

No. 22-9908

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 2023 TERM

FAKEBLOCK, INC.,

Petitioners,

v.

LUCILLE AUSTERO,

Respondent.

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

BRIEF FOR THE PETITIONER

Team 45
Counsel for Petitioner

QUESTIONS PRESENTED

- I. Did the Fifteenth Circuit err in holding that internet social media companies are not immune under 47 U.S.C. § 230 from state-law right-of-publicity claims when § 230(e)(2) only provides an exception to § 230's broad grant of immunity for claims arising under intellectual property law?

- II. Did the Fifteenth Circuit err in abandoning this Court's well-settled precedent in *Zacchini v. Scripps-Howard Broad Co.*, 433 U.S. 562 (1977) by expanding an unworkable and overreaching rule for right-of-publicity claims that threatens fundamental First Amendment protections of free speech and expression?

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OPINION BELOW

The opinion of the United States District Court for the District of Newport Beach is unreported. The record provides the unpublished en banc opinion of the United States Court of Appeals for the Fifteenth Circuit in *Austero v. FakeBlock, Inc.*, No. 20-9804 (15th Cir. Oct. 17, 2022) (en banc), *cert. granted*, No. 22-9908 (Oct. 9, 2022). R. at 1a–39a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the First Amendment of the United States Constitution, U.S. Const. amend. I, and the construction of 47 U.S.C. § 230 of the Communications Decency Act of 1996. Pertinent portions of both are reproduced in the Appendix.

STATEMENT OF JURISDICTION

The United States District Court for the District of Newport Beach had subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332(a). The United States Court of Appeals for the Fifteenth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Statement of Facts

Maeby Fünke, a digital artist and programmer, specializes in using generative artificial-intelligence (AI) to create realistic, digital models. *Austero v. FakeBlock, Inc.*, No. 20-9804, op. at 3a (15th Cir. Oct. 17, 2022) (en banc). She created her own generative AI software—called “Mommy, What Will I look Like?”—to produce life-

like digital models. *Id.* Her early forays into generative AI focused on simulating what prospective parents' children would look like. *Id.* at 3a n.2.

But Fünke wanted to do more, and politics provided her with an opportunity to do so. *See id.* at 4a. In 2018, Fünke's mother, Lindsay Bluth, ran for Newport Beach's seat in the United States Congress against Lucille Austero, a prominent actress, dancer, singer, and political candidate. *Id.* at 3a–4a. With twenty-two movies, seven studio albums, and multiple Broadway and television programs under her belt, Austero is world-renowned. *Id.* at 4a. Some of her most famous performances include a striptease in the movie *Tell Me That You Love Me*, *Junie Moon*, the “Mein Herr” tap dance in the film *Cabaret*, 1992 tap-dancing performances at Radio City Music Hall, and her performance of “New York, New York,” from the film *New York, New York*. *Id.* at 25a–26a. Moreover, Austero cultivated a unique image: her signature spiky pixie cut and her famous *Cabaret* outfit (a halter vest, short shorts, derby hat, garters, and lace-up boots). *Id.* Having conquered the film industry, Austero turned her eyes to conquering politics.

Faced with Austero's celebrity status, Fünke wanted to help her mother's campaign because she believed that the media covered Austero too favorably and ignored Austero's “darker side.” *Id.* at 4a. She also hoped to attract more customers for her software. *Id.* So, she created “Moonie.” *Id.*

Moonie is a digital, AI-generated model. *Id.* To build Moonie, Fünke's AI software started by analyzing Austero's films and albums and used them as “raw building blocks” for Moonie's appearance and voice. *Id.* at 3a, 27a. As a result,

Moonie’s skin color, body style, and proportions are similar to Austero’s. *Id.* at 25a. Although Ann Veal, an expert for Austero, testified that Moonie’s voice “could very well be Lucille’s current voice digitally raised by one octave,” no conclusive testimony established that Moonie’s voice was Austero’s. *Id.* at 26a. For her part, Fünke later said that her software purposefully altered Moonie’s voice to be distinct from Austero’s. *Id.* at 27a.

Moonie earned its moniker because it would “moon” audiences when strip-teasing. *Id.* at 25a n.6. Besides stripping, Moonie can talk, sing, and dance. *Id.* at 4a. Physically, it resembles a human standing approximately 5’4” tall, with short, flat black hair styled in a pixie cut with prominent bangs. *Id.* at 4a, 23a. It is clad in a halter vest, short shorts, derby hat, garters, and lace-up boots. *Id.* at 25a. Moonie’s face is clear of birthmarks, and its nose has a prominent downward tip. *Id.* at 24a.

Moonie’s humanness ends there. Like other AI-generated models, Moonie possesses malformed characteristics. *Id.* at 23a n.5. For starters, its eyes are wideset, asymmetrical, and mismatched. *Id.* at 24a. Next, its mouth is disproportionately large. *Id.* When it smiles, it reveals a toothless mouth. *Id.* Further, its left hand only has four fingers and displays signs of inconsistent aging: the back of the hand and three fingers are wrinkled, while the index finger is smooth. *Id.*

Using Moonie, Fünke’s AI created a five-minute video—titled *Moonie Bares All*—that featured Moonie tap dancing in a burlesque outfit. *Id.* at 5a. The dance is reminiscent of a performance Austero did in 1992, although Moonie did not emulate Austero’s famous “Mein Herr” tap dance in *Cabaret*. *Id.* at 25a. After forty-five

seconds, Moonie stumbled, steadied herself, then stripped off her clothing. *Id.* at 5a. Moonie then sang altered lyrics to the song “New York, New York,” from Leonard Bernstein’s musical and subsequent film, *On the Town*. *Id.* Moonie’s rendition referred to her wealth, substance dependency, and suggested that she thought little of Newport Beach’s citizens. *Id.*

After creating *Moonie Bares All*, Fünke used her position as an investor in the social-media startup FakeBlock to share *Moonie Bares All* with the public. *See id.* Run by college students on a shoestring budget out of California, FakeBlock has no corporate officers, job titles, or official responsibilities, and thus no real limit on what Fünke could do. *See id.* at 5a, 56a. Thus, Fünke leveraged her position as an investor to upload *Moonie Bares All* to FakeBlock’s website. *See id.* at 5a, 56a–57a.

When Fünke uploaded *Moonie Bares All* to FakeBlock, she captioned it with “VOTE 4 LINDSAY BLUTH.” *Id.* at 6a. She also included a link to her mother’s campaign website. *Id.* *Moonie Bares All* subsequently acquired significant attention online, with viewers stressing Moonie’s “fails” while dancing and stripping. Austero filed suit. *Id.* at 2a.

Procedural History

Austero first sued FakeBlock in the District Court of Newport Beach *Id.* at 2a. She requested an injunction requiring FakeBlock to remove *Moonie Bares All* from its website. *Id.* at 6a. FakeBlock removed the video three days later and revoked Fünke’s access to FakeBlock. *Id.* But after Austero lost the congressional race, she amended her complaint to allege that FakeBlock and Fünke, by creating and

disseminating *Moonie Bares All*, infringed her right of publicity under Newport Beach law. *Id.* at 2a, 6a.

After discovery, FakeBlock and Fünke moved for summary judgment. *Id.* at 2a. They argued that Austero failed to state a viable right-of-publicity claim. *Id.* They also argued that *Moonie Bares All* is a First Amendment protected parody. *Id.* Additionally, FakeBlock argued that § 230 of the Communications Decency Act insulated FakeBlock from liability for Fünke’s content. *Id.*

The district court rejected FakeBlock’s § 230 argument but held that the First Amendment protected both FakeBlock and Fünke from liability for creating a parody. *Id.* Austero appealed to the Fifteenth Circuit. *Id.* at 7a.

The Fifteenth Circuit affirmed the district court in part and reversed it in part. *Id.* at 2a. It affirmed the district court’s ruling that § 230 did not protect FakeBlock as it held that Austero’s right-of-publicity claim falls under § 230(e)’s intellectual property exception. *Id.* The Fifteenth Circuit then reversed the district court’s grant of summary judgment on the merits, ruling that *Moonie Bares All* infringed Austero’s right of publicity and is not a protected parody under the First Amendment. *Id.* FakeBlock and Fünke timely appealed, and this Court granted certiorari. *FakeBlock, Inc. v. Austero*, 600 U.S. ___(No. 22-9908) (Oct. 9, 2023).

SUMMARY OF THE ARGUMENT

Freedom of speech is fundamental to preserving the free exchange of ideas on online platforms and promoting multiple viewpoints in a democratic society. Section 230 of the Communications Decency Act and the First Amendment guard against censorship and a tyrannical monopoly on public thought and expression. Without

these safeguards, social media platforms and content creators are vulnerable to government censorship. Therefore, the Fifteenth Circuit improperly reversed the district court's order for summary judgment in favor of Fünke and FakeBlock for two reasons.

First, the Fifteenth Circuit erred as a matter of law in holding that § 230's intellectual property exception includes state-law right of publicity claims. Congress designed § 230 to foster free speech online, free of burdensome regulations. Consequently, § 230 protects any interactive computer service from being held liable for third-party content unless one of § 230's narrow exceptions apply. Specifically, § 230(e)(2) provides that § 230 shall not limit the application of intellectual property law.

The Fifteenth Circuit erred in concluding that § 230(e)(2) includes state-law right of publicity claims. First, intellectual property's ordinary meaning only includes copyrights, trademarks, and patents. That is because intellectual property protects works of intellect. The United States Code confirm this, as statutes throughout define intellectual property in relation to protecting works of intellect. The right of publicity, by contrast, protects individuals' name or likeness. It does not protect original works of intellect, and thus is not intellectual property under § 230(e)(2).

Next, § 230(e)(2)'s intellectual property exception only applies to federal intellectual property laws. Section 230(e) provides specific, limited exceptions for state laws claims that coextend with federal law. Additionally, including state-law intellectual property claims in § 230(e)(2) would undermine Congress's goal of

insulating online platforms from inconsistent state-law regimes. Thus, the Fifteenth Circuit erred in holding that § 230(e)(2) includes state intellectual property law as doing so defeats Congress's purpose in creating § 230.

Second, the Fifteenth Circuit erred as a matter of law in holding that Austero's right-of-publicity claim raises a genuine dispute of material fact. The common-law right-of-publicity protects individuals against misappropriation of their name or likeness. However, Newport Beach law has not defined the elements of this cause of action. The Fifteenth Circuit failed to consider the majority rule, or alternatively, neglected to certify the question of law to the Supreme Court of Newport Beach in an *Erie* case of first impression.

Furthermore, federal copyright law preempts Austero's right-of-publicity claim, as applied to Moonie's name, costume, tap dance, voice, and song, because the state-law claim falls within the subject matter of 17 U.S.C. § 102(a). Additionally, *Moonie Bares All* does not appropriate any unique identifiable characteristics associated with Austero's likeness. Thus, Fünke and FakeBlock are entitled to summary judgment on Austero's right-of-publicity claim as a matter of law.

Even if the Court holds that a genuine dispute of material fact exists on Austero's right-of-publicity claim, the First Amendment insulates Fünke's short film under both the hybrid test adopted by the Sixth Circuit in *ETW Corp. v. Jireh Publishing, Inc.* and the public-interest defense.

For these reasons, this Court should reverse the Fifteenth Circuit's decision and direct enter summary judgment for Fünke and FakeBlock.

ARGUMENT

Free speech is fundamental to preserving the open exchange of ideas on online platforms. Protected by § 230 and the First Amendment, social media companies provide a space—free from government censorship—where individuals can speak freely, even when they say or create things that appear tasteless or offensive. Because of § 230 and the First Amendment, social media can empower people to freely experiment with novel technologies, such as generative AI, and engage in time-honored American traditions, like parodying politicians. Thus, the safeguards inherent within § 230 and the First Amendment are fundamental to preserving the online marketplace of ideas.

The Fifteenth Circuit erred as a matter of law in denying Fünke and FakeBlock’s motion for summary judgment. Summary judgment orders are reviewed *de novo*. *Thompson v. Dist. of Columbia*, 832 F.3d 339, 344 (D.C. Cir. 2016). Summary judgment is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(a). Evidence is viewed in the light most favorable to the non-moving party, and all inferences are drawn in that party’s favor, although courts cannot weigh the evidence or make determinations of credibility. *Id.*

Specifically, Fifteenth Circuit made two critical mistakes when it stripped FakeBlock of § 230 immunity and denied Fünke and FakeBlock the First Amendment’s protection. First, the Fifteenth Circuit wrongly concluded that § 230’s intellectual property exception includes state-law right-of-publicity claims. Second, the Fifteenth Circuit wrongly held that Austero raised a genuine dispute of material

fact concerning the appropriation of her likeness on her right-of-publicity claim. Even if she did, the First Amendment insulates Fünke’s film from censorship as protected speech under *ETW Corp. v. Jireh Publishing, Inc.* and the public-interest defense.

I. THE FIFTEENTH CIRCUIT ERRED AS A MATTER OF LAW BECAUSE RIGHT-OF-PUBLICITY CLAIMS ARE NOT INTELLECTUAL PROPERTY, AND § 230(E)(2) ONLY APPLIES TO CLAIMS ARISING UNDER FEDERAL INTELLECTUAL PROPERTY LAW.

Section 230 protects free speech online by insulating social media companies from liability for third-party content. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). To safeguard the free exchange of ideas online, § 230 provides that no interactive computer service “shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). It defines interactive computer services as those that “enable computer access by multiple users to a computer server.” § 230(f)(2). An information content provider, by contrast, is any “person or entity responsible in whole or in part” for creating and developing information. § 230(f)(3). Thus, Congress bestowed “broad federal immunity” on internet platforms to protect free speech. *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (quoting *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006)).

Congress’s broad grant of immunity reflects § 230’s policy: promoting free speech online. *Zeran*, 129 F.3d at 330. Specifically, Congress designed § 230 “to promote the continued development of the Internet and other interactive computer services,” “preserve the vibrant and competitive free market that presently

exists . . . unfettered by Federal or State regulation,” and “encourage the development of technologies which maximize user control.” § 230(b)(1)–(3).

Although broad, § 230’s protections are not unlimited. Namely, § 230 has “[n]o effect” on federal “criminal law,” “communications privacy law,” or “sex trafficking law,” nor state laws that are consistent with federal law. § 230(e)(1), (3)–(5). Section 230 also has “[n]o effect on intellectual property law.” § 230(e)(2) (“Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”). Unless one of these exceptions applies, plaintiffs may not sue interactive computer services for third-party content. *Zeran*, 129 F.3d at 330.

Here, § 230(c)(1) protects FakeBlock because FakeBlock is an interactive computer service—not an information content provider—as it did not create *Moonie Bares All*.¹ Hence, FakeBlock is only liable for *Moonie Bares All* if a § 230(e) exception applies. The Fifteenth Circuit erred in holding that FakeBlock is liable under § 230(e)(2)’s intellectual property exception for two reasons. First, intellectual property’s ordinary meaning does not include the right of publicity because the right of publicity is a privacy tort, thereby precluding Austero’s claim. Second, even if the right of publicity is a state intellectual property claim, § 230(e)(2)’s exception only

¹ Below, Austero argued that FakeBlock is an information content provider because Fünke was a FakeBlock “corporate officer.” *Austero*, op. at 11a. But the definition of an information content provider is construed narrowly, and FakeBlock cannot be vicariously liable for Fünke’s acts without “a finding that the defendant and the infringer have an apparent or actual partnership, have authority to bind one another in transactions with third parties or exercise joint ownership or control over the infringing product.” *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1150 (7th Cir. 1992). Here, Fünke held no corporate position and had no official responsibilities. *Austero*, op. at 56a. Further, FakeBlock never held out Fünke as working on its behalf. *Id.* Thus, FakeBlock is not an information content provider.

applies to intellectual property claims arising under federal law. Thus, this Court should reverse the Fifteenth Circuit’s decision and hold that § 230 shields FakeBlock from liability.

A. Under Section 230(e)(2)’s Ordinary Meaning, Intellectual Property Includes Copyrights, Trademarks, and Patents, Not Right-of-Publicity Torts.

Under § 230(c)(1), interactive computer services are not liable for third-party content absent an exception under § 230(e). *Zeran*, 129 F.3d at 330. Section 230(e)(2) provides a limited exception for claims arising under “intellectual property law.” § 230(e)(2). However, § 230 does not define “intellectual property,” rendering the term ambiguous. *Perfect 10*, 488 F.3d at 1118.

To resolve statutory ambiguities, courts start with the text. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Statutes are “interpreted as taking their ordinary, contemporary, common meaning,” *Perrin v. United States*, 444 U.S. 37, 42 (1979), “at the time of enactment,” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

But courts cannot read statutory text in isolation. Text derives meaning from context, so “[i]nterpretation of a word or phrase depends upon reading the whole statutory text, [while] considering the purpose and context of the statute.” *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Context includes the broader body of law in which the enactment fits. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1990).

Along with context, courts use canons of statutory interpretation to resolve ambiguities. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). For example,

the negative-implication canon presumes that “Congress acts intentionally and purposely” when it “includes particular language in one section of a statute but omits it in another.” *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). But like other interpretive canons, Congress’s inclusion or omission of language is a “guide” and not, without more, “conclusive.” *Chickasaw Nation*, 534 U.S. at 93; Antonin Scalia & Bryan Garner, *Reading Law* 59 (2012) (noting that “[p]rinciples of interpretation are guides” that “often point in different directions”).

A similar canon is the presumption against ineffectiveness. Scalia & Garner, *supra*, at 63. It counsels construing statutes to give “effect to all [statutory] provisions” and “avoid rendering superfluous” any statutory language. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). This canon is “strongest when an interpretation would render superfluous another part of the same statutory scheme.” *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013).

Ultimately, interpretive canons seek to effectuate Congress’s legislative purpose. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594–99 (2004). For “[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat” the statute’s plain purpose. *Bob Jones Univ. v. United States*, 461 U.S. 327, 331 (1997). Giving terms “broad meaning[s]” that lead to “absurd results” “makes it unreasonable to believe” that Congress intended that result. *Pub. Citizen v. U.S. Dep’t of Justice*,

491 U.S. 440, 454 (1989). So, Congress does not always “intend words of common meaning to have their literal effect.” *Watt v. Alaska*, 451 U.S. 259, 266 (1981).

Here, the canons of statutory interpretation show that “intellectual property” under § 230(e)(2) does not include the right of publicity. First, intellectual property’s ordinary meaning includes copyrights, trademarks, and patents as all three focus on protecting original works of intellect. Second, the right of publicity is not intellectual property because it protects name and likeness, not works of intellect.

1. Intellectual Property’s Ordinary Meaning Includes Copyrights, Trademarks, and Patents.

The touchstone of intellectual property is that it protects original works of intellect. *See Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (1991). For example, patents protect designs and inventions that are “new” and “useful.” 35 U.S.C. § 101. Similarly, copyrights secure “original work[s] of authorship.” 17 U.S.C. § 102(a). And trademarks identify and distinguish between manufactured goods and products to prevent consumer confusion. 15 U.S.C. § 1127; *see also Jack Daniel’s Properties, Inc. v. VIP Prods., LLC*, 599 U.S. 140, 145–46 (2023) (“[E]very trademark’s ‘primary’ function[] [is] ‘to identify the origin or ownership of the article to which it is affixed.’”) (quoting *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916)). As a result, intellectual property’s practical functions, as seen in federal law, point toward its ordinary meaning: it includes copyrights, trademarks, patents, and anything else that secures works of intellect.

The United States Code confirms the linkage between intellectual property and copyright, trademark, and patent law. For example, 15 U.S.C. § 4301 refers to

“patents” as intellectual property. 15 U.S.C. § 4301(b)(2)(C). Similarly, 19 U.S.C. § 2242 defines “persons that rely upon intellectual property protection” as those owning copyrights or patents. 19 U.S.C. § 2242(d)(1)(B). And 35 U.S.C. § 2114 empowers the American Battle Monuments Commission to “use and register intellectual property,” which it defines as trademarks, patents, and copyrights. 35 § 2114(a)(1)–(4). Thus, the United States Code shows that intellectual property’s ordinary meaning in federal law is inseparable from copyright, trademark, and patent law. *See Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 947 (2022) (looking to how “nearby statutory provisions” used a specific word); *Peter v. NantKwest, Inc.*, 140 S. Ct. 365, 373 (2019) (examining how terms were used “across various statutes” dealing with similar subjects).

Consequently, intellectual property, when understood in light of its function and place in federal law, protects works of intellect. It follows that when Congress included “intellectual property” in § 230(e)(2), it gave the term its plain, ordinary meaning: copyrights, trademarks, and patents. *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1053 (9th Cir. 2019) (holding that “established intellectual property” includes copyrights, trademarks, and patents). As a result, intellectual property does not include state-law right-of-publicity claims. *Id.*

2. *The Right of Publicity Protects Name and Likeness, Not Works of Intellect.*

Intellectual property’s ordinary meaning is further substantiated when compared to what the right of publicity is, namely, a privacy tort. William Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960) (including right of publicity in the four main privacy torts). Rooted in common-law privacy rights, the right of publicity “protect[s]

individuals from having their names and likeness used without permission.” Jennifer Rothman, *The Right of Publicity* 4 (2018).

The right of publicity’s history verifies that it is a privacy right. From the earliest decisions, courts linked the right of publicity to the right of privacy. Early twentieth-century celebrities such as Thomas Edison, J.P. Chinn, and Charles Eliot successfully pursued right-of-publicity claims for misappropriation of their likenesses. *See, e.g., Foster-Milburn Co. v. Chinn*, 120 S.W. 364 (Ky. 1909); *Eliot v. Jones*, 120 N.Y.S. 989 (Sup. Ct. Special Term 1910); *Edison v. Edison Polyform & Mfg. Co.*, 67 A. 392 (N.J. Ch. 1907). Today, courts recognize the “right of publicity either by expressly acknowledging a separate tort for the right of publicity or by finding it encompassed within the four classic privacy torts, specifically, wrongful appropriation.” *Gignilliat v. Gignilliat, Savitz & Bettis*, 684 S.E.2d 756, 759 (S.C. 2009); *see also Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003) (stating that misappropriation and right-of-publicity claims are “two torts” “essentially the same”).

What the right of publicity protects further corroborates its status as a privacy tort. Properly understood, the right of publicity protects individuals’ property interest in their name and likeness. Rothman, *supra*, at 11–14. It does not secure “works of the intellect.” *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 163 (D. Mass. 2015), *aff’d sub nom., Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016). Thus, it falls outside intellectual property law. *See, e.g., Longoria v. Kodiak Concepts, LLC*, 527 F. Supp. 3d 1085, 1098 (D. Ariz. 2021) (right of publicity

is a tort); *Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201, 1205 (11th Cir. 2009) (same); *Kirby v. Sega of Am., Inc.*, 114 Cal. App. 4th 47, 55 (Cal. Ct. App. 2006) (same).

Moreover, this Court's decision in *Zacchini v. Scripps-Howard Broadcasting Co.* confirmed that the right of publicity is a privacy-based tort, not an intellectual property right. There—in dicta—this Court noted that the right of publicity is “analogous” to intellectual property because it incentivizes individuals to invest in their performances. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977). Yet far from enshrining the right of publicity as intellectual property, the *Zacchini* Court's dicta merely described the right's *effect*—encouraging investment in one's performance—not what the right *is*. To the contrary, the *Zacchini* Court described the right of publicity as a tort three times. *Id.* at 571, 573.

Thus, courts that have severed the right of publicity from its privacy moorings and shoved it into the intellectual property realm have misinterpreted *Zacchini*'s dicta. *Almeida*, 456 F.3d at 1323 (citing *Zacchini* to assert that the right of publicity is intellectual property); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967 (10th Cir. 1996) (similar). *Zacchini* did not pretend to transform a tort—the right of publicity—into intellectual property. *See Zacchini*, 433 U.S. at 753. Instead, *Zacchini* recognized that right of publicity claims, like intellectual property, incentivize investing in one's performances. *See id.* But *Zacchini* did not merge the two. *See id.*

Without support in this Court's precedents, the Fifteenth Circuit erred in relying on cases that conflated the right of publicity with intellectual property. That

is because the cases the Fifteenth Circuit erroneously relied on simply asserted that the right of publicity is intellectual property without any analysis. *See Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302 (D.N.H. 2008); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 928–29 (6th Cir. 2003); *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1448 (11th Cir. 1998).

The Fifteenth Circuit further erred in relying on the Third Circuit's decision in *Hepp v. Facebook*. First, the Third Circuit limited its holding to Pennsylvania law and expressed “no opinion as to whether other states' right of publicity qualify as intellectual property as a matter of federal law.” *Hepp v. Facebook*, 14 F.4th 204, 214 (3d. Cir. 2021). Second, the Third Circuit's analysis consisted of examining dictionary definitions. *See id.* at 212–14. Although dictionaries are useful, it is error to “make a fortress out of the dictionary.” *Pub. Citizen*, 491 U.S. at 454. Worse, the Third Circuit ignored how other federal law defines intellectual property, and how intellectual property protects fundamentally different interests than the right of publicity. Based on a misreading of *Zacchini*, the Third Circuit simply assumed that the right of publicity is sufficiently analogous to intellectual property to qualify as such under § 230(e)(2). *Hepp*, 14 F.4th at 212–14.

Consequently, the Fifteenth Circuit erred in holding that the right of publicity is intellectual property. Intellectual property protects works of intellect and is defined throughout the United States Code as copyrights, trademarks, and patents. By contrast, the right of publicity is rooted in privacy law and protects individuals' names and likenesses—not original works of intellect. Thus, the right of publicity falls

outside the “established intellectual property right[s] under federal law”— copyrights, trademarks, and patents. *Enigma Software* 946 F.3d at 1053. Accordingly, § 230(e)(2)’s intellectual property exception only includes copyrights, trademarks, and patents. It does not include right-of-publicity tort claims.

B. Even if the Right of Publicity is Intellectual Property, § 230(e)(2)’s Intellectual Property Exception Only Applies to Federal Intellectual Property Laws.

Section 230(e)(2) has no “effect on intellectual property law.” § 230(e)(2). It elaborates that “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property.” *Id.* The Fifteenth Circuit, relying on *Hepp* and two district court cases, concluded that “any law” means “federal *or state* intellectual property claims.” *Austero*, op. at 17a. In doing so, the Fifteenth Circuit ignored its duty to consider § 230’s “whole statutory text,” “purpose,” and “context.” *Dolan*, 546 U.S. at 486.

Here, a holistic reading of § 230 shows that the intellectual property exception only applies to *federal* intellectual property law. As a result, this Court should reject the Fifteenth Circuit’s expansive reading of § 230(e)(2) for two reasons. First, § 230(e)’s text and structure show that the provision’s exceptions accommodate state law only to the extent they coextend with federal law. Second, a holistic reading of § 230 furthers Congress’s purpose of protecting online platforms from liability. Thus, this Court should reverse the Fifteenth Circuit and hold FakeBlock not liable.

1. *Section 230(e)'s Text and Structure Show that "Intellectual Property Law" Means "Federal Intellectual Property Law."*

Section 230(e)(2) states that § 230 shall have “[n]o effect on intellectual property law” and that nothing in it “shall be construed to limit or expand any law pertaining to intellectual property.” § 230(e)(2). On its face, “any” law would seemingly include state and federal law. But statutory meaning does not hinge on a single word or phrase; instead, language must be viewed in light of “the provisions of the whole law.” *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 51 (1987). Here, § 230(e)— when read as a whole— shows that § 230(e)(2) exempts only federal, not state, intellectual property law.

Section 230(e)'s structure shows that only state law claims coextending with federal law are permissible. For starters, § 230(e)(3) provides that § 230 will not “prevent any State from enforcing any State law that is consistent with this section.” § 230(e)(3). But “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* Section 230(e)(3), then, explicitly states that only *consistent* state laws are included in § 230(e)'s exceptions. State laws that are inconsistent with specified federal laws under § 230(e) are barred. *See* § 230(e)(1), (4)–(5). And § 230's structure and text supply no reason for why § 230(e)(2) is exempt from § 230(e)(3)'s consistency requirement.

Section 230(e)(1), (4), and (5) further reinforce that only coextensive state laws are included under § 230(e). First, § 230(e)(4) exempts federal “communications privacy law[s]” from § 230's broad immunity. § 230(e)(4). But state communication

privacy laws are exempt only if they coextend with similar federal law. *Id.* Likewise, § 230(e)(5) carves out an exception only for federal “sex trafficking laws” and consistent state laws. *See* § 230(e)(5)(A)–(C). Finally, although a literal reading of § 230(e)(1)’s “no effect on criminal law” provision would include state laws, courts recognize that § 230(e)’s structure clarifies that the criminal law exception only applies to *federal* law, even if it does not explicitly say so. *See Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1274–75 (W.D. Wash. 2012) (“[I]f Congress did not want [§ 230] to apply in state criminal actions, it would have said so.”). Thus, if Congress wished for § 230(e)(2) to break from the rest of § 230(e) and include both state and federal laws, it could have said so. It did not. And given that the right of publicity is not coextensive with federal law, it does not fall under § 230(e)(2)’s intellectual property exception. *Enigma Software*, 946 F.3d at 1053.

The Fifteenth Circuit erred in ignoring § 230(e)’s coextension principle. Instead, the Fifteenth Circuit, along with the Third Circuit and two district courts, relied on § 230(e)(2)’s language that includes “any intellectual property law” to conclude that it encompasses state and federal intellectual property law. *See Austero*, *op. at* 17a; *Hepp*, F.4th at 211; *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703–04 (S.D.N.Y. 2009); *Friendfinder*, 540 F. Supp. 2d at 299–300. The Fifteenth Circuit reasoned that “when Congress wished to distinguish between state and federal law in § 230, it knew how to do so.” *Austero*, *op. at* 14a (quoting *Friendfinder*, 540 F. Supp. 2d at 300).

Yet even though “any” has an “expansive” meaning, *Friendfinder*, 540 F. Supp. 2d at 299, Congress does not always intend words “to have their literal effect,” particularly when it would compel an “absurd result,” *Watt*, 451 U.S. at 266; *Green*, 490 U.S. at 509. Here, the first “absurd result” would be to nullify § 230(e)’s coextension principle. Further, exalting “any” over the rest of § 230(e)’s text would render § 230(e)(3)’s consistency requirement pointless, as clever plaintiffs could use § 230(e)(2) to evade § 230’s prohibition on inconsistent state-law claims. *Cf. Hibbs*, 542 U.S. at 101 (statutes are construed “so as to avoid rendering [language] superfluous); *Marx*, 568 U.S. at 386 (“[The] canon against surplusage” is “strongest when an interpretation would render superfluous another part of the same statutory scheme”). And most importantly, the Fifteenth Circuit’s myopic focus on “any” leads to the greatest absurdity of all: defeating § 230’s plain statutory purpose. *Cf. Bob Jones*, 461 U.S. at 331 (“[A] court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute”).

2. Including State-Law Right-of-Publicity Claims in § 230(e)(2)’s Intellectual Property Exception Undermines Congress’s Purpose in Creating § 230.

Congress created § 230 to provide expansive immunity for online platforms so they would be “unfettered by Federal or State regulation.” § 230(b)(2) (emphasis added); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). Congressional policy, then, favors an expansive application of § 230 immunity. *Carafano*, 339 F.3d at 1123. And opening up § 230(e)(2) to any state intellectual property claim jeopardizes Congress’s purpose in creating § 230 by exposing online platforms to new forms of liability. *Enigma Software*, 946 F.3d at 1053; *see also Bob*

Jones, 461 U.S. at 331 (noting that courts should avoid interpretations that undermine a statute’s “plain purpose”).

That is because allowing “any particular state’s definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress’s goal of insulating the development of the internet from the various state-law regimes.” *Perfect 10*, 488 F.3d at 1118. Yet by ramming the right of publicity into

§ 230(e)(2), the Fifteenth Circuit eviscerated § 230’s protections, thereby threatening the freedom of speech online. For “[i]f the intellectual property law exception were to encompass any claim . . . that do[es] not directly involve intellectual property rights— it would create a potential for new liability that would upset, rather than ‘preserve’ the vibrant culture of innovation on the internet that Congress envisioned.” *Enigma Software*, 946 F.3d at 1053. Section 230(e)(2), then, “should be construed narrowly” to only apply to federal intellectual property “to advance [§ 230’s] express policy of providing broad immunity.” *Id.*

Moreover, expanding § 230(e)(2)’s intellectual property exception to include all state intellectual property claims exposes online platforms like FakeBlock to liability under fifty different, inconsistent, and ever-changing state-law regimes. Contrary to the Fifteenth Circuit’s assertion that right-of-publicity laws are mostly uniform, state laws vary widely. *Austero*, op. at 17a n.4; Karyn A. Temple, U.S. Copyright Office, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* 115 (2019), <https://www.copyright.gov/policy/moralrights/full-report.pdf> (“The appearance of near uniformity in adoption of some version of the right of publicity

believes the degree to which the exact contours of the right differ significantly from jurisdiction to jurisdiction”). Right-of-publicity laws differ on what attributes are protected, how long protections last, whether the right survives death, if the right must be registered, and even whether plaintiffs need to live in a state to sue under its right-of-publicity law. *Id.* at 115–16. So, for example, a Wisconsin resident could “assert a claim in Washington for a posthumous violation of that state’s right of publicity” even while residing in Wisconsin, which “does not recognize such a posthumous right.” *Id.* at 116. As a result, allowing state intellectual property claims under § 230(e)(2) would incentivize forum shopping and “fetter” online platforms, thwarting Congress’s goals in creating § 230. § 230(b)(3); *see also Barrett v. Rosenthal*, 146 P.3d 510, 526 (Cal. 2006) (warning that inconsistent standards under § 230 invite forum shopping).

Next, including state intellectual property laws in § 230(e)(2) would put courts in the impossible position of deciphering what state-law claims even qualify as intellectual property. Because if § 230(e)(2) includes state intellectual property law, clever plaintiffs could smuggle any number of state tort claims—unfair competition, dilution, trade defamation—past § 230(c)(1)’s protections by repackaging them as intellectual property. *Perfect 10*, 488 F.3d at 1119 n.5. Thus, “[a]s a practical matter, inclusion of rights protected by state law within the ‘intellectual property’ exemption would fatally undermine the broad grant of immunity provided by [§ 230].” *Id.*

Finally, the Fifteenth Circuit’s decision to open the floodgates of state-law right-of-publicity claims creates a one-of-a-kind loophole in federal intellectual property

law. Because even though § 230(e)(2) does not protect services like FakeBlock from federal intellectual property claims, the Digital Millennium Copyright Act’s “safe harbor” provision still protects them. 17 U.S.C. § 512(c) (describing how internet providers are immune from liability unless they have knowledge of the potential copyright infringement and fail to take down infringing content expeditiously). Similar protections for online platforms exist for trademark claims. *Tiffany, Inc. v. eBay, Inc.*, 600 F.3d 93, 107 (2d Cir. 2010). No such protections exist for the right of publicity. Hence, § 230 is the only true safeguard online platforms have from state-law intellectual property claims. The Fifteenth Circuit’s decision denies FakeBlock and other online platforms even that protection by stripping away § 230’s protections, thereby leaving them stranded in a stormy area of the law with no safe harbors in sight.

The paradoxical upshot of all this is that FakeBlock and other online platforms would enjoy greater protection from the limited number of federal intellectual property claims than from a host of varied state-law intellectual property claims. This is particularly dangerous given the vast web of possible allusions and associations that could evoke a potential plaintiff, who could then sue under whichever states’ intellectual property regime is most favorable. *See White v. Samsung Elecs. Am.*, 989 F.3d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting) (Mem.) (“[T]he panel majority erects a property right of remarkable and dangerous breadth: Under the majority’s opinion, it’s now a tort for advertisers to remind the public of a celebrity.”).

Consequently, this Court should reverse the Fifteenth Circuit's decision and hold that § 230(e)(2)'s intellectual property exception only includes federal intellectual property law. Because § 230's language, structure, and purpose point to the same conclusion: the Fifteenth Circuit got it wrong. And following its approach would allow fifty inconsistent state intellectual property regimes to run rampant through internet immunity law, fracturing the expansive—but delicate—framework that Congress created in § 230 to protect the free speech online. Given that the right of publicity fundamentally jeopardizes Congress's § 230 policy, it is a poor fit for § 230's intellectual property exception, and this Court should reverse.

II. THE FIFTEENTH CIRCUIT ERRED AS A MATTER OF LAW IN REVERSING THE ORDER FOR SUMMARY JUDGMENT BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTS ON AUSTERO'S RIGHT-OF-PUBLICITY CLAIM, AND THE FIRST AMENDMENT INSULATES THE AI-GENERATED MODEL FROM CIVIL LIABILITY.

Freedom of speech and expression are fundamental to preserving the robust exchange of ideas. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 570 (1942). Discourse and vigorous debate further public participation in a democratic constitutional system and guard against a tyrannical monopoly on public thought and expression. *See Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

The First Amendment promotes the exchange of values in the marketplace of ideas by conferring formidable protections to speech and expression. *See New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). Entertainment is no exception. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) (noting that First Amendment protections extend to entertainment, including motion pictures, radio,

television broadcasts, and live media); *see also* *Taynec v. City of Phila.*, 687 F.2d 793, 796 (3d Cir. 1982). Additionally, parodies and caricatures, as artistic forms of self-expression, are a “vital commodity” in the marketplace of ideas and subject to full First Amendment protection. *See Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 972 (10th Cir. 1996). Accordingly, state-law claims that restrain an artist from engaging in self-expression stifle the free dissemination of ideas.

Fünke and FakeBlock are entitled to summary judgment on Austero’s right-of-publicity claim for two reasons. First, under the *Landham* test—the majority rule adopted by federal circuits—*Moonie Bares All* does not appropriate Austero’s likeness. Second, even if the Court holds that a fact issue exists on Austero’s claim, the First Amendment insulates *Moonie Bares All* from claims for civil liability. Thus, this Court should reverse the Fifteenth Circuit’s decision and hold that Austero’s right-of-publicity claim fails as a matter of law.

A. Petitioners Are Entitled to Summary Judgment Because *Moonie Bares All* Does Not Misappropriate Austero’s Likeness Under the *Landham* Test.

The common law right of publicity is a civil cause of action for individuals harmed by the misappropriation of their name or likeness for personal use or benefit. *Zacchini*, 433 U.S. at 564; *see also* Restatement (Second) of Torts § 652C. The fundamental policy underlying this civil claim is to compensate individuals who have sustained devaluation to their personal identities—a valid property interest—through commercial exploitation. *McFarland v. Miller*, 14 F.3d 912, 923 (3d Cir. 1994). Although the right of publicity creates a property interest in one’s identity, the

claim is limited to misappropriation of “name or likeness.” *See* Restatement (Second) of Torts § 652C, cmt. a. Accordingly, various jurisdictions have defined the elements of the right of publicity through state common law.

In *White v. Samsung Electronics America, Inc.*, the Ninth Circuit broadly expanded the scope of right-of-publicity claims beyond appropriation of name or likeness to encompass misappropriation of an individual’s *identity*. 971 F.2d 1395, 1398 (9th Cir. 1992). The court reasoned that the Restatement (Second) approach did not provide adequate protection from a tortfeasor’s exploitation of an individual’s commercial identity. *Id.* Thus, the court held that Samsung’s use of a female-shaped robot wearing a gown, wig, and jewelry near a “Wheel of Fortune” gameboard misappropriated celebrity Vanna White’s identity. *Id.* at 1400.

In effect, the *White* decision established an unprecedented expansion of the scope of right-of-publicity claims that is impracticable and inconsistent with the First Amendment. *See White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1516 (9th Cir. 1993) (Mem.) (Kozinski, J., dissenting) (warning that the majority’s holding “impoverishes the public domain” because future creators will face claims asserted by plaintiffs with an “exaggerated sense of their own fame and significance”); *see also Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 626 (6th Cir. 2000) (declining to extend the *White* decision because its expansive holding would give every celebrity a right to compensation for “every subtle nuance” that could potentially invoke a celebrity’s identity).

Although the Ninth Circuit adopted this sweeping interpretation of the right of publicity, the majority of circuits have rejected its reasoning. Instead, the Sixth, Tenth, and Eleventh Circuits have adopted the *Landham* test, holding that a right-of-publicity claim requires the claimant to show (1) significant commercial value associated with the individual's name or likeness; (2) the tortfeasor misappropriated that individual's name or likeness; and (3) the misappropriation resulted in devaluation to the claimant's unique identifiable characteristics. *Id.*; *see also Cardtoons*, 95 F.3d at 970; *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1447 (11th Cir. 1998).

This Court should adopt the *Landham* test and hold that Fünke and FakeBlock are entitled to summary judgment on Austero's right-of-publicity claim for four reasons. First, the Fifteenth Circuit erred as a matter of law on an *Erie* question by failing to consider the majority rule or, alternatively, neglecting to certify the question of law to the Supreme Court of Newport Beach. Second, this Court should adopt the *Landham* test—the majority rule used by federal circuits—because it is the best approach for balancing the common-law right of publicity with the First Amendment. Third, federal copyright law preempts Austero's right-of-publicity claim, as applied, to Moonie's name, costume, tap dance, voice, and song. Fourth, Fünke and FakeBlock are entitled to summary judgment because *Moonie Bares All* does not appropriate Austero's unique identifiable characteristics.

1. *The Fifteenth Circuit Erred by Failing to Consider the Majority Rule, or Alternatively, Neglecting to Certify the Question of Law to the Supreme Court of Newport Beach in an Erie Case of First Impression.*

A federal court with subject-matter jurisdiction based on diversity of citizenship is bound to apply the substantive law of the state where it sits. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 91 (1938); *see also Guaranty Tr. Co. v. York*, 326 U.S. 99, 114 (1945). However, in cases where state substantive law does not resolve an ambiguity concerning a cause of action's elements, the court must consult decisions from other jurisdictions and the "majority rule" to make an informed *Erie* prediction concerning the state judicial system's likely resolution of that ambiguity. *See Amerisure Ins. v. Navigators Ins.*, 611 F.3d 299, 311 (5th Cir. 2010); *see also SMI Owen Steel Co. v. Marsh USA, Inc.*, 520 F.3d 432, 437 (5th Cir. 2008).

In addition to consulting the law of other jurisdictions when ruling on a matter of state law, a federal court is permitted to certify a question to the state supreme court. *See McMillan v. Amazon.com*, 983 F.3d 194, 202 (5th Cir. 2020); *see also State Farm Mut. Auto Ins. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001). Specifically, the federal court may certify a question of law to the state supreme court when the court applying state substantive law faces an issue of first impression involving "scant on- point precedent." *See McMillan*, 983 F.3d at 202; *see also JCB, Inc. v. Horsburgh & Stott Co.*, 912 F.3d 238, 239 (5th Cir. 2018). The policy undergirding this rule is clear: federal courts cannot substitute their own judgment on matters of state concern without an informed basis for resolving a conflict in the state law. *See McMillan*, 983 F.3d at 202. To hold otherwise would obstruct deeply entrenched principles of comity and federalism in this Court's jurisprudence. *See Kremen v. Cohen*, 325 F.3d 1035,

1038 (9th Cir. 2003). Thus, because the state judiciary system is in the best position to resolve any conflicts in the federal court's resolution of a state substantive legal question under *Erie*, federal courts must act on an informed basis when ruling on these issues.

The Fifteenth Circuit improperly expanded the scope of Newport Beach's common law right of publicity by applying New Hampshire law without consulting the entire available body of law or the majority rule in other jurisdictions. The basis for subject-matter jurisdiction on Austero's right-of-publicity claim against Fünke and FakeBlock is diversity of citizenship. *See* 28 U.S.C. § 1332. As a result, *Erie* mandated that the Fifteenth Circuit apply Newport Beach's substantive law when ruling on the summary judgment motion for Austero's state-law claim. *See Erie*, 304 U.S. at 91.

Furthermore, although Newport Beach courts have adopted the Restatement (Second) of Torts in defining the general right of publicity, the claim's specific elements are not defined in Newport Beach law. *See Austero*, op. at 19a. Consequently, in ruling on Fünke and FakeBlock's motion for summary judgment, the Fifteenth Circuit was tasked with resolving an *Erie* question of state substantive law concerning the elements for a right-of-publicity cause of action. Because the court expanded the scope of Newport Beach's right of publicity without consulting the majority rule in other jurisdictions or certifying the question to the Supreme Court of Newport Beach, the Fifteenth Circuit's resolution of this state law ambiguity was improper. With little, if any, precedent available under Newport Beach law on an

issue of first impression, the Fifteenth Circuit injected its own judgment concerning the elements of the cause of action without making an informed *Erie* analysis as to the majority rule on this issue.

Moreover, even if the Fifteenth Circuit chose not to consult the majority rule on this case of first impression, it should have certified the question to the Supreme Court of Newport Beach to resolve an ambiguity in state law. *See Childress v. Costco Wholesale Corp.*, 978 F.3d 664, 666 (9th Cir. 2020). Here, the state judiciary, not a federal court sitting in diversity on an *Erie* question of law, was best positioned to resolve this uncertainty in the law. *See McMillan*, 983 F.3d at 202 (“[F]ederal-to-state certification is prudent when consequential state-law ground is to be plowed, such as defining and delimiting state causes of action.”).

Finally, to the extent that the Fifteenth Circuit relied on *Doe v. Friendfinder Network, Inc.*, to define the elements of the right-of-publicity claim, that case is distinguishable. First, the court resolved the right-of-publicity claim in *Friendfinder* on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 293 (D.N.H. 2008). Thus, the district court’s analysis merely focused on the sufficiency of the plaintiff’s allegations in the complaint to survive dismissal under the plausibility pleading standard. *See id.* Claimants face a substantially lower burden in clearing a motion to dismiss than they do in achieving summary judgment. *See generally Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Because *Friendfinder* did not address the merits of the plaintiff’s right-of-publicity claim, the rule of

decision in *Friendfinder* is inapposite. *See Friendfinder*, 540 F. Supp. 2d at 293. Second, in defining the elements of a right-of-publicity claim under New Hampshire law, the *Friendfinder* court based its analysis on a single legal treatise—persuasive authority at best—with no other support. *Id.* at 304. Thus, the Fifteenth Circuit erred by relying on *Friendfinder* to define the contours of a Newport Beach cause of action, thereby substituting its judgment for the appropriate legislative authority in Newport Beach.

Therefore, the Fifteenth Circuit inappropriately expanded Newport Beach’s right-of-publicity claims by failing to consider the full body of law available on an issue of first impression, including the majority rule adopted by other jurisdictions, or alternatively, neglecting to certify the question of law to the Supreme Court of Newport Beach.

2. *This Court Should Adopt the Landham Test—the Majority Rule Adopted by Federal Circuits—Because It Best Balances the Right of Publicity with Fundamental First Amendment Protections.*

In light of the lower court’s improper resolution of an *Erie* question in Newport Beach’s law, the correct test governing the scope of right-of-publicity claims is the *Landham* test, adopted by a majority of jurisdictions. Under the *Landham* test, a cause of action for infringement on an individual’s right of publicity exists where the claimant shows (1) significant commercial value associated with the individual’s name or likeness; (2) the tortfeasor misappropriated that individual’s name or likeness; and (3) the misappropriation resulted in devaluation to the claimant’s unique identifiable characteristics. *See Landham*, 227 F.3d at 626; *see also Cardtoons*, 95 F.3d at 970; *Allison*, 136 F.3d at 1447. The *Landham* test is the best

approach to Austero's right-of-publicity claim because it most effectively balances the commercial value in one's name or likeness with fundamental First Amendment protections. *See Landham*, 227 F.3d at 626. Additionally, this approach provides a workable rule for courts to apply in challenging cases that conflict with federal copyright law. *See id.*; *see also White*, 989 F.2d at 1515 (Kozinski, J., dissenting).

The *Landham* test strikes an appropriate balance between protecting individuals' image and likeness while preserving fundamental constitutional protections under the First Amendment. *See Landham*, 227 F.3d at 626. The foundational purpose of the right of publicity is to protect the commercial value individuals possess in their image or likeness from exploitation. *See Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983). Moreover, the right of publicity compensates individuals whose name or likeness has been misappropriated and devalued. *See id.* The core First Amendment protections guarding against restraints on freedom of speech and expression are in tension with these principles. *See Landham*, 227 F.3d at 626. Withholding the right to publish entertainment that invokes an individual's identity, such as parodies and caricatures, would inevitably place substantial restrictions on the work of artists and content creators. *See White*, 989 F.2d at 1516 (Kozinski, J., dissenting). Thus, an inherent conflict exists between right-of-publicity claims and First Amendment freedoms of free speech and expression. *See id.*

The conflict between the right of publicity and the First Amendment is further compounded in jurisdictions that have expanded the scope of right of publicity beyond

misappropriation of name or likeness to encompass exploitation of an individual's identity. See *White*, 971 F.2d at 1399; see also *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974). This concern is especially pronounced in cases involving a celebrity's identity. See *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997). Federal courts have struggled to distinguish celebrities from their fictional roles when determining whether celebrities are entitled to assert a right-of-publicity claim. See *Landham*, 227 F.3d at 626. As a result, the Ninth Circuit's expansion of the right of publicity is unworkable and poses a significant threat to the First Amendment rights of content creators by curtailing the speech of artists who invoke celebrity images.

The *Landham* test provides a workable resolution to this conflict. On the one hand, the test offers a remedy for commercial misappropriation of an individual's name or likeness where the claimant can show significant commercial value associated with that name or likeness. *Id.* By requiring claimants to show devaluation of commercial identity beyond *de minimis* harm, this approach ensures that only non-frivolous, good-faith claims for violation of the right of publicity can proceed. See *White*, 989 F.2d at 1515 (Kozinski, J., dissenting). Thus, this standard shields content creators from meritless claims brought for mere resemblances to a celebrity's identity without any evidence of harm, furthering artistic creation and expression under the First Amendment. See *Landham*, 227 F.3d at 626. At the same time, this rule also respects the right of publicity by providing a remedy for misappropriation of name or likeness when it is uniquely identifiable with the claimant. See *id.* As a result, the

Landham test best resolves any conflict between the common-law right of publicity and the First Amendment.

Furthermore, the Ninth Circuit's sweeping expansion of the scope of right-of-publicity claims interferes with federal copyright law. Giving actors a right of publicity in the fictional characters they portray for profit conflicts with federal copyright law's function in allowing screenwriters, film producers, and other entertainers to benefit from an original copyrightable work in the fictional characters they create. *See Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1143 (9th Cir. 2006). Thus, an inherent conflict also exists between the right of publicity and the Federal Copyright Act. *See id.*

Despite these conflicts, the Ninth Circuit's expansive approach exacerbates these concerns by allowing celebrities to unjustly claim a right of publicity in the work they do for a living. *See White*, 989 F.2d at 1515 (Kozinski, J., dissenting). At worst, it restricts the constitutionally-protected speech and expression of entertainers, publishers, and content creators. *See id.* The *Landham* test addresses these crucial concerns by requiring claimants to demonstrate that the alleged misappropriation resulted in exploitation of their unique identity as opposed to the fictional roles they perform in the course of their professional work. *See Landham*, 227 F.3d at 625. Because courts are not in the position to make factual determinations concerning the scope of an actor's role, the *Landham* test resolves any tension between right-of-publicity claims and federal copyright law by focusing the analysis on the celebrity's "own persona and not the character's." *Id.*

Accordingly, the *Landham* test—the approach adopted by a majority of federal circuits—best balances the right of publicity with federal copyright law and fundamental First Amendment protections and is the appropriate rule for resolving right-of-publicity claims.

3. Federal Copyright Law Preempts Austero’s Right-of-Publicity Claim, as Applied, to Moonie’s Name, Costume, Tap Dance, Voice, and Song.

The Copyright Act, 17 U.S.C. § 106, preempts Austero’s right-of-publicity claim, as applied to Moonie’s name, costume, tap-dance choreography, voice, and the vocal performance of “New York, New York.”

Under the Supremacy Clause of the United States Constitution, federal law preempts state law when the state law “actually conflicts with a valid federal statute” or “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Edgar v. MITE Corp.*, 457 U.S. 624, 631 (1982); *see also* U.S. Const. art. VI, cl. 2. A state right-of-publicity claim is preempted by the Copyright Act when (1) the “subject matter” of the state law right-of-publicity claim falls within the subject matter of copyright defined in 17 U.S.C. §§ 102 and 103, and (2) the state law rights are equivalent to the rights established under copyright law. *See Laws*, 448 F.3d at 1137; *see also Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001). Here, Austero’s right-of-publicity claim alleges misappropriation of her likeness as to the use of a costume from *Cabaret*, the name “Moonie,” the tap-dance choreography, the alleged use of Austero’s voice, and the performance of the song—all of which fall under federal copyright law.

For copyright preemption to apply, the state-law claim must first fall within the purview of § 102(a) of the Copyright Act. Section 102(a) defines the subject matter protected under the Copyright Act as “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a). Under § 102(a), “works of authorship” are defined as “literary works”; “musical works, including any accompanying words”; “dramatic works, including any accompanying music”; “pantomimes and choreographic works”; “motion pictures and other audiovisual works”; and “sound recordings.” *Id.*

Additionally, the Copyright Act will only preempt state law where the state right-of-publicity claim is equivalent to the rights protected under 17 U.S.C. § 106. *See Downing*, 265 F.3d at 1005. Thus, the state law claim must “involve acts of reproduction, adaptation, performance, distribution, or display” and “must not include any extra elements that make it qualitatively different from a copyright infringement claim.” *Melendez v. Sirius XM Radio, Inc.*, 50 F.4th 294, 302 (2d Cir. 2022) (quoting *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004)). In applying this standard, courts consider the nature of the rights the claimant seeks to enforce and analyze whether the elements of the state law claim are “qualitatively different” from those of a copyright infringement claim. *Comput. Assocs. Int’l v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992); *see also Laws*, 448 F.3d at 1143.

Moreover, federal copyright law preempts right-of-publicity claims where the work in dispute holds an *expressive* component instead of an advertising purpose. *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1029 (3d Cir. 2008). As a result, where the right-of-publicity claim targets a work that contains fundamentally expressive components, as opposed to a trade purpose such as advertising, federal copyright law will preempt the state right-of-publicity claim. *Id.*

Federal copyright law preempts Austero’s right-of-publicity claim because Moonie’s name, costume, tap-dance, voice, and the use of the song constitute protected subject matter under § 102(a) of the Copyright Act. Section 102(a) includes choreographic works, sound recordings, musical works, motion pictures, and dramatic works in its list of protected works of authorship. Here, Moonie’s name, costume, tap-dance, voice, and vocal performance constitute literary, musical, dramatic, and choreographic works, motion pictures, and sound recordings. Therefore, the disputed sections of *Moonie Bares All* are original works of authorship within § 102(a)’s scope. As a result, because Moonie’s name, costume, tap dance, and voice similarities are works of authorship subject to copyright protection under § 102(a), they are protected by the Copyright Act.

Under the second element for copyright preemption, the publicity rights Austero asserts in the components of *Moonie Bares All* are equivalent to the rights protected in a copyright cause of action. *See* 17 U.S.C. § 106. Here, the elements of the state law claim Austero seeks to enforce are not “qualitatively different” from those of a copyright cause of action. *See Melendez*, 50 F.4th at 302. The publicity

rights Austero seeks to enforce in Fünke’s alleged use of the costume, fictional character, choreographic dance, and voice recordings are core components to works of authorship created by artists or publishers. *Austero*, op. at 25a. Although Austero appeared as a dancer, actor, or singer in these productions, she does not retain a protected property interest in the roles she plays or the acts she performs in artistic works crafted by other individuals. *Id.* Despite Austero claiming a protectable property interest in the use of the dramatic works she performed throughout her career, the rights asserted here implicate the use of dramatic performances. And because federal copyright law protects against the unauthorized use of such dramatic performances, Austero’s state-law claim for misappropriation of her identity is equivalent to the rights protected by federal copyright law. *See Fleet v. C.B.S.*, 50 Cal. App. 4th 1911, 1921 (1996) (noting that dramatic performances captured on film are copyrightable).

Furthermore, *Moonie Bares All* contains core expressive components that require preemption under federal copyright law. Fünke testified that her purpose in creating Moonie was to assist her mother’s political campaign by exposing Austero’s “darker side” as a political candidate. *Austero*, op. at 4a. The model, singing lyrics criticizing Austero’s campaign, communicated a message to the public that Austero is not concerned with Newport Beach’s citizens and voters. *Id.* at 5a. After publishing the film, Fünke uploaded it to FakeBlock captioned with the post “VOTE 4 LINDSAY BLUTH.” *Id.* at 6a. The post also contained an internet link to Bluth’s campaign website. *Id.* Because a computer-generated parody model attacking a candidate

constitutes an expressive message under the First Amendment, rather than a commercial advertising purpose, federal copyright law preempts Austero's right-of-publicity claim.

Consequently, the Copyright Act preempts Austero's right-of-publicity claim because the subject matter of the claim involves the same subject matter defined and protected under 17 U.S.C. § 102(a). The rights asserted by Austero are equivalent to the rights shielded by federal copyright law, and Fünke's film contains expressive components requiring protection under the Copyright Act. Therefore, Austero's right-of-publicity claim is preempted by federal copyright law as applied to Moonie's name, costume, dance, voice, and vocal performance.

4. *Fünke and FakeBlock Are Entitled to Summary Judgment Because Moonie Does Not appropriate Any Unique Identifiable Characteristics Associated with Austero's Likeness.*

Applying the *Landham* test to the merits of Austero's right of publicity claim, no genuine dispute of material fact exists because the evidence fails to demonstrate any unique identifying characteristics between Moonie and Austero. Although Austero claims commercial value in her likeness, *Moonie Bares All* does not misappropriate any unique identifiable characteristics sufficient to raise a genuine dispute of material fact concerning the appropriation of her likeness under Newport Beach law. See *Landham*, 227 F.3d at 626.

First, Moonie's physical characteristics—including skin color, height, weight, build, hair color, and hairstyle—are not unique identifiable features sufficient to raise a fact issue concerning the association of the AI-generated model with Austero's likeness. *Austero*, op. at 25. Although Moonie's basic attributes are similar to Austero,

such as its black hair, skin tone, pixie haircut, and 5'4" stature, those characteristics do not uniquely identify Austero. *See id.* at 25a. Hence, these physical attributes fail to create an “inseparable” link between the model and the celebrity in the public mind. *See Landham*, 227 F.3d at 625; *see also Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

In holding that Moonie misappropriated Austero’s physical likeness, the Fifteenth Circuit improperly relied on *Hart v. Electronic Arts, Inc.* and *Davis v. Electronic Arts, Inc.* In *Hart*, the claimant was uniquely identifiable because the biographical and statistical information of the Rutgers college quarterback, including jersey number, field position, college experience, home state, hometown, and class year, was the only available information in the video game, which therefore created an inseparable association in the public mind with the quarterback. *See Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 146 (9th Cir. 2013); *see also White*, 971 F.2d at 1404 (Alarcon, J., dissenting); *Landham*, 227 F.3d at 625. Here, Moonie’s physical characteristics cannot establish the same inseparable association with Austero in the public mind. Unlike in *Hart*, in which the association was based on immutable physical and biographical characteristics in the context of a college football video game, Moonie’s general female physical characteristics, without more, fails to create a uniquely identifiable association in the public mind. *Landham*, 227 F.3d at 625. *Hart*, then, is distinguishable, and the Fifteenth Circuit erred in relying on it.

Second, the alleged resemblance between Moonie’s singing voice and Austero’s voice similarly fails to establish an inseparable link between Moonie and Austero.

The Fifteenth Circuit erred in holding that Austero’s claim for misappropriation of her singing voice raised a genuine dispute of material fact because the association between Moonie’s singing voice and Austero’s did not uniquely identify Austero’s voice. *Austero*, op. at 28a.

The Fifteenth Circuit’s erred in relying on *Midler v. Ford Motor Co.* because it is distinguishable. In *Midler*, Ford Motor Company used the claimant’s voice in a commercial where the imitative voice “sounded exactly” like one of Midler’s records. *Midler v. Ford Motor Co.*, 849 F.2d, 460, 462 (9th Cir. 1988). Additionally, the *Midler* claimant presented affidavits attesting that individuals in the entertainment industry thought Midler was singing in the commercial. *Id.* Here, unlike in *Midler*, the only evidence Austero presented concerning the alleged misappropriation of her voice is from an expert who opined that “Moonie’s voice *could* very well be Lucille’s current voice digitally raised by one octave.” *Austero*, op. at 26a. As such, the expert’s testimony—unlike the conclusive testimony in *Midler*—is speculative, leaving significant doubt that (1) Fünke used Austero’s voice in the recording and (2) that, at best, Austero’s voice was modified an entire octave in vocal range. *See id.* Because the court only draws reasonable inferences in the nonmoving party’s favor on a motion for summary judgment, this highly speculative and unfounded testimony weighs against Austero’s right-of-publicity claim. *See Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1326 (11th Cir. 1982) (“[A] jury will not be allowed to engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility.”); *see also* Fed. R. Civ. P. 56(a). Furthermore, Fünke testified that she

intentionally altered Moonie's voice to be distinct from Austero's voice. *Austero*, op. at 27a. Therefore, Austero failed to raise a genuine dispute of material fact concerning the misappropriation of her likeness as it pertains to the alleged use of her voice.

Third, the resemblance between the name "Moonie" and the "Junie Moon" role Austero once played also fails to establish an inseparable link between Moonie and Austero. Any claimed similarity between Moonie and Junie Moon fails to delineate a uniquely identifiable association between Moonie and Austero. *See Carson*, 698 F.2d at 835 (holding that defendant corporation misappropriated Johnny Carson's persona by using his introductory slogan as the name for its line of toiletries when the use of the slogan clearly identified Carson); *see also Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137 (Wis. 1979) (holding that corporate use of the name "Crazylegs" on a shaving gel violated the right of publicity because this name "clearly identified" the plaintiff); *Motschenbacher*, 498 F.2d at 826–27 (holding that use of distinctive decorations on a racecar satisfied "identifiability" necessary to establish a discernible association with the plaintiff).

Moonie's name does not uniquely identify Austero. Moonie's only alleged resemblance to the name Junie Moon is that both involve the word "moon." *See id.* at 25a n.6; *Austero*, op. at 64a. Unlike in *Carson*, in which the "Tonight Show" distinctively identified Johnny Carson's name at the beginning of each television segment, Moonie is a fictional character and does not represent Austero. *See Carson*, 698 F.2d at 835. And unlike "The Tonight Show" in *Carson*, Austero played the Junie Moon role fifty-two years ago. *Austero*, op. at 64a. Not only is the film that Junie Moon

appeared in not well-known, but it was a “financial flop” and failed to establish a distinctive association with Austero. *Id.* As such, the name “Junie Moon” does not invoke Austero’s unique image or likeness. Accordingly, any alleged association between Moonie and Junie Moon does not arise to the level of identifiability necessary to create an inseparable link between Moonie and Austero.

Furthermore, the costume and tap dance also do not uniquely identify Austero. First, costumes are tailored for the fictional characters—not the actors playing the role. And Austero failed to demonstrate that this costume is unique or that an inseparable association exists in the public mind between the character she played in *Cabaret* and her person. Second, the tap dance does not uniquely identify Austero because no evidence exists that Austero choreographed the dance or that the public would associate the dance steps with Austero personally. Therefore, the costume and tap dance also fail to create an inseparable link between Moonie and Austero.

Consequently, because the alleged similarities between Moonie and Austero fail to raise any unique identifiable characteristics implicating Austero’s likeness under the *Landham* test, Fünke and FakeBlock are entitled to summary judgment as a matter of law on Austero’s right-of-publicity claim.

B. Even If the Court Holds That a Fact Issue Exists on Austero’s Right-of-Publicity Claim, the AI-Generated Film Is Protected by the First Amendment.

Although the common-law right of publicity is essential to ensuring protection against the exploitation of an individual’s name and likeness, it must be carefully balanced against the fundamental protections of the First Amendment in promoting

freedom of speech and expression. *Zacchini*, 433 U.S. at 578. The First Amendment protects entertainment as a form of artistic expression essential to promoting the free dissemination of ideas. *See id.* The right safeguards music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

Even if the Court holds that Austero’s right-of-publicity claim stands, the First Amendment insulates Fünke and FakeBlock from this claim. First, Fünke’s AI-generated film is protected under *ETW v. Jireh Publishing, Inc.* Second, the public-interest defense precludes Austero from proceeding on her right-of-publicity claim against Fünke and FakeBlock.

1. Moonie Bares All Is Protected Under ETW v. Jireh Publishing, Inc., or Alternatively, the Transformative Use Test.

To balance the right of publicity with freedom of speech, courts have developed three approaches to determine whether a work of artistic expression is sufficiently protected under the First Amendment. First, the Ninth Circuit has adopted the transformative use test. Under this test, courts inquire into whether the artistic work contains sufficiently transformative elements to confer a First Amendment right of protection or, alternatively, whether the work “portrays a mere literal likeness.” *See, e.g., Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001). Second, the Tenth Circuit has adopted a balancing test, under which courts (1) consider the importance of the right to free expression and the consequences of curtailing that right and (2) weigh those consequences against the effect of infringing on the claimant’s right of publicity. *See Cardtoons*, 95 F.3d at 972. Finally, the Sixth

Circuit has adopted a hybrid test, in which courts (1) weigh the competing First Amendment interests of free speech against the interest the claimant has in the right of publicity and (2) subsequently apply the transformative use test. *See ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 936 (6th Cir. 2003).

This Court should adopt the hybrid test from *ETW v. Jireh Publishing, Inc.*, because it most effectively balances the First Amendment interests of freedom of speech with protections against exploitation of an individual's likeness for profit. *Id.* However, even if the Court applies the transformative use test, the Fifteenth Circuit erred as a matter of law by failing to analyze *Moonie Bares All* as a whole, which contains sufficient transformative components to garner First Amendment protection.

The hybrid test adopted by the Sixth Circuit in *ETW* is the appropriate test for balancing the right of publicity with the First Amendment protections of content creators. *See ETW*, 332 F.3d at 933. It allows for application of the transformative use test to determine whether the work is protected. *Id.* But it also requires courts to engage in a First Amendment inquiry, prioritizing the fundamental protections of speech and expression. *Id.* As a result, the test protects political lampooning, parodies, and caricatures without requiring courts to establish bright-line rules for categorizing speech. *See id.* It also allows courts to balance this speech with the rights that individuals have in their name or likeness. *See id.*

Applying this test, Fünke and FakeBlock's free speech interests outweigh Austero's interests in enforcing her right-of-publicity claim. Fünke created Moonie as

a parody to criticize a political candidate in the 2018 election, thereby assisting her mother's political campaign. *Austero*, op. at 4a. A purpose in publishing Moonie was to inform the public about the Austero's "darker side" as a political candidate. *See id.* Moreover, Fünke captioned her post on FakeBlock with "VOTE 4 LINDSAY BLUTH" and included an internet link to her mother's campaign website. *Id.* at 6a. Although Fünke also wanted to draw attention to her new AI-generating software, that interest was secondary. *Id.* at 4a. There is no information in the ad, unlike the line of advertising cases relied on by the Fifteenth Circuit, indicating that Fünke's post was a commercial advertisement. *See White*, 971 F.2d at 1401 (discussing that the sole purpose of the commercial was for advertising purposes).

Unlike the advertisement in *White*, in which the commercial's entire purpose was to promote Samsung products to consumers, the fundamental purpose of Fünke's model is to publish information concerning Austero's campaign. *See id.* at 1397. Thus, Fünke's film contains a core political expressive component. The film is dedicated to parodying and lampooning Austero in her role as a politician. Even the lyrics of the modified "New York, New York" that Moonie sings specifically attack Austero as a political candidate. *See id.* at 36a. Thus, the Moonie model is a parody and a form of political speech entitled to a high level of protection under the First Amendment. Because *Moonie Bares All* contains expressive components of political parody, any property interest Austero claims in her name or likeness is outweighed by the concerns of protecting political speech.

Applying the second step of the *ETW* framework, any alleged use of Austero's likeness is sufficiently transformative and qualifies for First Amendment protection under the transformative use test. *See ETW*, 332 F.3d at 933. Under this test, an artistic work is immune from a civil action if it contains significant transformative elements which add a substantial creative component to the work such that the depiction of the individual constitutes one of the raw materials from which an original work is synthesized. *See Comedy III*, 21 P.3d at 809 (noting that the First Amendment protects parodies and caricatures of celebrities). Conversely, a work is not protected if it constitutes a literal depiction or imitation of a celebrity. *See ETW*, 332 F.3d at 809. In applying the transformative use test, courts consider the artistic work as a whole to determine whether the work is protected by the First Amendment. *See id.* at 934; *see also Winter v. D.C. Comics*, 69 P.3d 473, 479 (Cal. 2003).

The Fifteenth Circuit erred in its application of the transformative use test because it failed to consider Fünke's AI model as a whole. Under the transformative use test, courts examine the artistic work as a whole to determine whether it is sufficiently transformative to qualify for First Amendment protection. *Hart*, 717 F.3d at 171–72; *see also Winter*, 69 P.3d at 479. Although the Fifteenth Circuit correctly held that the First Amendment protects Moonie's song lyrics as a parody, it further divided *Moonie Bares All* into separate and independent works, holding that Moonie's voice, costume and the tap-dancing performances infringed on Austero's right of publicity. *See Austero*, *op.* at 37. The Fifteenth Circuit misapplied the transformative

use test by concluding that Moonie constituted an impermissible literal depiction of Austero without analyzing the short film as a whole. *Id.*

Moonie Bares All contained significant transformative elements such that Austero was merely a raw material in the parody produced by Fünke. The Moonie model is not a literal depiction of Austero. It is a parody. Hence, it falls within the scope of political speech under the First Amendment. Although Austero's appearance was a building block of the short film, the film's fundamental political purpose places it outside the scope of liability under a right of publicity claim. Simply put, Austero's image is not the sum and substance of the work. It is merely a building block used by Fünke in an artistic attempt to criticize a public figure running for political office. Thus, the film is protected under the First Amendment.

Furthermore, there are key differences between Austero and Moonie. Unlike Austero, the Moonie model has "flat" hair, lacks a beauty mark, a downward-tipping nose, and a disproportionately large and toothless mouth. *Id.* at 24a. Further, it does not display Austero's famous smile, it only has four, inconsistently aged fingers on its left hand, and its eyes are distinct, unnatural, and wideset. *Id.* These distinctive features evidence Fünke's expressive contribution to the content depicted in *Moonie Bares All*. As a result of these differences, Moonie is not a literal depiction of Austero. Also, Fünke testified that Moonie's singing voice was developed based on recordings used as "raw building blocks" for the model. *See id.* at 27a.

Additionally, Moonie is not a literal depiction or image of Austero under the traditional transformative use test as applied by the Ninth Circuit. Instead, Fünke's

short film used Austero in the development of a larger work of parody for public criticism of Austero’s political campaign. *See ETW*, 332 F.3d at 809. Therefore, because both elements of the hybrid test are met, Fünke’s film is entitled to full First Amendment protection. Further, because both the transformative use test and the First Amendment balancing test are satisfied, *Moonie Bares All* is protected under all of the approaches adopted by federal courts on this issue.

2. *Moonie Bares All Is Protected under the Public-Interest Defense.*

In addition to the hybrid test under *ETW*, *Moonie Bares All* is also protected under the public-interest defense. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1282 (9th Cir. 2013); *see also Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 792 (1995).

The public-interest defense precludes liability for right-of-publicity claims affecting works and the publication of matters in the public interest. *Hilton v. Hallmark Cards*, 599 F.3d 894, 912 (9th Cir. 2010). The scope of the public interest defense encompasses the protection of recent events and “newsworthy” matters. *Id.* As such, the defense applies to expressive works that publish or report information on matters of public concern. *Id.* Furthermore, because information contributing to or associating with a political campaign constitutes political speech under the First Amendment, the public interest defense is essential to preserving the free exchange of ideas by shielding publishers from liability for matters affecting the public. *See Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 878 (8th Cir. 2012). Fünke designed her AI-generated model to expose the “darker side” of Austero’s political candidacy. *Austero*, op. at 4a. Fünke further published *Moonie*

Bares All to criticize Austero because she believed her criticism would inform the public about a candidate who received “too favorable attention from the media.” *Id.* In the short film, Moonie sings modified lyrics to the song “New York, New York,” providing social criticism of Austero and other wealthy politicians favoring. *Id.* at 36a. Furthermore, Fünke’s endorsed Lindsay Bluth’s congressional campaign through the written message “VOTE 4 LINDSAY BLUTH” and the link to Bluth’s campaign website. *Id.* at 6a. Because information contributing to a political campaign constitutes political speech protected by the First Amendment, the public-interest defense independently bars Austero’s right-of-publicity claim.

Therefore, the First Amendment shields *Moonie Bares All* from Austero’s right-of-publicity claim under both the hybrid test from *ETW Corp. v. Jireh Publishing, Inc.* and the public-interest defense.

CONCLUSION

Together, § 230 and the First Amendment defend free speech online. The Fifteenth Circuit jeopardized these protections, first by piercing § 230’s broad grant of federal immunity, and second, by jettisoning the First Amendment’s robust protections for works of parody. To preserve free speech online, this Court should reverse and direct entry of summary judgment for FakeBlock and Fünke.

Dated November 20, 2023.

Respectfully submitted,
/s/ _____

Counsel for Petitioner

APPENDIX

U.S. Const. amend. I

Congress shall make no law respecting . . . abridging the freedom of speech.

47 U.S.C. § 230(c) Protection for “Good Samaritan” blocking and screen of offensive material.

(1) Treatment of publisher or speaker.

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

47 U.S.C. § 230(e) Effect on others law.

(2) No effect on intellectual property law.

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