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Docket No. 22-9908

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In The

**Supreme Court of the United States**

October Term, 2023

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**FAKEBLOCK, INC. AND MAEBY FÜNKE,**

*Petitioners,*

v.

**LUCILLE AUSTERO,**

*Respondent.*

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

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**BRIEF FOR RESPONDENT**

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Counsel for Respondent  
Team 4

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## QUESTIONS PRESENTED

- I. Does FakeBlock qualify for immunity under § 230 of the CDA when Congress excludes language limiting the immunity exception solely to federal intellectual property claims or when FakeBlock's corporate officer—Maebly Fünke—posts *Moonie Bares All*?
- II. Given that the First Amendment's transformative-use test only protects works sufficiently transformed into something more than mere likeness, did the defendants infringe upon Lucille Austero's right of publicity by posting *Moonie Bares All*—a video featuring an artificial intelligence model identifiable as Ms. Austero?

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## **STATEMENT OF JURISDICTION**

The United States District Court for the District of Newport Beach granted summary judgment in favor of the defendants. R. at 2a. Subsequently, the United States Court of Appeals for the Fifteenth Circuit properly exercised its jurisdiction in granting certiorari—ultimately reversing and remanding the case. R. at 39a. On October 9, 2023, this Court granted certiorari to the Supreme Court of the United States. R. at 1a. Thus, jurisdiction is proper pursuant to 28 U.S.C. § 1254(1).

## **OPINIONS BELOW**

The decision and order of the United States District Court for the District of Newport Beach is unreported. R. at 1a. The decision and order of the United States Court of Appeals for the Fifteenth Circuit is also unreported but set out in the record. R. at 1a–67a.

## **RELEVANT PROVISIONS**

Section 230 of the Communications Decency Act (CDA), 47 U.S.C. § 230, is relevant to this case and reprinted in Appendix A. The First Amendment to the United States Constitution, U.S. CONST. amend. I, is also relevant to this case and reprinted in Appendix B.

## STATEMENT OF THE CASE

### *Factual Background*

***From Broadway Star to Politician.*** Lucille Austero is a world-renowned celebrity who has been in the spotlight for the past several years. R. at 3a. Not only has Ms. Austero starred on Broadway, but she has also released seven studio albums, acted in twenty-two movies, and appeared on television. R. at 3a. Ms. Austero’s diverse array of talents has allowed her to win several awards, including Oscar, Emmy, and Tony awards. R. at 3a. Some of her most iconic performances include *Cabaret*, *New York, New York*, and *Tell Me That You Love Me*, *Junie Moon*. R. at 25a–26a. Following the conclusion of her successful career, Ms. Austero ran for office as a representative in the United States Congress against Lindsay Buth—the mother of Maebly Fünke. R. at 3a.

***Maebly Fünke Creates Moonie Bares All.*** Maebly Fünke is a programmer and digital artist focused on creating realistic artificial intelligence models. R. at 3a. Soon after the election began, Maebly Fünke created a video starring a model generated by artificial intelligence named “Moonie,” which closely resembles Ms. Austero. R. at 4a. In this video, Moonie stumbles around the stage, strips off her clothing, and sloppily sings altered lyrics to the song “New York, New York.” R. at 5a. The lyrics refer to Ms. Austero’s substance dependency, wealth, and allegedly poor view of Newport Beach’s citizens. R. at 5a. In response to questions about the video, Maebly Fünke testified that one of the reasons she created *Moonie Bares All* was to reveal the “darker side” of Ms. Austero. R. at 4a.

***Moonie or Austero?*** Maeby Fünke’s character, Moonie, bears several similarities to Ms. Austero. R. at 4a. Even though Maeby Fünke testified that she used Ms. Austero as the “starting point” to develop both Moonie’s appearance and voice, the character retained several of Ms. Austero’s unique features. R. at 4a. For instance, both are roughly the same height with similar body compositions and share Ms. Austero’s signature hairstyle—short, black hair with prominent bangs. R. at 4a. Beyond physical similarities, Moonie also shares characteristics of Lucille Austero’s famous characters. R. at 25a. Specifically, Moonie wears the same outfit and performs the same tap dance as Lucille Austero in *Cabaret*. R. at 25a.

***Fünke Puts FakeBlock on the Map.*** In 2018, FakeBlock was a new social-media website with only three corporate officers holding the authority to post content—George Maharis, Paul Huan, and Maeby Fünke. R. at 5a. Maeby Fünke acted as FakeBlock’s director of investor relations, and she invested in the website. R. at 5a–6a. As the director of investor relations, part of her job duties included advertising the website and attracting new investors. R. at 42a. While holding this position, Maeby Fünke uploaded *Moonie Bares All* solely to FakeBlock. R. at 6a. Following the post, Maeby Fünke later testified that she did not upload her video to any other website because she wanted to draw attention solely to FakeBlock. R. at 6a. Maeby Fünke accomplished this goal as *Moonie Bares All* went viral, drawing significant attention across the internet message boards. R. at 6a.

## ***Procedural Background***

***District of Newport Beach.*** Shortly after Maeby Fünke posted *Moonie Bares All*, Ms. Austero sued both FakeBlock and Maeby Fünke, alleging that the artificial intelligence model in the video infringed upon her right of publicity. R. at 6a. As a result, both defendants filed motions for summary judgment. R. at 7a. In their motions, both FakeBlock and Maeby Fünke argued that Ms. Austero did not have a viable right-of-publicity claim and that *Moonie Bares All* is a form of expression protected by the First Amendment. R. at 7a. FakeBlock further argued that it was immune from Ms. Austero's claim under the CDA. R. at 7a. Ultimately, the court granted summary judgment to both defendants but rejected FakeBlock's immunity claim. R. at 7a.

***Fifteenth Circuit.*** Ms. Austero appealed the decision. R. at 1a. Writing for the majority, the Honorable Judge Zuckercorn reversed and remanded the district court's grant of summary judgment. R. at 1a–2a. The majority held that the district court erred when it granted summary judgment to the defendants but correctly rejected FakeBlock's immunity claim. R. at 2a. Though Chief Judge Ping and Judge Jarvis concurred with the judgment, Judge Walter dissented, arguing that the court should have affirmed the grant of summary judgment. R. at 40a; R. at 67a. Subsequently, FakeBlock and Maeby Fünke filed a petition for a writ of certiorari in this Court, which it granted. R. at 1a.

## SUMMARY OF THE ARGUMENT

We respectfully ask this Court to affirm the Fifteenth Circuit’s holding that FakeBlock is not entitled to CDA immunity, Lucille Austero has raised a genuine issue of material fact regarding her right-of-publicity claim, and the defendants failed to prove their affirmative defense under the First Amendment. Foremost, FakeBlock is not immune from Lucille Austero’s lawsuit because § 230(e)(2)’s immunity exception applies. Based on well-established statutory interpretation principles, the Court will only depart from the statutory language based on the most extraordinary showing of contradictory legislative intent. Because Congress deliberately omitted modifying language from § 230(e)(2), included the word “any,” and used the term “federal” in other parts of the CDA—it is clear that Congress intended for § 230(e)(2) to encompass intellectual property claims arising under state law. Additionally, several courts—including this Court—have long recognized that the right of publicity is comparable to various aspects of intellectual property law. Specific to this case, Lucille Austero’s right-of-publicity claim qualifies as an intellectual property claim because it protects Ms. Austero’s right to reap the rewards of her success.

However, even if this Court does not adopt this interpretation, FakeBlock still does not receive CDA immunity. Websites do not receive CDA immunity for their own tortious speech. *Moonie Bares All* qualifies as FakeBlock’s own speech because it was created and posted by one of the website’s corporate officers—Maebly Fünke. Furthermore, Maebly Fünke posted the video in her corporate capacity as director of investor relations for the purpose of attracting new investors.

Additionally, Lucille Austero has raised a genuine issue of material fact regarding her right-of-publicity claim, and the defendants have failed to prove their First Amendment affirmative defense. FakeBlock and Maeby Fünke infringed upon Lucille Austero's right of publicity in three ways. First, Maeby Fünke appropriated her identity by utilizing Lucille Austero's most iconic roles in *Moonie Bares All*. Second, Maeby Fünke appropriated Lucille Austero's likeness by using artificial intelligence to create Moonie—a character closely resembling Ms. Austero. Third, Maeby Fünke violated Lucille Austero's right of publicity by imitating her singing voice without her consent.

Finally, the defendants have failed to prove their affirmative defense under the First Amendment. To balance the interests of the First Amendment and right-of-publicity claims, this Court should apply the transformative-use test. Under this test, the defendants must show that they transformed *Moonie Bares All* into something more than a literal depiction of Lucille Austero. However, the defendants fail the transformative-use test because Moonie is a literal depiction of Lucille Austero performing all of the activities that made her famous. For the foregoing reasons, this Court should affirm the Fifteenth Circuit's decision.

## STANDARD OF REVIEW

Whether FakeBlock receives CDA immunity from Lucille Austero’s right-of-publicity claim is a question of law reviewed de novo. *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1147 (9th Cir. 2002) (“We review questions of statutory interpretation de novo.”); *Jones v. Dirty World Ent. Recs. LLC*, 755 F.3d 398, 406 (6th Cir. 2014) (citing *Smith v. Leis*, 407 F. App’x 918, 927 (6th Cir. 2011)) (explaining that questions regarding entitlement to CDA immunity are reviewed de novo). Likewise, whether the Fifteenth Circuit properly reversed summary judgment is also a question of law reviewed de novo. *See Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1445 (11th Cir. 1998) (citing *Gordan v. Cochran*, 116 F.3d 1438, 1439 (11th Cir. 1997)). Summary judgment is only appropriate if—after examining the entire record—there is no genuine issue of material fact. *Id.* (citing FED. R. CIV. P. 56(c)).



## ARGUMENT

**I. This Court should affirm the Fifteenth Circuit’s decision that FakeBlock is not immune from Lucille Austero’s lawsuit because § 230 does not immunize websites against state right-of-publicity claims or claims arising from their own speech.**

In 1996, Congress passed § 230 of the CDA to promote the continued development of the internet while also encouraging websites to use filtering technology to block inappropriate content. *Hepp v. Facebook*, 14 F.4th 204, 208 (3d Cir. 2021); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); *see* 47 U.S.C. § 230(b). To balance these interests, § 230 confers immunity upon websites for certain claims in specific situations. *See* LEE C. BOLLINGER & GEOFFREY R. STONE, SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 68–69 (Oxford Univ. Press 2022). For instance, “[n]o 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.* at 68 (quoting 47 U.S.C. §230(c)(1)).

Though § 230 provides broad protection for websites, this grant of immunity is not limitless. *See Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019). Absent any statutory exceptions, a website only receives immunity if: (1) the website qualifies as a “provider or user of an interactive computer service,” (2) the claim stems from “information provided by another information content provider,” and (3) the claim treats the website “as the publisher or speaker of that information.”<sup>1</sup> *Universal*

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<sup>1</sup> All parties agree that FakeBlock is a provider of an interactive computer service under the CDA’s definition. 47 U.S.C. § 230(f)(2); R. at 10a. Additionally, none of the parties dispute the fact that Lucille Austero seeks to hold FakeBlock liable as the

*Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); 47 U.S.C. § 230(c)(1). Accordingly, FakeBlock does not receive immunity from Lucille Austero's claim because a statutory exception applies, and Ms. Austero's claim seeks to hold FakeBlock liable for its own speech. R. at 11a; R. at 40a.

**A. FakeBlock is not immune from Lucille Austero's lawsuit because § 230(e)(2)'s immunity exception encompasses right-of-publicity claims arising under state law.**

Section 230 immunity is constrained by § 230(e)(2), which states that courts should construe § 230(c)(1) in a way that neither “limit[s] or expand[s] any law pertaining to intellectual property law.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (quoting *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 414 (S.D.N.Y. 2001)). However, because the CDA does not include a definition of “intellectual property,” the courts are divided on the proper scope of § 230(e)(2). Compare *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008) (holding that the § 230(e)(2) exception applies to state-law claims for invasion of privacy), with *Perfect 10, Inc.*, 488 F.3d (concluding that “intellectual property” means “federal intellectual property”). Therefore, we urge this Court to adopt the Fifteenth Circuit's decision that Congress did not intend to limit the immunity exception solely to federal intellectual property claims and that the right of publicity qualifies as an intellectual property claim for purposes of § 230(e)(2). R. at 17a–18a.

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publisher of *Moonie Bares All*. R. at 10a. However, the parties disagree as to whether this claim also arises from FakeBlock's own speech. R. at 10a.

**1. Given this Court’s well-established statutory interpretation principles, Congress intended to include state intellectual property claims in § 230(e)(2)’s immunity exception.**

The Court’s first step in statutory interpretation is to examine the plain text, giving effect to every word Congress used. *United States v. Moreno*, 727 F.3d 255, 259 (3d Cir. 2013) (citing *United States v. Gonzales*, 520 U.S. 1, 4 (1997)); *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542 (1940) (“[T]he function of the courts . . . is to construe the language so as to give effect to the intent of Congress.”); *Talley v. Wetzel*, 15 F.4th 275, 280 (3d Cir. 2021) (stating that courts must begin with the statutory text). The Court does so because it “presume[s] Congress expresse[d] its intent through the ordinary meaning of its language.” *A.A. v. Att’y Gen. U.S.*, 973 F.3d 171, 180 (3d Cir. 2020) (quoting *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 302 (3d Cir. 2011)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (stating that it is the Court’s duty to give effect to every word of a statute). When examining this language, the Court must interpret the text as a whole to ensure the statute’s provisions are compatible, not contradictory. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Because of these well-established principles, the Court will only depart from the statutory language based on “the most extraordinary showing of contrary intentions in the legislative history.” *Id.* (quoting *In re Phila. Newspapers, LLC*, 559 F.3d 298, 314 (3d Cir. 2010)).

To further illustrate these principles, in *Hepp v. Facebook*, the Third Circuit held that interpreting “any law pertaining to intellectual property” as “any *federal*

law pertaining to intellectual property” departs too far from the natural reading of § 230(e)(2). *Hepp*, 14 F.4th at 210–11. There, a newscaster sued various social media platforms, including Facebook, alleging violations of her right of publicity under state law. *Id.* at 206–07. However, the district court dismissed the case, holding that the social media companies were entitled to immunity because § 230(e)(2) does not apply to violations of state law. *Id.* at 207.

Reversing the district court’s decision, the Third Circuit reiterated the principle that courts will only stray from the statutory text based on the most extraordinary showing of conflicting congressional intent. *See id.* at 211–12 (“Because we adhere to the most natural reading of § 230(e)(2)’s text, we hold that § 230(e)(2) is not limited to federal laws.”). On appeal, Facebook argued that § 230(e)(2)’s limitation only applies to federal law on three grounds: the structure of § 230(e), the statute’s policy provision, and other practical policy reasons. *Id.* at 210. The court rejected these arguments, reasoning that if Congress wanted to limit § 230 solely to federal law, it knew how to do so. *Id.* at 211 (“[T]hose references also suggest that when Congress wanted to cabin the interpretation about state law, it knew how to do so—and did so explicitly.”). Because policy considerations cannot displace the text, the Third Circuit ultimately adopted the interpretation that § 230(e)(2) applies to both federal and state laws pertaining to intellectual property. *Id.*; *see also Lycos, Inc.*, 478 F.3d (dismissing a claim on other grounds because § 230(e)(2) preserved the state-law claim); *Atl. Rec. Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009)

(holding that because Congress differentiated between local, state, or federal law four times in § 230(e), Congress did not intend to limit § 230(e)(2) solely to federal law).

Conversely, in *Perfect 10, Inc. v. CCBill LLC*, the Ninth Circuit held that “intellectual property” means “federal intellectual property.” *Perfect 10, Inc.*, 488 F.3d at 1119. In its brief analysis, the court noted that state laws regarding intellectual property “are by no means uniform” as compared to relatively well-established federal intellectual property laws. *Id.* at 1118. Based on this concern, the Ninth Circuit ultimately concluded that extending the immunity exception to varying state-law claims would contravene Congress’s goal of promoting the development of the internet. *Id.*

Like the Third Circuit in *Hepp*, the Fifteenth Circuit has obeyed this Court’s well-founded statutory interpretation principles. R. at 17a; *see Hepp*, 14 F.4th at 212. In *Hepp*, the court focused on the plain text of § 230(e)(2) to hold that if Congress wished to limit this subsection solely to federal law, it knew how to do so. *Hepp*, 14 F.4th at 211–12. Here, the Fifteenth Circuit expands on *Hepp*’s plain-text analysis. *See id.* at 210–12; R. at 13a–15a. To begin, the court briefly discussed *Universal Communication Systems, Inc. v. Lycos, Inc.*, to show that the First Circuit simply assumed that § 230(e)(2) applied to state-law claims. R. at 13a–14a; *see Lycos, Inc.*, 478 F.4th at 422. Next, the court utilized the detailed analysis presented by a New Hampshire district court in *Doe v. Friendfinder Network, Inc.* R. at 14a; *see Friendfinder Network, Inc.*, 540 F. Supp. 2d at 299–302. The Fifteenth Circuit agreed with the district court and recognized that the statute contains the word “any” in §

230(e)(2), which illustrates that Congress did not intend to limit this subsection to a particular type of intellectual property law. R. at 14a; *see Friendfinder Network, Inc.*, 540 F. Supp. 2d at 299. On top of this, the Fifteenth Circuit also adopted the district court’s rationale that Congress used the word “federal” in other parts of the CDA, indicating that Congress deliberately omitted the phrase from § 230(e)(2). R. at 14a; *see Friendfinder Network, Inc.*, 540 F. Supp. 2d at 300. Finally, the court noted that a New York district court also concluded that § 230(e)(2) encompasses state law for many of the same reasons as the court in *Friendfinder Network, Inc.* R. at 14a; *see Project Playlist, Inc.*, 603 F. Supp. 2d at 704; *Friendfinder Network, Inc.*, F. Supp. 2d at 299–302.

While the Fifteenth Circuit recognized the same policy concerns that the Ninth Circuit raised in *Perfect 10, Inc.*, the majority ultimately rejected these arguments because they cut against these longstanding statutory interpretation principles. R. at 16a–17a.; *Perfect 10, Inc.*, 488 F.3d at 1118–19. Judge Walt’s dissent builds on the Ninth Circuit’s concerns by arguing that the majority should have examined §230(e)(2) beyond the plain text to effectuate rather than frustrate Congress’s policy of promoting the development of the internet. R. at 50a (quoting *D.B. v. Cardall*, 826 F.3d 721, 739 (4th Cir. 2016)). However, this argument is misplaced for two reasons. R. at 16a–17a. First, as the majority notes, it is not the court’s job to second guess Congress’s policy decisions, and § 230(e)(2) illustrates Congress’s objective of balancing its stated policy goals with state intellectual property rights. *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 126 (1989) (“Our task is to apply the text,

not to improve upon it.”); R. at 17a. Second, the Ninth Circuit’s interpretation creates inconsistency among § 230’s provisions. R. at 12a. Specifically, this interpretation contradicts § 230(e)(3), which states that “[n]othing in this section shall be construed to prevent any [s]tate from enforcing any [s]tate law that is consistent with this section.” 47 U.S.C. § 230(e)(3); R. at 12a. Overall, the majority properly followed this Court’s statutory interpretation principles by giving effect to Congress’s own language rather than allowing certain policy considerations to displace the text. R. at 17a.

**2. Lucille Austero’s right-of-publicity claim constitutes an intellectual property claim under § 230(e)(2) because it protects Ms. Austero’s right to reap the rewards of her success.**

Though the courts typically interpret and apply § 230 in defamation cases, the statute’s language does not limit its application solely to defamation cases. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009). Several courts have applied § 230 to right-of-publicity claims, recognizing that the right of publicity “involves a cognizable property interest.” *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 967 (10th Cir. 1996) (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977)); *see also Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323 (11th Cir. 2006) (stating that “there appears to be no dispute that the right of publicity is a type of intellectual property right”). This cause of action may have originated from the right of privacy; however, today’s courts acknowledge that the right of publicity holds an important place in intellectual property law. *Almeida*, 456

F.3d at 1322 (citing J. Thomas McCarthy, *Melville B. Nimmer & the Rights of Publicity: A Tribute*, 34 UCLA L. REV. 1703, 1712 (1987)).

The Supreme Court has concluded that a state's interest in protecting an individual's right of publicity is "closely analogous to the goals of patent and copyright law." *Zacchini*, 433 U.S. at 573. In *Zacchini v. Scripps-Howard Broadcasting Co.*, this Court highlighted the important differences between the right of privacy and the right of publicity. *Id.* Specifically, this Court focused on the fact that the goal of right-of-publicity claims is not to protect hurt feelings; rather, it is to protect an individual's right to "reap the reward of his endeavors"—the same goal underlying intellectual property law. *Id.*; see also *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 151 (3d Cir. 2013) (stating that the goal of a right-of-publicity claim is to "protect the property interest that an individual gains and enjoys in his identity through his labor and effort").

In contrast, some lower courts have suggested that only certain right-of-publicity claims qualify as intellectual property claims. See *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 163 n.13 (D. Mass. 2015). Specifically, in *Doe v. Backpage.com, LLC*, a Massachusetts district court—in a footnote—stated that though a person may be able to copyright their photograph, "it does not follow that the underlying image is *ipso facto* protectable under intellectual property law." See *id.* at 163–64. However, the court affirmed the motion to dismiss on other grounds. *Id.* at 164.

Relying on *Zacchini*, the Fifteenth Circuit correctly held that Lucille Austero has stated an intellectual property claim for purposes of § 230(e)(2). R. at 18a; see



*Zacchini*, 433 U.S. at 473. In *Zacchini*, this Court made it clear that right-of-publicity claims are analogous to intellectual property law because they protect an individual’s right to “reap the reward of his endeavors.” *Zacchini*, 433 U.S. at 473. Similarly, Lucille Austero brought this right-of-publicity claim against FakeBlock and Maebly Fünke to protect her right to reap the rewards of her success. Lucille Austero is not seeking damages for embarrassment; instead, Ms. Austero is seeking damages for FakeBlock and Maebly Fünke’s infringement upon her right to profit from the use of her name and likeness. *Id.*; R. at 6a. Accordingly, Ms. Austero’s claim seeks to protect her right to profit from another’s use of her fame—a protection this Court has deemed comparable to the goals of intellectual property law. R. at 6a; R. at 18a; *see Zacchini*, 433 U.S. at 473.

Even if this Court adopts the approach suggested by *Backpage.com* and Judge Walt’s dissent, Lucille Austero’s claim still qualifies as an intellectual property claim under § 230(e)(2). *See Backpage.com, LLC*, 104 F. Supp. 3d at 163–64; R. at 18a. In his dissent, Judge Walt relied on *Backpage.com* to support his argument that Lucille Austero’s right-of-publicity claim does not qualify as an intellectual property claim. R. at 54a; *see Backpage.com, LLC*, 104 F. Supp. 3d at 163 n.13. Specifically, Judge Walt stated that Lucille Austero’s physical appearance is not a product of her human intellect. R. at 55a. However, this statement ignores Lucille Austero’s esteemed career as a singer, dancer, and actress—all of which has led to her fame and fortune. R. at 55a; R. at 3a. The prestige arising from Lucille Austero’s image is a direct result

of her intellect in creating a successful career. R. at 3a. Thus, Lucille Austero has sufficiently alleged an intellectual property claim for purposes of § 230(e)(2).

**B. Alternatively, FakeBlock is not immune from Lucille Austero’s claim because the CDA does not shield FakeBlock from liability for its own speech.**

Again, § 230 may provide broad protection for websites, but this immunity is not limitless. *See Force*, 934 F.3d at 64. Section 230 protects websites that act as a “publisher or speaker of any information provided by another.” However, these websites remain liable for their own speech. 47 U.S.C. § 230(c)(1); *Lycos*, 478 F.3d at 419–420 (citing *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1262–63 (N.D. Cal. 2006)). Accordingly, FakeBlock is not entitled to CDA immunity because the website is partially responsible for the creation of *Moonie Bares All*, a video posted by Maebly Fünke in her capacity as FakeBlock’s director of investor relations. R. at 43a.

**1. FakeBlock, through Maebly Fünke, is responsible for the creation of *Moonie Bares All*.**

Section 230 immunity does not apply when a plaintiff seeks to hold a website liable for its own speech. *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016). A website is no longer acting as a publisher or speaker of another party’s information when that website is responsible—in whole or in part—for the creation of the information. *LeadClick Media, LLC*, 838 F.3d at 174 (citing 47 U.S.C. § 230(f)(3)). Thus, for summary judgment purposes, if a plaintiff proves that a jury—construing all reasonable inferences in the plaintiff’s favor—could potentially find that a website is responsible for the creation of the tortious content, that website will

not receive CDA immunity. *Id.* (citing *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009)); *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021).

Demonstrating this point, the court in *Anthony v. Yahoo! Inc.*, held that Yahoo! did not receive CDA immunity from Anthony's fraud claims because Yahoo! intentionally created the tortious content. *Anthony*, 421 F. Supp. 2d at 1262–63. There, Yahoo! asserted immunity under the CDA after Anthony alleged that the website created false dating profiles to lure users into renewing their subscriptions. *Id.* at 1262. Ultimately, the court held that the CDA did not apply because Yahoo! created and posted the profiles itself. *Id.* at 1263; *see also Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005) (holding that a website did not receive immunity because the allegations supported a finding that its operators contributed to the creation of the defamatory content).

Comparable to *Anthony*, FakeBlock is not entitled to CDA immunity because *Moonie Bares All* is FakeBlock's own speech. *See Anthony*, 421 F. Supp. 2d at 1263; R. at 43a. Maeby Fünke, one of FakeBlock's corporate officers, created and posted *Moonie Bares All* to the website. R. at 5a–6a. At the time, only the three corporate officers possessed the authority to upload videos to FakeBlock. R. at 5a. If a third party had posted the video, FakeBlock would still be eligible for CDA immunity. *See* 47 U.S.C. § 230(c)(1); *Lycos*, 478 F.3d at 419–420 (noting that immunity only applies when the content is provided by another information content provider). However, because the only individuals who could add content to FakeBlock were FakeBlock's

own officers, every post constituted FakeBlock’s own speech. R. at 5a. Therefore, FakeBlock does not receive CDA immunity for its own speech. R. at 43a.

**2. Maeby Fünke acted in her corporate capacity as FakeBlock’s director of investor relations when she posted *Moonie Bares All*.**

Individuals—as well as corporations—can be liable for certain violations of intellectual property. *See Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991) (citing *Mead Johnson & Co. v. Baby’s Formula Serv., Inc.*, 402 F.2d 19 (5th Cir. 1968)). This is because corporations can only act through their agents and employees. *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 225 (3d Cir. 2007) (citing *Bel-Ray Co. v. Chemrite Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999)). Therefore, a court will hold a corporation liable for the acts of its agent if the agent is acting within the course and scope of their employment. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998).

Illustrating this point, the court in *Council on American Islamic Relations. v. Ballenger* held that Representative Ballenger acted within the course and scope of his employment when he made certain defamatory statements. *See Council on Am. Islamic Rel. v. Ballenger*, 444 F.3d 659, 664–65 (D.C. Cir. 2006). In this case, the Council on American Islamic Relations (CAIR) sued a United States Representative, Cass Ballenger, for defamatory comments he made in an interview. *Id.* at 662. To decide whether he received immunity under the Westfall Act, the court analyzed whether Representative Ballenger acted within the course and scope of his employment as a federal official. *Id.* Ultimately, the court held that Representative Ballenger was acting within the scope of his employment because the interview fell

within his authorized duties, and the defamatory statement was incidental to the work he was employed to perform. *Id.* at 664–65.

Following this analysis, we agree with Chief Judge Ping’s concurrence that FakeBlock does not receive CDA immunity because Maeby Fünke acted within the scope of her employment when she posted *Moonie Bares All*. R. at 41a–43a. Like Representative Ballenger, Maeby Fünke was acting within the scope of her employment because attracting investors to FakeBlock was an essential part of her authorized duties. *See Ballenger*, 444 F.3d at 664–65; R. at 42a. At the time she posted the video, Maeby Fünke served as FakeBlock’s director of investor relations. R. at 5a. As the director of investor relations, some of Maeby Fünke’s job duties include advertising the website and attracting potential investors. R. at 42a. Accordingly, Maeby Fünke posted *Moonie Bares All* solely to FakeBlock to carry out these job duties. R. at 42a. She testified that she only posted the video to FakeBlock because she knew the video would go viral, and she wanted the web traffic to specifically go to FakeBlock. R. at 42a. Therefore, a reasonable jury could conclude that Maeby Fünke acted in her corporate capacity when she posted *Moonie Bares All*. R. at 43a.

Judge Walt’s dissent suggests that Maeby Fünke could not have acted in her corporate capacity because FakeBlock did not have well-defined job duties. R. at 56a–58a. Furthermore, Judge Walt argues that Lucille Austero has not presented any evidence showing that Maeby Fünke had a responsibility to attract investors to FakeBlock. R. at 57a. First, even though FakeBlock’s job titles were vague, deposition testimony revealed each officer’s role. R. at 5a n.3. It reasonably follows that if the

testimony revealed that Maeby Fünke was the director of investor relations, she acted within this role when she posted the video. R. at 5a–6a. This is especially true given the fact that she posted the video with the intent for it to go viral and attract web traffic to FakeBlock. R. at 5a–6a. Second, because Maeby Fünke was the director of investor relations, advertising and attracting investors is, at the very least, incidental to the work she was employed to perform. R. at 42a; *see Ballenger*, 444 F.3d at 664–65. For these reasons, we agree with Chief Judge Ping’s concurrence that FakeBlock is not entitled to immunity because the CDA does not shield websites from liability for their own speech. R. at 41a–43a.

**II. This Court should uphold the Fifteenth Circuit’s decision because the defendants appropriated Lucille Austero’s identity through *Moonie Bares All*—a form of expression the First Amendment does not protect.**

Several states, including Newport Beach, recognize the right of publicity “to protect the property interest that an individual gains and enjoys in his identity through his labor and effort.” *Hart*, 717 F.3d at 151. However, the First Amendment is a powerful—though certainly not invincible—defense to the right of publicity. *See id.* at 150 (first citing *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003); and then citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–61 (1985)). Therefore, this Court must analyze Lucille Austero’s right-of-publicity claim and whether this protection of Ms. Austero’s identity overcomes Maeby Fünke’s freedom of expression. *See id.* at 153 (noting that the courts must balance the tension between the right of publicity and the First Amendment); R. at 19a.

**A. The defendants infringed upon Lucille Austero’s right of publicity by publishing *Moonie Bares All*—a video featuring an artificial intelligence model identifiable as Ms. Austero.**

Given that the right of publicity is “a creature of state law,” several states have adopted some form of the cause of action either by statute or at common law. *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 928 n.13 (6th Cir. 2003). Newport Beach has adopted the Restatement’s version of the cause of action, which states: “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 Restatement is further broken down into two elements: validity and infringement.<sup>2</sup> *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 304 (quoting 1 THOMAS J. MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 3:2 (2d ed. 2000)) (noting that New Hampshire has adopted § 652C of the Restatement). Specifically, plaintiffs must show that they own an enforceable right in their identity or personas and that the defendants, without permission, used some aspect of the identity or persona in a way that the plaintiffs are identifiable from the use. *Id.* In accordance with these two elements, Lucille Austero owns an enforceable right in her identity, and Maeby Fünke used Ms. Austero’s identity—without her permission—in such a way that she

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<sup>2</sup> The second element, infringement, is divided into two subparts: (1) “Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant’s use” and (2) “Defendant’s use is likely to cause damage to the commercial value of that persona.” *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 304. However, the defendants did not challenge whether its infringement was likely to cause damage to the commercial value of Lucille Austero’s persona. R. at 21a.

is identifiable in *Moonie Bares All*. *See id.* (applying the two elements to § 652C of the Restatement); R. at 31a.

**1. Maeby Fünke appropriated Lucille Austero’s identity and persona by utilizing her most notable roles in *Moonie Bares All*.**

Courts have acknowledged that “[t]elevision and other media create marketable celebrity identity value.” *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992). To protect this identity value, courts must focus on the relationships between actors or actresses and their roles. *McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994); *see also Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 625 (6th Cir. 2000). Accordingly, this Court should focus on the relationship between Ms. Austero and her roles because she “does not lose the right to control the commercial exploitation of . . . her likeness by portraying a fictional character.” *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997) (citing *Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979)).

For instance, in *White v. Samsung Electronics America, Inc.*, the Ninth Circuit reversed summary judgment because the plaintiff alleged facts showing the defendants appropriated her identity. *See White*, 971 F.2d at 1399. There, Vanna White—hostess of the *Wheel of Fortune* game show—sued Samsung after the company released an advertisement featuring a robot utilizing some of White’s identifying features. *Id.* In addition to standing on the game show set, the robot wore a long gown, blonde wig, and large jewelry. *Id.* The court stated that Samsung appropriated White’s identity because the robot could only be referring to her, noting that even Samsung referred to the advertisement as the “Vanna White ad.” *See id.*



Likewise, the Third Circuit reversed summary judgment in *McFarland v. Miller* after the plaintiff raised a genuine issue of material fact regarding his proprietary interest in his childhood character’s name. *See McFarland*, 14 F.3d at 922. In that case, George “Spanky” McFarland sued Joseph Miller for infringing upon his right of publicity. *Id.* at 913–14. During his childhood, McFarland starred in a popular television show—“The Little Rascals”—as a character nicknamed “Spanky.” *Id.* at 914. In the lawsuit, McFarland alleged that Miller’s restaurant appropriated an image of McFarland from his time on the show as well as the name “Spanky.” *Id.* Though Miller argued that the rights to the name and image belonged to the producer of the show, the court ultimately rejected this argument. *Id.* The court reasoned that if an actor has a personal connection to the character’s name or image, then the actor has a viable right-of-publicity claim. *See id.* at 922; *see also Landham*, 227 F.3d at 626 (explaining that the use of a character must invoke the actor’s own persona for the actor to have a viable right-of-publicity claim).

Comparable to *White*, Lucille Austero has alleged facts showing that FakeBlock and Maeby Fünke appropriated her identity. *See White*, 971 F.2d at 1399; R. at 21a–22a. In *White*, the court held that Vanna White raised a genuine issue of material fact when she alleged that Samsung appropriated her identity by releasing an advertisement featuring a robot exhibiting Ms. White’s distinct features. *White*, 971 F.2d at 1399. Specifically, the robot wore a gown, a blonde wig, and large jewelry while appearing on the game show’s set. *Id.* Likewise, Maeby Fünke appropriated Lucille Austero’s identity by utilizing several of Ms. Austero’s identifying features. R.

at 25a. Maeby Fünke’s character, Moonie, mimics Lucille Austero’s physical traits, her outfit from *Cabaret*, and her tap-dance routine from *Cabaret*. R. at 25a. Though each of these traits by themselves may not point to Lucille Austero, all of these traits viewed together only point to Ms. Austero. R. at 25a. Thus, just like *White*, Lucille Austero has raised a genuine issue of material fact by alleging facts showing that Moonie is identifiable as Ms. Austero. *White*, 971 F.2d at 1399; R. at 25a.

Furthermore, like *McFarland*, Lucille Austero has a proprietary interest in the iconic roles she has played, which Maeby Fünke has appropriated. *See McFarland*, 14 F.3d at 922; R. at 25a. In *McFarland*, the court held that George McFarland had an enforceable property interest in the character that he played as a child because he had a personal connection with the role. *McFarland*, 14 F.3d at 922. Accordingly, Maeby Fünke has appropriated Lucille Austero’s persona through Ms. Austero’s famous character, Junie Moon. R. at 25a. Though Judge Walt’s dissent argues that there are no similarities between Moonie and Junie Moon, this argument ignores other relevant facts. R. at 64a; R. at 25a. Not only does Moonie utilize the name of Lucille Austero’s character, but Moonie replicates Junie Moon’s striptease while also displaying several of Ms. Austero’s identifying features. R. at 25a.

Moreover, Maeby Fünke has appropriated Lucille Austero’s persona through Ms. Austero’s iconic role in *Cabaret*. R. at 25a. In *Moonie Bares All*, Moonie wears the same outfit that Lucille Austero wore in *Cabaret* and imitates the same tap-dance performance from the film. R. at 25a. Once again, Judge Walt’s dissent argues that Lucille Austero does not have a protectable interest in her role in the film. R. at 63a.

However, this argument misinterprets Lucille Austero’s argument. R. at 30a. Lucille Austero is not simply asserting that Maeby Fünke appropriated her role in *Cabaret*; instead, Lucille Austero is arguing that Maeby Fünke appropriated her *identity* partly because of the imitation of her iconic roles. R. at 30a. Thus, Lucille Austero has raised a genuine issue of material fact as to Maeby Fünke’s appropriation of Ms. Austero’s identity. R. at 31a.

**2. Maeby Fünke exploited Lucille Austero’s likeness when she used artificial intelligence to create Moonie—a character closely resembling Ms. Austero.**

Although courts have considered the appropriation of likeness in the context of animatronic robots and video-game avatars, the courts have not yet considered appropriation through artificial intelligence models. *See Wendt*, 125 F.3d at 809 (analyzing right-of-publicity infringement in the context of animatronic robots); *Hart*, 717 F.3d at 146–47 (discussing right-of-publicity infringement in the context of video-game avatars). However, these cases are instructive because they all illustrate similar principles. *See Wendt*, 125 F.3d at 809; *Hart*, 717 F.3d at 146–47. Particularly, a defendant’s appropriation of the plaintiff’s likeness does not have to be an exact replication to constitute an infringement on the plaintiff’s right of publicity. *See Wendt*, 125 F.3d at 809 (“[L]ikeness’ need not be identical or photographic.”).

In accordance with this principle, a plaintiff has raised a genuine issue of material fact if the plaintiff alleges that a defendant has appropriated their likeness or identity to some degree. *See Wendt*, 125 F.3d at 811–12. In *Wendt v. Host International, Inc.*, two famous actors sued Host International, Inc. after the company

created animatronic robots resembling the actors' roles on the popular television show, "Cheers." *Id.* at 809. Though the district court granted summary judgment in favor of Host, the Ninth Circuit reversed because the actors had raised a genuine issue of material fact as to the degree to which the robots looked like them. *Id.* at 811.

Comparable to *Wendt*, Lucille Austero has raised a genuine issue of material fact as to the degree to which Moonie resembles her. *See Wendt*, 125 F.3d at 811; R. at 28a. Specifically, Moonie's hairstyle, hair color, skin color, height, body style, and body proportions resemble Lucille Austero. R. at 25a. Furthermore, Moonie is also wearing the same costume that Austero wore in her iconic role in *Cabaret*. R. at 25a. Though there are some acknowledged dissimilarities, such as Moonie's nose or the size of Moonie's mouth, these dissimilarities are not dispositive. R. at 23a–24a. Because Moonie resembles Lucille Austero to *some* degree, Ms. Austero has raised a genuine issue of material fact. R. at 24–25a.

### **3. Maeby Fünke violated Lucille Austero's right of publicity by imitating her singing voice without her consent.**

Though a plaintiff's "identity or persona" is typically associated with their name or likeness, courts have expanded "identity or persona" to also include a plaintiff's distinctive voice. *See McFarland*, 14 F.3d at 918 (associating the right of publicity with an individual's right to protect their name or likeness); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (holding that the defendants appropriated the plaintiff's distinctive singing voice). The courts made this expansion because "a voice is as distinctive and personal as a face." *Midler*, 849 F.2d at 463. However, courts

must consider how widely known a singer's voice is when determining whether a defendant has appropriated the voice. *Id.*

Demonstrating this, the Ninth Circuit expanded "identity or persona" to include a plaintiff's distinctive singing voice in *Midler v. Ford Motor Co. Midler*, 849 F.2d at 463. There, Bette Midler, a well-known actress and singer, sued Ford Motor Company after it aired a commercial imitating Midler's voice. *Id.* at 461–62. Ford did not use Ms. Midler's name or likeness; rather, the company hired a singer to imitate her voice without her consent. *Id.* Because the human voice is so closely tied to a person's identity, the court held that Ford pirated Bette Midler's identity. *Id.* at 463. However, the court did note that this holding does not extend to every imitation of a voice; instead, the holding applies when a company deliberately appropriates a professional singer's well-known voice in order to promote a product. *Id.*

Comparable to *Midler*, Lucille Austero has a widely known, distinctive singing voice, which Maeby Fünke imitated without her consent. *Midler*, 849 F.2d at 461–62; R. at 26a. Lucille Austero is a world-renowned singer. R. at 3a. She has sung on Broadway and released seven studio albums, all of which have won her many awards. R. a 3a. Based on this fame and success, Lucille Austero's voice, in terms of uniqueness, is similar to Bette Midler's. R. at 3a; *see Midler*, 849 F.2d at 463.

Furthermore, Maeby Fünke imitated Lucille Austero's distinct singing voice. R. at 2a. Specifically, Maeby Fünke used Ms. Austero's various vocal performances as the "raw building blocks" for her character, Moonie's, voice. R. at 27a. Though Maeby Fünke claims that she altered the voice to be distinct from Lucille Austero's, expert

testimony revealed that Moonie’s voice could very well be traced to Lucille Austero’s voice. R. at 26a–27a. It is also important to note the song that Moonie sings in the video. R. at 26a. In *Moonie Bares All*, Moonie sings a song called “New York, New York,” the name of a song widely attributable to Lucille Austero’s role in the film of the same name. R. at 26a. Although the lyrics have been altered, we agree with the Fifteenth Circuit that “it is not coincidental that *Moonie Bares All* features a song with the same name as one widely attributed to Austero.” R. at 26a. Viewing all of these facts together, Lucille Austero has raised a genuine issue of material fact regarding her right-of-publicity claim. R. at 31a.

**B. The First Amendment does not protect *Moonie Bares All* because the defendants failed to prove that the video qualifies as a transformative use of Lucille Austero’s likeness.**

There is an ongoing struggle for courts attempting to balance First Amendment rights with rights of publicity. *See Hart*, 717 F.3d at 152 (citing *Zacchini*, 433 U.S. at 574–75). To balance these interests, the courts created three primary tests: (1) the predominant-use test, (2) the *Rogers* test, and (3) the transformative-use test. *Id.* at 153. However, because the transformative-use test specifically seeks to balance intellectual property interests against the First Amendment, this test is best suited for analyzing Lucille Austero’s claim. *Id.* at 158.

The courts have laid out five factors for determining whether a work has been sufficiently “transformed into something more than mere likeness or imitation,”

which ultimately creates a spectrum of infringement.<sup>3</sup> *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1274 (9th Cir. 2013) (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809–10 (Cal. 2001)). Simply put, while parodies of a celebrity may receive First Amendment protection, literal depictions or imitations of a celebrity for commercial gain constitute infringement. *Comedy III Prods., Inc.*, 21 P.3d at 808.

Demonstrating this point, a California court has applied the transformative-use test to video game avatars. *See No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 411 (Cal. Ct. App. 2011). In this case, the defendants created a video game featuring avatars that resembled the real-life band, “No Doubt.” *Id.* Specifically, the avatars were “literal recreations” of the band members, and the avatars were engaging in the “same activity by which the band achieved and maintains its fame.” *Id.* Based on this, the California court held that the video game failed to transform the avatars into something other than literal depictions of the band members doing exactly what they are famous for. *Id.* Therefore, the court rejected the First Amendment defense. *Id.*

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<sup>3</sup> These five factors include: (1) whether the defendant used the celebrity’s likeness as the “raw materials” for the work rather than creating a literal depiction or imitation of the celebrity; (2) whether the work is the “defendant’s own expression” and something more than just the celebrity’s likeness; (3) whether the literal or creative elements predominate; (4) whether the economic value of the work derives from the celebrity’s fame; and (5) whether the defendant’s skill is subordinated to the “goal of creating a conventional portrait of the celebrity.” R. at 33a (citing *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1274).

Relying on the California court, the Ninth Circuit—in two separate cases—also used the transformative-use test to reject the First Amendment affirmative defense. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1277; *Davis v. Elect. Arts Inc.*, 775 F.3d 1172, 1178 (9th Cir. 2015). In both cases, the defendants created football video games, which included avatars resembling famous football players. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1276; *Davis*, 775 F.3d at 1178. Because the avatars were literal depictions of the athletes engaged in the activity that made them famous, the court held that the defendants failed to prove the transformative-use defense. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1277; *Davis*, 775 F.3d at 1178; *see also Hart*, 717 F.3d at 170 (“We therefore hold that the . . . games at issue in this case do not sufficiently transform Appellant’s identity to escape the right of publicity claim. . . .”).

Similar to the cases involving the band and the football players, Maeby Fünke has failed to show that she sufficiently transformed her character, Moonie, into something other than a literal depiction of Lucille Austero. *See No Doubt*, 122 Cal. Rptr. 3d at 411; *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1277; *Davis*, 775 F.3d at 1178; R. at 25a; R. at 37a. In all of these cases, the courts rejected the transformative-use defense when the avatar closely resembled the celebrities and when the avatar was engaged in the activity that made the celebrity famous. *See No Doubt*, 122 Cal. Rptr. 3d at 411; *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1277; *Davis*, 775 F.3d at 1178. Here, Moonie



resembles Lucille Austero in a way that she is identifiable from the video. R. at 25a. Specifically, Moonie shares Lucille Austero's skin color, hair color, signature hairstyle, height, body style, and body proportions. R. at 25a. Additionally, Moonie is acting, singing, and dancing in the video—all the activities in which Lucille Austero has won numerous awards and garnered fame. R. at 25a.

Though there are some dissimilarities between Moonie and Lucille Austero, namely certain facial features, these differences are not dispositive. R. at 23a–24a. If this analysis was limited to Moonie's face, the transformative-use defense may apply. R. at 24a. However, just like a video game avatar, a model generated by artificial intelligence will not perfectly replicate a celebrity. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1277 (rejecting the argument that users can alter the avatar's characteristics). Therefore, considering the totality of Moonie's features, the character is a literal depiction of Lucille Austero. R. at 25a; R. at 37a.

Additionally, though Judge Walt's dissent argues that *Moonie Bares All* constitutes a parody, this argument fails to consider Maeby Fünke's intent behind the video. R. at 67a. In his dissent, Judge Walt compares *Moonie Bares All* to a skit on *Saturday Night Live*. R. at 67a (citing *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1520 (9th Cir. 1993) (Kozinski, J., dissenting)). However, the purposes underlying the creation of a *Saturday Night Live* skit differ from Maeby Fünke's intentions in creating *Moonie Bares All*. *See generally Elsmere Music, Inc. v. Nat'l Broad. Co.*, 482 F. Supp. 741, 744 (S.D.N.Y. 1980) (demonstrating that the goal of

*Saturday Night Live* sketches is to create effective parodies). Here, Lucille Austero has raised a genuine issue of fact regarding Maeby Fünke’s intentions in creating *Moonie Bares All*. R. at 5a–6a. Specifically, Lucille Austero has alleged that Maeby Fünke appropriated Ms. Austero’s identity in *Moonie Bares All* to draw attention to FakeBlock and attract investors to the website. R. at 5a–6a. Because Maeby Fünke has failed to show that she sufficiently transformed her character, Moonie, into something other than a literal depiction of Lucille Austero, *Moonie Bares All* does not receive First Amendment protection. R. at 39a. Therefore, this Court should affirm the decision of the Fifteenth Circuit. R. at 39a.

### **CONCLUSION**

Lucille Austero has demonstrated that FakeBlock is not entitled to CDA immunity. Following this Court’s statutory interpretation principles, Congress intended for § 230(e)(2)’s immunity exception to encompass intellectual property claims arising under state law. Moreover, Lucille Austero’s right-of-publicity claim qualifies as an intellectual property claim because several courts, including this Court, recognize the similarities between the two claims. However, even if this Court adopts a different interpretation of § 230(e)(2), FakeBlock remains liable for the speech of its own corporate officer—Maeby Fünke.

Additionally, Lucille Austero has shown that *Moonie Bares All* infringes upon her right of publicity and does not deserve First Amendment protection. Maeby Fünke infringed upon Lucille Austero’s right of publicity in *Moonie Bares All* by utilizing her most notable roles, using artificial intelligence to create a character

resembling her, and imitating her singing voice without her consent. Further, *Moonie Bares All* does not receive First Amendment protection because Maebly Fünke failed to transform Moonie into something other than a literal depiction of Lucille Austero.

For these reasons, this Court should affirm the decision of the Fifteenth Circuit Court of Appeals.

Respectfully submitted,

/s/ Team 4

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Counsel for Respondent

**CERTIFICATE OF SERVICE**

We certify that a copy of the Respondent’s brief was served upon Petitioners, FakeBlock, Inc. and Maebly Fünke, through the counsel of record by certified electronic receipt request, on this, the 20th day of November, 2023.

Respectfully submitted,

/s/ Team 4

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Counsel for Respondent

**CERTIFICATE OF COMPLIANCE**

The undersigned counsel certifies that the Respondent’s brief complies with the word limitation specified in Rule 2.5(c) of the 2024 Competition Rules for The Hunton Andrews Kurth Moot Court National Championship. The total word count is 10,085 words.

Respectfully submitted,

/s/ Team 4

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Counsel for Respondent

## APPENDIX A

### **The Communications Decency Act of 1996**

#### (a) Findings

The Congress finds the following:

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

#### (b) Policy

It is the policy of the United States—

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

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

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

(1) Treatment of publisher or speaker

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

(2) Civil liability

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

- (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
- (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Obligations of interactive computer service

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

(e) Effect on other laws

(1) No effect on criminal law

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

(2) No effect on intellectual property law

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

(3) State law

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

(4) No effect on communications privacy law

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

(5) No effect on sex trafficking law

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

- (A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;
- (B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or
- (C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

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

(2) Interactive computer service

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

(3) Information content provider

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

(4) Access software provider

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

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

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

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



## APPENDIX B

### **Constitutional Provision**

#### **U.S. CONST. amend. I**

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.