No. 22-9908

In the

Supreme Court of the United States

FakeBlock, Inc. and Maeby Fünke.,

Petitioner,

v. Lucille Austero,

Respondent.

On Writ of Certiorari to the

United States Court of Appeals for the Fifteenth Circuit

BRIEF FOR RESPONDENT

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Counsel for Respondent

November 20, 2023

QUESTIONS PRESENTED

I. Whether FakeBlock has immunity under the Communications Decency Act of 1996 from state-law claims alleging infringement upon a celebrity's right of publicity when its corporate officer posted on its platform a video depicting a celebrity's likeness and voice?

II. Whether a software-generated character that closely resembles a real-life celebrity's body style, hair, outfit, voice, and roles infringes upon that celebrity's right of publicity or, conversely, is protected under the First Amendment?

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The opinion of the Fifteenth Circuit is unreported but available at *Austero v. FakeBlock, Inc.*, No. 20-9804 (15th Cir. Oct. 17, 2022). The opinion of the Newport Beach District Court is unreported.

JURISDICTION

The Fifteenth Circuit issued its opinion on October 17, 2022. This Court has jurisdiction over this case under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Communications Decency Act of 1996 provides in relevant part that

> 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).

47 U.S.C. § 230(c)(2)(A)–(B).

The Act clarifies that nothing shall impair enforcement of "any other Federal criminal statute." *Id.* § 230(e)(1). The Act further provides that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property," *id.* § 230(e)(2), and "[n]othing 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," *id.* § 230(e)(3).

The Communication Decency Act reflects congress's findings that "the Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, any myriad avenues for intellectual activity." *Id.* § 230(a)(3).

The Communication Decency Act establishes the policy of the United States is "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and State regulation." *Id.* § 230(b)(2).

The Communication Decency Act 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." *Id.* § 230(f)(3).

The Restatement (Second) of Torts § 652C provides that "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." Restatement (Second) Of Torts § 652C.

The First Amendment to the United States Constitution provides that "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." U.S. Const. amend. I.

STATEMENT OF THE CASE

A. Factual Background

Lucille Austero is a world-renowned actor, singer, and dancer who has released seven studio albums. R. at 3a. Ms. Austero has won an Oscar, an Emmy, and four Tony awards for her acting, dancing, and singing performances. R. at 25a. In 2018, Ms. Austero ran to represent Newport Beach in the United States House of Representatives. R. at 3a. Her opponent in the election, Lindsay Bluth, campaigned heavily on internet social-media platforms such as Instagram and Twitter. R. at 2a. Bluth's daughter, Maeby Fünke, is the director of investor relations at a startup social-media website called FakeBlock, Inc. ("FakeBlock"). R. at 5a. Ms. Fünke uses her digital art and programming skills to create realistic AI-generated models. R. at 3a.

In early 2018, Ms. Fünke used Ms. Austero's appearance and voice to create an AI-generated model called "Moonie." R. at 4a. Moonie and Ms. Austero have the same height, body shape and proportions, skin color, hairstyle, and voice. R. at 4a. Without Ms. Austero's permission, Ms. Fünke's software analyzed Ms. Austero's singing voice from her various albums and acting roles to make sure Moonie sang and spoke like Austero. R. at 4a. In addition to politically smearing Ms. Austero, Ms. Fünke's motivation for creating Moonie was to advertise and profit off her software's ability to generate realistic-looking simulacra. *Id.*

Ms. Fünke created a five-minute film featuring Moonie called *Moonie Bares All*. R. at 5a. In the film, Moonie appears on stage in the identical outfit to the one Ms. Austero wore in her movie *Cabaret*, R. at 25a, and begins tap dancing. R. at 5a.

Ms. Austero had a similar tap dance performance in 1992 in the famous Radio City Music Hall. R. at 25a. Within about 45 seconds of the video, Moonie stumbles while dancing, appears to lose her balance, and staggers to the side of the stage, where she braces herself against a set piece. R. at 5a. After recovering her balance, Moonie then strips off her clothing. *Id.* Similarly, Ms. Austero played Junie Moon in the movie *Tell Me That You Love Me, Junie Moon*, in which Ms. Austero strips off her clothes. R. at 25a. Moonie then sings, in slurred words, altered lyrics to the song "New York, New York" from the Leonard Bernstein musical and subsequent film *On the Town*. R. at 5a. Moonie is known for singing the similarly titled but different song "New York, New York" in the film of the same name. R. at 26a.

On May 29, 2018, Ms. Fünke, uploaded the video, titled *Moonie Bares All*, exclusively to FakeBlock. R. at 5a. At this time, FakeBlock was still in its "beta" stage and not open for posts from the public. *Id.* As a result, Ms. Fünke was one of three people, along with the company's CEO and CFO, allowed to post content on FakeBlock. *Id.* Ms. Fünke testified that she only posted the video to FakeBlock because she wanted to improve FakeBlock's stock price by drawing attention to the site. R. at 6a. The post was live on FakeBlock for 90 days. R. at 5a–6a. FakeBlock's CEO, George Maharis, eventually deleted the video and fired Ms. Fünke after this lawsuit was filed. R. at 42a.

B. Proceedings Below

Austero sued FakeBlock and Ms. Fünke in Newport Beach district court for infringing upon Ms. Austero's right of publicity under Newport Beach state law. R. at 6a. The basis for the lawsuit was that the Moonie short film appropriated Ms.

Austero's identity and infringed on her right to profit from her likeness and identity as an actress and musician. *Id.*

After conducting discovery, both Defendants moved for summary judgment. R. at 7a. Both Defendants argued that *Moonie Bares All* did not violate Newport Beach's right of publicity law. FakeBlock further argued they were immune from liability for Newport Beach's law under section 230 of the Communications Decency Act. *Id.* Both Defendants also asserted that even if they were liable under Newport Beach's right of publicity law, the *Moonie Bares All* video was protected under the First Amendment. *Id.*

The district court rejected FakeBlock's immunity claim but granted summary judgment to both Defendants on the merits of Ms. Austero's right of publicity claim. *Id.* Ms. Austero appealed the district court decision to the United States Court of Appeals for the Fifteenth Circuit. *Id.* FakeBlock also urged the Fifteenth Circuit to affirm the summary judgment on its immunity claim. *Id.*

The Fifteenth Circuit affirmed the district court's denial of summary judgment for FakeBlock's immunity claim by holding that FakeBlock is not entitled to immunity against Ms. Austero's right of publicity claim. R. at 18a. The Fifteenth Circuit, however, reversed and remanded the district court's grant of summary judgment to Defendants regarding the merits of Ms. Austero's right-of-publicity claim and held that the Defendants failed to prove their affirmative defenses under the First Amendment. R. at 39a.

SUMMARY OF THE ARGUMENT

FakeBlock is not immune, under the Communications Decency Act of 1996, 47 U.S.C. § 230, from Ms. Austero's state-law claim alleging infringement upon a celebrity's right of publicity.

First, the statute's plain language does not extend immunity for violations of "any" intellectual property law, including state laws. While section 230 distinguishes state law from federal law in several instances, it makes no distinction between state and federal intellectual property laws.

Second, a celebrity's right of publicity qualifies as intellectual property because section 230's scope extends to any law pertaining to intellectual property. Due to the statute's broadness, the nature of the injury, and the majority of legal definitions for intellectual property, the provision includes right-of-publicity claims.

Third, section 230 does not grant immunity for right-of-publicity claims when the internet social media company is responsible for the content. Given the content was posted exclusively to FakeBlock, by its corporate officer before the site was accessible to the public, the company is at least partially responsible for the injury and unqualified for immunity.

Defendants' Moonie character infringes Plaintiff's right of publicity because Plaintiff owns an enforceable right in her identity and Defendants, without permission, has used her identity in such a way that Plaintiff is identifiable. Plaintiff owns a right in her identity based on her roles as an actress, singer, and dancer and based on her physical characteristics. Moonie's performance appropriates Ms.

Austero's identity by using Ms. Austero's physical characteristics, such as height, body style, skin color, outfit, and hairstyle, roles as an actor, dancer, and singer, and singing voice.

Defendants' Moonie character is not protected by the First Amendment because it fails the transformative use test. Moonie so closely resembles Ms. Austero's physical characteristics, voice, and roles, that the work is mere celebrity likeness. Furthermore, Plaintiff's right of publicity claim is not barred by the public interest defense because Defendants were not publishing factual data, but instead were entertaining viewers and informing them about Ms. Fünke's AI-generating software. Therefore, this Court should affirm the Fifteenth Circuit's judgment.

ARGUMENT

I. FakeBlock Does Not Have Immunity Under the Communications Decency Act Of 1996 From State-Law Claims Alleging Infringement Upon a Celebrity's Right Of Publicity.

The Communications Decency Act ("CDA") grants immunity to interactive computer services in certain circumstances. 47 U.S.C. § 230(c). The CDA establishes that "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." *Id.* § 230(c)(2). The statute defines an 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." *Id.* § 230(f)(3). The statute explains that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3). However, the statute also specifies that

"[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property." *Id.* § 230(e)(2).

To be immune from the CDA, FakeBlock must prove it has no responsibility for uploading *Moonie Bares All*. *Id.* § 230(f)(3). But even if FakeBlock is not the information content provider, FakeBlock must then prove either section (e)(2) applies to only federal intellectual property laws or that the right of publicity does not pertain to intellectual property. *Id.* § 230(e)(2). This court should affirm the Fifteenth Circuit's holding that FakeBlock is not immune from state right-of-publicity laws because the statute's plain language includes all intellectual property laws, the right of publicity pertains to intellectual property, and because FakeBlock is the information content provider of *Moonie Bares All*.

A. The Plain Language of 47 U.S.C. § 230(E)(2) Establishes that the Statutory Exception Applies to State Law Claims.

The statute's plain language demonstrates that the exception for intellectual property laws should also apply to state laws. *See* 47 U.S.C. § 230(e)(2) ("Nothing in this statute shall be construed to limit or expand *any* law pertaining to intellectual property"). Statutory interpretation "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Assn. v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). With that in mind, courts must still interpret statutes holistically to ensure interpretations produce "a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). This Court considers the modifier "any"

as "expansive language [that] offers no indication whatever that Congress intended [a] limiting construction." *Harrison v. PPG Indus.*, 446 U.S. 578, 589 (1980). Here, the statute's ordinary meaning includes state intellectual property laws. The language of section(e)(2) is "[n]othing in this statute shall be construed to limit or expand *any* law pertaining to intellectual property." 47 U.S.C. § 230(e)(2) (emphasis added). It is illogical to conclude that by using "any" as the modifier, Congress intended to restrict every state's intellectual property laws. The ordinary definition of "any" as an adjective is to be "used to indicate a person or thing that is not particular or specific." *Any*, BRITANNICA DICTIONARY (Online Edition). The text does not distinguish between state and federal intellectual property laws.

FakeBlock contends that there is a presumption that the statute refers to federal law because it only references state law when it is coextensive with federal law. R. at 13a. But this interpretation fails to explain why Congress explicitly distinguishes federal or state law throughout the statute, even when it uses "any" as a modifier. *See generally* 47 U.S.C. § 230. For example, the provision that precedes section (e)(2) states the statute does not impair the enforcement of "any other Federal criminal statute." *Id.* § 230(e)(1). The succeeding provision of section (e)(2) similarly follows the pattern with "[n]othing in this statute should be construed to prevent any State from enforcing any State law that is consistent with this section." *Id.* § 230(e)(3). In total, Congress distinguishes federal versus state law on seven different occasions. *See, e.g.*, *Id.* § 230(b)(2), (e)(1), (e)(3), (e)(4), (e)(5). The ordinary meaning of the provision includes state intellectual property laws, and the entire context of the

statute demonstrates that when Congress wants to distinguish state law from federal law, it does so explicitly.

There is no evidence that the legislative purpose requires relieving internet computer service companies from having to follow state intellectual property laws. Because the provision's plain language supports including state intellectual property laws, FakeBlock must show including state intellectual property laws is incompatible with congressional purpose. *See United Sav. Assn of Tex.*, 484 U.S. at 371 (1988). The court's role is to "apply the text, not to improve upon it," even when they believe doing so serves the law's purpose. *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989). The Ninth Circuit has ruled section (e)(2) applies to only federal intellectual property laws based on the statute's purpose. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–1119 (9th Cir. 2007). The fault with the Ninth Circuit's reasoning is that it generated its own purpose for the statute and then attempted to improve upon the text. *Id.* The Ninth Circuit believes the legislative purpose is to insulate "the development of the Internet from the various state-law regimes." *Id.* The court presumably drew that conclusion from section (b)(2), which states the purpose of the statute is to "preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). While the statute seeks to limit regulation generally, it has not drawn a line between state and federal regulation. *Id.* Nothing in the statute suggests that the lack of uniformity in state law would make following the law too burdensome on internet service providers.

FakeBlock's policy arguments for not applying state intellectual property law unreasonably assume what Congress meant by promoting the free market of the Internet and interactive service providers. The Third Circuit argued that protecting state property rights matches the statute's purpose of promoting effective market exchange. *Hepp v. Facebook*, 14 F.4th 204, 211 (3d Cir. 2021). That court further determined that the right of publicity can enhance market efficiency and vibrancy by bolstering endorsements. *Id.* The Fifteenth Circuit's dissent was unconvinced by *Hepp's* logic, reasoning that Congress could not have intended for state intellectual property laws to apply if the statute granted immunity from a wide range of state and federal laws. R. at 49a. But as the Third Circuit pointed out, it is perfectly logical that Congress included section 230(e)(2) to balance the policy of limiting regulation while recognizing the importance of state intellectual property rights. *Hepp*, 14 F.4th at 211.

The legislative purpose is too broad for this Court to decide applying state intellectual property laws is incompatible with the purpose. The Ninth Circuit, echoed by the Fifteenth Circuit's dissent, erred in concluding that Congress must not have intended to include state intellectual property laws because it is too difficult for social media companies to follow the multiple jurisdiction's laws. *See Perfect 10, Inc.*, 488 F.3d at 1118–1119. While this Court can assume that Congress' fundamental goal was to minimize the burden on internet service companies to comply with all state laws, this Court can just as easily assume that Congress included section (e)(2) because it recognized that preserving all intellectual property law helps promote a

free market. But neither assumption should outweigh the text because the plain language of a statute is only displaced when its apparent effect is incompatible with the statute's purpose. *See United Sav. Assn of Tex.*, 484 U.S. at 371 (1988). One cannot find a specific purpose on this issue without adding further substance to the law. 47 U.S.C. § 230(b). FakeBlock's policy arguments should fail because they expand the statute's purpose.

Because the statute's plain language exception includes all intellectual property laws in its exception, that is how the court should rule. When considering the statute in its entirety, Congress has demonstrated its ability to clarify state versus federal law when a distinction is necessary. Congress' purpose is to limit state and federal regulation and there is no basis to conclude federal law is a default interpretation within the statute. Finally, reasonable minds may differ over what constitutes the promotion of the free market on the Internet; however, it would be outside this Court's purview to pick a side in contradiction to the statute's meaning.

B. Ms. Austero's Claim of Infringement of Her Right of Publicity is an Intellectual Property Claim Under Section 230(E)(2).

Infringing on Ms. Austero's right of publicity qualifies as an exception under section 230(e)(2) because the right of publicity sufficiently pertains to intellectual property. The statute identifies the scope of the exception as "any law pertaining to intellectual property." 47 U.S.C. § 230(e)(2). The *Hepp* Court reasoned that even if one does not include the right of publicity at the core of intellectual property, the statute's broad language implies peripheral rights, such as the right of publicity, fall under intellectual property. *Hepp*, 14 F.4th at 214. In *Hepp*, the Third Circuit noted

that the majority of legal definitions of intellectual property include the right of publicity. *Hepp*, 14 F.4th at 212–14. The court cited several legal dictionaries, including *Black's and McCarthy's*, that explicitly include the right of publicity in their intellectual property definition. *Id.* at 213. The court further reasoned that "because trademark and right of publicity are analogous" in substance, any legal definition of intellectual property including trademark should include the right of publicity as well. *Id.* at 214. Weighing both the explicit inclusion of the right of publicity and the implicit inclusion of publicity by association with trademark, the court concluded that the majority of legal definitions favor considering the right of publicity as intellectual property. *Id.*

In response, the Fifteenth Circuit's dissent criticized *Hepp's* reasoning and alternatively presented examples of Congress defining intellectual property in a way that omits the right of publicity. R. at 53a. However, these alternative definitions were from statutes related to bankruptcy and international trade, where Congress chose to define the scope of the law. *Id.* Here, Congress did not provide an exhaustive list to narrow the scope of intellectual property, but rather defined the scope as "any law pertaining to intellectual property." 47 U.S.C. § 230(e)(2). The Fifteenth Circuit's dissent's reliance on exhaustive lists from unrelated statutes is not as persuasive of a definition as the broad definitions of intellectual property relied on by the Third Circuit, given that the statute is broad. Congress' use of the modifier "any" suggests intellectual property is broadly defined.

The statute's broad use of intellectual property demonstrates that the proper inquiry for including a right-of-publicity claim is whether there is an injury to intangible property, not whether the plaintiff's claim spawns directly from the human intellect. The right of publicity defends the property interest "of an individual to reap the rewards of [their] endeavors." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977). This right contrasts with personal rights to privacy because it does not claim a cause of action for emotional injury but rather the profits of a celebrity's likeness to which they are entitled. *Id.* Ms. Austero's stated injury is that the Moonie character infringed on Ms. Austero's right to profit from her likeness and identity. R. at 6a. Ms. Fünke testified that one of her intentions in creating Moonie was to "create a realistic-looking simulacra to demonstrate and advertise her software's capabilities to potential licensees." R. at 4a.

This attempt to use Ms. Austero's likeness to promote her business directly affects property interests in line with the state's intent in protecting intellectual property interests. If the right of publicity in this context does not at least pertain to intellectual property, what sort of property would? If Congress meant intellectual property in the narrowest sense, it would not have defined the scope as "any law pertaining to intellectual property." 47 U.S.C. § 230(e)(2). It is reasonable to assume Congress referenced intellectual property broadly, so it would not need to list every intangible property applicable to the statute. *Id.*

The right of publicity is an intangible property with commercial value that functions similarly to trademark rights. *Hepp*, 14 F.4th at 214. There is no basis for

the Fifteenth Circuit dissent's assertion that Congress would draw a line between the right of publicity and the right of something like a patentable invention. R. at 53a. Though the *Hepp* Court limited their holding on the right of publicity to a specific Pennsylvania statute focused on valuable interest in likeness, the logic still applies to the Newport Beach right of publicity common law because it still holds people liable when they appropriate other's likeness for their benefit. R. at 9a. Because the right of publicity is a claim for an injury to intangible property, it appropriately fits within section (e)(2)'s broad scope of intellectual property.

Finally, even if intellectual property must come literally from human intellect (it does not), Ms. Austero's claim still involves a product of the human intellect. In addition to Ms. Austero's physical appearance, Ms. Fünke's software analyzed Ms. Austero's singing voice from her albums to generate Moonie's voice. R. at 4a. One purpose of using Ms. Austero's singing voice was to advertise her software's capabilities to potential licensees. *Id.* If Moonie's singing voice did not mirror Ms. Austero's, Ms. Fünke's software would not have successfully demonstrated its ability to imitate Ms. Austero's singing voice. *Id.* The extent by which the singing infringes on Ms. Austero's claim is discussed further in the merits section of the brief; however, for purposes of whether this claim is intellectual property, the fact that Ms. Fünke used Ms. Austero's vocal performances is more akin to a product of human intellect than merely using her face and body.

Because the statute defines the scope as any law pertaining to intellectual property, Ms. Austero's claim relates to an injury to intangible property rights, and

because Ms. Austero's voice is a product of the human mind, the right of publicity claim qualifies as intellectual property under section (e)(2).

C. FakeBlock is Not Qualified For Immunity From the CDA Because FakeBlock Itself Infringed on Ms. Austero's Right of Publicity.

FakeBlock is not qualified for immunity from the CDA because regardless of whether section (e)(2) includes state intellectual property laws, FakeBlock itself is the information content provider through Fünke's role as a corporate executive. The statute 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." 47 U.S.C. § 230(f)(3). Further, corporations are subject to liability when the corporation's agents commit tortious acts within the scope of their authority. *See Meyer v. Holley*, 537 U.S. 280, 285–86 (2003).

FakeBlock is responsible for the *Moonie Bares All* because Ms. Fünke's actions in uploading the video were within the scope of her corporate capacity as FakeBlock's director of investor relations. Ms. Fünke testified that she created the video to advertise her software and assist her mother's political campaign. R. at 4a. But those reasons alone do not explain why Ms. Fünke only uploaded the video to FakeBlock. R. at 2a. Bluth's campaign relied on multiple social media platforms, so it is unclear, as a political strategy, why Ms. Fünke only posted to FakeBlock. R. at 2a. Fünke's other stated purpose was to advertise her software. R. at 4a. But once again, limiting the software to one social media platform, especially one with substantially less traffic than other platforms such as Facebook or Twitter, is at odds with the fundamental goal of advertising. *Id.* Furthermore, Ms. Fünke admitted she uploaded

her film exclusively to FakeBlock because she knew her film would go viral, and she wanted the traffic to go to FakeBlock for her investment in the site. R. at 42a. These questionable motivations suggest Ms. Fünke acted with FakeBlock's interests in mind, not only her or her mother's personal interests.

The evidence of Ms. Fünke's role with FakeBlock is sufficient for this case to survive a motion for summary judgment because a reasonable jury could find that Ms. Fünke acted at least partially on behalf of FakeBlock. The Fifteenth Circuit's dissent argues that there is no evidence that Ms. Fünke is the director of investor relations, and it is immaterial that Ms. Fünke was one of three individuals with the ability to post to FakeBlock. R. at 57a–58a. Specifically, the dissenting opinion believes that because FakeBlock was disorganized in its corporate composition, there is no evidence of Ms. Fünke's job description, and just because she could post on the site does not mean she was doing so in a corporate capacity. *Id.* However, for summary judgment motions, courts must view the facts and draw reasonable inferences "in the light most favorable to the party opposing" the summary judgment motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The dissenting opinion has abandoned this requirement by asserting that there must be direct evidence that Ms. Fünke was responsible for investor relations and that she uploaded the video at the direction of FakeBlock. R. at 57a–58a. But it is reasonable to infer that because Fünke worked at FakeBlock, used her influence in Hollywood to convince people to invest, and was one of three people with the ability to post to FakeBlock, that posting the video was within the scope of her role at FakeBlock. R. at 56a–57a.

FakeBlock argues that Ms. Fünke's testimony suggests she uploaded the video to enhance her investment in the company. R. at 42a. However, her investment in the company is inseparable from the company's interests to the point where it is reasonable to infer that Ms. Fünke acted on behalf of FakeBlock. *Id.* Further, just because Ms. Fünke might have had additional personal interests in posting the video does not absolve FakeBlock of responsibility because the statute defines information content providers as anyone with partial responsibility for developing information on the Internet. 42 U.S.C. § 230(f)(3). A reasonable jury may find FakeBlock is responsible for the development of information by allowing Fünke, one of its corporate executives, to post the material to the site in its beta stage for ninety days. R. at 2a.

The context of Ms. Fünke's termination from FakeBlock also shows that FakeBlock is not immune from liability for the uploaded video. FakeBlock claims that by terminating Ms. Fünke, it is clear uploading the video was not within the scope of her corporate authority. R. at 42a. However, the timing tells a different story. The video remained on FakeBlock while Ms. Fünke remained employed for ninety days. *Id.* Ms. Fünke's termination and the post's deletion did not occur until after Ms. Austero filed the lawsuit. *Id.* If posting the video was outside the scope of Ms. Fünke's role, a reasonable jury may find that Mr. Maharis would have acted ninety days sooner.

The context of section 230 also influences how this Court should rule. Section 230's purpose is to preserve the free market of Internet activity to support content such as the "myriad avenues for intellectual activity." 47 U.S.C. § 230(a)–(b). At this

stage of FakeBlock's existence, there is no free market to preserve. R. at 2a. Three people in the world may produce content for the site. *Id.* This law grants immunity to internet service providers from needing to police the myriad of content their customers post, not immunize them from the tortious acts of its own corporate executives. *See* 47 U.S.C. § 230(a)(b).

Ultimately, the plain language of section (e)(2) supports applying state intellectual property laws. The video constitutes intellectual property because intellectual property is defined broadly enough to include the right of publicity. Finally, even if this court determines section (e)(2) does not apply state intellectual property laws, FakeBlock still does not qualify for immunity because, for a summary judgment action, there is more than sufficient evidence for a reasonable jury to find that Ms. Fünke acted in a corporate capacity when she uploaded the video. Protecting FakeBlock from the actions of its employees during the site's beta stage is wholly unrelated to the statute's purpose. For those reasons, we ask this court to affirm the Fifteenth Circuit's holding that FakeBlock does not qualify for immunity under the CDA.

II. Defendants' Computer-Generated Artificial-Intelligence Moonie Character That Closely Resembles Plaintiff Infringes Upon Plaintiff's Right of Publicity And Is Not Protected By The First Amendment.

A. Defendants' Moonie Character Infringes Plaintiff's Right of Publicity Because Plaintiff Owns an Enforceable Right in Her Identity and Defendant, Without Permission, Has Used Her Identity in Such a Way that Plaintiff is Identifiable.

Under the right of publicity law, "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." Restatement (Second) Of Torts § 652c. Most courts do not limit this tort to "name or likeness," but instead have found unlawful appropriations for any "aspect of identity or persona." *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992) (unique occupation); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988) (singing voice); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983) (catchphrase).

To prove a right of publicity claim, a plaintiff must prove that (1) plaintiff owns an enforceable right in the identity or persona of a human being; (2) defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant's use; and (3) defendant's use is likely to cause damages to the commercial value of that persona. *See Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 304 (D.N.H. 2008). Here, the Defendants concede the third element so this brief addresses only the first and second elements.

1. Plaintiff Owns an Enforceable Right in Her Identity Based on Her Roles as a World-Renowned Actor Dancer, and Singer, and Based on Her Physical Characteristics.

Plaintiff must prove that she "owns an enforceable right in her identity and persona." *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 304. An actor owns an enforceable right in her own identity and persona when the identity of a fictional character has become so synonymous with the identity of the actor playing the role. *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 625 (6th Cir. 2000); *White*, 971 F.2d at 1399. In *White*, the Ninth Circuit ascribed significance to the fact that Vanna White was (and still is) the only actor who has ever played the role—a host turning

letters on *Wheel of Fortune*—that was depicted in the relevant advertisement. *White*, 971 F.2d at 1399.

Here, Ms. Austero's identity is being a world-renowned actor, dancer, and singer. R. at 25a. Ms. Austero is famously known for her "Mein Herr" performance in *Cabaret*. *Id.* Ms. Austero has played the titular acting role, Junie Moon, in the movie *Tell Me That You Love Me, Junie Moon*. *Id.* Ms. Austero had a tap-dancing performance in 1992 at the famous Radio City Music Hall. *Id.* Ms. Austero is also known for singing the song "New York, New York" in the film of the same name R. at 26a. The combination of all of these roles is synonymous with Ms. Austero's identity. *Landham*, 227 F.3d at 625. Ms. Austero is not arguing that she owns the right to all of these roles, but that she owns the right to her identity which is composed of these roles during her many years as an actor, dancer, and singer.

Even if Plaintiff does not own an enforceable right in her identity based on her fictional characters, Plaintiff owns an enforceable right in what she looks like. *See Wendt v. Host Intern., Inc.*, 125 F.3d 806, 811 (9th Cir. 1997) (holding that actors raised a genuine issue of material fact concerning the degree to which the robot figures looked like them). Therefore, Plaintiff satisfies the first element because Plaintiff's height, body style and proportions, skin color, and hairstyle were used in Defendants' Moonie character. R. at 4a; *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 304.

2. Defendants Made an Unauthorized Use of Identifiable Aspects of Plaintiff's Persona By Posting a Short Film With The Moonie Character Closely Resembling Plaintiff's Body Style, Hair, Outfit, Voice, And Roles.

Plaintiff must also prove that "defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant's use." *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 304. The first identifiable aspect of Ms. Austero's identity or persona are her physical characteristics, such as height, body style, and hair. *See Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1175–76 (9th Cir. 2015) (football player's avatar in video game was "described by his position, years in the NFL, height, weight, skin tone and relative skill level in different aspects of the sport"); *Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1271 (9th Cir. 2013) (football player's avatar in video game had "the player's actual jersey number and virtually identical height, weight, build, skin tone, hair color, and home state."); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013) (football player's avatar in video game had the same hair color, hair style and skin tone, and the same accessories worn by football player during his time at Rutgers).

Here, Moonie appropriates Ms. Austero's physical characteristics. Both are approximately 5'4" tall, have the same body shape and proportions, skin tone, and share similar hairstyles: short black hair "pixie" haircut with prominent bangs. R. at 4a. This is like in *Davis*, *Keller*, and *Hart*, in which the football players' video game avatars had the same height, weight, skin tone, and hair color. *Davis*, 775 F.3d at 1175–176; *Keller*, 724 F.3d at 1271; *Hart*, 717 F.3d at 166. Additionally, Moonie wears the identical outfit (*i.e.*, a halter vest, short shorts, a derby hat, garters, and lace-up boots) that Ms. Austero memorably wore in the movie *Cabaret*. R. at 25a. Like in *Davis*, *Keller*, and *Hart*, in which the football players' avatars wore the players'

jersey numbers and the same accessories, Moonie wears the identical outfit to Ms. Austero's well-known *Cabaret* outfit. *Davis*, 775 F.3d at 1175–176; *Keller*, 724 F.3d at 1271; *Hart*, 717 F.3d at 166.

The second identifiable aspect of Ms. Austero's identity or persona are her well-known roles as a singer, actor, and dancer. *White*, 971 F.2d at 1399. In *White*, defendants, without White's consent, created an advertisement for Samsung video-cassette recorders depicting a robot, dressed in a blond wig, long gown, and large jewelry, turning a block letter on a game-board next to a wheel. *Id.* The Ninth Circuit reversed summary judgment to defendants on White's right of publicity claim because the advertisement appropriated White's identity by using her role on the Wheel of Fortune game show. *Id.*

Here, Moonie's performance appropriates Ms. Austero's identity by using her roles as an actor, dancer, and singer. Ms. Austero has won an Oscar, an Emmy, and four Tony awards for her acting, dancing, and singing performances. R. at 25a. Ms. Austero played the titular acting role, Junie Moon, in the movie *Tell Me That You Love Me, Junie Moon*, in which Ms. Austero strips off her clothes. *Id.* Moonie's name resembles "Junie Moon" and Moonie's character–like Ms. Austero in the movie–strips off her clothes in the short film. R. at 5a. Additionally, Moonie's tap dance is remarkably similar to Ms. Austero tap-dancing performance in 1992 at the famous Radio City Music Hall. R. at 25a. Ms. Austero is also known for singing the song "New York, New York" in the film of the same name. R. at 26a. In the short film, Moonie sings altered lyrics to the similarly titled but different song "New York, New York"

from the Leonard Bernstein musical and subsequent film *On the Town*. R. at 5a. Like in *White*, in which the defendants appropriated White's identity by depicting a robot turning a block letter on a game-board next to a wheel like White did in her role on the Wheel of Fortune, defendants here appropriated Ms. Austero's identity by depicting Moonie acting, dancing, and singing like Ms. Austero did in her past roles. *White*, 971 F.2d at 1399.

The third identifiable aspect of Ms. Austero's identity or persona is her singing voice. *See Midler*, 849 F.2d at 463. In *Midler*, defendant hired a backup singer to the nationally known singer Bette Midler to imitate Midler's recording of the song "Do you Want to Dance." *Id.* at 462. The Ninth Circuit reversed summary judgment to the defendant and held that a plaintiff's widely known distinctive singing voice could be the subject of an appropriation claim even if the defendant merely *imitated* the plaintiff's voice. *Id.* at 463. Here, Moonie appropriates Ms. Austero's singing voice. Ms. Austero's expert Ann Veal, an opera singer and vocal-performance coach, opined that "Moonie's voice *could very well* be Lucille's *current* voice digitally raised by one octave." R. at 26a. Furthermore, Fünke testified that her software analyzed recordings of Ms. Austero's multiple albums and acting roles, R. at 4a, and used those recordings as the "raw building blocks" for Moonie's voice. R. at 27.

Defendants' expert Marky Bark's identification of superficial dissimilarities was insufficient for summary judgment because it fails to focus on the *combination* of the similarities. *See White*, 971 F.2d at 1399 (noting that viewed separately, the individual aspects of the ad say little, but viewed together, they leave little doubt

about the celebrity the ad is meant to depict). Mr. Bark only compared facial features and the left hand. R. at 23a–24a. Mr. Bark failed to compare the overall looks of Ms. Austero and Moonie and missed key similarities, such as body style, hair, outfit, voice, and roles. R. at 27a. The combination of all of these factors makes Ms. Austero identifiable from Moonie. Therefore, Plaintiff satisfies the second element of a right-of-publicity claim. *See Friendfinder Network, Inc.*, 540 F. Supp. 2d at 304.

B. Defendants' Moonie Character That Closely Resembles Plaintiff's Body Style, Hair, Outfit, Voice, and Roles Is Not Protected by the First Amendment Because The Work Is Mere Celebrity Likeness.

Defendants argue that the Moonie character is protected by the First Amendment. The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech" U.S. Const. amend. I. For Defendants to prevail on summary judgment for their First Amendment affirmative defense, both Defendants must "establish beyond peradventure *all* of the essential elements of the claim or defense." *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021).

There are various balancing tests to resolve tensions between the First Amendment and right-of-publicity claims: the "predominant use" test, the trademark-based Rogers test, and the "transformative use" test. *Hart*, 717 F.3d at 153. The "transformative use" test best fits this situation because the test is flexible to accommodate intellectual property defenses, such as fair use or parody, and First Amendment defenses, such as parody, factual reporting, fictionalized portrayal, lampooning, and subtle social criticism. *See Comedy III Prods., Inc. v. Gary Saderup,*

Inc., 21 P.3d 797, 807–09 (Cal. 2001). Additionally, courts have used the "transformative use" test in similar circumstances in which football players alleged that their look-alike avatars in video games infringed upon their right of publicity. *See Davis*, 775 F.3d at 1177–178; *Keller*, 724 F.3d at 1273–279; *Hart*, 717 F.3d at 158–70.

The "transformative use" test depends on whether a work is sufficiently "transformed into something more than a mere celebrity likeness or imitation." *Comedy III*, 21 P.3d at 799. Courts reject the transformative use defense when defendants depict celebrity re-creations doing the same activity that the celebrity is known for. *See Davis*, 775 F.3d at 1177–178 (rejecting transformative use defense because video game "replicates players' physical characteristics and allows users to manipulate them in the performance of the same activity for which they are known in real life—playing football for an NFL team"); *Keller*, 724 F.3d at 1276 (same); *Hart*, 717 F.3d at 165–70 (same). Similarly, in *No Doubt v. Activision Publishing, Inc.*, the court rejected the transformative use defense because defendants in a video game depicted unalterable re-creations of real-life No Doubt band members performing rock songs. 192 Cal. App. 4th 1018, 1034–035 (2011). The court further noted that defendant's use of realistic band member depictions was motivated by a desire to capitalize on the band's fan-base and increase sales and, therefore, the video game's graphics and background content were "manifestly subordinated to the overall goal of creating a conventional portrait of [No Doubt] so as to commercially exploit [its] fame." *Id.* at 1035.

To determine whether a work is sufficiently transformative, courts consider five factors. *Keller*, 724 F.3d at 1274. First, "if the celebrity likeness is one of the raw materials from which an original work is synthesized, it is more likely to be transformative than if the depiction or imitation of the celebrity is the very sum and substance of the work in question." *Id.* Here, Ms. Austero is not simply used as a "raw material" for these parts of the film; Ms. Austero is "the very sum and substance." *Id.* The main and only character in the film is Moonie who closely resembles Ms. Austero's body style, hair, outfit, voice, and roles. R. at 27a. Therefore, the first factor weighs against transformative use.

Second, "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." *Keller*, 724 F.3d at 1274. Here, the Defendants' expression is the likeness of Ms. Austero. *Id.* As explained in Section II.A.2., Moonie has the same height, body style, skin color, haircut and color as Ms. Austero. R. at 4a. Moonie is depicted in the short film stripping, tap dancing, and imitating Ms. Austero's singing voice, which are all activities that Ms. Austero did in roles that led to her fame. R. at 5a, 25a–27a. Like in *Davis*, *Keller*, *Hart*, and *No Doubt*, in which the defendants depicted in video games celebrity re-creations doing the same activity that the celebrity is known for, the Defendants here depicted in a short film a character with the same physical characteristics as Ms. Austero doing the same activities that she is known for—acting, dancing, and singing. *See Davis*, 775 F.3d at 1177–178; *Keller*, 724 F.3d at

1276; *Hart*, 717 F.3d at 165–70. Therefore, the second factor weighs against transformative use.

Third and fourth, "whether the literal and imitative elements, or the creative elements, predominate in the work" and whether "the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted." *Keller*, 724 F.3d at 1274. Here, the imitative elements predominate in the work and the marketability and value of the work derives from Ms. Austero's fame. *Id.* Ms. Fünke admitted that her purpose in creating Moonie was to create a character that imitates Ms. Austero to advertise her software's realistic portrayal of celebrities to potential licensees. R. at 4a. The software is marketable and has economic value because the software uses Ms. Austero's fame to showcase the software's imitation capability and create more celebrity depictions. Therefore, the third and fourth factors weighs against transformative use.

Fifth, "when 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," the work is not transformative. *Keller*, 724 F.3d at 1274. The court in *No Doubt* noted that defendant's use of realistic band members' depictions was motivated by a desire to capitalize on the band's fan-base and increase game purchases and, therefore, the video game's graphics and other background content were "manifestly subordinated to the overall goal of creating a conventional portrait of [No Doubt] so as to commercially exploit [its] fame." 192 Cal. App. 4th at 1035. Here, Ms. Fünke's skill is manifestly subordinate to the overall goal of creating a

character that looks like Ms. Austero to exploit her fame. Like in *No Doubt*, in which the defendant's purpose for using realistic depictions of band members was to capitalize on the band's fan-base and increase purchases, 192 Cal. App. 4th at 1035, Defendants' purpose here for using realistic depictions of Ms. Austero was to capitalize on her fame/recognizability and advertise the software's realistic portrayal of celebrities to potential licensees. R. at 4a. Therefore, the fifth factor weighs against transformative use. In sum, Defendants' Moonie character is not protected by the First Amendment because it fails the transformative use test.

C. Plaintiff's Right of Publicity Claim Is Not Barred by the Public Interest Defense Because Defendants Were Not Publishing Factual Data.

Defendants also contend that, because Austero is a political candidate running for political office, her publicity claim is barred by the public-interest defense. Under the public interest defense, "no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it." *Hilton v. Hallmark Cards*, 599 F.3d 894, 912 (9th Cir. 2010) (citation omitted). This defense applies to people who, through accomplishments or lifestyle, attract bona fide attention to their doings. *See id.* This defense, however, is limited to "publishing or reporting" factual data. *Davis*, 775 F.3d at 1179; *Hilton*, 599 F.3d at 912. Here, Defendants were not publishing or reporting factual data. The short film *Moonie Bares All* was meant to entertain viewers and inform them about Fünke's AI-generating software, not to publish facts about Ms. Austero. R. at 5a. Therefore, the public-interest defense does not apply. *See Davis*, 775 F.3d at 1179; *Hilton*, 599 F.3d at 912.

CONCLUSION

For the foregoing reasons, this Court should affirm the Fifteenth Circuit's judgment.