create films, advertisements, songs, and any number of other works to replace Austero. (*Id.*) This is not the case in *ETW Corp.* where Tiger Woods could still earn a considerable income from golfing and authorized endorsements. *See ETW Corp.*, 322 F.3d at 938.

Without more, *Moonie Bares All* does nothing to sufficiently transform Austero’s identity, and Petitioner Fünke has already admitted to creating Moonie for the benefit that would come from imitating Austero. (R.4a.). For these reasons, the

short film should not be protected by the First Amendment as a matter of law and this Court should affirm the Fifteenth Circuit.

### **CONCLUSION**

For these reasons, this Court should conclude that FakeBlock is not immune from Austero's state-law right of publicity claim under Section 230. Further, this Court should hold that Petitioners infringed on Austero's right of publicity, and the AI-generated model, Moonie, is not protected under the First Amendment.

Respectfully submitted,

**TEAM 15**

*Counsel for Respondent*

## **CERTIFICATE OF COMPLIANCE**

The undersigned, counsel for Respondent, hereby certifies that, in compliance with Competition Rule 2.6 and Supreme Court Rule 33.1, Respondent's brief contains 13,968 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendix.

Respectfully submitted,

**TEAM 15**

*Counsel for Respondent*

## **APPENDIX**

### CONSTITUTIONAL PROVISIONS

The First Amendment of the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## STATUTORY PROVISIONS

47 U.S.C. § 230. Protection for private blocking and screening of offensive material

### (a) Findings

The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

### (b) Policy

It is the policy of the United States—

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;



- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.