

No. 22-9908

IN THE

Supreme Court of the United States

FAKEBLOCK, INC. AND MAEBY FÜNKE,

Petitioners,

v.

LUCILLE AUSTERO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Respondent - Team # 29
Counsel of Record

QUESTIONS PRESENTED

1) Whether state-law right of publicity claims are exempt from the conditional immunity provided to social media companies by the Communications Decency Act of 1996, 47 U.S.C. § 230, which specifically commands *any* intellectual property claim is not precluded by the Act?

2) Whether an artificial-intelligence rendered deepfake that mimics a real-life celebrity infringes upon that celebrity's right of publicity, and whether such a deepfake is outside the protection of the First Amendment?

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OPINIONS BELOW

The Fifteenth Circuit Court of Appeals' unpublished opinion is *Austero v. FakeBlock, Inc.*, No. 20-9804 (15th Cir. Oct. 17, 2022). The District Court of Newport Beach case number is 18-cv-5309.

JURISDICTION

This case originated in the United States District Court for the District of Newport Beach, with subject matter jurisdiction proper under 28 U.S.C. § 1332. The Fifteenth Circuit, exercising its jurisdiction under 28 U.S.C. § 1291, affirmed the District Court's immunity finding and reversed its grant of summary judgment in an opinion and final order entered on October 17, 2022.

Petitioners then timely filed a Petition for Certiorari, which this Court granted on October 9, 2023. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS & STATUTES

The relevant portions of the Communications Decency Act read: "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." 47 U.S.C. § 230(c)(1). "No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property." 47 U.S.C. § 230(e)(2). "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." 47 U.S.C. § 230(f)(3).

The First Amendment to the United States Constitution reads: “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.

The Fourteenth Amendment, incorporating the First to the states, reads in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law” U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Accomplished actress, aspiring politician

Although Lucille Austero is an aspiring public servant, she is better known for her decorated acting career. R. at 1. Ms. Austero has appeared on Broadway, acted in twenty-two feature films, released seven studio albums, and entertained millions on television. *Id.* at 3. She is among a rarified group of performers to receive Oscar, Emmy, and Tony awards for her work. *Id.*

Ms. Austero’s roles are as varied as she is prolific. Early in her career, Ms. Austero played Junie Moon in the film *Tell Me That You Love Me, Junie Moon*, a financial flop in which she appeared nude. *Id.* at 25, 64. More eminently, she tapped danced in her “Mein Herr” performance in *Cabaret*. *Id.* at 25.

Despite her massive success across the entertainment industry, Ms. Austero decided to run for Congress to serve Newport Beach, the newest state in the American Union. *Id.* at 3.

FakeBlock officer develops obscene deepfake

Petitioner Maeby Fünke was a corporate officer of Petitioner FakeBlock, Inc. (“FakeBlock”), a Delaware corporation with its principal place of business in Irvine, California. R. at 5. Still in its infancy, FakeBlock is a social media website started in a UC-Irvine dorm. *Id.* at 56.

In addition to her unpaid role at FakeBlock, Ms. Fünke is a computer programmer specialized in creating realistic, artificial intelligence (“AI”) generated models of actual people (commonly known as “deepfakes”). *Id.* at 3, 5, 38 n.10. One such AI-generated deepfake is “Moonie.” *Id.* at 4. Ms. Fünke developed Moonie to mimic Ms. Austero; her portfolio of recorded songs, dance numbers, and acting roles served as the sole starting point upon which the Moonie deepfake was developed. *Id.* at 3, 4.

With this material, the AI-model developed a short, bawdy burlesque film, “Moonie Bares All.” *Id.* at 5-6. In it, the only cast member, Moonie, dances a tap routine replicating Ms. Austero’s iconic 1992 performance at Radio City Music Hall. *Id.* at 5, 25. But Moonie then falters, stumbling across stage. *Id.* at 5. Upon recovering, Moonie strips off her dress—the same dress memorably worn by Ms. Austero in the hit film *Cabaret*. *Id.* at 5, 25. Now, wearing nothing but “censorship pixels,” Moonie sings in a slurred, drunken voice, concluding the performance with a rendition of “Newport, Newport,” a tune based on “New York, New York”—a song

famously attributed to Ms. Austero. *Id.* at 5, 26, 36. The song features a political candidate insulting her constituents, using narcotics in the back of a limousine while Newport citizens suffer around her. *Id.* at 36. Currently, Ms. Austero suffers from chronic vertigo. *Id.* at 44. In a past life, Ms. Austero battled and overcame substance abuse disorder *Id.* at 3.

Fünke posts “Moonie Bares All” via FakeBlock

In the months preceding the 2018 congressional election, Ms. Fünke posted “Moonie Bares All” on FakeBlock. *R.* at 5. At this time, FakeBlock was “in beta,” and only Ms. Fünke and her fellow corporate officers could upload videos to the site. *Id.* at 5. Aside from attracting lascivious internet users, Ms. Fünke stated in deposition testimony she had two motivations for creating Moonie. *Id.* at 4, 6. First, Ms. Fünke sought to make a hyper-realistic simulacrum, a deepfake, showcasing her AI software’s ability to potential licensees. *Id.* at 4. Second, Ms. Fünke’s mother, now Congresswoman Lindsay Bluth, was running for office opposite Ms. Austero. *Id.* at 2. Accordingly, Ms. Fünke wanted to negatively portray her mother’s opponent, revealing Ms. Austero’s so-called “darker side.” *Id.* at 4. The post included a caption urging a vote for Lindsay Bluth and included a link to Bluth’s campaign website. *Id.* at 6. Although Ms. Bluth campaigned heavily across several social-media platforms, Ms. Fünke posted “Moonie Bares All” solely on FakeBlock to draw attention to the nascent business. *Id.* at 2, 6. This was part of a larger public campaign throughout Hollywood to hype the venture. *Id.* at 56.

For three months, the post remained on FakeBlock until Ms. Austero filed for an injunction to have it removed. *Id.* at 6. In response, George Maharis, the CEO,

removed both the video and Ms. Fünke from FakeBlock. *Id.* Ms. Austero lost the election. *Id.*

Moonie’s “uncanny” resemblance to Ms. Austero

Standing at the same height as Ms. Austero, Moonie copied her body type, proportions, and skin tone. R. at 25. Moonie also sports Ms. Austero’s iconic “pixie” hairstyle in the same hair color. *Id.* Ms. Fünke failed to capture some of Ms. Austero’s features, namely: Ms. Austero’s spiky hair, nose shape, well-proportioned smile that displays her teeth, beauty mark, and symmetrical eyes. *Id.* at 23-24. Although not obvious, Moonie’s left hand had only four fingers and showed inconsistent aging. *Id.* However, Ms. Fünke’s expert, Mr. Marky Bark, explained that these are classic anomalies that arise in AI-generated deepfakes. Known as the “uncanny valley” phenomenon, viewers often notice subtle but difficult to articulate differences between a deepfake and its real-life counterpart. *Id.* at 23 n.5. They represent limitations of deepfake technology, not the intention of the creators per se. *See id.*

In addition to appearance, Ms. Austero also served as the sole audio source for Moonie. *Id.* at 4. Ms. Fünke’s software analyzed Ms. Austero’s copious albums and acting dialogue to produce Moonie’s singing voice. *Id.* While Ms. Fünke claimed to have varied Moonie’s voice to distinguish it, performance coach and vocal expert Ann Veal testified that “Moonie’s voice *could very well* be Lucille’s *current* voice digitally raised by one octave.” *Id.* at 26 (emphasis in original).

Procedural History

Ms. Austero filed suit to enforce her right to publicity in the District of Newport Beach, pursuant to 28 U.S.C. § 1332. R. at 2. She asserted the Petitioners infringed on her right of publicity under Newport Beach common law, a cause of action as stated in the Restatement (Second) of Torts § 652C. *Id.* at 2, 9. Petitioners moved for summary judgement on three grounds: (1) that Petitioners did not violate Ms. Austero’s right of publicity; (2) that even if they did, the First Amendment of the United States Constitution protects Ms. Fünke’s deepfake; and (3) that FakeBlock is immune to liability pursuant to Section 230 of the Communications Decency Act (“CDA”), 47 U.S.C. § 230. *Id.* at 2.

The District Court granted Petitioners’ motion in part. *Id.* It held that although FakeBlock was not immune under Section 230, Petitioners prevailed on the merits. *Id.* Ms. Austero appealed; the Fifteenth Circuit affirmed in part and reversed in part. *Id.* at 2. The court below affirmed that the CDA afforded FakeBlock no immunity and reversed on the merits, holding Petitioners violated Ms. Austero’s right of publicity. *Id.* Further, the court held Petitioners failed to prove that the First Amendment afforded them protection. *Id.* at 39.

This Court granted certiorari. *Id.* at 1. It reviews grants or denials of summary judgment *de novo*. *In re La. Crawfish Providers*, 852 F.3d 456, 462 (5th Cir. 2017) (citing Fed. R. Civ. P. 56(a)).

ARGUMENT SUMMARY

Respondent Lucille Austero’s state law right of publicity claim is properly decided at trial. Ms. Austero raises genuine disputes of material fact that must be

resolved by a jury and were inappropriate for resolution on summary judgment by the District Court of Newport Beach. The Court of Appeals for the Fifteenth Circuit appropriately reversed the lower court on the merits of Ms. Austero's claim and set the matter for trial, while affirming Petitioner FakeBlock, Inc. is not entitled to immunity under Section 230 of the Communications Decency Act of 1996.

Immunity. Congress passed the CDA to shield “interactive computer service” providers like FakeBlock from liability for hosting the speech of others, lest every comments section become a viper pit of potential legal liability for the host. But this immunity only applies when *another* entity is speaking on FakeBlock's platform. It does not apply when the computer service provider *itself* is speaking—when FakeBlock is, in essence, hosting its own speech. That is the case here.

Maeby Fünke was an investor and corporate officer of FakeBlock, one of only three individuals with the ability to post video on the site. Posting video, in this case an AI-generated “deepfake,” was part and parcel of her responsibilities as a FakeBlock corporate steward, and consistent with her incentives as a FakeBlock investor. As such, a claim brought against FakeBlock for hosting the deepfake is a claim brought against the computer service provider for its own speech. Thus, the company is not entitled to Section 230 immunity.

Even if the deepfake was not FakeBlock's own speech, there are statutory exceptions carved into the CDA's grant of immunity. One such exception is for *any* intellectual property claim, regardless of whether brought under federal or state law. The right of publicity has long been recognized as an intellectual property

claim by courts and leading legal authorities. Yet again, the CDA does not bar Ms. Austero's right of publicity claim. And any imputations that excepting FakeBlock from immunity in the instant case will somehow bring "the death of the internet" are unfounded and hyperbolic.

On the merits. Petitioners misappropriated Ms. Austero's identity to attract viewers to FakeBlock in violation of her right of publicity. They now invoke the First Amendment to shelter their profiteering. However, this Court has made clear that the First Amendment does not protect mimicking another's identity without contributing creative expression.

Newport Beach's common law right of publicity protects people's ability to profit from their identity. As an accomplished performer, Ms. Austero's identity is instantly identifiable to the masses. Petitioners capitalized on that identity.

Petitioners created an AI-generated deepfake video portraying Ms. Austero tap dancing, performing a striptease, and drunkenly singing about her disdain for the Newport citizens she sought to represent in Congress. By posting the deepfake on FakeBlock, Petitioners attracted much needed web traffic, scored Ms. Fünke free advertising of her AI-model, and helped propel Ms. Fünke's mother—Ms. Austero's political rival—into Congress. A windfall for Petitioners that violated Ms. Austero's right of publicity.

Petitioners now invoke the First Amendment's protections for expressive works and political speech. The deepfake qualifies for neither. Ms. Fünke has admitted to purposefully creating the AI model to *replicate* Ms. Austero. Ms.

Fünke’s only creative contribution was a take on a song Ms. Austero famously sung. While the lyrics may have otherwise qualified as political speech, spoken from a deepfake, they do not.

The First Amendment stands for unfettered political discourse. Erroneous statements are an accepted byproduct, traditionally rectified by counter-speech. However, political speech expressed via deepfakes distorts and diminishes the antidote of counter-speech. When the public confuses Ms. Fünke’s political speech with Ms. Austero’s, Austero cannot undo the damage with her own speech, undermining the First Amendment. The Constitution cannot serve as Petitioners’ get-out-of-jail-free card.

ARGUMENT

Summary judgement is inappropriate, trial is required: Respondent’s claim an AI-generated deepfake infringes on her right of publicity involves numerous issues of triable fact—a claim not precluded by the First Amendment nor the Communications Decency Act.

Respondent first addresses the threshold question of ostensible immunity for Petitioner FakeBlock, Inc. under Section 230 of the Communications Decency Act of 1996, establishing that FakeBlock is not immune—both because the company itself was the speaker of the injurious deepfake and because Ms. Austero’s claim is entitled to a statutory exception under the CDA.

Discussion of the numerous factual disputes inappropriate for summary judgment resolution and the inapplicable nature of First Amendment protection follows the immunity discussion.

Immunity under Section 230

“The reports of my death are greatly exaggerated.”—Mark Twain

This case is about Lucille Austero, a beloved entertainer and aspiring public servant who beat a substance addiction and struggles with a disruptive health issue. Petitioners make it about something else. They frame the case around the future viability of the internet as a forum for expression and information. *See Austero v. FakeBlock, Inc.*, No. 20-9804, slip op. at 44-45 (15th Cir. Oct. 17, 2022) (Walt, J., dissenting). If Ms. Austero’s claim is allowed to proceed past the immunity threshold, the argument goes, this Court is sounding the death knell for a free, vibrant, profitable internet. *See id.* Such obituaries have been written before. *See, e.g.,* Alison Frankel, *3rd Circuit Splits with 9th, Says Celeb Can Sue Facebook for Unauthorized Photo*, Reuters (Sept. 23, 2021), <https://perma.cc/CZ3Q-GFRS> (“If the doomsday predictions are right . . . appellate judges just broke the internet.”). Like Twain’s obit, they have proved premature, even risible.¹

The Communications Decency Act does not shield corporations from responsibility for their own conduct. 47 U.S.C. § 230(c)(1), (f)(3). Nor does it grant immunity from all claims. *Id.* § 230(e). “The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet.” *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc). Instead, it authorized a generous immunity for internet companies to host the speech of others,

¹ Ironically, this quote itself is probably a bit exaggerated. *See* Emily Petsko, *Reports of Mark Twain’s Quote About His Own Death Are Greatly Exaggerated*, Mental Floss (Nov. 1, 2018), <https://perma.cc/7A76-HDWG>.

provided these companies did not A) themselves engage in actionable conduct; or B) facilitate the theft or abuse of intellectual property, another cornerstone of the modern economy. In this case, FakeBlock did both. The company now attempts to elide responsibility by backfooting this Court into understandable but unfounded concerns about “killing” the internet.

A. FakeBlock, Inc. was the speaker of the injurious deepfake and is therefore not immune from suit under Section 230.

Ms. Austero does not seek to hold FakeBlock responsible as the publisher or speaker of “information provided by another information content provider,” 47 U.S.C. § 230(c)(1), but instead for the company’s own speech. *See Austero*, slip op. at 40 (Ping, C.J., concurring). This narrow approach does not implicate the thorny policy concerns involved in setting the scope of the § 230(e)(2) intellectual property exception. When “narrow grounds for decision [are] available, resolving broader, more difficult questions ‘must await a different case.’” *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1989 (2020) (Breyer, J., concurring) (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1947 (2018)). Such judicial restraint allows the Court to avoid the “political thicket,” a thicket which is overgrown in this area of law, and one properly left for Congress to untangle.² *See Colegrove v. Green*, 328 U.S. 549, 556 (1946).

² In fact, Congress is actively trying to “untangle” Section 230 right now. *See infra* Part B.2.a.

1. Interactive computer service providers remain liable for their own speech and content under § 230(c)(1).

FakeBlock is only entitled to immunity under Section 230 if the company is hosting the speech of “*another* information content provider.”³ 47 U.S.C. § 230(c)(1) (emphasis added). Interactive computer service providers that are themselves speaking—even if said speech resembles posts by other users—are liable for the content of their speech like any other person or corporation. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1087 (9th Cir. 2021) (“[I]nternet companies remain on the hook when they create or develop their own internet content.”); *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (“[An] interactive computer service provider remains liable for its own speech.”).

Furthermore, a website operator, like FakeBlock, can be both an interactive computer service provider and an information content provider simultaneously, “the categories are not mutually exclusive.” *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1263 n.6 (N.D. Cal. 2006); *see also Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014). Meaning, if an interactive computer service “passively displays content that is created *entirely* by third parties,” then it is merely a service provider with respect to that content and possibly immune from suit. *Roommates*, 521 F.3d at 1162 (emphasis added). But content that an interactive computer service provider is “responsible [for], *in whole or in part*” is its

³ The only dispute between the parties on this point is whether FakeBlock was the speaker/developer of the deepfake, or whether the fake constitutes Fünke’s expression alone. *See Austero*, slip op. at 11.

own content, not that of *another* information provider, and is therefore outside the protection of the CDA. *Id.* (emphasis added) (quoting § 230(f)(3)).

Corporations, of course, are not themselves sentient entities, they “act only through agents and employees,” like Ms. Fünke. *Bel-Ray Co. v. Chemrite Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999). Further, one does not need to be a statutory officer of a business to be inextricably bound to it as an agent; a mere investor who “anticipates a share of the profits” can be held a legal representative of the firm, with attendant liabilities. *See Pinter v. Dahl*, 486 U.S. 622, 654-55 (1988) (a securities regulation context); *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1577 (9th Cir. 1990) (shareholders liable in tort as if they were “the actual employers”); *Segal v. Genitrix, LLC*, 478 Mass. 551, 571 (2017) (investors became official agents when conferred authority by the board, or when investor is appointed an officer).

a. Fünke either acted entirely on FakeBlock’s behalf, or FakeBlock contributed to the violation of Respondent’s publicity rights; immunity is abrogated either way.

There are two ways to view this case: 1) Ms. Fünke’s deepfake post was solely the work of FakeBlock, Inc., speech made on the company’s behalf by a corporate officer and investor who was tasked with drawing attention to the site and boosting investment; or 2) the post was expression by Fünke the individual, to which FakeBlock made a material contribution, developing the injurious post “in part.” *See Roommates*, 521 F.3d at 1162. In either case, there can be little doubt FakeBlock was responsible for the deepfake post, at least partially. To pass summary judgment, Ms. Austero, the non-movant, need only demonstrate a

reasonable person, making all inferences in her favor, could agree. *See Tolan v. Cotton*, 572 U.S. 650, 651, 657 (2014).

Conduct in service of FakeBlock alone. A reasonable juror could arrive at the conclusion Ms. Fünke’s deepfake post was done wholly on FakeBlock’s behalf based the exclusivity of the posting alone. Ms. Fünke testified her motivation for the post was to demonstrate her separate AI venture’s deepfake capabilities and benefit her mother’s campaign by magnifying Ms. Austero’s “darker side.” R. at 4. But Ms. Fünke did not post the deepfake to the myriad other social media platforms where the campaign had a heavy presence, only FakeBlock. R. at 2, 4-6. Nor did she push it via the paid advertising channels typical of campaigns. *Id.* Both would have offered far more exposure for her deepfake software and more aid to her mother’s campaign.⁴ Ms. Fünke specifically directed all web traffic and media attention from the viral deepfake to FakeBlock, even though this course of action undermined her stated rationale for creating the fake in the first place. R. at 4-5, 42. She was willing to distribute the offending video through a potentially self-defeating, low-visibility channel because she desired to associate the deepfake with FakeBlock *specifically*—to advertise FakeBlock—where she was invested and employed. R. at 5-6, 42. This was part of a larger public campaign throughout Hollywood to hype the venture. R. at 56.

While FakeBlock ultimately removed the video, this does little to undercut the reality that FakeBlock embraced both the exposure and beta testing the post

⁴ After all, FakeBlock was still “in-beta,” meaning it was not a fully finished product released to the full public. *See Beta*, Merriam-Webster Dictionary (11th ed. 2020); R. at 5.

provided. It remained up for months, well into election season and the attendant controversy, and was pulled down by the CEO only after Ms. Austero filed suit and the fake became more liability than asset. R. at 42.

FakeBlock materially contributed. Even accepting, as Petitioners must argue, that FakeBlock was just the conduit for Ms. Fünke’s individual speech, interactive computer services lose immunity when they aid in the “creation and development” of a third party’s actionable speech by making a “material contribution to the alleged illegality of the content.” *Dirty World*, 755 F.3d at 410. While courts are still defining the contours of this new “material contribution test,” when computer service providers solicit *uncompensated* contributions from the *public*, this generally does not abrogate immunity—unlike when company monies flow to hand-picked content developers directly. *Compare Dirty World*, 755 F.3d at 403 (immunity for edited “cyberbullying” posts solicited from public with no compensation), *with FTC v. Accusearch Inc.*, 570 F.3d 1187, 1200-01 (10th Cir. 2009) (no immunity for display of unlawful information researchers were paid to develop).

Here, public users were totally uninvolved in the violation of Ms. Austero’s publicity right by FakeBlock. *See Roommates*, 521 F.3d 1172 n.32 (suggesting when content is not public user-generated it deserves considerably less immunity). Only the CEO, CFO, and Ms. Fünke, the investment director, had authority to upload videos to the fledgling enterprise.⁵ R. at 5, 41. There were no information content

⁵ The use of these job titles is discussed *infra* Part A.1.b.

providers with video upload capabilities outside the firm at all; Fünke was one of only three individuals *in the world* with the ability to post such content. *Id.*

When FakeBlock featured videos, it featured only videos from the corporate officers and investors, “agents or employees,” who were developing and testing the site’s video capabilities, which were still “in beta.” *Id.* at 5-6, 57. Any test or demonstration of FakeBlock’s video feature, even utilizing video files created outside the firm, was “nothing more than [the company’s] ‘own acts.’” *Snap*, 995 F.3d at 1094 (quoting *Roommates*, 521 F.3d at 1165). Though Ms. Fünke may have been an unpaid employee, *R.* at 5-6, FakeBlock still compensated her for posting the actionable speech through returns on her investment. *See Dirty World*, 755 F.3d at 414 (highlighting compensation for posting actionable speech as a factor in numerous Section 230 cases). Further, the exclusivity of the post, discussed above, elicits a reasonable inference Ms. Fünke primarily sought to pump FakeBlock’s value and her attendant financial stake, flowing the boosted share price into her pocket.

To survive summary judgment, all Ms. Austero must demonstrate—bathed in the light most favorable to her claims—is that a reasonable juror could believe that the deepfake post to FakeBlock was content “in whole or in part” made on FakeBlock, Inc.’s behalf by its officer and investor Maeby Fünke. *Roommates*, 521 F.3d at 1162. The above facts—viewed in almost any light—demonstrate such a finding would be a reasonable one.

- b. *The Fifteenth Circuit dissenting analysis creates perverse incentives and misunderstands the nature of internet start-ups.*

Circuit Judge Walt, in dissent, warns a finding for Ms. Austero here is “a huge mistake,” cautioning this result would be “very dangerous” to the future of web-based speech and commerce. *Austero*, slip op. at 44-45, 49 (Walt, J., dissenting). With respect to Judge Walt and his eulogy for the internet, his analysis features pitfalls of its own for future litigants in cases involving upstart tech firms.

The dissent, in addressing this narrow holding by Chief Judge Ping, takes issue with the majority’s “cleaned up” rendition of FakeBlock job titles, which are sophomoric, if not lewd. *Id.* at 56 (hating “the loathsome sobriquet ‘P Hound’”). It characterizes FakeBlock as something almost undeserving of proper consideration by the courts, as “not a well-run, ordered company . . . [but] a ragtag, unsophisticated start-up conceived in a UC Irvine dorm room and run by college students on a shoestring budget.” *Id.* This line of reasoning presents two problems:

First, allowing corporate defendants to elide responsibility for wrongful conduct simply because they have unprofessional or juvenile job titles for chief executives creates a deeply perverse incentive. The more unprofessional one’s firm appears on paper, apparently, the less a judge should take claims against it seriously, at least as regards § 230(c)(1) immunity. This Court should not crack the door to rewarding bad corporate behavior with an “impunity-earned-by-recklessness.” *Scott v. Harris*, 550 U.S. 372, 385-86 (2007) (“We are loath to lay down a rule . . . [when] [i]t is obvious the perverse incentives such a rule would create.”)

Second, characterizing FakeBlock as something “ragtag” or unworthy of treatment as an “ordinary, rational company” because it was started in a California dorm room ignores that some of the most successful, lucrative companies in history began this way. Apple—the most valuable corporation in the world on some days—started in a California garage. *See generally* Walter Isaacson, *Steve Jobs* (2011). Meta, then Facebook, started and grew to viral acclaim out of a dorm room. *See generally* Ben Mezrich, *The Accidental Billionaires* (2009). Far from being “sophisticated,” that company began as a sophomore “which classmate is hotter” website started by a literal college sophomore. *Id.* Microsoft, Napster (speaking of intellectual property concerns...), Dell Computer, the list goes on and on. *See, e.g., Top-10 Dorm-Room Ventures*, CNBC (Sept. 13, 2013), <https://perma.cc/6CTW-ESED>; Miranda Perez, *Dorm Room Fund Rakes in \$12.5M to Fuel Student-Led Startups*, BuiltinBoston.com (Sept. 6, 2022), <https://perma.cc/J32M-PQFR>.

Internet start-ups—precisely the kind of firms contemplated by the CDA in § 230(a)-(b)—often start this way. Upstart status should not excuse them when seeking the protection of the CDA; the CDA exists to regulate them *specifically*.

2. Respondent provides no shortage of evidence sufficient to survive summary judgment, particularly when considering all reasonable inferences in her favor.

At summary judgment, as this Court knows, Ms. Austero is entitled to have all the facts construed in the light most favorable to her, with all reasonable inferences drawn in her favor. *Tolan*, 572 U.S. at 651, 657. This Court does not evaluate the credibility of the witnesses, nor weigh the balance of the evidence; that is for a jury. *See id.* “The burden of persuasion imposed on moving party by Rule 56

is *a stringent one*. Summary judgment should not be granted unless it is clear that a trial is unnecessary . . . ‘[if] there is *any* evidence in the record from *any* source from which a reasonable inference in [Austero’s] favor may be drawn, [FakeBlock] simply cannot obtain summary judgment.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 n.2 (1986) (emphasis added) (internal citations omitted). Further, in determining whether a moving party has met its burden of persuasion, the Court is obliged to take account of the entire setting of the case and all papers of record. 10A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2721 (4th ed. 2023).

Ms. Austero cites evidence and points of law, already discussed above, that create genuine disputes of material fact as to whether Ms. Fünke, in whole or in part, was acting in a corporate capacity when posting to FakeBlock: the exclusive use of FakeBlock, despite its reach limitations; the fact FakeBlock left the offensive and controversial material up through its viral cycle, only removing it after service of a lawsuit; the limited nature—corporate officers only—of those with video posting capabilities; the fact all videos were uploaded as part of a “beta-testing” phase; and Fünke’s leadership role and her investment in FakeBlock. R. at 4-6, 41-42, 56.

The dissent, when discussing perceived flaws in Ms. Austero’s evidence, ironically and unfortunately, engaged in flagrant weighing of this evidence. *Austero*, slip op. at 56, 57 (Walt, J., dissenting) (“the evidence *suggests* . . . it is *more likely* that . . .”) (emphasis added). The dissent further made movant-favorable inferences—maybe reasonable ones, but verboten—throughout its analysis. For

example, concluding that because Ms. Fünke made other video posts, this means she was acting in her individual capacity in posting the deepfake. *Id.* at 57-58. But the dissent made no such non-movant favorable inferences—as required by Rule 56—such as that Ms. Fünke’s exclusive posting was part of her job to boost FakeBlock’s value and test its video features. *Id.* at 56-57. This after trying to let FakeBlock off the hook for its conduct by emphasizing its “dorm room nature”—a factual characterization wholly inappropriate for summary judgment; one only appropriate for a jury room. *Id.* at 56.

Finally, evidence that Ms. Fünke has been formally accused of a crime of moral turpitude, fraud, involving her deepfakes, *Austero*, slip op. at 3-4 n.2, allows the reasonable inference she is not being fully truthful about her ostensible motivations. *Albidrez v. Astrue*, 504 F. Supp. 2d 814, 822 (C.D. Cal. 2007) (crimes involving moral turpitude are a basis for discounting credibility); *People v. Bedolla*, 28 Cal. App. 5th 535, 554 (2018) (crimes of moral turpitude are “at least minimally relevant” to credibility). While Ms. Fünke’s self-serving deposition testimony does have to be considered on its face, without weighing her credibility, *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 161 (5th Cir. 2021), this does not mean that evidence of her dishonesty vanishes. Fünke’s alleged criminality, part of “the entire setting of the case and all papers of record,” is itself evidence from which jurors could draw reasonable inferences, leading the way past summary judgment to trial. *See Wright & Miller, supra*, §§ 2721, 2726 (judgment is not appropriate when non-movant offers specific facts that call into question the credibility of the movant’s

evidence) (citing *TypeRight Keyboard Corp. v. Microsoft Corp.*, 374 F.3d 1151, 1159 (Fed. Cir. 2004)).

The dissent relies on this evidence to call Ms. Fünke a “grift[er].” *Austero*, slip op. at 57 (Walt, J., dissenting). If a reasonable juror might also, summary judgment cannot be granted.

Concluding: Section 230's purpose was to ensure “an individual or entity operating a website should not, in addition to its own legal responsibilities, be required to monitor all of the content created by third parties. . . .” Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, Rich. J.L. & Tech, para. 60 (Aug. 27, 2020), <https://perma.cc/UBT8-VPCZ> (Cox is the author and co-sponsor of Section 230). Far from having to monitor “all of the content created by third parties,” Cox, *supra*, all FakeBlock needed to monitor to avoid suit was content posted by the only three employees who could post at all.

For the above reasons, FakeBlock, Inc. is not entitled to immunity under the CDA. This narrow holding presents no terminal diagnosis to internet commerce. Rather, it properly enforces the boundaries of Section 230’s grant of immunity.

B. The statutory exception to Section 230 immunity for “any law pertaining to intellectual property” covers state claims, including a claim for infringement on the right of publicity.

Section 230 has been widely interpreted to include a “broad” grant of immunity for providers of interactive computer services. *See Lycos*, 478 F.3d at 418-19; *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); *Austero*, slip op. at 45-46 (Walt, J., dissenting). This immunity-favorable posture is consistent with the policy rationale of the CDA, which was enacted to “promote the continued

development” of internet services and web-based media and “preserve [a] vibrant and competitive free market.” 47 U.S.C. § 230(b)(1)-(3). Deference in favor of immunity is appropriate in many edge cases.

But this is not an edge case. Congress’ policy aim in the mid-1990s was clear, Respondent concedes. Equally clear, however, is the CDA’s unqualified statutory exception to immunity for intellectual property claims: “No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.” § 230(e)(2).

The text is clear; Section 230 has *no effect* on intellectual property claims. *Id.* (emphasis added). No matter how broad its shield of immunity in other arenas, this shield does not protect interactive computer service providers from “*any* law pertaining to intellectual property.” *Id.* (emphasis added). Further, while the unambiguous text should be enough to resolve the case for Respondent, the policy Petitioners rely on to push this Court beyond that text favors protections for intellectual property as much as it encourages technological development through grants of immunity.

- 1. § 230(e)(2)’s plain language clearly indicates state-law intellectual property claims are excluded from the CDA’s grant of immunity.**

“[I]n interpreting a statute” this Court commands itself, “always turn first to one, cardinal canon before all others . . . that a legislature says in a statute what it means and means in a statute what it says there.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Where the “statute’s language is plain”—as it is in the case of § 230(e)(2)—“the sole function of the courts is to enforce it according to its

terms.” *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (internal citations omitted).

The text of § 230(e)(2) is clear on its face. *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 414 (S.D.N.Y. 2001) (“The Court rejects the suggestion that the words of Section 230(e)(2) are ambiguous and, therefore, finds no need to resort to other canons of statutory construction.”). Any latent doubts as to the text’s meaning are mollified by examining the use of modifiers “state” and “federal” throughout the statute, as well as through the inclusion of the word “any” to modify “law pertaining to intellectual property.”

Use of “federal” and “state” throughout. “It is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) (internal quotation marks omitted); see *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (declining to rewrite a statute when it was clear Congress had contemplated both state and federal law and “denominat[ed] [each] expressly” throughout the text). This principle of interpretation is so ancient it has its own Latin canon, *expressio unius est exclusio alterius*—“the expression of one thing implies the exclusion of others.” Antonin Scalia & Bryan Garner, *Reading Law* 107-09 (2012). This canon, while not without

contextual exceptions, is properly applied where, as here, the drafter of text is aware of surrounding context and the implicit scope of their words. *See id.*

Here, Congress *clearly* contemplated the interplay of federal and state laws when drafting Section 230 and deliberately chose to include both federal and state claims in the intellectual property exception to immunity. In the section immediately preceding the IP exception, just a few centimeters up the page, Congress specified an exception for “any other *Federal* criminal statute.” 47 U.S.C. §230(e)(1) (emphasis added). In the sections immediately following the IP exception—again, mere centimeters away—Congress excepted from immunity “State or local” laws that are consistent with the federal code, as well as any “State” laws that deal with issues of cyberprivacy. *Id.* § 230(e)(3)-(4). Yet § 230(e)(2) does not read, “No effect on *Federal* intellectual property law”—the text denotes that “any” intellectual property claim can be brought.

And if Congress had somehow intended federal law to be the “default setting” for Section 230, it would not have taken pains to specify when it was referring to federal law. *See Id.* § 230(e)(1) (referring to “any other Federal criminal statute”). This modifier “Federal” would be purely extraneous, in violation of the so-called “rule against surplusage.” *See United States v. Butler*, 297 U.S. 1, 65 (1936) (“[W]ords cannot be meaningless, else they would not have been used.”); Scalia & Garner, *supra*, at 174-78.

If Congress wanted to make internet companies immune from state law intellectual property claims, it clearly had the vocabulary to do so. *Hepp v.*

Facebook, 14 F.4th 204, 211 (3d Cir. 2021) (“[W]hen Congress wanted to cabin the interpretation about state law, it knew how to do so—and did so explicitly.”); *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.”). Not only did Congress “know how to do so” in a general sense, but lawmakers actively considered the interplay of state and federal law when drafting § 230(e). They included both in the exception by way of the plain text.

Use of the word “any.” As acknowledged above, Congress intended a broad immunity for interactive computer service providers. But it also chose to include a modifier—any—that makes it clear the exception to immunity for intellectual property is broad as well. When legislators use this “expansive” word, “it offers no indication whatever that Congress intend[s] the limit[ed] construction” of a statute. *Harrison v. Ppg Indus.*, 446 U.S. 578, 589 (1980) (applying this principle to the Clean Air Act). The use of the word “any” “suggests a broad meaning.” *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (the Federal Tort Claims Act). A word or principle “any” modifies must be read “indiscriminately.” *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (internal citation omitted) (firearms statutes).

Congress didn’t just “fail to specify” if state or federal claims were included in the intellectual property immunity exception. It *did* specify. Congress denoted a “broad” and “expansive” exception for intellectual property claims—*any and all* intellectual property claims.

The text is the first stop for any judge. *Ron Pair*, 489 U.S. at 241. When the text is clear, as here, it should be the last. *See id.*

a. Analysis that rejects this plain reading of the statute in favor of policy concerns fails to grapple with the text at all.

Courts that reject Section 230's plain meaning tend to do so with nary an explanation. The only circuit court to hold that Section 230 immunity precludes state IP claims, the Silicon Valley-headquartered Ninth Circuit, dismissed the text's inclusion of "any" IP claim in the § 230(e)(2) exception in a mere three paragraphs, barely discussing the text of the statute at all. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 (9th Cir. 2007). That court essentially *ignored* the text and unceremoniously concluded that Congress' policy goals had to control.⁶ *See id.*

This eliding of the actual statute itself has been heavily criticized, both implicitly and explicitly. *See Hepp*, 14 F.4th at 211 ("[P]olicy considerations cannot replace text."); *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703 n.11 (S.D.N.Y. 2009) ("The Ninth Circuit did not engage in a textual analysis in *Perfect 10.*"); *Friendfinder*, 540 F. Supp. at 299 ("The Ninth Circuit made no attempt to reckon with the presence of the term 'any'--or for that matter, the absence of term 'federal'--in § 230(e)(2) . . ."). The Fifteenth Circuit dissent called *Perfect 10* "better reasoned" than the authorities relied on by the majority. *Austero*, slip op. at 47 (Walt, J., dissenting). In fact, *Perfect 10* offers no reasoning at all regarding the clear text. *See* 88 F.3d at 1118-19.

⁶ This lack of dedication to the text has filtered down to some district courts. *See Curran v. Amazon.com, Inc.*, No. 2:07-0354, 2008 WL 472433, at *11 (S.D. W. Va. Feb. 19, 2008) (concluding CDA immunity exists for state publicity claims in one sentence with no discussion).

Of course, this Court is supreme. It is not bound by the First, Third, or Ninth Circuit, nor any court. But courts interpreting the law as actually written unanimously hold state law claims are included in the intellectual property exception, often pointedly so. *See Gucci*, 135 F. Supp. at 413 (“**The plain language of Section 230(e)(2) precludes [a] claim of immunity [from state trademark infringement].**”) (bold in original).

To only focus on Congress’ policy rationale is to embrace an “argument [that] lacks any support in the plain language of the CDA.” *Project Playlist*, 603 F. Supp. at 703. It is a total “retreat[] to the usual redoubt of failing statutory interpretation arguments: an unadorned appeal to public policy.” *Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1943 (2022).

2. Policy does not favor Petitioners alone: Congress’ exception for IP claims is itself rooted in important policy considerations.

The command to faithfully apply coherent text is clear: “Our task is to apply the text, not to improve up on it.” *LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 126 (1989). “[E]xtratextual arguments, they are more properly directed at Congress.” *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 573 (2012). “Policy considerations cannot displace the text.” *Hepp*, 4 F.4th at 211.

Not all courts stop at text, of course. When a strict interpretation of the text would “defeat the plain purpose of the statute,” courts will sometimes examine the underlying policy that motivated Congress to act. *See Austero*, slip op. at 48 (Walt, J., dissenting) (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983)). However, contrary to the assertions of the Petitioners and the Fifteenth Circuit

dissent, policy considerations do not line up neatly behind immunity for FakeBlock. Congress' purpose in enacting the CDA is not defeated by the IP exception that Congress itself authored.

Interactive computer service providers, like Facebook in *Hepp* and FakeBlock in the instant case, want to have their cookies, and eat them too. These tech firms point to Congress' stated goal to encourage a "vibrant and competitive free market . . . unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(1), but myopically assume that their financial and legal interests are the only ones that must have mattered to Congress. "[Their] premise is right: Congress enacted a pro-free-market policy. But [tech companies'] desired conclusion does not necessarily follow." *Hepp*, 4 F.4th at 211.

Intellectual property rights, like physical property rights, enable "the resulting formation of effective markets." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1029 (2021) (describing the interplay of various bundles of rights that facilitate markets). This Court has long recognized that protecting economic value and incentivizing innovation is core to intellectual property doctrine. *See Mazer v. Stein*, 347 US 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . . [s]acrificial days . . . deserve rewards."); *see also Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 399 (2001) ("The right of publicity . . . protects a form of intellectual property that society deems to

have some social utility.”). And these same economic and incentive rationales are long baked into the right of publicity, specifically. J. Thomas McCarthy & Roger E. Schechter, *The Rights of Publicity & Privacy* §§ 2:6, 2:7 (2d ed. 2023); Michael D. Murray, *The Right of Publicity in a Nutshell* 60 n.3 (1st ed. 2018) (collecting authorities).

Congress wanted the internet to grow and develop because it valued the economic and technological benefits that were emerging from this growth, that’s clear from Section 230’s policy statement.⁷ See 47 U.S.C. § 230(b). However, “[a]s the presence of § 230(e)(2) indicates . . . Congress also believed that laws protecting intellectual property rights should nevertheless remain in effect--that the potential costs to those rights, in essence, outweighed the benefits [of immunity].”

Friendfinder, 540 F. Supp. 2d at 300.

Congress’ cost-benefit calculation was prescient; the string cite of intellectual property issues that proliferated along with internet companies could go on for pages. See, e.g., *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th. Cir. 2001); *Amazon. com, Inc. v. Barnesandnoble.com, Inc.*, 337 F.3d 1343 (Fed. Cir. 2001); Elise Czajkowski, *‘The Fat Jew’: Joke-Stealing Parasite or Social Media Genius?*, *The Guardian* (Aug. 19, 2015), <https://perma.cc/4LAF-7JDE>; Benjamin D. Schwartz, *Who Owns Memes?*, *Nat’l L. J.* (Aug. 5, 2022), <https://perma.cc/EA8Y-Z4Y8> (admonishing memelords).

⁷ This language about the importance of innovation and commerce is the extent of the legislative depths available to plumb. See *Gucci*, 135 F. Supp. 2d at 414 n.11 (“Section 230’s legislative history provides no clues as to the meaning of the unadorned 17 words that comprise [§ 230(e)(2)].”).

In truth, Congress was largely concerned with protecting interactive computer service providers from defamation and libel suits—not intellectual property claims—when it authored Section 230. *Cox, supra*, at paras. 25-30; *see also Gucci*, 135 F. Supp. 2d at 417.

a. Concerns about burdening interactive computer service providers are unfounded. Further, Congress is already addressing the appropriate scope of Section 230 immunity.

Petitioners, like some dissenting jurists, assert the proper, text-loyal reading of the statute now “opens the floodgates” and threatens to drown the internet in a sea of litigation and red tape. *Hepp*, 14 F.4th at 225 (Cowen, J., dissenting). Like Twain’s obituary, this is an exaggeration.

In the first place, the First Circuit has allowed state-law IP claims for well over a decade since *Lycos* was decided, as has the busy Southern District of New York after *Gucci* in 2001 and *Project Playlist* in 2009. As the *Hepp* majority pointed out in 2021, the internet appears very much alive in Boston and New York City. 14 F.4th at 211 (“Well over a decade has passed since those cases were decided, yet neither Facebook nor its *amici* provide evidence that the rulings created the disarray they now predict.”).

Second, social media firms and media organizations are routinely subject to laws of all 50 states in legal arenas that Section 230 does not cover, and federalism has not been fatal.⁸ For example, the growing regulatory minefield of biometric

⁸ These inconsistency concerns are not truly at issue in this case as the cause of action here is ripped straight out of the Restatement (Second) of Torts and adopted by many other states. *Austero*, slip op. at 10, 17 n.4. This was also true of the *Friendfinder* case. 540 F. Supp. 2d at 301 n.12 (highlighting similarities between plaintiff’s state right of publicity claim and the Lanham Act).

privacy statutes. *See, e.g.*, Ill. Comp. Stat. Ann. § 740 ILCS 14 (the Illinois Biometric Information Privacy Act); Tex. Bus. & Com. Code Ann. § 503.001 (Texas biometric regulations); Wash. Rev. Code § 19.375.010 (the same in Washington).

The *Friendfinder* court shared this skepticism that “alive and well” computer service companies could not operate effectively nationwide while subject to state IP protection: “This court has no reason to believe that reading § 230(e)(2) to exempt state intellectual property law would place any materially greater burden on service providers than they face by having to comply with federal intellectual property law.” 540 F. Supp. 2d at 301-02 (citing 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 22:2 (4th ed. 1992)).

Third, Congress is currently considering rewriting Section 230 as it is. The topic of immunity for tech firms is one of great public controversy, especially on social media. *See, e.g.*, Sen. Tom Cotton (@TomCottonAR), Twitter (Oct. 16, 2020), <https://perma.cc/5RV2-XUF2> (“We need to strip away the immunity that Section 230 gives Big Tech.”). Lawmakers have held hearings on the subject. *See, e.g.*, Brian Fung, *Senators Warn Big Tech on Section 230: ‘Reform is Coming’*, CNN (March 8, 2023), <https://perma.cc/8DCT-Y6GD>. New legislation was introduced just this year. Press Release, Mark Warner, Senator, *Legislation to Reform Section 230 Reintroduced in the Senate, House* (Feb. 28, 2023), <https://perma.cc/YAU8-PGAE>.

This Court’s recent practice is to defer to Congress when it “actively weighs the issue [before the Court].” *Nat’l Coal. for Men v. Selective Serv. Sys.*, 141 S. Ct. 1815, 1816 (2021), *denying cert. to*, 969 F.3d 546 (5th Cir. 2020) (denying certiorari

while Congress studies and debates changing draft requirements). To short circuit an active policy process invites Congress to avoid resolution of tough questions: “Rather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts. When this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned.” *Cannon v. Univ. of Chi.*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting).

Finally, there is no federal right to publicity under which Ms. Austero could bring her claim for this distasteful and cruel violation of her intellectual property right. See Dustin Marlon, *Unmasking the Right of Publicity*, 71 *Hastings L.J.* 419, 426 (2020). Ruling in favor of Petitioners would leave her entirely without remedy.

In conclusion:

The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to [other] businesses. . . . its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress.

Roommates, 521 F.3d at 1164 n.15.

At this point, it is doubtful that litigants (or even Congress itself) could kill the internet if they tried. It is such a ubiquitous part modern life that allowing state law intellectual property claims alongside federal ones—which is Congress’ plain command—would be a dent on the side of Cybertruck. Even accepting some of

Congress' stated intentions might *feel* somewhat discordant with a muscular immunity for all intellectual property claims, policy arguments cut both ways. Strong countervailing policy in favor of intellectual property rights means this Court, respectfully, must "assum[e] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175 (2009).

3. Right of publicity claims are long recognized as intellectual property claims.

FakeBlock argued in the court below that, state law or not, the right of publicity is not an IP claim anyway. *Austero*, slip op. at 18. This is contrary to clear precedent and leading authorities on the right of publicity.

This Court, along with circuit and state supreme courts across the country, recognizes the right of publicity as an intellectual property claim. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) ("[T]he State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual . . . closely analogous to the goals of patent and copyright law."); *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 a type of intellectual property right . . ."); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003) ("The right of publicity is an intellectual property right . . ."); *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1448-50 (11th Cir. 1998) (applying intellectual property doctrine to restrict the right of publicity); *Comedy III*, 25 Cal. 4th at 399 ("The right of publicity, like copyright, protects a form of intellectual property . . ."); *see also Perfect 10, Inc. v.*

CCBill, LLC, 340 F. Supp. 2d 1077, 1109 (C.D. Cal. 2004) (holding the right of publicity is an IP right), *rev'd on other grounds*, 488 F.3d 1102 (9th Cir. 2007).

Foundational academic authorities on the subject are equally clear.

McCarthy, *supra*, §§ 1:8, 5:2 (“The Right of Publicity is property and, along with patents, trademarks, copyrights, and trade secrets, is properly viewed as an intellectual property right.”) (internal quotation marks omitted); J. Thomas McCarthy, *Melville B. Nimmer and the Right of Publicity: A Tribute*, 34 *UCLA L. Rev.* 1703, 1712 (1987) (“The right of publicity matured into a distinctive legal category occupying an important place in the law of intellectual property.”).

Clear again are essentially all the of relevant legal dictionaries. *See Kouichi Taniguchi*, 566 U.S. at 566-69 (finding the weight of relevant dictionaries to be decisive in a statutory interpretation question). While those definitions are not reproduced at length here, these authorities were extensively detailed by the *Hepp* court, 14 F.4th at 212-14, and are appended to that court’s holding. To take just one example, *Black’s* states intellectual property comprises primarily trademark, patent, and copyright, “but also includes trade-secret rights, publicity rights” *Intellectual property*, *Black’s Law Dictionary* (11th ed. 2019).

The question would seem closed. But FakeBlock and the Fifteenth Circuit dissent attempt to re-write clear law by trying to excise the particular stripe of publicity claim brought by Ms. Austero from its established home within intellectual property law. *Austero*, slip op. at 52-55 (Walt, J., dissenting). In short, because this right of publicity claim is rooted in Ms. Austero’s likeness, rather than

some amorphous “product of human intellect,” this flavor of IP claim is not protected by Section 230. *See id.*

This salami slicing finds no support in the text of Section 230, nor its policy statement, nor much real support in relevant precedent. *Cf. Zacchini*, 433 U.S. at 562. Instead, it rests on a series of inferences drawn from a stilted reading of various definitions of “intellectual property,” a footnote from a district court opinion, *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 163 n.13 (D. Mass. 2015), and several unrelated IP cases and contexts. *See Austero*, slip op. at 52-53 (Walt, J., dissenting). This approach has received doubtful consideration by other courts. *See Almeida*, 456 F.3d at 1323 n.4. It is, as above, more verboten judicial policy making. If Congress wishes to clearly define the scope of intellectual property—either universally, or just for the purposes of Section 230 immunity—it is free to do so at any time.⁹

This line of reasoning further assumes that actors and performers do not purposefully and meticulously curate their names, images, and likenesses to create a recognizable “personal brand” and profit from that brand. That they don’t employ teams of expensive publicists, stylists, trainers, and other image professionals to help them create this image. *See, e.g., Men’s Health, Rob McElhenney on Getting Jacked for ‘It’s Always Sunny’, YouTube* (Feb. 7, 2020), <https://perma.cc/Q9NY-RVVS> (exploring both the enormous financial incentive and enormous team effort required to gain or lose weight for a TV role).

⁹ Congress is already considering a Section 230 re-write. *See supra* Part B.2.a.

There is no reason in law, nor in common sense, to assume that the “image and likeness” of an actor and performer is not deliberate “product of the human intellect.”

For the above reasons, FakeBlock, Inc. is not entitled to immunity under Section 230. Respectfully, the Fifteenth Circuit should be affirmed.

The merits: Ms. Austero’s right of publicity claim

Analogous to patent and copyright law, the right of publicity serves the state’s interest in protecting an individual’s right to reap the reward of their creative endeavors. *See Zacchini*, 433 U.S. at 573. In posting a video that commercially exploited Ms. Austero identity, FakeBlock and Ms. Fünke reaped the rewards of Ms. Austero’s distinguished performing career. Petitioners now call upon the First Amendment as a shield to protect their profiteering. But a constitutional right is not a ticket to freeride. This Court has plainly dispelled the myth that protecting an individual’s right of publicity frustrates First Amendment interests any more than creating legal liability for copyright infringement. *See id.* at 575. Moreover, awarding “Moonie Bares All” First Amendment protection would taint—rather than contribute to—the marketplace of political ideas.

C. Ms. Fünke’s AI-generated deepfake commandeered Ms. Austero’s identity, violating her right of publicity.

Most states maintain a right of publicity to protect an individual’s right to control the commercial use of his or her identity. McCarthy & Schechter, *supra*, § 1.2. Newport has similarly adopted a common law right of publicity modeled after the Restatement (Second) of Torts § 652C. R. at 9-10. However, because Newport’s

highest court has never officially identified the elements of the claim, the Fifteenth Circuit made an *Erie* guess as to how Newport’s high court would apply the law in this case. *See, e.g., Sanchelima Int’l, Inc. v. Walker Stainless Equip. Co., LLC*, 920 F.3d 1141, 1145-46 (7th Cir. 2019); *SMI Owen Steel Co., Inc. v. Marsh USA, Inc.*, 520 F.3d 432, 436-37 (5th Cir. 2008).

When making an *Erie* guess, a court may consider “the majority rule,” the decisions of other jurisdictions, and treatises, among other sources. *SMI Owen Steel*, 520 F.3d at 437. As the Fifteenth Circuit dissent noted, the court below used the same elements applied in the District of New Hampshire without indicating what informed their *Erie* guess. *See Austero*, slip op. at 20-21, 58-59 (Walt. J., dissenting). Fair enough. Nonetheless, consistent with the Fifteenth Circuit’s opinion, the right of publicity is not limited to name and likeness. *See, e.g., Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836 (6th Cir. 1983) (holding defendant infringed plaintiff’s identity by using his introduction phrase); *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974) (holding defendant appropriated plaintiff’s identity despite his likeness being unrecognizable); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137-38 (Wis. 1979) (holding a nickname fell within plaintiff’s identity). Whether applying the Fifteenth Circuit’s elements or applying a different set of elements that an *Erie* guess may conjure, the analysis remains largely unchanged.

The elements provided *infra* (hereby, “the California Elements”) mirror the approach of leading treatises and California’s common law, a likely model for

Newport Beach. *See Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001) (citing *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 346-47 (Ct. App. 1983)) (reciting California’s right of publicity elements). California is the prior jurisdiction of the land that is now Newport. Additionally, both states are similarly situated in that they have large celebrity populations. Finally, California’s approach reflects the typical test for a common law right of publicity claim. *See* 31 Thomas Philip Boggess V, *Causes of Action Second Series* 121 § 5 (2023) (citing *Eastwood*, 149 Cal. Rptr. 342); Mark Roesler & Garrett Hutchinson, *What’s in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, American Bar Association (Sept. 16, 2020) (citing the same), <https://perma.cc/XH5Y-JT72>.

Whether applying the California Elements or the ones recited by the Fifteenth Circuit, the analysis hinges on Petitioners’ appropriation of Ms. Austero’s identity or persona.

The California Elements represent the typical common law right of publicity approach, applying four elements analogous to those applied by the Fifteenth Circuit: (1) the defendant used the plaintiff’s identity or persona; (2) defendant’s use of the persona was for the defendant’s advantage, commercial or otherwise; (3) the plaintiff did not consent to defendant’s use of his or her identity; and (4) defendant’s use likely injured the plaintiff. Boggess, *supra*, § 5; Roesler & Hutchinson, *supra*; *see also* McCarthy & Schechter, *supra*, § 3:2.

Some courts have adopted a two element right of publicity analysis. Boggess, *supra*, § 5. However, this approach reflects the Restatement (Third) of Unfair

Competition, not the Restatement (Second) of Torts adopted by Newport. *See id.* Regardless, either approach arrives at the same result for a given fact pattern. *Id.* The above California Elements are now addressed in order.

1. Petitioners' deepfake trespasses Ms. Austero's identity, not that of a copyright-protected character.

At the heart of any right of publicity claim is that the defendant used the plaintiff's identity or persona. *See Eastwood*, 198 Cal. Rptr. at 347; Boggess, *supra*, § 5. Adding onto the California Elements, the Fifteenth Circuit also assessed whether Ms. Austero maintains an enforceable right in her identity notwithstanding any copyrights of the works in which she has appeared. As the Fifteenth Circuit rightfully determined: Petitioners' Moonie deepfake bears *ample* similarities to Ms. Austero's identity—raising fact issues well beyond the scope of summary judgment; and, Ms. Austero has not lost her right *in her own identity* by virtue of her illustrious acting career. *Austero*, slip op. at 21-22, 29-30

a. Petitioners usurped Ms. Austero's identity by creating an AI mosaic of Ms. Austero.

California Element one. Reflecting numerous features of Ms. Austero's, Petitioners blatantly appropriated her identity. When a defendant's use identifies the plaintiff, the defendant has infringed the plaintiff's identity or persona. McCarthy & Schechter, *supra*, § 3:10; *see* Restatement (Third) of Unfair Competition § 46, cmt. d (Am. L. Inst. 1995). Any number of characteristics might identify the plaintiff. *See Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 146 (3rd Cir. 2013) (virtual avatar); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463-64 (9th Cir. 1988) (voice); *Carson*, 698 F.2d at 832-33 (catch phrase). Whether the use identifies

the plaintiff is a fact inquiry that should not be summarily dismissed unless it is very clear that the plaintiff is not identifiable. *McCarthy*, *supra*, § 3:10. Under our facts, there is no straight-faced argument that Moonie *clearly* does not identify Ms. Austero, as the Fifteenth Circuit’s dissent tacitly admitted through its own factfinding pursuit. *See Austero*, slip op. at 61-65 (Walt, J., dissenting) (researching the average height of women to dispel the majority’s finding that Ms. Austero’s height, weight, build, hair color, and hair style sufficiently identifies her).

In one example, a videogame developer created a game based on the National Collegiate Athletic Association’s (“NCAA”) football league. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013). The game allowed users to control avatars representing NCAA athletes in simulated football games. *Id.* Each avatar had the same height, weight, build, skin tone, and hair color, as its corresponding real-life athlete. *Id.* The game even replicated the athlete’s unique playing behavior. *Id.* Each avatar was assigned to the same school’s team and wore the same jersey—less the athlete’s name—as its respective athlete. *Id.* These teams of avatars played in virtual renditions of the unique college stadiums in which the teams really played. *Id.* This recreation of NCAA athletes violated their rights of publicity. *Id.* at 1273.

In striking similarity, Ms. Fünke replicated Ms. Austero with many of the same techniques. Moonie had Ms. Austero’s skin color, hair color and style, and body proportions. R. at 25. Moonie wore an identical dress to one famously associated with Ms. Austero. *Id.* Moonie tap danced the same number that Ms.

Austero performed in the Radio City Music Hall. *Id.* Moonie’s performance even took place on a stage, an environment associated with multi-time Tony award winners like Ms. Austero. *Id.* at 5, 25. Disturbingly, Moonie’s behaviors even mimicked Ms. Austero’s ailments: stumbling and singing in a drunken cadence in allusion to Ms. Austero’s past substance abuse and struggles with vertigo. *Id.* at 44. Just as with the videogame designer, Ms. Fünke identified Ms. Austero using not only Austero’s physical attributes, but apparel and specific settings associated with her individual career.

Perhaps a viewer could not identify the avatar or AI “simulacra” by physical attributes, apparel, or setting alone. However, these components compound to effectively evoke the plaintiffs’ identities, closing any cognitive gaps where identifying features may have gone uncaptured. *Cf. In re NCAA*, 724 F.3d at 1271. Petitioners cannot evade infringement merely because they used ancillary references to Ms. Austero’s career to more effectively portray the actress. *Cf. Motschenbacher*, 498 F.2d at 827 (holding despite plaintiff’s likeness being unrecognizable, a commercial depicting his distinctive car identified him).

b. *Ms. Austero has an enforceable right in her identity notwithstanding her past roles and performances.*

Ms. Austero’s right in her identity remains uninhibited. Although Ms. Austero is an actress whose recognition has accrued over her various roles, this does not confine her right of publicity. *See Wendt v. Host Intern., Inc.*, 125 F.3d 806, 811 (9th Cir. 1997). True, Ms. Austero could not claim a right of publicity *in her performance* within a copyright-protected work. Regardless, she may claim a right

in her likeness in the context of such a work. Compare *Wendt*, 125 F.3d at 809 (holding copyright-protected TV show did not preempt actors’ right of publicity claim with respect to their *likenesses*), with *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 673 (7th Cir. 1986) (holding an employer’s copyright in a performance preempted players’ right of publicity in the *performance*). On the contrary, copyright protection coexists with the right of publicity. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989) (holding that the Patent and Copyright Clauses of the U.S. Constitution do not preempt states laws promoting intellectual property); *Zacchini*, 433 U.S. at 573 (acknowledging the coexistence of copyright law and right of publicity).

Importantly, Ms. Austero’s claim is not rooted in past performances to which she does not hold contractual IP rights. “Moonie Bares All” borrowed stray elements from Ms. Austero’s various performances, including her outfit from *Cabaret*, and a striptease reminiscent of her “Junie Moon” role. See R. at 23. However, Ms. Austero’s does not assert that Moonie identifies characters from Ms. Austero’s works. Cf. *Wendt*, 125 F.3d at 811 (holding plaintiffs raised a triable claim not in their *characters*, but in *their own likenesses*). Indeed, nowhere does the record propose that anyone thought Moonie evoked a fictional character.

The only common thread of the video’s allusions is a famous actress, Lucille Austero. Accordingly, Ms. Austero claims that Moonie “closely resembles **Austero**.” R. at 2 (emphasis added); See *Austero*, slip op. at 30. Because she is suing for the

appropriation of her own identity, no issue of ownership favors Petitioners here. *See Wendt*, 125 F.3d at 811.

2. It was to Ms. Fünke and FakeBlock’s advantage to draw attention to the site with a lewd deepfake portraying a celebrity.

California Element Two. Common law right of publicity requires that the defendant’s appropriation was to their advantage. A defendant may derive an advantage in infringing plaintiff’s right of publicity even without a monetary gain. *Henley v. Dillard Dept. Store*, 46 F. Supp. 2d 587, 597 (N.D. Tex. 1999); McCarthy & Schechter, *supra* § 3:2. The defendant need only receive a commercial benefit that they would not have otherwise received. *Henley*, 46 F. Supp. 2d at 597; McCarthy & Schechter, *supra* § 3:2; *see Eastwood*, 198 Cal. Rptr. at 349 (holding that appropriating a celebrity’s right of publicity to attract consumer attention is a commercial advantage).

Whether to promote her AI-modeling capabilities, to bolster her mother’s political campaign, or to draw attention to FakeBlock, posting “Moonie Bares All” on FakeBlock was to Ms. Fünke’s advantage. As Ms. Fünke articulated, posting an AI deepfake that closely resembles a real-life celebrity could spawn potential *licensing opportunities*, an inherently commercial endeavor. R. at 4. Ms. Fünke’s other stated purpose in posting the video was to promote her mother’s campaign for political office, which happened to be successful. R. at 4. The social and financial advantages of having a family member in Congress are, perhaps unfortunately, well established by now. *See* Lauren Fox, *All in the Family: House Members Lining Family Pockets with Political Cash*, U.S. News & World Report (March 22, 2012),

<https://tinyurl.com/bdhxph8t> (“Calif. Rep., Jerry Lewis, paid his wife \$512,293 to work in his congressional office over four years.”). Under either motive, Ms. Fünke’s advantage in posting the video is clear.

Further, posting the video only on FakeBlock stood to commercially benefit FakeBlock as well as Ms. Fünke. Being the exclusive host of a scandalous celebrity deepfake would attract the consumer attention that a start-up like FakeBlock needs to stand out. *See* R. at 6; *cf. Eastwood*, 198 Cal. Rptr. at 349 (holding tabloid received commercial advantage through attracting readers’ attention by exploiting celebrity’s personality). It had just that effect. “Moonie Bares All” exploded on internet message boards. R. at 6. By her own admission, Ms. Fünke chose not to post the video on other websites because she wanted to draw attention to FakeBlock and reap the benefits as an investor. *Id.*

FakeBlock cannot, after allowing the post to stand for three months, claim that was not complicit in seeking to benefit from “Moonie Bares All.” *Austero*, slip op. at 42-43 (Ping, J., concurring). As an initial matter, Ms. Fünke was director of investor relations, an officer, for the entire duration that the video was posted. R. at 5-6. Thus, as discussed above in Part A, Ms. Fünke’s actions were the actions of FakeBlock’s itself. *See Bel-Ray Co.*, 181 F.3d at 444. Notwithstanding, FakeBlock was in a “beta” developmental stage, requiring maintenance and attention. *See* R. at 5. It follows that FakeBlock would likely be acutely aware of a video creating measurable website traffic. Certainly, inferring this evidence in favor of Ms.

Austero, FakeBlock has not produced enough evidence to wash its hands of Ms. Fünke on summary judgment.

3. Ms. Austero did not consent to her likeness being appropriated by Petitioners.

California Element three. Naturally, no right of publicity violation would arise provided the plaintiff—unlike Ms. Austero—consented to the use of their identity. The right of publicity both empowers individuals to control the use of their identity through licensing, and provides relief where a third party appropriates that identity without permission. *Eastwood*, 198 Cal. Rptr. at 348. Therefore, absent authorization, commercially exploiting the plaintiff's identity gives rise to an actionable right of publicity claim. *Id.*

The facts here provide no basis to infer that Ms. Austero consented to have her identity stolen in the service of her own harassment. *See generally Austero*, slip op. To the contrary, Ms. Austero sued for the video's removal, inducing FakeBlock to reflexively remove the video without protest. R. at 6. This behavior dispels any myth of a commercial relationship between the two.

4. Ms. Austero need not prove, nor do Petitioners contest, her injury.

California Element four. Injury to a plaintiff is presumed upon satisfying all other elements of right of publicity. *Del Amo v. Baccash*, 2008 WL 4414514, at *6-7 (C.D. Cal. 2008) (holding, after surveying right of publicity caselaw, injury is presumed upon satisfaction of all other elements); Boggess, *supra*, § 13; McCarthy & Schechter, *supra*, § 3:2; *see Ainsworth v. Century Supply Co.*, 693 N.E.2d 510, 514 (Ill. App. 1998). Although commercial damages must be proven for monetary relief,

quantifiable damages are an unnecessary to state a prima facie case. *Bogges*, *supra* § 13. Moreover, Ms. Austero’s injury from the video is uncontested. Petitioners do not challenge that Ms. Austero suffered injury in their summary-judgment motions. *Austero*, slip op. at 21. Therefore, summary judgment requires inferring injury in favor of the nonmovant. *See Guzman*, 18 F.4th at 160. In sum, Ms. Austero has easily produced triable issues of fact on all other elements of her right of publicity claim, giving rise to the presumption of her injury.

D. Ms. Austero’s right of publicity claim does not infringe Petitioners’ First Amendment rights.

Right of publicity defendants often retreat to the First Amendment’s protection of free expression to shield their infringement. However, the First Amendment offers no shelter to infringers who have invoked the plaintiff’s identity without expressive transformation. *See Comedy III*, 25 Cal.4th at 403; *accord Zacchini*, 433 U.S. at 578. Indeed, by her own admission, Ms. Fünke sought to closely *replicate* Ms. Austero’s identity, not to transform it. *See R.* at 4. Moreover, Ms. Fünke’s political motivation does not render Moonie a modern form of political speech. Spoken by a deepfake, political speech serves to foul—not enrich—American political dialogue.

1. Commandeering Ms. Austero’s identity for clickbait was not a transformative use.

In “Moonie Bares All,” the only hint of transformation lies in Moonie’s song, and the First Amendment does not rescue it. Both the First Amendment and intellectual property rights were designed to cultivate new ideas. The right of publicity encourages individuals to pursue endeavors that promote works of art and

entertainment. *See Zacchini*, 433 U.S. at 573. The First Amendment allows individuals to craft *new* ideas from these works. *See Comedy III*, 25 Cal.4th at 403. To accommodate both creative mechanisms, many courts have converged on the transformative use test. *See Hart*, 717 F.3d at 153 (holding, with respect to right of publicity, predominant use test was “at best” too subjective, and *Rogers* test was improper analysis); *ETW Corp*, 332 F.3d at 936; *In re NCAA*, 724 F.3d at 1283 (rejecting *Rogers* test in favor of transformative use test).¹⁰ Courts apply the transformative use test to assess whether a would-be infringer sufficiently transformed the plaintiff’s identity to warrant First Amendment protection. *See Hart*, 717 F.3d at 165; *Comedy III*, 25 Cal. 4th at 403 (holding expressive uses of a celebrity’s likeness include, e.g., commentary, parody, or lampoon).

The California Supreme Court first adapted the transformative use test from the fair use test, observing that balancing right of publicity rights with the First Amendment bore similar considerations to those of copyright law—as both are intellectual property. *See Comedy III*, 25 Cal. 4th at 399, 403-07; *accord Zacchini*, 433 U.S. at 573. The transformative use test asks whether the plaintiff’s identity is the very sum and substance of the work in question—a non-transformative use, or whether the plaintiff’s identity is just one of the so-named “raw materials” contributing to an original work—a transformative use. *See Comedy III*, 25 Cal. 4th

¹⁰ While at first the Sixth Circuit indicated that applying the *Rogers* test would be appropriate to determine whether a right of publicity infringer was protected by the First Amendment, *see Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003), it adopted the transformative use test one month later in the *ETW* decision. 329 F.3d 437, 461 (6th Cir. 2003). As the Ninth Circuit noted, the *Rogers* test seeks protects *consumers* from confusion, whereas the right of publicity protects a *plaintiff’s* identity. *In re NCAA*, 724 F.3d at 1281.

at 406. This determination hinges on whether literal and imitative elements or creative elements predominate the work, not on the quality of artistic contribution itself. *See id.* at 407 (holding that a vulgar or poor-quality work may be expressive and thus protected, while a skillful imitation may not).

The right of publicity has estopped bad actors from freeriding on another's labor. *Cf. Zacchini*, 433 U.S. at 578 (preventing news company from broadcasting performer's human cannonball act); *Hepp*, 14 F.4th at 214 (preventing Facebook from using a news anchor's photograph to advertise a dating service); *Hart*, 717 F.3d at 170 (protecting collegiate athletes whose avatar appeared in a videogame). Importantly, right of publicity prevents infringers from monetizing the plaintiff's personal recognition, opposed to the infringer's own creative skill and talent. *Cf. Comedy III*, 25 Cal. 4th at 408 (holding charcoal drawing of a famous trio, without creative contribution, exploited their fame in violation of right of their publicity).

Ms. Austero is an actress. She has appeared in twenty-two movies, released seven studio albums, taken the Broadway stage, and captivated people on their home televisions. R. at 3. She is among the rare few to attain Oscar, Emmy, *and* Tony awards. *Id.* These accomplishments were only possible through diligence, dedication, and hard work. Dancing, singing, and acting are her very livelihood.

"Moonie Bares All" is a piracy of Ms. Austero's trade. Ms. Fünke set out to demonstrate that her AI-model could realistically deepfake that trade. R. at 4. Ms. Austero was not merely some of the "raw material," she was *the only* material used to generate "Moonie Bares All." *See* R. at 4, 27. The result was Moonie: a woman

matching Ms. Austero’s features and body type, wearing clothes that Ms. Austero had famously worn, performing a dance that Ms. Austero had danced, and singing. *Id.* at 25. “Moonie Bares All” amounts to no more than a copy of Ms. Austero’s craft. Ms. Austero’s claim speaks to the core of the right of publicity: “protecting the proprietary interest of the individual in his act in part to encourage such entertainment.” *See Zacchini*, 433 U.S. at 573.

That “Moonie Bares All” is bare of creative elements aligns with Ms. Fünke’s motives. Ms. Fünke purposefully used Ms. Austero’s performances to create a *realistic-looking simulacra*, a deepfake, to demonstrate her software’s capabilities to potential licensees. *Id.* Drawing reasonable inferences—as required by Rule 56—Ms. Fünke had incentive to copy Ms. Austero as closely as possible, as to best attract potential licensees of her AI-model. Any changes to Ms. Austero would frustrate that purpose.

Ms. Austero and Moonie’s dissimilarities are few, and they are neither infusions of expression nor creativity. The differences in Moonie’s hair, face, hands, and skin are “classic” anomalies that arise in AI-generated images. *R.* at 23 n.5 (expert testimony that AI-generated visual anomalies are a phenomenon known as the “uncanny valley”). These differences represent bugs in the software, flaws, they are NOT deliberate transformations. Indeed, even Moonie’s striptease was unoriginal, as Ms. Austero has herself stripped in her role in *Tell Me That You Love Me, Junie Moon*. *See R.* at 25.

Unlike caricatures of Major League Baseball players, the physical differences between Ms. Austero and Moonie offer no social commentary. *Compare* R. at 23-24, *with Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996) (holding parody baseball cards provided social commentary that warranted First Amendment protection). On the contrary, the transformative use test only offers protection where creative elements *predominate* in the work. *See In re NCAA*, 724 F.3d at 1274 (emphasis added). A far cry from predominating, Ms. Fünke’s sole creative contribution to the work was Moonie’s song, a variation of “New York, New York.” While Ms. Fünke intended this song to “reveal[] the ‘darker side’ of a political candidate,” R. at 4, protecting it as political speech would be to protect the speech of a deepfake of Ms. Austero. Deepfake speech is a ventriloquism that serves only to hazardously taint “the marketplace of ideas” that serve as a cornerstone of our democracy.

2. Polluting political speech with realistic, AI-generated deepfakes of public figures hamstring the core value of the First Amendment.

*“I think Thomas Jefferson would have said, ‘The more speech, the better.’ That’s what the First Amendment is all about, **so long as the people know where the speech is coming from.**”* –Justice Antonin Scalia (emphasis added)¹¹

When the people do not know where—or from whom—speech is coming, the core principles of free speech implode. Speech is essential to democracy. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010). The United States is a

¹¹ Matt Vasilogambros et al., *Scalia Defends Citizens United Decision, Reflects on Term in Rare TV Appearance*, The Atlantic (July 18, 2012), <https://perma.cc/7JAH-PT3W>.

nation committed to uninhibited public debate, accepting that some amount of erroneous statements are an inevitable byproduct of the dialogue. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964). In this system, the remedy to erroneous speech is more speech, a doctrine known as counter-speech. Holly Kathleen Hall, *Deepfake Videos: When Seeing isn't Believing*, 27 *Cath. U. J. L. & Tech.* 51, 63 (2018) (citing *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring)). While this system has served the United States well since its founding, it is a system that was designed around pamphlets and speeches, and later adapted to radio, film, and television. It was not designed in the anticipation of AI-generated deepfakes. *See id.*

In recent years, a deluge of internet news sources has undercut the corrective effect of counter-speech. *See Philip M. Napoli, What if More Speech is no Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 *Fed. Comm. L. J.* 55, 57-59 (2018). Algorithms that curate internet news media to the ideals of each individual internet user create an echo chamber of thought. *Id.* Thus, the marketplace of ideas is now hand-picked by a virtual personal shopper who one may not even realize exists. In this echo chamber, separating truth from fallacy has become increasingly difficult. *See Hall, supra* at 67. This new bespoke marketplace has detrimentally polarized the American political landscape.

Deepfakes are technology's latest and greatest sabotage to meaningful political discussion. No longer can someone see a video and know whether it ever happened. *Cf. Fact Check: "Drunk" Nancy Pelosi Video is Manipulated*, Reuters

(August 3, 2020), <https://perma.cc/6GB7-NLMV>. This poses the gravest danger when that video depicts a political candidate. If curated internet news was a needle piercing the heart of First Amendment political discussion, deepfakes accompany that needle with a sword.

In a time when someone can effectively generate realistic videos of events that have never occurred—as Ms. Fünke has—the line between real and deepfake is hopelessly blurred. Ms. Austero cannot overcome Ms. Fünke’s speech with her own speech *because people will think Ms. Fünke’s speech was in fact Ms. Austero’s*. This is an indelible mark that the truth cannot erase from the minds of Ms. Austero’s constituents.

States have already recognized that deepfakes’ threaten the American political system and have begun establishing countermeasures. Nine states have enacted regulations on deepfakes in the context of election influence. Isaiah Poritz, *Deepfake Porn, Political Ads Push States to Curb Rampant AI*, Bloomberg Law (June 20, 2023), <https://perma.cc/35CK-93XN>; *see also Austero*, slip op. at 38 n.10. States are laboratories for democratic experimentation. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). To stay this experimentation today will have serious consequences to the democracy of the nation. *See id.*

Sheltering “Moonie Bares All” under the protection of political speech may stifle these states’ important and invaluable experimentation in democracy. Although the right of publicity is a cause of action that does not minimize

publication but determines who is able to publish, *see Zacchini*, 433 U.S. at 573, setting a precedent that deepfake creators can evade repercussions under a guise of political speech compromises the foundation on which free speech is built.

CONCLUSION

For these reasons, this Court should affirm the judgment of the United States Court of Appeals for the Fifteenth Circuit in favor of the Respondent.

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