

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 PETITIONERS**

---

**TEAM 41**

*Counsel for Petitioners*

---

---

## QUESTIONS PRESENTED

1. Section 230 of the Communications Decency Act immunizes internet service providers from claims that treat the provider as the publisher or speaker of information provided by another information content provider unless the claim pertains to intellectual property. After Fünke created and uploaded *Moonie Bares All* to FakeBlock, Austero brought a state-law claim against FakeBlock and Fünke for allegedly infringing upon her right to profit from her publicity. Is FakeBlock immune from Austero's claim?
2. Newport Beach's right of publicity protects individuals when others appropriate their likeness; however, the First Amendment shields expressions from liability if they comment on a matter of public interest or transform raw materials into original creations. Fünke created a short film—*Moonie Bares All*—that tells a story about a tap-dancing Newport Beach politician who struggles with substance abuse. Do the right of publicity and the First Amendment prohibit Austero's claim?

## TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW .....	1
STATEMENT OF JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED .....	1
STATEMENT OF THE CASE .....	3
SUMMARY OF THE ARGUMENT .....	9
ARGUMENT .....	12
I.    Under the CDA § 230, FakeBlock is immune from Austero’s right-of publicity claim. ....	13
A.    This Court should hold that § 230(e)(2)’s intellectual-property exclusion only applies to federal intellectual-property claims. ....	14
1.    Section 230’s text and structure permit two interpretations of § 230(e)(2).....	16
2.    Congress’s express purpose confirms that § 230(e)(2) should only exclude federal intellectual property claims from immunity. ....	18
3.    Excluding only federal intellectual-property claims from immunity ensures predictability in the law and prevents censorship that stifles the freedom of speech. ....	21
B.    Even if this Court interprets § 230(e)(2) to exclude all federal and state intellectual-property claims from immunity, Austero’s specific claim does not pertain to intellectual property. ....	22
1.    This Court’s precedent only suggests that some right-of-publicity claims are intellectual-property claims. ....	23
2.    Austero’s right-of-publicity claim is not an intellectual-property claim because it does not seek to protect products of the human intellect.....	25

C.	FakeBlock is immune from Austero’s claim because Fünke acted in her personal capacity when she uploaded <i>Moonie Bares All</i> .....	27
II.	Austero’s right-of-publicity claim fails as a matter of law because <i>Moonie Bares All</i> does not appropriate Austero’s identity under Newport Beach law, and the First Amendment shields Fünke and FakeBlock from liability. ....	31
A.	Newport Beach only protects a right-of-publicity plaintiff when the defendants appropriate the plaintiff’s “name or likeness” to benefit themselves. ....	32
1.	This Court need only rely on § 652C to define the right of publicity’s scope. ....	32
2.	Protecting “identity or persona” expands the right of publicity’s scope beyond what Newport Beach law requires. ....	34
B.	Austero has not shown a viable right-of-publicity claim because she does not own a valid publicity interest upon which <i>Moonie Bares All</i> infringes. ....	37
1.	Under Newport Beach’s right-of-publicity law, Austero has not shown that Fünke and FakeBlock appropriated her likeness for their own benefit. ....	37
2.	Even if this Court expands Newport Beach’s law beyond § 652C, Austero has not shown that Fünke and FakeBlock used her identity or persona in an identifiable way. ....	42
C.	The First Amendment shields <i>Moonie Bares All</i> from any liability because it is a parody, it comments on a matter of public interest, and it transforms raw materials into an original, creative expression. ....	47
1.	A reasonable viewer understands that <i>Moonie Bares All</i> is a parody that comments on Newport Beach’s election. ....	47
2.	<i>Moonie Bares All</i> is a fair comment on a matter of public interest—the “darker side” of a Newport Beach congressional candidate. ....	49
3.	<i>Moonie Bares All</i> transforms the “raw materials” that it uses from Austero’s performances into an original and creative expression. .	50
	CONCLUSION.....	53

## TABLE OF AUTHORITIES

### Constitutional Provisions

U.S. CONST. amend. I.....	21
---------------------------	----

### Statutes

17 U.S.C. § 512.....	19
47 U.S.C. § 230.....	13
47 U.S.C. § 230(a) .....	18, 19
47 U.S.C. § 230(a)(3) .....	13
47 U.S.C. § 230(a)(4) .....	13
47 U.S.C. § 230(b) .....	18, 19
47 U.S.C. § 230(b)(2) .....	13, 18, 21
47 U.S.C. § 230(c)(1) .....	14, 28
47 U.S.C. § 230(e) .....	14, 18
47 U.S.C. § 230(e)(2) .....	14
47 U.S.C. § 230(e)(3) .....	16
47 U.S.C. § 230(e)(4) .....	16
47 U.S.C. § 230(f)(3).....	28
KY. REV. STAT. ANN. § 391.170(1) (West 1984).....	36

### United States Supreme Court Cases

<i>303 Creative LLC v. Elenis</i> , 600 U.S. 570 (2020) .....	12
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	30
<i>Bob Jones Univ. v. United States</i> , 461 U.S. 574 (1983) .....	15
<i>Buckley v. Am. Const'l Law Found., Inc.</i> , 525 U.S. 182 (1999) .....	49
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994) .....	48
<i>Erie R.R. Co. v. Tompkins</i> , 304 U.S. 64 (1938).....	32
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U.S. 495 (1952).....	13, 47
<i>King v. Burwell</i> , 576 U.S. 473 (2015).....	15

<i>McCullen v. Coakley</i> , 573 U.S. 464 (2014).....	12
<i>N.Y. State Dept. of Soc. Servs. v. Dublino</i> , 413 U.S. 405 (1973).....	15, 18
<i>Shapiro v. United States</i> , 335 U.S. 1 (1948).....	15
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967).....	13
<i>United States v. Am. Trucking Ass'ns</i> , 310 U.S. 534 (1940) .....	15
<i>W.V. Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943) .....	12
<i>Zacchini v. Scripps-Howard Broad. Co.</i> , 433 U.S. 562 (1977).....	23

### **United States Courts of Appeal Cases**

<i>Almeida v. Amazon.com, Inc.</i> , F.3d 1316 (11th Cir. 2006) .....	24
<i>Asadi v. G.E. Energy (USA), L.L.C.</i> , 720 F.3d 620 (5th Cir. 2013) .....	15
<i>Batzel v. Smith</i> , 333 F.3d 1018 (9th Cir. 2003).....	21
<i>Berlin v. E.C. Publ'ns, Inc.</i> , 329 F.2d 541 (2d Cir. 1964).....	47
<i>Cardtoons, L.C. v. Major League Baseball Players Ass'n</i> , 95 F.3d 959 (10th Cir. 1996) .....	passim
<i>Carson v. Here's Johnny Portable Toilets, Inc.</i> , 698 F.2d 831 (6th Cir. 1983).....	36
<i>Davis v. Elec. Arts Inc.</i> , 775 F.3d 1172 (9th Cir. 2015).....	38, 39
<i>Dryer v. Nat'l Football League</i> , 814 F.3d 938 (8th Cir. 2016).....	43
<i>Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.</i> , 946 F.3d 1040 (9th Cir. 2019) .....	18, 26
<i>ETW Corp. v. Jireh Publ'g, Inc.</i> , 332 F.3d 915 (6th Cir. 2003).....	31, 51
<i>Fair Hous. Council v. Roommates.Com, LLC</i> , 521 F.3d 1157 (9th Cir. 2008).....	28
<i>FTC v. Accusearch Inc.</i> , 570 F.3d 1187 (10th Cir. 2009) .....	28
<i>FTC v. LeadClick Media, LLC</i> , 838 F.3d 158 (2d Cir. 2016).....	28
<i>GeoMetWatch Corp. v. Behunin</i> , 38 F.4th 1183 (10th Cir. 2022).....	30
<i>Hart v. Elec. Arts</i> , 717 F.3d 141 (3d Cir. 2013) .....	33, 39
<i>Hepp v. Facebook</i> , 14 F.4th 204 (3d Cir. 2021).....	passim
<i>Horgan v. Macmillan, Inc.</i> , 789 F.2d 157 (2d Cir. 1986) .....	43
<i>In re Jackson</i> , 972 F.3d 25 (2d Cir. 2020).....	33

<i>In re NCAA Student-Athlete Name &amp; Likeness Licensing Litig.</i> , 724 F.3d 1268 (9th Cir. 2013) .....	39, 50
<i>Keller v. Elec. Arts Inc.</i> , 724 F.3d 1268 (9th Cir. 2013).....	38, 39
<i>Landham v. Lewis Galoob Toys, Inc.</i> , 227 F.3d 619 (6th Cir. 2000) .....	36
<i>Laws v. Sony Music Ent., Inc.</i> , 448 F.3d 1134 (9th Cir. 2006) .....	42
<i>McFarland v. Miller</i> , 14 F.3d 912 (3d Cir. 1994) .....	40
<i>Meadows v. Hartford Life Ins. Co.</i> , 492 F.3d 634 (5th Cir. 2007) .....	33
<i>Midler v. Ford Motor Co.</i> , 849 F.2d 460 (9th Cir. 1988) .....	36, 44, 45
<i>Motschenbacher v. R.J. Reynolds Tobacco Co.</i> , 498 F.2d 821 (9th Cir. 1974) .....	36
<i>Newcombe v. Adolf Coors Co.</i> , 157 F.3d 686 (9th Cir. 1998) .....	37, 44
<i>Perfect 10 Inc. v. CCBill LLC</i> , 488 F.3d 1102 (9th Cir. 2007) .....	14, 19, 22
<i>Showler v. Harper’s Mag. Found.</i> , 222 F. App’x 755 (10th Cir. 2007) .....	33
<i>Sinatra v. Goodyear Tire &amp; Rubber Co.</i> , 435 F.2d 711 (9th Cir. 1970).....	44
<i>United Parcel Serv., Inc. v. Weben Indus., Inc.</i> , 794 F.2d 1005 (5th Cir. 1986) .....	32
<i>Universal Commc’n Sys., Inc. v. Lycos, Inc.</i> , 478 F.3d 413 (1st Cir. 2007) .....	14
<i>White v. Samsung Elecs. Am., Inc.</i> , 971 F.2d 1395 (9th Cir. 1992).....	passim
<i>Zeran v. Am. Online, Inc.</i> , 129 F.3d 327 (4th Cir. 1997).....	13, 18, 22

## **Other Cases**

<i>Carlisle v. Fawcett Publ’ns, Inc.</i> , 201 Cal. App. 2d 733 (Cal. Dist. Ct. App. 1962) ...	49
<i>Comedy III Prods., Inc. v. Gary Saderup, Inc.</i> , 21 P.3d 797 (Cal. 2001).....	47, 50, 51
<i>Doe v. Friendfinder Network, Inc.</i> , 540 F. Supp. 2d 288 (D.N.H. 2008).....	34
<i>Fenster v. Ellis</i> , 898 N.Y.S.2d 582 (N.Y. App. Div. 2010) .....	29
<i>Jane Doe No. 1 v. Backpage.com, LLC</i> , 104 F. Supp. 3d 149 (D. Mass. 2015).....	26
<i>Kirby v. Sega of Am., Inc.</i> , 144 Cal. App. 4th 47 (Cal. Ct. App. 2006) .....	31, 39, 50, 51
<i>Loftus v. Greenwich Lithographing Co.</i> , 192 A.2d 251 (N.Y. App. Div. 1920).....	38
<i>Northland Fam. Plan. Clinic, Inc. v. Ctr. for Bio-Ethical Reform</i> , 868 F. Supp. 2d 962 (C.D. Cal. 2012) .....	48
<i>Pooley v. Nat’l Hole-In-One Ass’n</i> , 89 F. Supp. 2d 1108 (D. Ariz. 2000) .....	35

<i>Rosa &amp; Raymond Parks Inst. for Self Development v. Target Corp.</i> , 90 F. Supp. 3d 1256 (M.D. Ala. 2015) .....	46
<i>S.C. v. Dirty World, LLC</i> , No. 11-CV-00392, 2012 WL 3335284 (W.D. Mo. Mar. 12, 2012) .....	29
<i>Walkowicz v. Am. Girl Brands, LLC</i> , 20-cv-374, 2021 WL 510729 (W.D. Wis. Feb. 11, 2021). .....	38
<i>Winter v. DC Comics</i> , 69 P.3d 473 (Cal. 2003) .....	47, 50, 52

## Other Sources

Barbara Singer, <i>The Right of Publicity: Star Vehicle or Shooting Star?</i> , 10 CARDOZO ARTS & ENT. L.J. 1 (1991) .....	42
Courtney Kim, <i>Analyzing the Circuit Split over CDA Section 230(e)(2): Whether State Protections for the Right of Publicity Should Be Barred</i> , 96 S. CAL. L. REV. 449 (2022) .....	20
Erin Mayer, <i>The 34 Most Iconic Pixie Cuts of All Time</i> , REDBOOK, <a href="https://www.redbookmag.com/beauty/hair/advice/g2109/iconic-pixie-cuts/">https://www.redbookmag.com/beauty/hair/advice/g2109/iconic-pixie-cuts/</a> (last visited Nov. 19, 2023).....	39
<i>Intellectual Property</i> , BLACK’S LAW DICT. (11th ed. 2019) .....	25
J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 1:24 (2d ed. 2000) .....	34
KEVIN J. HICKEY, CONG. RSCH. SERV., IF10986, <i>Intellectual Property Law: A Brief Introduction</i> (2022) .....	19
RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977) .....	31, 32, 37, 41
VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, <i>Section 230: An Overview</i> (2021).....	25
<i>What Is the Average Height for Women?</i> , CLEVELAND CLINIC, <a href="https://health.clevelandclinic.org/what-is-the-average-height-for-women/">https://health.clevelandclinic.org/what-is-the-average-height-for-women/</a> (last visited Nov. 19, 2023).....	40
William Prosser, <i>Privacy</i> , 48 CAL. L. REV. 383 (1960).....	35



## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifteenth Circuit is unpublished but may be found at *Austero v. FakeBlock, Inc.*, No. 20-9804 (15th Cir. Oct. 17, 2022). The opinion of the United States District Court for the District of Newport Beach is unpublished and unavailable.

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit issued its opinion on October 17, 2022. Petitioners timely filed a writ of certiorari, and this Court granted certiorari on October 9, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

“Congress shall make no law . . . abridging the freedom of speech . . . .” U.S. CONST. amend. I.

The Communications Decency Act of 1996, 47 U.S.C. § 230, provides, in pertinent parts:

### **(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 benefits 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;

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

**(1) Treatment of publisher or speaker**

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

**(e) Effect on other laws**

**(2) No effect on intellectual property**

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.

**(f) Definitions**

**(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.

**STATEMENT OF THE CASE**

Maebly Fünke is an artist who specializes in digital programming and artificial intelligence. *Austero v. FakeBlock, Inc.*, No. 20-9804, op. at 3 (15th Cir. Oct. 17, 2022). She particularly excels at creating AI-generated models that resemble realistic human beings. *Id.* She created a software that creates these models and hopes that others will also use the program in the future. *Id.* at 4.

Fünke saw an opportunity to use this software when her mother, Lindsay Bluth, ran for Newport Beach’s congressional seat in 2018. *Id.* at 3, 4. Fünke hoped to support Bluth’s campaign by using her software to expose the “darker side” of another candidate—Lucille Austero. *Id.* at 4. Fünke created a five-minute film called “*Moonie Bares All!!!*” that she created to showcase her innovative software and to send a political message. *Id.* at 5–6. This political message suggests that Newport Beach could be encountering a congressional candidate that abuses alcohol and disparages the state’s citizens. *Id.* at 5.

In *Moonie Bares All*, this candidate is Moonie—an AI-generated model who Fünke created in early 2018. *Id.* at 4. Moonie represents the most up-to-date example of what Fünke’s software can achieve. *Id.* While Fünke strives to create realistic images, her software still distorts many human features and produces the “hallmarks” of AI-generated models: uneven eyes, abnormal teeth, unnatural hair, and “missing, misshapen, or disproportionately sized body parts.” *Id.* at 23. Moonie’s face, for example, reveals a disproportionately large mouth and a prominent, downward-tilting nose. *Id.* at 24. Her eyes are “unnatural,” “asymmetric,” and “wideset.” *Id.* Moonie also exhibits one of AI-generated models’ most common anomalies: her left hand only has four fingers, some of which appear wrinkled and some smooth. *Id.*

Despite these anomalies, Moonie also has several generic and unremarkable features. *Id.* at 23. For example, Moonie stands at approximately 5’4”, which is the average height of an American woman over twenty years old. *Id.* at 4, 62. She has a black pixie cut—a hairstyle that many women have embraced and that commentators

have celebrated. *Id.* at 4, 55 n.1. Completing her physical appearance, her outfit encompasses “a halter vest, short shorts, a derby hat, garters, and lace-up boots.” *Id.* at 5, 25. When the film begins, Moonie appears in this outfit and begins to tap dance. *Id.* at 5.

Forty-five seconds after *Moonie Bares All* begins, Moonie starts to stumble and lose her footing. *Id.* She staggers to the stage’s border and must brace herself against a set piece. *Id.* Once she regains control, she begins to strip, which reveals her nude yet pixelated body. *Id.* This “striptease” inspired Fünke to name the character “Moonie.” *Id.* at 25 n.6. Moonie then begins to sing in a slurred voice that further affirms her intoxication. *Id.* at 5. Her song alters the lyrics to the piece “New York, New York” from Leonard Bernstein’s musical and film *On the Town*. *Id.* She belts out, in part:

Newport, Newport, it’s a wonderful town, Voters love me even though I put ‘em down, Don’t know their ass from a hole in the ground, Newport, Newport, it’s a wonderful town!

Newport, Newport, it’s a celebrity’s dream, Where I can find lots and lots of codeine The mobs suffer as I ride in a limousine, Newport, Newport, it’s a celebrity’s dream!

*Id.* at 36.

In May 2018, Fünke uploaded the film to FakeBlock, a start-up Internet platform in which Fünke invested. *Id.* at 2, 6. Fünke, who seized the early opportunity to invest in FakeBlock, saw the platform’s potential and volunteered without pay to help FakeBlock attract other investors. *Id.* at 5. FakeBlock did not attach a job title to Fünke’s unpaid assistance. *Id.* She could, however, access FakeBlock to upload videos while the site was still “in beta.” *Id.* Because she invested in the platform, she

exclusively uploaded *Moonie Bares All* to FakeBlock and hoped that it would increase the site's traffic. *Id.* at 6.

And it did. *Id.* Internet users watched *Moonie Bares All* and discussed the “fails” that Moonie made while she danced and stripped. *Id.* Fünke hoped this traffic would also help Bluth's congressional run, so she posted a link to Bluth's campaign site with the video and commented “VOTE 4 LINDSAY BLUTH.” *Id.* at 61. When Austero saw the video, however, she alleged that Moonie appropriated her likeness because the two share certain characteristics. *Id.* at 6.

Austero is a retired actress, singer, and dancer. *Id.* at 3. She achieved great success in entertainment before she shifted to politics. *Id.* Although she stopped acting in 2009 and released her final album in 2010, she still appears in cameos as herself. *Id.* Her fans specifically recognize her black pixie cut's signature, “spiky” style, her famous teeth-bearing smile, and the distinctive beauty mark on her left cheek. *Id.* at 23–24. Like Moonie, Austero's distinctive attributes accompany her other more generic features, like her 5'4” height. *Id.* at 4. Austero's voice, which classified her as a soprano before her 1997 vocal-cord surgery, reflects the tone of a mezzo soprano or an alto. *Id.* at 26. n.7.

Austero participated in several works before she retired. Among other works, she played roles in *Cabaret; New York, New York*; and *Tell Me That You Love Me, Junie Moon*. *Id.* at 30. These works—and Austero's characters within them—varied greatly. *Id.* For example, *Cabaret's* costume designer directed Austero to wear a “halter vest, short shorts, a derby hat, garters, and lace-up boots.” *Id.* at 25. In *Tell Me That You*

*Love Me, Junie Moon*, Austero starred as Junie Moon, a character without a pixie cut whose severe facial scarring played a central role in the plot. *Id.* at 64 (Walt, J., dissenting). Austero played several nude scenes in that movie. *Id.*

And in *New York, New York*, Austero sang “(Theme from) New York New York,” a song that Frank Sinatra later made famous. *Id.* at 26. Austero has performed tap dances at least twice: once as her character in *Cabaret* and once as herself at the Radio City Music Hall in 1992. *Id.* at 25. Although Austero received fame for her 1992 tap dance, some of her performances have received less attention. *Id.* at 64 (Walt, J., dissenting). For example, *Tell Me That You Love Me, Junie Moon*, which came out fifty-two years ago, financially flopped and is not commonly associated with Austero. *Id.*

Fünke used Austero as the “starting point” to create Moonie because Austero had acted in a variety of roles and released several different albums. *Id.* at 4. Starting with these “raw building blocks,” Fünke altered Austero’s voice, appearance, and behavior. *Id.* at 27. For example, Moonie’s voice does not match Austero’s voice at any time in her life. *Id.* Austero, however, produced an expert witness who testified that “Moonie’s voice might be Austero’s current voice but possibly digitally altered to be an octave higher.” *Id.* at 65 (Walt, J., dissenting). Also, Moonie’s appearance similarly differs from Austero’s at any time in Austero’s life. *Id.* at 27. While Moonie and Austero have similar heights, body types, skin, and hair, Moonie’s hair is “flat” rather than “spiky,” she has no beauty mark on her left cheek, and she displays a toothless grin. *Id.* at 23.

After she lost the election, Austero sued FakeBlock and Fünke in Newport Beach District Court under Newport Beach’s right-of-publicity law. *Id.* at 6. She alleged that “Moonie so closely resembles Austero as to appropriate Austero’s identity and infringe on her right to profit from her likeness and identity.” *Id.* Fünke moved for summary judgment on two grounds: (1) Austero did not demonstrate a right-of-publicity claim; and (2) the First Amendment protects *Moonie Bares All*. *Id.* at 7. FakeBlock moved for summary judgment on the same grounds, and it also raised an affirmative defense under § 230 of the Communications Decency Act (“CDA”) to argue that it is immune from liability as an internet service provider. *Id.* The Newport Beach District Court exercised diversity jurisdiction over the claim. *Id.* at 2.

Although the Newport Beach District Court rejected FakeBlock’s immunity defense, it granted FakeBlock and Fünke summary judgment on the merits. *Id.* The Fifteenth Circuit reviewed the case and held that §230 does not immunize FakeBlock, Austero asserted a viable right-of-publicity claim under Newport Beach state law, and the First Amendment did not protect *Moonie Bares All*. *Id.* This decision did not escape scrutiny, however. *See id.* at 44 (Walt, J., dissenting). In dissent, Circuit Judge Walt expressed that “[t]he Court has made a huge mistake” and echoed a sister circuit’s concerns that “[c]reativity is impossible without a rich public domain.” *Id.* FakeBlock and Fünke timely appealed the Fifteenth Circuit’s decision, and this Court granted certiorari to decide the questions presented.



## SUMMARY OF THE ARGUMENT

This Court’s longstanding protection of the “marketplace of ideas” requires it to continue protecting the freedom of expression, even in the face of emerging technologies with unprecedented capabilities. As artificial intelligence evolves, the law must not overprotect property interests at free expression’s expense. However, the Fifteenth Circuit’s decision threatens fundamental speech protections by overprotecting right-of-publicity interests. This Court should reverse the Fifteenth Circuit’s decision for three reasons: (1) the CDA immunizes FakeBlock from Austero’s claim; (2) Austero fails to demonstrate a viable right-of-publicity claim; and (3) the First Amendment protects Fünke and FakeBlock from liability.

First, Congress enacted § 230 of the CDA to preserve the online marketplace of ideas. It made the careful policy decision to immunize internet providers from most claims, however, internet service providers are not immune from claims pertaining to intellectual property. Here, FakeBlock is immune from Austero’s state-law right-of-publicity claim because § 230(e)(2) should only exclude federal intellectual-property claims, Austero’s specific claim is not an intellectual-property claim, and Fünke acted in her personal capacity when she uploaded *Moonie Bares All* to FakeBlock.

Section 230(e)(2) should only exclude federal intellectual-property claims from immunity. Because the CDA does not define “intellectual property,” this Court should interpret § 230(e)(2) consistent with Congress’s intent. This Court should look to Congress’s express purpose because § 230’s text and structure permit two reasonable interpretations of § 230(e)(2). Interpreting § 230(e)(2) to only exclude federal

intellectual-property claims maintains § 230's express purpose because federal intellectual-property law is limited, well established, and it provides independent immunity. Further, this interpretation allows internet service providers to accurately predict potential liability and will not overly restrict online speech in fear of state-law liability. Accordingly, strictly interpreting § 230(e)(2) preserves online forums that promote the freedom of speech.

Even if this Court interprets § 230(e)(2) to exclude state-law intellectual-property claims, Austero's claim does not pertain to intellectual property. This Court's precedent suggests that some—but not all—right-of-publicity claims are intellectual-property claims. However, Austero's right-of-publicity claim is not an intellectual-property claim because it does not seek to protect commercially valuable products of the human intellect. Austero's human intellect did not produce her physical appearance, likeness, or identity.

FakeBlock is immune from Austero's claim because it is not the information content provider of *Moonie Bares All*. Instead, FakeBlock passively displayed content that Fünke unilaterally created and submitted. Further, Fünke acted in her personal capacity when she uploaded *Moonie Bares All* because she wanted to advertise her own software, assist her mother's political campaign, and increase web traffic to FakeBlock to increase her own investment in the site. Additionally, Austero produced no evidence that supports a reasonable inference that Fünke acted on FakeBlock's. Thus, this Court should reverse the Fifteenth Circuit's decision that denied FakeBlock's motion for summary judgment on its § 230 immunity defense.

Second, Austero's right-of-publicity claim fails as a matter of law. Newport Beach adopted the Restatement (Second) of Torts § 652C to articulate its right of publicity. Many federal courts have sufficiently defined state laws that use § 652C to define their rights of publicity, and this Court may do the same without needing to rely on an "*Erie* guess" to predict what Newport Beach's state law requires. The Fifteenth Circuit erroneously modified Newport Beach's right of publicity when it expanded § 652C's scope to encompass "identity or persona." If the Fifteenth Circuit needed additional guidance regarding § 652C's scope, it should have certified a question to the Newport Beach Supreme Court.

Nevertheless, Austero's claim fails under both standards. Under Newport Beach state law, Austero may only assert an interest in her name or likeness. However, her generic physical characteristics do not provide her an enforceable likeness. She also may not assert an enforceable interest in characteristics that belong to the roles that she has played. And Fünke and FakeBlock did not appropriate her likeness under § 652C because they did not benefit as if Austero herself were in Moonie's role.

Under the broader standard, Austero cannot enforce an interest in any of the characteristics that she shares with Moonie except her generic appearance. She cannot enforce an interest in her tap dance or songs because they are copyrightable, and she has not shown sufficient uniqueness in her dancing style, her voice, or her life experiences. She is left only with her generic physical appearance, which does not sufficiently identify her. This Court should reverse the Fifteenth Circuit's decision that denied summary judgment on Austero's right-of-publicity claim.

Third, the First Amendment shields *Moonie Bares All* from liability because it is a parody, it comments on a matter of public interest, and it transforms raw materials into a new and original expression. It is a parody because a reasonable viewer understands that it uses humor to criticize Austero’s political candidacy. It comments on a matter of public interest—Newport Beach’s election. And under the transformative use test, it uses raw materials from Austero’s work to create an original expression that conveys a new meaning. Further, because *Moonie Bares All* would be an inadequate substitute for *Cabaret*, the film further suggests that it is transformative and protected by the First Amendment. Thus, this Court should reverse the Fifteenth Circuit’s decision that rejected Fünke and FakeBlock’s First Amendment defense.

## ARGUMENT

This Court has long recognized the fundamental role that free expression contributes to society, and it consistently reiterates that “if there is any fixed star in our constitutional constellation,’ it is the principle that the government may not interfere with ‘an uninhibited marketplace of ideas.’” *303 Creative LLC v. Elenis*, 600 U.S. 570, 584–85 (2020) (quoting *W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), and then quoting *McCullen v. Coakley*, 573 U.S. 464, 476 (2014)). This protection encompasses not just speech that informs, but also speech that entertains. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996).

When states decide to protect publicity rights, legislatures and courts have recognized that they must carefully craft these laws to avoid a “chilling effect” on free

expression and creativity. *See Time, Inc. v. Hill*, 385 U.S. 374, 401–02 (1967) (Douglas, J., concurring). Evolving technologies, like artificial intelligence, may exacerbate these tensions. However, this Court has recognized that no entity may censor speech simply because a new forum has the *capacity* for evil. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). This case provides this Court with the opportunity to ensure that the law evolves—alongside technology—to ensure that the free expression principles upon which this country emerged remain protected, encouraged, and celebrated.

**I. Under the CDA § 230, FakeBlock is immune from Austero’s right-of-publicity claim.**

The Internet provides one of the most evolving forums for free expression. In 1996, Congress preserved this forum when it passed § 230 of the CDA. *See* 47 U.S.C. § 230. Congress found that the rise of the Internet and internet service providers created a “forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” *Id.* § 230(a)(3). Importantly, these forums “have flourished, to the benefit of all Americans, with a minimum of government intrusion.” *Id.* § 230(a)(4). Congress recognized the “obvious chilling effect” that intermediate tort liability would pose on the freedom of speech. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997). Thus, when Congress passed § 230, it made a careful policy decision to immunize internet service providers to “preserve the vibrant and competitive free market that presently exists . . . unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2).

Section 230(c)(1) grants internet service providers immunity from claims that treat them as a “publisher or speaker of any information provided by another information content provider.” *Id.* § 230(c)(1). Unless the internet service provider is also an information content provider, courts construe § 230 immunity broadly. *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007). This broad immunity is only subject to a few narrow exclusions, including claims “pertaining to intellectual property.” 47 U.S.C. § 230(e)(2). Here, FakeBlock is immune from Austero’s right-of-publicity claim under § 230 because: (1) Section 230(e)(2) only excludes federal intellectual-property claims from immunity; (2) Austero’s specific claim is not an intellectual-property claim; and (3) FakeBlock is not an information content provider because Fünke acted in her personal capacity.

**A. This Court should hold that § 230(e)(2)’s intellectual-property exclusion only applies to federal intellectual-property claims.**

When Congress crafted § 230’s broad immunity, it carefully preserved the immunity by creating only a few narrow exclusions. *Id.* § 230(e). Relevant here, § 230(e)(2) states: “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.” *Id.* § 230(e)(2). As a result, internet service providers are not immune from claims “pertaining to intellectual property.” *Perfect 10 Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007). However, Congress did not define “intellectual property” in the CDA. All courts agree that Congress intended to grant internet service providers broad immunity, but the circuits are split as to whether § 230(e)(2) excludes *both* federal and state intellectual-property claims from immunity. *See Perfect 10*, 488 F.3d at 1119 (holding that § 230(e)(2) excludes only

federal intellectual-property claims); *Hepp v. Facebook*, 14 F.4th 204, 212 (3d Cir. 2021) (holding that § 230(e)(2) excludes both federal and state intellectual-property claims).

Section 230(e)(2) should only exclude federal intellectual-property claims from immunity. When courts interpret a statute, they aim to “give effect to the intent of Congress.” *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542 (1940). Courts start with the text; however, they should not interpret provisions in isolation because a provision only has meaning when placed in its context. *King v. Burwell*, 576 U.S. 473, 486 (2015). Instead, courts should interpret the “provisions of a statute in a manner that renders them compatible, not contradictory.” *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013). If the provisions of a statute—read as an integrated whole—permit two interpretations, courts should interpret the statute “in the manner which effectuates rather than frustrates the major purpose of the legislative draftsman.” *Shapiro v. United States*, 335 U.S. 1, 31 (1948). Ultimately, courts must not “interpret federal statutes to negate their own stated purposes.” *N.Y. State Dept. of Soc. Servs. v. Dublino*, 413 U.S. 405, 419–20 (1973); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (“[A] court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.”).

Because Congress intended to grant internet service providers broad immunity, this Court should hold that § 230(e)(2) only excludes federal intellectual-property claims from immunity because this interpretation honors Congress’s express

legislative purpose, creates predictability in the law, and prevents a chilling effect on the freedom of speech.

**1. Section 230’s text and structure permit two interpretations of § 230(e)(2).**

Because the CDA does not define intellectual property, this Court should define intellectual property in a manner that gives effect to the intent of Congress. This Court should not interpret § 230(e)(2) in isolation, but instead in context with all provisions of § 230. When this Court reads § 230(e)(2) in context, its interpretation should complement—not contradict—the provisions of § 230. If § 230’s text and structure permit two interpretations of § 230(e)(2), this Court should look to the purpose of the statute.

Section 230’s text and structure suggest that Congress did not intend to exclude all federal and state intellectual-property claims from immunity. Section 230(e) narrowly excludes “specified federal laws and, in certain instances, co-extensive state laws.” *Hepp*, 14 F.4th at 219 (Cowen, J. dissenting). For example, § 230(e)(4) refers to a specific federal privacy statute and state laws that cover the *same* conduct. 47 U.S.C. § 230(e)(4) (“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.”). Further, Congress explicitly intended to preempt all state laws inconsistent with § 230. *Id.* § 230(e)(3) (“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.”) (emphasis added). Thus, if this Court reads the provisions of § 230 together, it can reasonably interpret § 230(e)(2) to only exclude



federal and *coextensive* state intellectual-property claims—not all state intellectual-property claims—from immunity.

However, § 230’s text and structure could reasonably lead to a different interpretation, which demonstrates that this Court should look to Congress’s purpose when it determines what “intellectual property” means under § 230(e)(2). The Fifteenth Circuit recognized that the § 230(e) exclusions only reference state law that is coextensive with federal law but suggested that this structural evidence “cuts both ways.” *Austero*, op. at 15 (quoting *Hepp*, 14 F.4th at 210–11). The Fifteenth Circuit reasoned that, because Congress did not use “modifying terms” within § 230(e)(2), but did in other § 230(e) exclusions, Congress knew how to limit § 230(e)(2) to federal law but did not. *Austero*, op. at 12–13. Accordingly, the Fifteenth Circuit confined its review to the plain language when it concluded that § 230(e)(2) excludes all federal and state intellectual-property claims from immunity. *Id.* at 17. The Fifteenth Circuit did not consider Congress’s purpose even though the text leads to multiple interpretations.

The Fifteenth Circuit ignored this Court’s statutory interpretation precedent when it failed to consider Congress’s express purpose even after it *explicitly* recognized that § 230’s text and structure “cuts both ways.” *Id.* at 12–13. Because § 230’s text and structure permit two interpretations of § 230(e)(2), the Fifteenth Circuit should have looked beyond the literal language of § 230(e)(2) and interpreted it in the manner that best effectuates the purpose of Congress.

**2. Congress’s express purpose confirms that § 230(e)(2) should only exclude federal intellectual property claims from immunity.**

Section 230(e)(2) should only exclude federal intellectual-property claims, which maintains Congress’s express purpose in § 230’s findings and policy. *See* 47 U.S.C. § 230(a)–(b). The codified findings and policy emphasize “the importance of the Internet, its continued development, the free exchange of information, and the need to keep governmental regulation of this forum to a minimum.” *Hepp*, 14 F.4th at 220 (Cowen, J. dissenting). Congress established broad § 230 immunity for internet service providers because it recognized that intermediate tort liability would threaten these findings and policies. *Zeran*, 129 F.3d at 330. It also recognized that it can only “preserve the vibrant and competitive free market” if this broad immunity remains “unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). As such, Congress preserved its findings and policy by crafting only a few narrow exclusions. *Id.* § 230(e). Because these exclusions limit the otherwise broad immunity, § 230’s stated purpose “counsels against an expansive interpretation of the [exclusions] that would diminish the scope of immunity.” *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1053 (9th Cir. 2019); *see also Dublino*, 412 U.S. at 419–20. Thus, this Court should narrowly interpret § 230(e)(2) to protect § 230’s broad immunity.

Interpreting § 230(e)(2) to only exclude federal intellectual-property claims promotes Congress’s express purpose because it preserves the broad immunity. Unlike state intellectual-property laws, federal law is well established and protects four forms of intellectual property: patents, copyrights, trademarks, and trade secrets. KEVIN J. HICKEY, CONG. RSCH. SERV., IF10986, *Intellectual Property Law: A*

Brief Introduction 1–2 (2022). Additionally, some federal intellectual-property statutes provide independent immunity. For example, the Digital Millennium Copyright Act includes a safe harbor provision which immunizes online service providers that remove potentially infringing content that a third-party posts. *See* 17 U.S.C. § 512(a)–(d). As such, § 230 immunity remains broad even when federal intellectual-property claims limit it.

By contrast, interpreting § 230(e)(2) expansively to exclude all federal and state intellectual-property claims eviscerates § 230’s broad immunity. In *Perfect 10*, the Ninth Circuit illustrated why this expansive interpretation “fatally undermines” § 230’s findings and policy. 488 F. 3d at 1119 n.5. It explained that state intellectual-property laws are “by no means uniform.” *Id.* at 1118. State intellectual-property laws “bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals.” *Id.* Further, because § 230 regulates conduct over the Internet, material on a website reaches every state. *Id.* Accordingly, an expansive interpretation of § 230(e)(2) would permit “the reach of any particular state’s definition of intellectual property to dictate the contours of [the] federal immunity.” *Id.* Thus, the Ninth Circuit rejected the expansive interpretation of § 230(e)(2) because “it would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes.” *Id.* (citing 47 U.S.C. § 230(a)–(b)).

The Ninth Circuit’s concern is especially relevant here. Austero argues that her right-of-publicity claim qualifies as a state intellectual-property claim. *Austero*, op. at

11. If it does, state right-of publicity-claims are inconsistent and vary from state to state. Courtney Kim, *Analyzing the Circuit Split over CDA Section 230(e)(2): Whether State Protections for the Right of Publicity Should Be Barred*, 96 S. CAL. L. REV. 449, 457–58 (2022). For example, state right-of-publicity laws vary on “the scope of the right, who may assert a claim, and the duration of the right.” *Id.* at 470. However, the Fifteenth Circuit dismissed this concern and claimed that because Newport Beach “adopted the Restatement (Second) of Torts section that has been adopted by many other states . . . the Ninth Circuit’s concerns about inconsistent state laws are less applicable here.” *Austero*, op. at 17 n.4.

But these concerns *do* apply here because this Court’s interpretation of § 230(e)(2) will implicate all states—whether they recognize the right of publicity through statute or common law. Further, the right of publicity is only one example of a state law that “could be characterized as intellectual property.” *See Hepp*, 14 F.4th at 219–20 (Cowen, J. dissenting) (listing trademark, unfair competition, dilution, and trade defamation as other state laws to consider). Accordingly, the Fifteenth Circuit diminished § 230’s broad immunity when it expansively interpreted § 230(e)(2) to exclude all state-law claims that could be considered “intellectual property.” *See id.* at 220 (“Would Congress have really gone so far as to grant immunity from a wide range of state and federal laws—including state criminal law—yet permit claims to go forward under the nebulous (and expansive) category of state ‘intellectual property’/‘rights of publicity’ laws?”). Thus, this Court will best effectuate § 230’s

express purpose if it holds that § 230(e)(2) only excludes federal intellectual-property claims from immunity.

**3. Excluding only federal intellectual-property claims from immunity ensures predictability in the law and prevents censorship that stifles the freedom of speech.**

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. This Court should protect this fundamental right and narrowly interpret § 230(e)(2) to only exclude federal intellectual-property claims from immunity.

A narrow interpretation of § 230(e)(2) protects the freedom of speech because it creates predictability in the law. Because federal intellectual-property law is well-established, internet services providers can accurately predict potential liability. As such, internet service providers need only restrict content to the extent necessary to satisfy federal intellectual-property law. Ultimately, that is what Congress intended when it created § 230 immunity to “preserve the vibrant and competitive free market that presently exists on the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2); *see also Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003) (“Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.”). Maintaining § 230’s broad immunity incentivizes internet service providers to continue to develop and offer forums for online speech without the fear of potential liability.

On the other hand, an expansive interpretation of § 230(e)(2) subjects internet service providers to liability from all state laws that could be considered intellectual

property. Because state intellectual-property laws are inconsistent, an internet service provider cannot predict its potential liability. *Perfect 10*, 488 F.3d at 1119 n.5 (“[N]o litigant will know if [it] is entitled to immunity for a state claim until a court decides the legal issue.”). Further, the Internet reaches every state. Accordingly, internet service providers are subject to all state laws and would thus be “forced to bear the costs of litigation under a wide variety of state statutes that could arguably be classified as ‘intellectual property.’” *Id.* To avoid potential liability, internet service providers may choose to restrict the content they publish. *Zeran*, 129 F.3d at 331. However, Congress enacted § 230’s broad immunity to “avoid any such restrictive effect.” *Id.* Thus, this Court should hold that § 230(e)(2) only excludes federal intellectual-property claims from immunity to preserve online forums that promote the freedom of speech.

**B. Even if this Court interprets § 230(e)(2) to exclude all federal and state intellectual-property claims from immunity, Austero’s specific claim does not pertain to intellectual property.**

The Fifteenth Circuit made twin errors when it held that Austero’s right-of-publicity claim is an intellectual-property claim for purposes of § 230(e)(2). First, it suggested that all right-of-publicity claims are intellectual-property claims. *Austero*, op. at 18. Second, it concluded that because Austero seeks to recover damages to her financial interests, her claim is an intellectual-property claim. *Id.* This Court should instead hold that not all right-of-publicity claims are intellectual-property claims and that Austero’s specific claim is not an intellectual-property claim.

**1. This Court’s precedent only suggests that some right-of-publicity claims are intellectual-property claims.**

Right-of-publicity claims are only intellectual-property claims in limited circumstances. In *Zacchini v. Scripps-Howard Broadcasting Co.*, this Court held that the right of publicity involves a cognizable property interest and analogized the specific claim to intellectual-property incentives. *See* 433 U.S. 562, 573-78 (1977). In that case, Hugo Zacchini sought damages from a television station that videotaped and broadcast his entire “human cannonball” act. *Id.* at 564. When it recognized the right of publicity, this Court reasoned that permitting the broadcast of Zacchini’s entire performance would pose a “substantial threat to the economic value of that performance.” *Id.* at 575. This Court then analogized the public interest in protecting Zacchini’s right of publicity to the interests that underlie patent and copyright law. *Id.* at 576. Like intellectual-property laws, the right of publicity incentivizes creativity and achievement, which ultimately benefits the public. *Id.* at 576–77. However, this Court cautioned that Zacchini’s claim was “more limited than the broad category of lawsuits that may arise under the heading of ‘appropriation.’” *Id.* at 573 n.10. Thus, this Court did not hold that *all* right-of-publicity claims are necessarily intellectual-property claims. It merely analogized the incentives of intellectual property with Zacchini’s specific right-of-publicity claim.

The Tenth Circuit clarified this Court’s analogy. In *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, the Tenth Circuit explained that analogizing the right of publicity to intellectual-property incentives was compelling for Zacchini’s claim because he alleged the “appropriation of the economic value of his *performance*, not

the economic value of his *identity*.” See 95 F.3d 959, 973 (10th Cir. 1996). However, when athletes and entertainment celebrities allege that a defendant misappropriated their identity, “the commercial value of their identities is merely a by-product of their performance values.” *Id.* In these cases, the analogy to intellectual-property incentives is strained because—without the right of publicity—celebrities can still “earn a living from the activities that have generated [their] commercially marketable fame.” *Id.* As such, the Tenth Circuit concluded that intellectual-property incentives are less applicable to a “typical right of publicity case involving the appropriation of a celebrity’s identity.” *Id.* Thus, this Court’s precedent only suggests that some—but not all—right-of-publicity claims are intellectual-property claims.

The Fifteenth Circuit erred when it suggested that all right-of-publicity claims are intellectual-property claims. First, the Fifteenth Circuit relied on the Eleventh Circuit’s dicta which claimed that “there appears to be no dispute that the right of publicity is a type of intellectual property claim.” *Almeida v. Amazon.com, Inc.*, F.3d 1316, 1323 (11th Cir. 2006). However, the Eleventh Circuit sidestepped analyzing this issue because it held that the plaintiff’s right-of-publicity claim would not survive a motion to dismiss. *Id.* at 1324. Second, the Fifteenth Circuit confused this Court’s holding and analogy in *Zacchini*. As explained above, this Court’s holding only suggests that *some* right-of-publicity claims are intellectual-property claims. When a law might—or might not—involve intellectual-property issues, courts look to “whether the plaintiff’s claim itself involves an intellectual property right.” VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, Section 230: An



Overview 25–26 (2021). Thus, this Court should determine whether Austero’s specific right-of-publicity claim is an intellectual-property claim.

**2. Austero’s right-of-publicity claim is not an intellectual-property claim because it does not seek to protect products of the human intellect.**

Right-of-publicity claims are only intellectual-property claims when they seek to protect commercially valuable products of the human intellect. The CDA does not define intellectual property. However, intellectual property is defined as: “A category of rights protecting commercially valuable products of the human intellect.” *Intellectual Property*, BLACK’S LAW DICT. (11th ed. 2019). The Fifteenth Circuit classified Austero’s claim as an intellectual-property claim because she sought “to protect her financial interests.” *Austero*, op. at 18. But a claim that seeks to protect a financial interest does not necessarily seek to protect products of the human intellect. Accordingly, the Fifteenth Circuit should have considered whether Austero’s right-of-publicity claim meets the definition of intellectual property.

The Third Circuit is the only circuit to directly address whether a right-of-publicity claim is an intellectual-property claim. In *Hepp*, the Third Circuit also relied on *Black’s Law Dictionary* when it held that all claims brought under Pennsylvania’s right-of-publicity statutes qualify as intellectual property. 14 F.4th at 212–14. However, the Third Circuit’s reasoning is not persuasive here for three reasons. First, the Third Circuit overlooked the actual definition of intellectual property and instead relied on the examples. *Id.* at 212 (recognizing that *Black’s Law Dictionary* included publicity rights as an example of an intellectual property claim). True, the right of publicity can protect intellectual property *but only if* the claim satisfies the

definition—e.g., the claim seeks to protect a product of the human intellect. *See Jane Doe No. 1 v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 163 n.13 (D. Mass. 2015) (“Although certain publicity rights are akin to ‘intellectual property’ rights, a person’s image is not a ‘product of the human intellect.’”). As such, the Third Circuit erroneously assumed that all publicity rights satisfy the definition of intellectual property.

Second, the Third Circuit referenced this Court’s analogy in *Zacchini* but overextended it to trademarks. *Hepp*, 14 F.4th at 213 (“Trademarks also foster the marketplace . . . so the right of publicity and trademark are close analogues.”). But like the Tenth Circuit explained in *Cardtoons*, the incentives analogy is not compelling for all right-of-publicity claims. Further, the analogy to trademark law is overbroad. For example, the Lanham Act is a federal trademark statute, however, not all claims brought under the Lanham Act relate to intellectual property. *Enigma Software*, 946 F.3d at 1045, 1053–54 (explaining that a false-advertising claim brought under the Lanham Act did not qualify for the § 230(e)(2) exclusion because the claim did not directly involve intellectual property). As such, the Third Circuit’s analogy to trademark law does not support its conclusion that all right-of-publicity claims are intellectual-property claims.

Third, the Third Circuit explicitly emphasized the “narrowness” of its holding. *Hepp*, 14 F.4th at 214. It reasoned that its holding does not “open the floodgates” because “Pennsylvania’s statute is limited.” *Id.* (“[I]t provides a right of publicity cause of action only for those whose valuable interest in their likeness ‘is developed

through the investment of time, effort, and money.”). Accordingly, the Third Circuit refrained from opining on “whether other states’ rights of publicity qualify as intellectual property as a matter of federal law.” *Id.* Thus, this Court should consider whether Austero’s specific claim seeks to protect “commercially valuable products of the human intellect.”

Here, Austero’s specific claim is not an intellectual-property claim because it does not allege infringement upon commercially valuable products her human intellect. Austero contends that Moonie “so closely resembles Austero as to appropriate her identity and infringe on her right to profit from her likeness and identity.” *Austero*, op. at 6. However, Austero’s physical appearance is not a product of her “human intellect.” Further, the commercial value of Austero’s likeness and identity is “merely a by-product” of the media and society and not of her *own* human intellect. *See Cardtoons*, 95 F.3d at 973. As such, Austero’s specific claim does not allege infringement upon any intellectual property. Thus, Austero’s right-of-publicity claim does not qualify for the § 230(e)(2) intellectual-property exclusion.

**C. FakeBlock is immune from Austero’s claim because Fünke acted in her personal capacity when she uploaded *Moonie Bares All*.**

Because Austero’s claim does not qualify for § 230(e)(2)’s exclusion, this Court must determine whether FakeBlock is immune from Austero’s claim under § 230(c)(1). FakeBlock is immune if: “(1) FakeBlock qualifies as a provider of an interactive computer service, (2) Austero’s claim is based on information provided by another ‘information content provider,’ and (3) Austero’s claim would treat FakeBlock as the ‘publisher or speaker’ of that information.” *Austero*, op. at 10. The parties only

dispute the second element. *Id.* at 11. However, FakeBlock satisfies the second element because Fünke is the only information content provider, and she did not act on behalf of FakeBlock.

First, Fünke is *Moonie Bares All's* only information content provider. Under § 230, internet service providers are not liable for information provided by another information content provider. 47 U.S.C. § 230(c)(1). Section 230 defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of the information provided through the Internet or any other interactive computer service.” *Id.* § 230(f)(3). Although courts have recognized that an internet service provider can also be an information content provider, the internet service provider is only liable as the information content provider if it is responsible for the creation or development of unlawful content. *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009).

An internet service provider is responsible for the development of unlawful conduct if it “contributes materially to the alleged illegality of the conduct.” *Fair Hous. Council v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008). However, an internet service provider is not responsible for the developing the unlawful conduct if it “passively displays content that is created entirely by third parties.” *Id.* at 1162. Accordingly, when a third party “unilaterally created and submitted” the disputed content, the internet service provider maintains § 230

immunity. *S.C. v. Dirty World, LLC*, No. 11-CV-00392, 2012 WL 3335284, at \*4 (W.D. Mo. Mar. 12, 2012).

Here, Fünke unilaterally created and submitted the disputed content—*Moonie Bares All*—to FakeBlock. FakeBlock did not materially contribute to the alleged illegality of *Moonie Bares All*. Instead, FakeBlock passively displayed the content created entirely by Fünke. Thus, FakeBlock is not an information content provider because it did not create or develop *Moonie Bares All*.

Second, Fünke acted in her personal capacity when she uploaded *Moonie Bares All*. Fifteenth Circuit Judge Ping reasoned that, because Fünke is a “corporate officer” of FakeBlock, Fünke’s actions are necessarily FakeBlock’s actions, which makes FakeBlock the information content provider. *Austero*, op. at 41 (Ping, J., concurring). However, an employee does not always act on behalf of its employer. For example, an employer is not liable for its employees’ actions if the employees act in their personal capacities or for “personal motives.” *Fenster v. Ellis*, 898 N.Y.S.2d 582, 584 (N.Y. App. Div. 2010). Here, Fünke uploaded *Moonie Bares All* because she wanted to advertise her *own* software and assist *her mother’s* political campaign. *Austero*, op. at 41 (Ping, J., concurring). Fünke also testified that she only uploaded her film to FakeBlock because she knew *Moonie Bares All* would go viral, and she wanted the web traffic to go to FakeBlock because she had invested in the site. *Id.* at 42. Thus, Fünke acted in her personal capacity and for personal motives.

Further, Austero produces no evidence to support a reasonable inference that Fünke acted on behalf of FakeBlock. To survive a motion for summary judgment, the

nonmovant must produce “sufficient evidence in specific, factual form” that a genuine issue of material fact exists. *GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1200 (10th Cir. 2022). To show that there is a genuine issue of material fact, the nonmovant must produce more than a “mere scintilla of evidence.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). If the nonmovant produces sufficient evidence, courts draw all reasonable inferences in favor of the nonmovant. *Behunin*, 38 F.4th at 1200. However, an inference is unreasonable if it requires speculation or is a mere possibility. *Id.*

Here, Judge Ping inferred that Fünke’s uncompensated role at FakeBlock “raises a reasonable inference that Fünke acted in her corporate capacity.” *Austero*, op. at 4 (Ping, J., concurring). However, Judge Ping’s inference is unreasonable because *Austero* did not produce any evidence about Fünke’s duties, why she had the authority to upload on FakeBlock, or how Fünke’s actions furthered the interests of FakeBlock. Without any evidence, Judge Ping’s inference was mere speculation. As such, *Austero* is not entitled to an inference that Fünke acted in her corporate capacity when she uploaded *Moonie Bares All*. Thus, FakeBlock satisfies the second element because *Austero*’s claim is based on information provided by another information content provider, Fünke.

Accordingly, FakeBlock is entitled to summary judgment on its § 230 immunity defense because § 230(e)(2)’s intellectual-property exclusion does not encompass *Austero*’s right-of publicity claim, and FakeBlock satisfies all three elements that § 230 immunity requires.

**II. Austero’s right-of-publicity claim fails as a matter of law because *Moonie Bares All* does not appropriate Austero’s identity under Newport Beach law, and the First Amendment shields Fünke and FakeBlock from liability.**

Austero has not demonstrated a Newport Beach right-of-publicity claim, and the First Amendment outweighs Austero’s publicity interests. Right-of-publicity laws inherently threaten this Court’s First Amendment jurisprudence. *See Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 58 (Cal. Ct. App. 2006) (“[A] tension frequently exists between the First Amendment’s goal of fostering a marketplace of ideas and respect for individual expression, and a celebrity’s right of publicity.”). Many courts recognize this tension and balance the two competing values. *See, e.g., ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 930–31 (6th Cir. 2003) (explaining that Ohio relied on the Restatement to craft its right of publicity to ensure that the right does not encroach upon First Amendment rights).

Newport Beach reflected this balance when it adopted § 652C. *See Austero*, *op. at* 9–10 (citing RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977)). Under § 652C—which requires plaintiffs to prove that defendants appropriated their “name or likeness” to benefit themselves—Austero cannot survive summary judgment, nor has she produced sufficient evidence that Fünke and FakeBlock used her identity or persona. Either way, however, the First Amendment protects *Moonie Bares All* because it parodies a public figure, involves the public interest, and transforms raw materials into a new expression.

**A. Newport Beach only protects a right-of-publicity plaintiff when the defendants appropriate the plaintiff’s “name or likeness” to benefit themselves.**

Newport Beach defined its right of publicity when it recognized § 652C as its state law. State substantive law governs when federal courts exercise diversity jurisdiction. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Federal courts may only make an “*Erie* guess” to predict what the state’s law requires if the state is silent on an issue; however, “predict” does not mean “create,” “modify,” or “adopt innovative theories” on the state’s behalf. *United Parcel Serv., Inc. v. Weben Indus., Inc.*, 794 F.2d 1005, 1008 (5th Cir. 1986). This Court need not predict the elements of Newport Beach’s right of publicity because Newport Beach already adopted § 652C, and the Fifteenth Circuit erred when it expanded § 652C on Newport Beach’s behalf. This Court should certify a question to Newport Beach if it cannot properly apply the state’s existing law.

**1. This Court need only rely on § 652C to define the right of publicity’s scope.**

Section 652C defines Newport Beach’s right of publicity. It provides: “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 (AM. L. INST. 1977). Its four comments explain that: (1) the right protects identity “*in so far* as it is represented by . . . name or likeness”; (2) defendants invade the right when they use a plaintiff’s name or likeness “for [their] own purposes and benefit”; (3) appropriation means that the defendants attempted to “pass [themselves] off as the plaintiff or otherwise seek to obtain for [themselves] the values



or benefits of the plaintiff's name or identity"; and (4) the right does not prohibit the "incidental use of name or likeness." *Id.* cmts a–d (emphasis added).

Federal circuits have relied on § 652C's text and comments alone to analyze other states' rights of publicity. *See, e.g., Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 638 (5th Cir. 2007) (using text and comments of § 652C to define the tort's scope under Texas law); *Showler v. Harper's Mag. Found.*, 222 F. App'x 755, 762–63 (10th Cir. 2007) (same under Oklahoma law). Two circuits explicitly refused to impose additional requirements. The Third Circuit refused to address the Restatement (Third) of Unfair Competition's broader right of publicity because New Jersey courts only adopted § 652C. *Hart v. Elec. Arts*, 717 F.3d 141, 151 n.13 (3d Cir. 2013). Because New Jersey adopted § 652C, it represented the "current incarnation of the right of publicity in New Jersey." *Id.* at 151. Similarly, the Second Circuit concluded that § 652C's comments provided the "probable scope" of Connecticut law, even though "there [was] very little Connecticut authority as to the boundaries of Connecticut's common law right of publicity." *In re Jackson*, 972 F.3d 25, 38 (2d Cir. 2020).

The current incarnation of Newport Beach's publicity right appears in § 652C. Like New Jersey and Connecticut, Newport Beach incorporated § 652C into its common law. *Austero*, op. at 9. Scarce case law alone does not suggest that federal courts need further guidance to apply the law. Nevertheless, the Fifteenth Circuit ignored Newport Beach law and this Court's precedent in *Erie* when it expanded Newport Beach's standard simply because it "agree[d] with . . . the reasons explained by the Ninth Circuit in *White*." *Austero*, op. at 20 (citing *White v. Samsung Elecs. Am.*,

*Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992)). It did not, however, explain why Newport Beach law requires this standard or why *White* controls the scope of Newport Beach’s state law.

**2. Protecting “identity or persona” expands the right of publicity’s scope beyond what Newport Beach law requires.**

The Fifteenth Circuit erroneously modified Newport Beach’s right of publicity. It reasoned that: (1) a federal district court expanded New Hampshire’s right of publicity in *Doe v. Friendfinder*; and (2) *White* and three other circuit decisions broadly defined other states’ rights of publicity. Austero, op. at 20 (citing *White*, 971 F.2d at 1399, and then citing *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 304 (D.N.H. 2008)). Both rationales violate this Court’s precedent in *Erie*.

*Doe v. Friendfinder*, which protects the “identifiable” use of a plaintiff’s “identity or persona,” should not define Newport Beach law for two reasons. First, the *Friendfinder* standard derived from a treatise that does not interpret or mention § 652C. See *Friendfinder*, 540 F. Supp. 2d at 302 (citing J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 1:24 (2d ed. 2000)). Second, the *Friendfinder* court did not even adopt this standard as New Hampshire law. 540 F. Supp. 2d at 304 n.18. Rather, the court explicitly reserved the issue of what standard applied and only analyzed the broader standard because the defendants raised it for the first time in a reply memorandum. *Id.* at 303 n.16, 304 n.18. This Court should not adopt—on Newport Beach’s behalf—a standard from a different case that the court only analyzed because a party argued it at the last minute.

Further, the four circuits that the Fifteenth Circuit cited rely on rationales that do not support broadening § 652C's scope. *White*'s standard should not control here because its reasoning does not apply to Newport Beach. In *White*, the Ninth Circuit concluded that the right of publicity's history supports expanding the right's scope beyond "name or likeness." *White*, 971 F.2d at 1397. It pointed to Dean William Prosser's 1960 law review article that recognized two publicity rights: name and likeness. *Id.* (citing William Prosser, *Privacy*, 48 CAL. L. REV. 383, 401–02 nn. 156, 157 (1960)). Prosser suggested that other means of appropriation *may* exist, which led the Ninth Circuit to expand California's publicity right. *White*, 971 F.2d at 1397–98. Prosser noted, however, that "[n]o such case appears to have arisen." William Prosser, *Privacy*, 48 CAL. L. REV. 383, 401 n.155 (1960).

But these cases had arisen when Newport Beach became a state in 2014. *See Austero*, op. at 3 n.1. Thus, when Newport Beach adopted § 652C, it knew that states protected varying degrees of publicity rights. Newport Beach could have adopted the Restatement (Third) of Unfair Competition § 46, which protects "name, likeness, or other indicia of identity," but it did not. *See, e.g., Pooley v. Nat'l Hole-In-One Ass'n*, 89 F. Supp. 2d 1108, 1111 (D. Ariz. 2000) (acknowledging that Arizona's right of publicity encompasses both Restatement definitions). Prosser's 1960 statement, which predicted what Newport Beach knew, does not justify expanding Newport Beach's publicity rights beyond the text and comments of § 652C.

The other cases upon which the Fifteenth Circuit relied to expand Newport Beach's right of publicity are similarly distinguishable. First, *Landham v. Lewis*

*Galoob Toys, Inc.* should not control here because it analyzed a Kentucky statute unlike § 652C that protects any “element of an individual’s personality.” 227 F.3d 619, 622 (6th Cir. 2000) (interpreting KY. REV. STAT. ANN. § 391.170(1) (West 1984)). Second, *Midler v. Ford Motor Co.* should not control here because it relied on a Ninth Circuit case that used three California-specific rationales to broaden the right of publicity. 849 F.2d 460, 463 (9th Cir. 1988) (citing *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 826 nn. 15, 16 (9th Cir. 1974)). *Motschenbacher* relied on two California trial court decisions, a California constitutional amendment, and a California statute’s legislative history to broaden the state’s right of publicity. *Motschenbacher*, 498 F.2d at 826 nn. 15, 16.

Third, *Carson v. Here’s Johnny Portable Toilets, Inc.* should not control here because it made an *Erie* guess based on Michigan’s law in 1983 before the state had adopted any right of publicity. *See* 698 F.2d 831, 834 n.1 (6th Cir. 1983) (predicting without explaining that “a celebrity’s legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes.”). This Court need not rely on a 1983 *Erie* guess about Michigan law to understand what § 652C requires. Thus, the Fifteenth Circuit imposed a standard on Newport Beach that impairs the state’s ability to choose its own law. If the Fifteenth Circuit needed additional guidance to determine what § 652C requires a plaintiff to prove, it should have certified a question to Newport Beach. However, this Court need not certify a question because *Austero* cannot survive summary judgment under either standard.

**B. Austero has not shown a viable right-of-publicity claim because she does not own a valid publicity interest upon which *Moonie Bares All* infringes.**

Austero cannot show a right-of-publicity claim under either standard. Both standards require Austero to show (1) validity and (2) infringement; however, the *Friendfinder* standard departs from § 652C in two significant ways. First, § 652C only protects “name or likeness,” while *Friendfinder* expands the right to include “identity or persona.” Second, § 652C requires Austero to prove that Fünke and FakeBlock appropriated her likeness by passing Moonie off as Austero, while *Friendfinder* only requires that viewers may identify Moonie as Austero. Austero failed to demonstrate that Fünke and FakeBlock appropriated her likeness to benefit themselves under § 652C, but even if this Court expands Newport Beach’s right of publicity, Austero has not shown that Fünke and FakeBlock used her identity or persona in *Moonie Bares All*.

**1. Under Newport Beach’s right-of-publicity law, Austero has not shown that Fünke and FakeBlock appropriated her likeness for their own benefit.**

Austero has not demonstrated a viable § 652C claim. Section 652C only imposes liability when defendants appropriate a plaintiff’s name or likeness to benefit themselves. RESTATEMENT (SECOND) OF TORTS § 652C cmt. c (AM. L. INST. 1977). Austero conceded that *Moonie Bares All* does not appropriate her name, so this case turns on her likeness. Likeness is “a visual image of a person other than a photograph.” *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998). Fünke and FakeBlock did not appropriate any visual image in which Austero has an enforceable interest.

Austero has no interest in her appearance because generic physical characteristics do not create valid likeness interests. *See White*, 971 F.2d at 1405 (Alarcon, J., concurring) (“But an attractive appearance, a graceful pose, blond hair, an evening gown, and jewelry are attributes shared by many women . . . They are not unique attributes of Vanna White’s identity.”)

*Walkowicz v. American Girl Brands, LLC* illustrated the difference between unique and generic physical attributes. *See* 20-cv-374, 2021 WL 510729 (W.D. Wis. Feb. 11, 2021). In that case, Walkowicz alleged that an American Girl doll appropriated their likeness.<sup>1</sup> *Id.* at \*2. Walkowicz is a famous astronaut who often displays “purple-streaked brown hair, space-patterned dress, and holographic shoes.” *Id.* The defendant’s “Girl of the Year” featured an astronaut doll with similar traits. *Id.* Walkowicz could not rely on these traits to enforce a right-of-publicity claim because they did not show that “they are the only person to wear space-themed clothing or holographic shoes, nor [did] they identify any unique similarities between the clothing they have worn and [the doll’s] clothing.” *Id.* at \*6. By contrast, the court explained, a right-of-publicity plaintiff could enforce a right in physical traits if the claim alleged that “a unique costume . . . was *singularly* identified with the plaintiff.” *Id.* (citing *Loftus v. Greenwich Lithographing Co.*, 192 A.2d 251, 252 (N.Y. App. Div. 1920)) (emphasis added). The court also emphasized that the successful plaintiff in *Loftus* showed that the contested image depicted her *exactly* how she had appeared in a previous photograph. *Id.*

---

<sup>1</sup> Walkowicz uses they/them pronouns.

The *NCAA Football* cases, which the Fifteenth Circuit analyzed, are consistent with *Walkowicz*. See *Austero*, op. at 29 (citing *Davis v. Elec. Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015); and then citing *Keller v. Elec. Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013); and then citing *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013)). In those cases, college football players alleged that a video game—which depicted college athletes—appropriated their identities. *Davis*, 775 F.3d at 1175–76; *Keller*, 724 F.3d at 1271; *Hart*, 717 F.3d at 166.

Unlike *Walkowicz*, these video games singularly identified the players when they included each player’s “actual jersey number and virtually identical height, weight, build, skin tone, hair color, and home state.” *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013). And the games depicted each player at a *specific* time in their life—when they played football at their respective institutions. *Hart*, 717 F.3d at 166 (“[T]he avatar’s accessories mimic those worn by Appellant during his time as a Rutgers player.”). By contrast, when an individual has a “continually moving” appearance and no “singular identity,” then this “lack of stasis” does not sufficiently support an appropriation allegation. *Kirby*, 144 Cal. App. 4th at 56.

*Austero*’s physical characteristics are not unique or static enough to give rise to an enforceable right-of-publicity interest. Like many women have blonde hair and wear evening gowns and jewelry, many women have pixie cuts and 5’4” statures. *Austero*, op. at 55 n.1 (“*Austero* hardly has a monopoly on pixie haircuts.”) (citing Erin Mayer, *The 34 Most Iconic Pixie Cuts of All Time*, REDBOOK,

<https://www.redbookmag.com/beauty/hair/advice/g2109/iconic-pixie-cuts/> (last visited Nov. 19, 2023)); *see also* *Austero*, op. at 62 (“[T]he average height among all American woman, aged 20 and up, is *5 foot 4 inches tall*.”) (citing *What Is the Average Height for Women?*, CLEVELAND CLINIC, <https://health.clevelandclinic.org/what-is-the-average-height-for-women/> (last visited Nov. 19, 2023)). In fact, women with pixie cuts and average height likely outnumber people who wear space-themed clothing and holographic shoes—traits that did not sufficiently provide a valid likeness interest in *Walkowicz*.

Further, *Austero* did not produce evidence that suggests that her physical traits are singularly identified with her or that allows the court to reasonably infer that *Moonie* portrays a *specific* version of *Austero*. Rather, her claim represents a “Frankenstein monster of sorts,” which more closely resembles the non-singular identities that the right of publicity deems unenforceable. *See Austero*, op. at 27. These facts suggest that § 652C does not provide *Austero* with an enforceable interest in the physical traits that she and *Moonie* share.

Further, *Austero* has no enforceable likeness interest in the burlesque costume that she wore in *Cabaret*. Performers may only enforce a publicity interest in their characters when their screen persona is “inseparable from [their] own public image.” *McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994). In *McFarland v. Miller*, *McFarland* produced sufficient evidence to demonstrate that his character’s name, “Spanky,” identified him. *Id.* at 922. People knew *McFarland* as “Spanky” for most of



his life, he endorsed products as “Spanky,” and he appeared in credits for *other* roles as “Spanky” McFarland. *Id.* at 915 nn. 4, 6, 922.

Unlike McFarland, Austero is separable from her role in *Cabaret*. She has played other characters in other films that were not associated with *Cabaret*. Since Austero retired, she has continued to profit through cameo appearances. However, she appears in these cameos as herself, not as a character. Thus, Austero does not demonstrate an enforceable likeness interest in her character’s burlesque costume, and her right-of-publicity claim fails as a matter of law.

Even if Austero owns an enforceable likeness interest, Fünke and FakeBlock did not attempt to pass Moonie off as Austero to benefit themselves. Section 652C requires plaintiffs to prove that the defendants “appropriated to [their] own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff’s name or likeness.” RESTATEMENT (SECOND) OF TORTS § 652C cmt. c (AM. L. INST. 1977). When a plaintiff demonstrates that a contested image is a stand-in for the plaintiff, the plaintiff likely satisfies this element. *See* RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (AM. L. INST. 1977); *see also White*, 971 F.2d at 1405 (Alarcon, J., concurring) (“No doubt the advertisement would have been more effective if Vanna White had appeared in it.”).

Austero does not meet this element for two reasons. First, Moonie cannot serve as a stand-in for Austero because the two have significant physical differences. Moonie displays the “hallmark” features of an AI-generated model—like distorted facial features, missing fingers, and skin that displays inconsistent aging. These distortions

ensure that the viewer knows that Moonie is not, in fact, Austero. *See Austero*, op. at 24 (“[I]f our analysis were confined to comparing facial features only, we would agree with our dissenting colleague that a reasonable fact finder would not find enough of a physical resemblance to conclude that Fünke appropriated Austero’s facial likeness for her Moonie character.”). Notably, Moonie lacks Austero’s features that people *would* recognize—like her “spiky hair” and her “famous smile.” Therefore, *Moonie Bares All* does not appropriate Austero’s visual image.

Second, Moonie and Austero’s resemblances do not benefit Fünke and FakeBlock. Fünke created the film to promote her software’s capability of generating realistic AI models. If Moonie were a stand-in for Austero, it would mean that the film would serve its same purpose had Austero herself played Moonie’s role in the film. That would defeat Fünke’s goal—to advertise her software’s model-generating capacity. Thus, Austero’s right-of-publicity claim cannot survive summary judgment because § 652C does not provide her an enforceable likeness interest, and Fünke and FakeBlock did not appropriate her likeness to benefit themselves.

**2. Even if this Court expands Newport Beach’s law beyond § 652C, Austero has not shown that Fünke and FakeBlock used her identity or persona in an identifiable way.**

Austero cannot survive summary judgment under the *Friendfinder* standard because she does not own an enforceable interest in her “identity or persona,” and *Moonie Bares All* does not identify Austero. The right of publicity “fill[s] the gaps left by copyright, privacy, and unfair competition laws.” Barbara Singer, *The Right of Publicity: Star Vehicle or Shooting Star?*, 10 CARDOZO ARTS & ENT. L.J. 1, 47 (1991). Because it is a gap-filling right, the right of publicity does not protect interests that

other property rights cover. Even broad publicity rights cannot protect interests that another law—like copyright law—encompasses. See *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1140–41 (9th Cir. 2006).

The *Friendfinder* standard, then, only protects non-copyrightable attributes like voice or a dancer’s style; however, it cannot protect copyrightable attributes like the song that a voice sings or the choreography that a dancer performs. These fine distinctions ensure that property rights serve the purposes for which they originated. See *Dryer v. Nat’l Football League*, 814 F.3d 938, 943 (8th Cir. 2016) (“When a right-of-publicity suit challenges the expressive, non-commercial use of a copyrighted work . . . that suit seeks to subordinate the copyright holder’s right to exploit the value of that work to the plaintiff’s interest in controlling the work’s dissemination.”).

Even under the *Friendfinder* standard, Austero has not demonstrated an enforceable right-of-publicity interest. Her claim rests on Moonie’s physical appearance, outfit, tap dance, song, voice, political candidacy, and career as an actress, singer, and dancer. Austero cannot enforce a right-of-publicity claim in Moonie’s outfit for the same reasons explained above—she is not sufficiently synonymous with her character in *Cabaret*. And although this standard allows this Court to consider Austero’s generic physical characteristics along with other *enforceable* attributes, Austero does not own sufficient enforceable interests in her identity to raise a reasonable inference that Moonie identifies her.

First, Austero’s tap performance at Radio City Music Hall is not an enforceable publicity interest. Choreography is copyrightable; therefore, it is unenforceable as a

publicity right. See *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 158 (2d Cir. 1986). And the *style* in which a dancer performs only provides an enforceable publicity interest if the dancer demonstrates that only she performs in that style. For example, in *Newcombe v. Adolf Coors Co.*, a baseball pitcher’s unique pitching stance created an enforceable publicity interest; however, the court relied on the fact that Newcombe was “the only one who ha[d] such a stance.” *Newcombe*, 157 F.3d at 692. Unlike Newcombe, Austero has not produced evidence that allows this Court to reasonably infer that she is the *only* person who tap dances in her style. Because she cannot demonstrate this level of uniqueness and because the right of publicity does not enforce interests in choreography, Austero does not own an enforceable publicity interest in her tap dance.

Second, Austero does not own an enforceable interest in the song “(Theme from) New York New York” or the song “New York, New York.” While the *Friendfinder* right of publicity allows voice-appropriation claims, it does not validate publicity interests in copyrightable works like song lyrics or musical numbers. In *Midler*, the Ninth Circuit explained this distinction. 849 F.2d at 461–64. It held that the right of publicity protected a mere imitation of Midler’s voice because her voice uniquely and distinctly identified her. *Id.* at 463–64. The court distinguished Midler’s claim from one that Nancy Sinatra brought prior. *Id.* at 462 (citing *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 717–18 (9th Cir. 1970)). In that case, Sinatra asserted an interest in a song that people associated with her. *Sinatra*, 435 F.2d at 712–13. The Ninth Circuit explained that Sinatra’s claim did not concern a “uniquely personal”

attribute like a distinct vocal style. *Id.* at 716. Rather, it focused on the song itself, which did not amount to a valid publicity interest. *Id.*

Austero's claim resembles Sinatra's—not Midler's. The Fifteenth Circuit suggested that because “(Theme from) New York New York” is “widely attributed to Austero,” Austero may enforce a right of publicity against Moonie's vocal performance of “New York New York”—an entirely different song. *See Austero*, op. at 26. In fact, the Fifteenth Circuit relied on Sinatra's case to conclude this; however, it declined to acknowledge that the Ninth Circuit rejected Sinatra's argument. If Sinatra could not sufficiently assert an interest in a song that was *actually* closely associated with her, then Austero likely cannot assert an interest in a song with the same name as a song that people associate with her. And “(Theme from) New York New York,” which Austero actually sang, has achieved its fame from Frank Sinatra—not Austero. Under the Fifteenth Circuit's reasoning, Frank Sinatra could enforce a right-of-publicity claim against Austero for her performance of “(Theme from) New York New York.”

Third, Austero has not produced evidence that suggests the uniqueness of her vocal style. When the Ninth Circuit protected Midler's voice, it explained that “a number of people” told Midler that the imitation “sounded exactly” like her. *Midler*, 849 F.2d at 461–62. Austero, by contrast, produced one expert witness who testified that “Moonie's voice might be Austero's current voice but possibly digitally altered to be an octave higher.” *See Austero*, op. at 26. This testimony does not create a reasonable inference that Moonie's voice “sounds exactly” like Austero's. By contrast,

Austero produced evidence that contradicts inferring that Moonie's voice appropriates hers. During at least one of Austero's films, Austero had a soprano's voice. Now, however, she sings in a much deeper voice because she had vocal-cord surgery in 1997. Therefore, Austero cannot demonstrate an enforceable right-of-publicity interest in her non-unique vocal style, the song "(Theme from) New York New York", or "New York, New York."

Fourth, Austero does not own an enforceable interest in her life experiences, which include her substance abuse history, her congressional candidacy, and her entertainment career. Even the *Friendfinder* right of publicity precludes validating publicity interests in a "life story." *Rosa & Raymond Parks Inst. for Self Development v. Target Corp.*, 90 F. Supp. 3d 1256, 1263 (M.D. Ala. 2015). Although the Ninth Circuit suggested that a career *could* give rise to an enforceable right of publicity, it emphasized that Vanna White was "the only one" who had her specific career. *White*, 971 F.2d at 1399. Austero has not produced evidence suggesting that nobody else with substance abuse issues has run for office or that she is the only retired actress that entered politics. Further, while Austero's impressive skill in acting, singing, and dancing sets her apart from performers that only hold one or two of these skills, she still has not shown that she is the *only* one. Thus, even under the *Friendfinder* standard, Austero may only enforce an interest in her physical appearance. Without more, the generic attributes of her identity or persona do not sufficiently identify Moonie as Austero and nobody else.

**C. The First Amendment shields *Moonie Bares All* from any liability because it is a parody, it comments on a matter of public interest, and it transforms raw materials into an original, creative expression.**

*Moonie Bares All* is entitled to full First Amendment protection. Films, including short films, impact “public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.” *Wilson*, 343 U.S. at 501. When the right of publicity threatens this free expression, courts emphasize that a balancing test is necessary to ensure they consider the important constitutional rights at stake. *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001).

The transformative-use test provides the best framework to balance the right of publicity against First Amendment interests. This test guides courts to determine whether a work that uses materials from another work transforms the work into a new expression. *Id.* at 808. But courts need not analyze a film under the transformative-use test when the film parodies another work or if it comments on a matter of public interest because the First Amendment strongly protects these expressions and renders a balancing test unnecessary. *Winter v. DC Comics*, 69 P.3d 473, 478 (Cal. 2003). The First Amendment protects *Moonie Bares All* on at least three grounds: (1) it is a parody; (2) it comments on a matter of public interest; and (3) it transforms raw materials into a creative expression.

**1. A reasonable viewer understands that *Moonie Bares All* is a parody that comments on Newport Beach’s election.**

The First Amendment protects *Moonie Bares All* because it is a parody. Courts provide parody “substantial freedom” because it is a “form of social and literary

criticism.” *Berlin v. E.C. Publ’ns, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964). This freedom allows creators to remind their audiences of celebrities because parodies’ humor “lies in the difference between the original and the parody.” *Cardtoons*, 95 F.3d at 970. The difference between the parody and the original is the parody’s commentary or criticism about the original. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 596–97 (1994) (Kennedy, J., concurring). This commentary, however, need not show itself during every second of the film. Rather, parody depends on whether a viewer could reasonably understand that it is not real. *Northland Fam. Plan. Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 971 (C.D. Cal. 2012).

Thus, the reasonable viewer understands that *Moonie Bares All*—as a whole—is a parody at least forty-five seconds into the film. From the start, the viewer already knows that Moonie is not *actually* Austero because of the physical dissimilarities between the two. This contributes to the viewer’s understanding that Austero did not actually begin to publicly perform a tap dance only to stagger off the stage and strip off her clothes forty-five seconds later. Immediately after Moonie stumbles back on the stage, she begins to sing the altered lyrics to “New York, New York”, which the Fifteenth Circuit correctly deemed parodical. At that point, any doubts that the viewer harbored about whether the film was not “the real thing” subside when Moonie begins to sing lyrics that flaunt her wealth, expose her substance dependencies, and demoralize immigrants.

The reasonable viewer understands that *Moonie Bares All* is a parody. The film may, at first, remind viewers of films in which Austero acted. During this set-up, her



candidacy may also spark nostalgia and interest them in her platform. Then, the film begins to highlight her substance dependencies when she staggers off the stage. Even before she begins to sing the parodical song, viewers have started to absorb the film's commentary and may wonder whether Austero—a previously-admired celebrity—truly embodies Newport Beach's most qualified representative. The song's lyrics then confirm that *Moonie Bares All* never represented a real Austero performance. It does not matter whether viewers found the film funny or if they even understood its message. It only matters that they knew that if the film reminded them of Austero, it did so as a parody and not a real Austero performance.

**2. *Moonie Bares All* is a fair comment on a matter of public interest—the “darker side” of a Newport Beach congressional candidate.**

The First Amendment shields Fünke and FakeBlock from liability because it comments on a matter of public interest. The First Amendment's public-interest defense relies on celebrities or other public figures' willing entrance into the public eye: “[T]here is a public interest which attaches to people who by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities.” *Carlisle v. Fawcett Publ'ns, Inc.*, 201 Cal. App. 2d 733, 746–47 (Cal. Dist. Ct. App. 1962). When this speech comments on a public figure who choose to enter politics, the First Amendment affords the speech its highest protection. *Buckley v. Am. Const'l Law Found., Inc.*, 525 U.S. 182, 183 (1999).

The public-interest defense bars Austero's right-of-publicity claim because it comments on Austero's activities as a public—and political—figure. Because the

Fifteenth Circuit held that Fünke’s modified lyrics to “New York, New York” constituted a parody, it did not analyze them under the public-interest defense. However, severing Moonie’s song from the rest of the film contradicts the First Amendment’s broad protection of political expression. *Moonie Bares All* provided social commentary on Austero’s candidacy, which Fünke made clear when she wrote “VOTE 4 LINDSAY BLUTH” on the video and provided Bluth’s campaign website. The public-interest defense thus protects *Moonie Bares All* from right-of-publicity liability.

**3. *Moonie Bares All* transforms the “raw materials” that it uses from Austero’s performances into an original and creative expression.**

The transformative-use test protects *Moonie Bares All*. This test recognizes that the competing values surrounding the right of publicity and the First Amendment require a balancing of interests. *Comedy III*, 21 P.3d at 806. Some courts articulate a five-factor test; however, others recognize that all transformative-use cases tend to turn on one factor: whether the work used an individual’s likeness as a “raw material” or whether the individual’s likeness comprised the very “sum and substance” of the work. *Compare In re NCAA*, 724 F.3d at 1274 *with Kirby*, 144 Cal. App. 4th at 58. Courts generally only use additional factors to support the conclusion that this “sum and substance” factor reaches. *See, e.g., Winter*, 69 P.3d at 477–78 (calling the “sum and substance” factor the “inquiry” of the transformative-use test before analyzing additional factors).

Fünke used Austero as a raw material for *Moonie Bares All*, but Moonie is not the very sum and substance of the film. A work that contains “significant transformative

or creative contribution” suggests that it sufficiently transforms raw materials into a new and original expression. *Comedy III*, 21 P.3d at 797. In *Kirby v. Sega of America, Inc.*, a California court illustrated when a work rises to a transformative level. *Kirby*, 144 Cal. App. 4th at 59. In that case, Kirby alleged that a video game character—Ulala—violated her publicity rights. *Id.* at 53. Kirby asserted that her retro and futuristic style portrayed a “unique public identity.” *Id.* at 51. Like Kirby, Ulala wore retro-style clothing. *Id.*

Nevertheless, the transformative-use test weighed in the creators’s favor because it created a “new expression.” *Id.* at 59. Kirby and Ulala’s differences demonstrated that Ulala represented more than a mere depiction of Kirby. *Id.* They had different heights, dance moves, and physiques, which sufficiently established that Ulala transformed Kirby’s likeness. *Id.* at 56–57. Although Ulala did not convey any substantive meaning, the test only required that she added something new to Kirby’s likeness. *Id.* at 60.

A work’s context may also suggest that a work is transformative. For example, in *ETW Corp. v. Jireh Publishing.*, an artist created a “panorama” of golfer Tiger Woods’s victory at a tournament. 332 F.3d at 936. Although the work used Woods’s likeness, additional artistic elements including Woods’s caddy, the leader board, past winners’ likenesses, and other tournament-related images, sufficiently transformed the work. *Id.* This mosaic of creative elements, the court explained, represented an artistic piece that “communicates and celebrates the value our culture attaches to such events.” *Id.*

Similarly, Moonie transforms raw materials from Austero's life into a creative new expression. Moonie and Austero are physically different, like Ulala and Kirby. And *Moonie Bares All* demonstrates even more transformative elements than Ulala because *Moonie Bares All*, like the panorama in *ETW Corp.*, conveys a message. It expresses political sentiments, reflects social values, and pokes fun at a public figure. Undoubtedly, Moonie and Austero have similarities, and *Moonie Bares All* may remind viewers of Austero. But the transformative-use test does not require—or even consider—identifiability. It simply ensures that the First Amendment safeguards creativity—even when it involves a celebrity's likeness. This balance, which the First Amendment requires, protects society's fundamental values in encouraging the free exchange of ideas.

A second transformative-use factor complements this conclusion: If someone purchased *Moonie Bares All*, Fünke's creativity would motivate that purchase—not Austero's likeness. At least one court has acknowledged transformative works suggest that a purchaser would find the work “unsatisfactory as a substitute for conventional depictions” of the plaintiff. *Winter*, 69 P.3d at 479. So it is here. *Moonie Bares All* is an unsatisfactory substitute for *Cabaret*. Unlike *Cabaret*, which portrays Austero's performance skills, Moonie “fails” at these skills. *Cabaret*'s viewers likely do not hope to see the movie's star drunkenly stumble off the screen forty-five seconds into the film. Thus, this factor further suggests *Moonie Bares All*'s transformative nature, which the First Amendment protects.

Depriving *Moonie Bares All* of the First Amendment’s protection would allow celebrities, politicians, or other individuals to censor any work that *reminds* viewers of them. This censorship—just like overbroad government regulation of online forums like FakeBlock—threatens the free expression principles that this Court and Congress have consistently reaffirmed. Internet service providers and creators need the freedom to discover how artificial intelligence will contribute to the vibrant discourse that the First Amendment promotes, and courts need the leeway to determine the balance between state privacy rights and constitutional safeguards. Courts are no strangers to novel issues, and they have the capabilities to define these rights in the context of artificial intelligence. This Court should not deny them this opportunity simply because individuals *could* use new technologies and the Internet to violate another’s privacy.

### CONCLUSION

For these reasons, FakeBlock and Fünke respectfully request this Court to reverse the Fifteenth Circuit’s decision.

Respectfully submitted,  
**TEAM 41**  
*Counsel for Petitioners*