
No. 22-9908

In the Supreme Court of the United States

FAKEBLOCK, INC.,

Petitioner

v.

LUCILLE AUSTERO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF FOR RESPONDENT

Team 56
Attorneys for Respondent

QUESTIONS PRESENTED

- I. Whether 47 U.S.C. § 230—the Communications Decency Act—immunizes social media companies from state-law right of publicity claims when it excepts from immunity claims arising under “any law pertaining to intellectual property” and when the right of publicity protects the time, effort, and expense necessary to build a protectable personality?
- II. Whether a high-tech artificial intelligence model that resembled a real-life celebrity—having a similar-looking skin color, height, hair color, hairstyle, body style, body proportions, voice, dance performance, and outfit—violates that celebrity’s right of publicity and if so, does that violation fail to receive First Amendment protection?

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OPINIONS BELOW

The opinion of the United States District Court for the District of Newport Beach is unpublished but can be found at No. 18-cv-5309. The United States Court of Appeals for the Fifteenth Circuit opinion is also unpublished but can be located at No. 20-9804 and at R. at 1a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit exercised jurisdiction under 28 U.S.C. § 1291. R. at 1a. Petitioners timely petitioned for writ of certiorari, which this Court granted under 28 U.S.C. § 1254(1) on October 9, 2023. R. at 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provision relevant here is the First Amendment. The statutory provision at play is the Communications Decency Act of 1996, 47 U.S.C. § 230.

STATEMENT OF THE CASE

A. Lucille Austero: the Celebrity

Lucille Austero, the plaintiff-respondent, is a world-famous celebrity. R. at 3a. She earned her fame acting, dancing, and singing. *Id.* Austero starred on Broadway, television, and in twenty-two movies. *Id.* On top of that, she released seven studio albums. *Id.* Because of her prolific career, Austero was one of the few performers who earned all three of the most prestigious performance awards—the Oscar, Emmy, and Tony awards. *Id.* Austero has enjoyed a successful career from which she eventually

retired in 2010. *Id.* In 2018, Austero ran for Congress in her home state of Newport Beach against her opponent, Lindsay Bluth. *Id.*

B. Maeby Fünke: the AI-Generator

Maeby Fünke, Bluth’s daughter, was a corporate officer at FakeBlock. R. at 5a. At the time, FakeBlock was a social media startup. *Id.* Fünke also developed an artificial intelligence software. R. at 4a. This software could generate realistic models that could replicate real people and performances. R. at 3a. During the campaign, Fünke generated an AI model using her software. R. at 4a. Although one reason Fünke generated the model was to help her mother’s campaign, Fünke testified that she first developed it to create a realistic AI model “to demonstrate and advertise her software’s capabilities to potential licensees.” *Id.* She named this model “Moonie.” *Id.*

C. “Moonie”: the AI-Model and the Video

Moonie mimicked Austero. R. at 4a. They were the same height with the same body type, had the same distinct hairstyle (short black hair with bangs), wore the same outfit, danced a similar dance, and had a similar voice. *Id.* This resemblance was all but coincidental: Fünke testified that she used Austero to create Moonie’s appearance *and* voice. *Id.* In fact, Fünke created Moonie’s voice using software to analyze Austero’s voice from her prior movies and albums. *Id.* Fünke wanted to create a realistic-looking AI version of Austero to show potential customers how effective her AI software could be. *Id.*

The five-minute video that Fünke created showed “Moonie” in a suggestive burlesque outfit, tap dancing, singing an amended version of “New York, New York,” falling over herself, and stripping until she was naked. R. at 5a. A blurring effect

shielded Moonie’s naked body. R. at 5a. Fünke labeled the video “Moonie bares All!!! – VOTE 4 LINDSAY BLUHM” and posted the video to FakeBlock. R. at 6a. Because FakeBlock was still in its early stages of development, only three people, all FakeBlock employees, could upload videos. R. at 5a. As the director of investor relations, Maebly Fünke was one of those three people. *Id.* She uploaded the video *exclusively* to FakeBlock, hoping that the video would increase traffic to the new site. R. at 6a. Fünke even testified that the lewd content of the video—the strip teasing replica of Austero, “Moonie”—was chosen to appeal to prurient internet users. *Id.* Fünke’s plan worked: The video depicting “Moonie” drew significant attention. *Id.* Three days after Austero filed suit and ninety days after the video was first posted, the FakeBlock CEO removed the video from the platform. *Id.* He also removed Fünke from her position at FakeBlock. *Id.* Austero lost her election several months later. *Id.*

D. Procedural History

On August 24, 2018, Austero sued FakeBlock in the United States District Court, District of Newport Beach. *Id.* Austero later added Maebly Fünke to the suit as a defendant. *Id.* Austero alleged that the defendants had infringed on her right of publicity and that they had profited from her likeness and identity. *Id.* Both defendants filed for summary judgment after discovery. R. at 7a. FakeBlock also stated an affirmative immunity defense under Section 230 of the Communications Decency Act, 47 U.S.C. § 230. *Id.* The district court rejected the immunity defense but granted the motions for summary judgment on the merits. *Id.* Austero appealed the decision to the Fifteenth Circuit. *Id.* The Fifteenth Circuit affirmed the denial of immunity requested by FakeBlock but reversed the orders granting summary

judgment on the merits. R. at 2a. FakeBlock and Maeby Fünke appealed, and this Court granted certiorari on October 9, 2023. R. at 1.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fifteenth Circuit and hold that Section 230 excepts from immunity a celebrity’s state-law right of publicity claim because such a claim falls under Section 230’s intellectual property immunity exception. Additionally, this Court should hold that a realistic, computer-generated artificial intelligence model that mirrors a real-life celebrity violates the right of publicity—and the First Amendment cannot shelter such a violation.

First, Congress makes laws, and courts construe them. To give full effect to this constitutional command, the text and structure of a statute must govern. Here, Section 230(e)(2)—which broadly excepts from immunity “*any* law pertaining to intellectual property”—really means “any law,” including state law. Other provisions in Section 230 confirm this, incorporating limiting language absent from Section 230(e)(2). Further, Section 230’s purpose of promoting the free market fits this reading because state intellectual property laws advance the incentive to create. Finally, state-law right of publicity claims are intellectual property claims because the right of publicity protects the same interests as other intellectual property rights—the time, effort, and expense necessary to build a protectable personality. Because the Fifteenth Circuit recognized these circumstances, this Court should affirm.

Second, intellectual property rights are essential. So too are First Amendment rights. But the First Amendment does not sanction stealing someone’s intellectual

property, including one’s common-law right of publicity. Here, a reasonable jury could find that Fünke and FakeBlock engaged in such theft. The common-law right of publicity—the inherent right of every human being to control the commercial use of his or her identity—has evolved to protect all facets of one’s persona. Under these persona protections, people infringe the right of publicity when they use any aspect of a celebrity’s identity for personal benefit. People can infringe this right by creating a robot replica of a celebrity for commercial use. People can infringe this right by creating a realistic digital replica of a celebrity in a video game. Just as people can infringe this right by creating a realistic artificial intelligence replica of a celebrity for a video—like Fünke and FakeBlock did here with *Moonie Bares All*. And the First Amendment does not protect Fünke and FakeBlock’s high-tech right of publicity infringement. Thus, this Court should affirm the Fifteenth Circuit.

ARGUMENT

Standard of Review

Both issues are questions of law that are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

I. SECTION 230 DOES NOT IMMUNIZE SOCIAL MEDIA COMPANIES FROM STATE-LAW RIGHT OF PUBLICITY CLAIMS.

Section 230 no doubt fosters “a largely unregulated free market online” by immunizing social media companies from certain content-related liability. *Hepp v. Facebook*, 14 F.4th 204, 208 (3d Cir. 2021). Among other things, Section 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content

provider,” snuffing out many claims against interactive computer service providers. 47 U.S.C. § 230(c). But Section 230’s immunization is not an absolute shield, nor is its reach unbounded. Rather, Congress sought to balance free market principles with the regulation of objectionable content. *Hepp*, 14 F.4th at 208.

To that end, Section 230 excepts from immunity certain claims against interactive computer service providers like FakeBlock. *See* 47 U.S.C. § 230(e). Of the five exceptions to immunity housed in Section 230, one is especially relevant here. Section 230(e)(2) makes clear that Section 230 does not limit or expand “any” intellectual property law. *Id.* A circuit split has emerged on whether state-law intellectual property claims—like Austero’s—fall under this exception. The First and Third Circuits, along with several district courts, have taken a textual approach, holding that the text and structure of Section 230(e)(2) covers both federal *and* state claims. *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 423 (1st Cir. 2007); *Hepp*, 14 F.4th at 210. But the Ninth Circuit parted ways, adding to the provision’s text and relying on Section 230’s “purpose” to hold that Section 230(e)(2) only reaches *federal* intellectual property claims. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007).

Here, the Fifteenth Circuit correctly adopted the former interpretation, holding that Section 230(e)(2) excepts from immunity Austero’s state-law right to publicity claim against FakeBlock. In so doing, it gave effect to the plain language, structure, and purpose of Section 230(e)(2). Thus, this Court should affirm the Fifteenth Circuit’s decision.

A. The Text, Structure, and Purpose of Section 230(e) Demonstrate Congress’ Intent to Except from Immunity State-Law Intellectual Property Claims.

Congress “says in a statute what it means and means in a statute what it says.” *Conn. Nat’l. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). As a result, the first step of statutory interpretation is defining the ordinary meaning of the statutory text. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Next, courts examine the statutory structure, giving effect to meaningful variations while ensuring that the interpretation of one provision does not render another nugatory or superfluous. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017). Finally, courts sometimes consider the purpose of the applicable provision—although that cannot “overcome the words of its text regarding the specific issue under consideration.” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). Here, these maxims hold that Section 230(e)(2) excepts from immunity state-law intellectual property claims.

1. Section 230(e)(2)’s Text Provides That Section 230 Does Not Limit “Any” Intellectual Property Law, Which Includes State-Law Intellectual Property Claims.

“Text is the alpha and the omega of the interpretive process.” *United States v. Maturino*, 887 F.3d 716, 723 (5th Cir. 2018). So statutory interpretation begins and ends with unambiguous statutory text. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). This is because the ordinary meaning of a statute’s terms presumptively captures Congress’s intent unless those terms bear a specialized or legal meaning. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). To that end, Section 230(e)(2)’s text is unambiguous and without qualification:

“*Nothing* in this section shall be construed to limit or expand *any* law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2) (emphasis added). This broad language—namely, the modifier “any”—establishes that Section 230(e)(2) reaches state-law intellectual property claims.

To begin, this Court turns to lay dictionaries to define statutory modifiers like “any.” *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218–19 (2008). In *Gonzales*, the statutory phrase under this Court’s microscope was “any other term of imprisonment.” *Gonzales*, 520 U.S. at 5. The Court turned to Webster’s Third Dictionary to define “any” as “one or some indiscriminately of whatever kind.” *Id.* (quoting *Webster’s Third New International Dictionary* 97 (1976)). Applying this definition, *Gonzales* held that the provision reaches both state and federal terms of imprisonment because Congress did not qualify “any” by adding limiting language. 520 U.S. at 5. In other words, the statute “means what it says” and was not limited to certain categories of prison sentences. *Id.* A decade later, *Ali* reached the same result. 552 U.S. at 218–19. There, the challenged phrase from the Federal Tort Claims Act was “any other law enforcement officer.” *Id.* at 219. Invoking the same dictionary definition as *Gonzales*, *Ali* held that “any” covers “officers of whatever kind.” *Id.* at 220. In fact, “Congress could not have chosen a more all-encompassing phrase” to express its intent. *Id.* at 221.

For that reason, absent qualifying language, “any” reaches far. *See, e.g., Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980). *Harrison* deemed a statutory phrase found in the Clean Air Act—“any other final action”—as “expansive language”

that “offers no indication whatever that Congress intended [a] limiting construction” of the provision. *Id.* Rather, the term “mean[s] exactly what it says, namely, any other final action.” *Id.* At bottom, broad modifiers lead to broad coverage. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 577 (1995).

The Third Circuit recognized the broadness of “any” in Section 230(e)(2). *Hepp*, 14 F.4th at 211. In adopting a text-based interpretation, *Hepp* first analyzed several district court opinions that concluded the same. *Id.*; see also *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008); *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703–04 (S.D.N.Y. 2009). For instance, *Friendfinder* analogized Section 230(e)(2) to the statutes in *Ali* and *Harrison*, reasoning that nothing in Section 230(e)(2) limits or qualifies its reach. *Friendfinder*, 540 F. Supp. 2d at 299. Similarly, *Atlantic Recording* invoked *Gonzales* and *Harrison* to conclude that “any,” as an unqualified modifier, does not suggest Congress intended a narrow construction that excludes state-law intellectual property claims. *Atl. Recording*, 603 F. Supp. 2d at 703. Rather, it reveals that Congress intended the opposite: broad applicability. *Id.*

The Ninth Circuit diverged, cabining the reach of Section 230(e)(2) by adding limiting language to the provision. *Perfect 10*, 488 F.3d at 1119. In a one-paragraph analysis, *Perfect 10* bypassed the ordinary meaning of Section 230(e)(2)’s terms. *Id.* at 1118–19. Instead, because Congress failed to define Section 230(e)(2)’s terms, *Perfect 10* blue-penciled “any law pertaining to intellectual property” to “*federal* intellectual property.” *Id.* at 1119 (emphasis added). The Ninth Circuit rested on its

view that Congress intended to shelter companies from differing state-law regimes. *Id.* at 1118. The dissent below—and FakeBlock—invoke *Perfect 10*'s reasoning in arguing for the same result. R. at 50a.

The Fifteenth Circuit got it right here in rejecting the Ninth Circuit's departure and adopting the text-based approach recognized by *Hepp*, *Friendfinder*, and *Atlantic Recording*—an approach undergirded by this Court's respect for ordinary meanings. And this approach recognizes that Section 230(e)(2)'s text is where “the inquiry should end, for where, as here, the statute's language is plain.” *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Indeed, the ordinary meaning of “any” remains “one or some indiscriminately of *whatever kind*.” *Any*, *Webster's Third New International Dictionary* 97 (1976) (emphasis added). Under this definition, Section 230(e)(2) must be construed as “a law of whatever kind pertaining to intellectual property,” necessarily capturing both state and federal law pertaining to intellectual property. Such a reading best reflects this Court's treatment of modifiers like “any”—treatment that existed before Section 230 was enacted. *See Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1940 (2022) (“[W]hen Congress enacts statutes, it is aware of this Court's relevant precedents.”). So interpreting “any” broadly in Section 230(e)(2) would produce harmonious results and stability across the entire *corpus juris*. All in all, giving effect to Section 230(e)(2)'s ordinary meaning furthers the foundational principle that laws be understood by those they govern and written by those they elect.

And that is the downfall of the Ninth Circuit—and the dissent’s—purpose-over-text approach.

First, rather than analyzing the express text of Section 230(e)(2), *Perfect 10* added unexpressed language to Section 230(e)(2), transforming “any intellectual property law” to “any *federal* intellectual property law.” 488 F.3d at 1119 (emphasis added). But Congress said no such thing, and courts may not add to a statute what is missing. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (“It is our duty to respect not only what Congress wrote but, as importantly, what it didn’t write.”). So here, there is no way, “without doing violence to the fair meaning of the words used,” *Grenada County Supervisors v. Brogden*, 112 U.S. 261, 269 (1884), to restrict Section 230(e)(2) to only federal law. That approach would violate the longstanding principle that the “[j]udicial power is . . . always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.” *Osborn v. Bank of the U.S.*, 22 U.S. 738, 866 (1824).

In any event, even if “intellectual property” meant “federal intellectual property” (it does not), the inclusion of “pertaining to” in Section 230(e)(2) shows that the provision still reaches state law. “Pertaining to” means “*related to* or associated with something specified; belonging or relevant to the matter at hand,” *Pertaining*, *Dictionary.com*, www.dictionary.com/browse/pertaining (last visited Oct. 29, 2023), and “to belong as a part, member, *accessory*, or product,” *Pertain*, *Merriam-Webster Collegiate Dictionary* (11th ed. 2003) (emphases added). This broad phrase counsels against a federal-only reading of Section 230(e)(2) because state intellectual property

laws relate to or accessorize federal intellectual property law. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (deeming “related to” to have an expansive sweep); *Hepp*, 14 F.4th at 214 (“So not only are core intellectual property laws included, but so are laws *pertaining* to the subject.”).

Second, Congress may well have intended to limit certain state-law claims under Section 230. But Congress enacted exceptions to immunity—under both federal and state law—proving that Congress did not intend that purpose to be sacrosanct. *See* 47 U.S.C. § 230(e). Indeed, courts cannot rewrite statutes as if they pursued “a policy at all costs” because statutes often balance several, sometimes competing interests. *Bartenwerfer v. Buckley*, 598 U.S. 69, 81 (2023). This Court should therefore adhere to its ordinary meaning canon by holding that Section 230(e)(2)’s text unambiguously excepts from immunity state-law intellectual property claims.

2. *Along With Its Text, Section 230(e)’s Structure Confirms That Section 230(e)(2) Excepts From Immunity State-Law Intellectual Property Claims.*

Statutory interpretation is a “holistic endeavor,” so the whole text should be examined to best capture the overall statutory scheme. *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). To that end, where “Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012). In other words, Congress employing different language in neighboring provisions suggests a meaningful variation. *Russello v. United States*, 464 U.S. 16, 23 (1983). Second, to prevent superfluity, courts must respect every word and phrase in a statutory scheme. *Lowe v. SEC*, 472

U.S. 181, 207 n.53 (1985). Here, these structural principles verify that state-law intellectual property claims fall under Section 230(e)(2)'s safe harbor.

Section 230(e)(2) is housed in a subsection titled “[e]ffect on other laws.” 47 U.S.C. § 230(e). This subsection shows that Section 230 leaves untouched at least five categories of existing law. *Id.* The first category shields from Section 230 several specific Federal statutes and “any other Federal criminal statute.” *Id.* § 230(e)(1). Second, Section 230(e)(2)—as discussed above—shelters “any law pertaining to intellectual property.” *Id.* § 230(e)(2). The third category provides that “[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section” and that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3). The fourth leaves intact the “Electronic Communications Privacy Act of 1986” and “any similar State law.” *Id.* § 230(e)(4). Finally, Section 230 does not impact federal sex trafficking laws or certain comparable state laws. *Id.* § 230(e)(5).

Against this backdrop, the Third Circuit concluded that limiting language in other Section 230(e) provisions—but missing from Section 230(e)(2)—solidifies Section 230(e)(2)'s broad sweep. *Hepp*, 14 F.4th at 209. *Hepp* reasoned that Congress expressly using “state” and “federal” elsewhere in Section 230(e) suggests that Congress explicitly limited the reach of such exceptions when it wanted to. *Id.* at 211. Yet it failed to do so in Section 230(e)(2), so “any” there reaches both state *and* federal law. *Id.*

In so concluding, *Hepp* again turned to *Atlantic Recording*. *Id.* at 210. That court recognized the same meaningful variation as *Hepp*, finding persuasive that four parts of Section 230(e) expressly delineate local, state, or federal law. *Atl. Recording*, 603 F. Supp. 2d at 703. Those different parts include Sections 230(e)(1) (“any other *Federal* criminal statute”), (e)(3) (“any *State* law” and “any *State* or *local* law”), and (e)(4) (“any similar *State* law”) (emphases added). *Id.* at 703–04. Compare this with Section 230(e)(2): “*any* law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2) (emphasis added). This, to *Hepp* and *Atlantic Recording*, was dispositive. *See also Friendfinder*, 540 F. Supp. 2d at 300 (reasoning that the “content of these provisions indicates that, where Congress wished to distinguish between state and federal law in § 230, it knew how to do so”).

Relatedly, courts interpreting other Section 230(e) exceptions have relied on Section 230(e)(2)’s broad sweep to limit those other exceptions. *Voicenet Comms., Inc. v. Corbett*, No. 04-1318, 2006 WL 2506318, at *4 (E.D. Pa. Aug. 30, 2006). *Voicenet* analyzed Section 230(e)(1), which provides Section 230 leaves untouched certain federal statutes “or any other *Federal* criminal statute.” *Id.*; 47 U.S.C. § 230(e)(1). The court said that this provision did not encompass state criminal statutes because if Congress intended all criminal statutes to escape Section 230’s grasp, it could have said “any criminal statute” as it did in Section 230(e)(2) to cover “any law pertaining to intellectual property.” *Voicenet Comms.*, 2006 WL 2506318, at *4. Thus, *Voicenet* concluded that the broad language of Section 230(e)(2) mandated the exclusion of state law in the narrower Section 230(e)(1). *Id.*

To be sure, *Hepp* noted that Section 230(e)'s structure might “cut[] both ways.” *Hepp*, 14 F.4th at 211. There, Facebook made the same argument FakeBlock raises here: Federal law is the default, so Congress only intended to reach state law when the provision expressly includes “state” and when state law is “coextensive with federal law.” *Id.* at 210; R. at 13a. But *Hepp* countered that the inclusion of “federal” in Section § 230(e)(1) belied Facebook’s argument. *Hepp*, 14 F.4th at 210. That is, if federal law were the default throughout Section 230(e), why would Section 230(e)(1) read “*federal* criminal statute?” *Id.*; see also *Atl. Recording*, 603 F. Supp. 2d at 702 (reasoning that “Section 230(e)(1) refers specifically to federal criminal law” and that “the specific reference would be unnecessary if . . . subsections (1), (2), and (4) covered only federal law”).

Considering these observations, the Fifteenth Circuit correctly recognized that Section 230(e)(2) excluding a qualifier like “federal,” “state,” or “local” represents a meaningful variation from its neighbors. See *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457–58 (2022) (applying the meaningful variation canon to distinguish a broad phrase from a narrow one). Put simply, if Congress wanted to limit Section 230(e)(2) to federal claims, it knew how to do so. That it did not—and instead used “any law”—is dispositive. It is for Congress, not a court, to amend Section 230(e)(2) to include qualifiers if it wishes to limit the provision’s reach. See *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (“[I]t is for Congress, not this Court, to rewrite the statute.”).

The Fifteenth Circuit approach dodges another structural snag: Limiting Section 230(e)(2) to federal intellectual property law and state laws coextensive with

federal law would pose superfluity problems. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 74 (2012) (“[I]t is no more the court’s function to revise by subtraction than by addition.”). First, such narrowing would render “federal” in Section 230(e)(1) superfluous. *See* 47 U.S.C. § 230(e)(1). Second, on FakeBlock’s coextensive limitation, R. at 13a, Congress expressly limited Section 230(e)(4) and (e)(5)’s reach to coextensive state-law claims by including “any *similar* State law” and “any charge . . . brought under State law if the conduct underlying the charge *would constitute a violation of [federal law]*,” respectively. 47 U.S.C. §§ 230(e)(1)–(2) (emphases added). That Congress explicitly cabined state-law claims to those similar to or coextensive with federal law reinforces—rather than rejects—a broad reading of Section § 230(e)(2), which contains no comparable restrictor. At bottom, Section 230(e)’s structure corroborates the broad sweep of Section 230(e)(2)’s text.

3. *The Ninth Circuit’s Purpose-Only Reading of Section 230(e)(2) Should Be Rejected Because It Cannot Be Squared With the Statutory Text and Structure.*

Together with adding the word “federal” to Section 230(e)(2), the Ninth Circuit and the dissent below short-circuit Section 230(e)(2)’s text and structure by relying on Section 230’s purported purposes. *Perfect 10*, 488 F.3d at 1118; R. at 50a. To them, excepting from immunity state-law intellectual property claims would impede the free market and create confusion across states. *Id.* But these speculative concerns cannot carry the day.

For starters, statutory purpose clauses cannot displace statutory exceptions. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019). Nor can judges invoke purpose to

supplant their wisdom for Congress' words. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). And as explained above, the text and structure compel the inclusion of state intellectual property laws. So purpose cannot trump that.

But even if this Court considers Section 230's purpose, excepting from immunity state-law intellectual property claims poses no fatal friction. Section 230(b) outlines Congress' policy in enacting Section 230. 47 U.S.C. § 230(b). This subsection outlines "the policy of the United States" with respect to both "Federal or State regulation." *Id.* § 230(b)(2).¹ In that provision, Congress expressed its desire to protect the "competitive free market" and promote the "continued development" of online platforms. *Id.* §§ 230(b)(1)–(2). Congress also stated its intent to encourage technological development. *Id.* § 230(b)(3). At the same time, Congress made clear that Section 230 sets out to limit "objectionable" and "inappropriate online material" and ensures "vigorous enforcement of Federal criminal laws." *Id.* §§ 230(b)(4)–(5).

In light of these competing purposes, state intellectual property laws support America's competitive free market. "After all, state property laws—along with contract laws—enable 'the resulting formation of effective markets.'" *Hepp*, 14 F.4th at 211 (quoting *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1029 (2021)).

First, state intellectual property laws encourage market competition by protecting ideas and content developed by individuals and smaller entities as they

¹ The language in Section 230(b)—that this "policy of the United States" applies to "Federal or State regulation"—supports the notion that "any law pertaining to intellectual property" in Section 230(e)(2) means both state and federal law.

compete against more entrenched institutions. Barnett, Jonathan M., “*How IP Rights Keep Markets Free*,” Hudson Institute (2021). Without such protections, these startups would typically lack the capital to challenge “capital-rich incumbents.” *Id.* In effect, these rights give startups and smaller companies leverage to compete. *Id.* So although state intellectual property laws might grant monopolies over individual *products*, these laws prevent monopolies over entire *industries* by leveling the market-entry playing field. See *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 976 (10th Cir. 1996) (“Underprotection of intellectual property reduces the incentive to create; overprotection creates a monopoly over the raw material of creative expression.”).

Second, weakening state-law intellectual property rights like the right of publicity would dissuade people from creating content or performing if they know that such content can be disseminated online—without any remuneration to the creator for their work and investment. See *Hepp*, 14 F.4th at 211 (“[I]f likeness interests are disregarded on the internet, the incentives to build an excellent commercial reputation for endorsements may diminish.”); see *infra* Section I(B)(2). Relatedly, affording blanket intellectual property immunity to internet service providers would strip creators of any recourse against the ever-increasing anonymous infringer. Both scenarios would have a chilling effect on the marketplace of ideas that the free market seeks to foster.

Third, even if state intellectual property laws cause some harm to the free market, Congress enacting five exceptions to immunity shows that Section 230’s

codified purposes were not intended to be pursued at all costs. *Friendfinder*, 540 F. Supp. 2d at 300 (reasoning that “the potential costs to those rights, in essence, outweighed the benefits of the alternative”). Section 230(e)(2)’s language expressly recognizes this: “*Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.*” 47 U.S.C. § 230(e)(2) (emphasis added). Resorting to Section 230’s policy statements, *see id.* § 230(b), to limit Section 230(e)(2)’s reach would further violate Section 230(e)(2) because that would require relying on another part of Section 230 to limit “any” law pertaining to intellectual property. Thus, Section 230’s codified purpose coexists with its text and structure.

Finally, the Ninth Circuit and dissent below go beyond that codified purpose to conceive another purpose: protecting companies and courts from a patchwork of different state intellectual property laws. *Perfect 10*, 488 F.3d at 1118; R. at 50a. Such an extratextual concoction invades the legislative domain, so it should be rejected. *United States v. Great N. Ry.*, 287 U.S. 144, 154 (1932) (“We have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute.”). But even considering the merits of this position, multi-state companies and federal courts sitting in diversity handle conflicting state laws every day—including in the intellectual property realm. *See* 28 U.S.C. § 1332. Despite this, the internet remains “alive and well,” showing “no sign of imminent collapse.” *Friendfinder*, 540 F. Supp. 2d at 302. So it is reasonable to expect these companies and courts to navigate state laws in the Section 230 context. In the end, Section 230’s purpose fails to trump its text and structure and instead bolsters it.

In sum, the Fifteenth Circuit correctly held that Section 230(e)(2)'s text, structure, and purpose prove that it excepts from immunity state-law intellectual property claims. This Court should therefore affirm.

B. The Right of Publicity is an Intellectual Property Right Based On Its Definition and the Interests It Seeks to Advance.

If state-law intellectual property claims are generally excepted from Section 230 immunity, the question narrows to whether Austero's state-law right-of-publicity claim falls under "intellectual property" law. The right of publicity stems from the common-law appropriation tort. *See, e.g., Pavesich v. New England Life Ins.*, 50 S.E. 68, 81 (Ga. 1905). This tort prohibits people from appropriating another's "name or likeness" and using it for personal gain. *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 999 (Colo. 2001).

This appropriation tort morphed over time, incorporating a property right. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 652C, cmt. a (AM. L. INST. 1977) (noting that the Restatement protects a property interest). Courts call this property right the "right of publicity." *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

The right of publicity is the "inherent right of every human being to control the commercial use of his or her identity." *Henley v. Dillard Dep't Stores*, 46 F. Supp. 2d 587, 590 (N.D. Tex. 1999) (quotations omitted). As a result, "[o]ne 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." § 652C. Financial harm undergirds this right:

[M]any prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their

likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.

Haelan, 202 F.2d at 868.

The right of publicity, however, is not just a property right. It is an *intellectual* property right for two reasons. *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323 (11th Cir. 2006); *see also* Thomas McCarthy & Roger E. Schechter, *The Rights of Publicity and Privacy*, § 3.1 (2d ed. 2023) (“The right of publicity is a state law created intellectual property right.”). First, the definition of “intellectual property” captures right of publicity claims. *Hepp*, 14 F.4th at 213. Second, the right of publicity advances similar interests as other intellectual property rights. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1976). This Court should affirm the Fifteenth Circuit and hold that Austero’s state-law right of publicity claim is an intellectual property claim excepted from immunity.

1. *The Definition of “Intellectual Property” Includes Right to Publicity Claims.*

Beginning with the text, legal terms of art are an exception to the ordinary meaning canon. *In re Morgan*, 717 F.3d 1186, 1192 (11th Cir. 2013). That is, when such terms are statutorily undefined, legal—not lay—dictionaries best define them. Scalia & Garner, *Reading Law* 73. To that end, “intellectual property” in Section 230(e)(2) is undefined and addresses Section 230’s mark on other laws, so it finds its meaning in legal dictionaries. *See Hepp*, 14 F.4th at 213 (turning to legal dictionaries to define “intellectual property” in Section 230(e)(2)). And those dictionaries reveal that “intellectual property” law embraces the right of publicity.

At the outset, several legal dictionaries expressly include the right of publicity under their definitions of “intellectual property”:

- Black’s: “A category of intangible rights protecting commercially valuable products of the human intellect. The category . . . includes . . . publicity rights.” *Intellectual Property, Black’s Law Dictionary* (11th ed. 2019).
- McCarthy’s: “‘Intellectual property’ is an all-encompassing term now widely used to designate as a group all of the following fields of law: . . . the right of publicity.” *Intellectual Property, McCarthy’s Desk Encyclopedia of Intellectual Property* (1991).

Notably, “Black’s is renowned, and McCarthy’s directly addresses the subject.” *Hepp*, 14 F.4th at 213. Thus, leading sources show that the right to publicity falls within the definition of intellectual property.

2. *The Right of Publicity Advances Similar Interests as Other Intellectual Property Rights.*

To be sure, dictionary definitions often differ to some degree. So comparing definitions from different dictionaries is prudent. Scalia & Garner, *Reading Law* 417. And here, other legal dictionaries omit explicit reference to the right of publicity in defining “intellectual property.” But this is trivial because many of those definitions implicitly bring the right of publicity within their sweep. *Hepp*, 14 F.4th at 213. For instance, several mention patents, trademarks, and copyrights. *See, e.g., Intellectual Property, Dictionary of Modern Legal Usage* (2d ed. 1995) (intellectual property includes “copyright, “trademark,” and “rights in literary, musical, artistic” works). Additionally, one of the definitions provides that intellectual property includes “an effective monopoly” over something, “such that the property rights holder may enjoy or recover from others who infringe on the rights.” *Intellectual Property, The Wolters Kluwer Bouvier Law Dictionary* (2012). Importantly, a dictionary definition only

“states the core meanings of a term” and “cannot delineate the periphery.” Scalia & Garner, *Reading Law* 418–19.

To that end, these definitions include the right of publicity by analogy because publicity rights advance sufficiently similar interests and guarantee the same remedies as copyright, trademark, and patent protections. *Zacchini*, 433 U.S. at 573. Those shared interests include allowing entertainers to “reap the reward” of their talents and energies. *Id.* at 573. In effect, giving them exclusive control over their publicity protects the “time, effort, and expense” necessary to build a protectable personality. *Id.* at 575. These commercial protections, in turn, motivate entertainers to perform, as copyright, patent, and trademark protections motivate creators to author works and make inventions. *Id.* at 576; *see also Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808-10 (Cal. 2001) (“The right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility.”).

In other words, the right of publicity fuels the “engine of free expression,” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003), with no less force than its intellectual property analogs. In many cases, as here, the movie does not matter without the right actor. The song does not matter without the right singer. And the dance does not matter without the right dancer. Recognizing this, the right of publicity “provides an economic incentive for [performers] to make the investment required to produce a performance of interest to the public.” *Zacchini*, 433 U.S. at 576; *see also* Roberta Rosenthal Kwall, *Fame*, 73 Ind. L.J. 1, 42 (1997) (“As a society, we value hard work,

and we encourage people making their mark by developing a persona that somehow stands out from the crowd.”). So the right of publicity is a piece of the greater intellectual property puzzle—protecting equally important interests often left unprotected by copyright, patent, or trademark law.

And Austero’s claim exemplifies why the right of publicity is an intellectual property right. Austero is not seeking relief based on a bruised ego. R. at 18a. Rather, she is seeking recovery for the “dilution of her right to profit from her own publicity.” *Id.* She developed this right over the course of her uniquely successful career—acting in twenty-two movies, releasing seven albums, and earning Oscar, Emmy, and Tony awards. R. at 3a. This success did not hinge on Austero’s pixie cut or height. Rather, it hinged on her ability to sing, act, and dance—and to promote herself in a marketable way. *See id.* These “socially enriching activities” are no doubt products of Austero’s intellect. Kwall, *supra*, at 41 (“[T]he effort in constructing the celebrity persona represents an intellectual, emotional, and physical effort on the part of the celebrity that requires protection.”). Therefore, right of publicity claims, including Austero’s, are intellectual property claims. Section 230(e)(2) thus excepts from immunity state-law right of publicity claims.

C. Austero Seeks to Hold FakeBlock Responsible for Its Own Speech, So FakeBlock Is Not Entitled to Immunity Under Section 230(c).

Alternatively, this Court can affirm the Fifteenth Circuit’s immunity holding on the narrower ground that FakeBlock posted the video itself, thus stripping away Section 230 immunity. R. at 40a. Section 230(c)(1) provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any

information *provided by another information content provider.*” 47 U.S.C. § 230(c)(1) (emphasis added). “Information content provider” includes “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.* § 230(f)(3) (emphasis added). As a result, “an interactive computer service provider remains liable for its own speech.” *Universal*, 478 F.3d at 419. Here, FakeBlock was the information content provider responsible for the video, thus removing FakeBlock’s immunity under Section 230(c)(1).

Fünke was a FakeBlock corporate officer when she uploaded the video. R. at 41a. Part of her corporate officer duties included “advertising the site and attracting additional investors.” *Id.* And although she offered differing reasons for uploading the video, she testified that she “knew—and in fact intended—that her film go viral” and “wanted the expected web traffic to come to FakeBlock because of her investment in the site.” *Id.* Moreover, at the time she uploaded the video, she was one of just three people with posting permission. *Id.* This raises a reasonable inference that Fünke acted under FakeBlock’s authority while uploading the video depicting Austero.

To be sure, the evidence at this point cuts both ways. For instance, Fünke also testified that she posted the video to help her mother’s campaign against Austero and to showcase her software. R. at 41a. But the presence of conflicting evidence and credibility determinations makes summary judgment inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253-55 (1986). Indeed, at that stage, all reasonable inferences must be construed in Austero’s favor. *See id.* Thus, if this Court rejects the

Fifteenth Circuit’s interpretation of Section 230(e)(2), this Court should still affirm the summary judgment reversal, though on these narrower grounds.

II. REALISTIC ARTIFICIAL INTELLIGENCE MODELS THAT MIRROR A REAL-LIFE CELEBRITY VIOLATE THE RIGHT OF PUBLICITY AND THE FIRST AMENDMENT CANNOT SHELTER SUCH VIOLATIONS.

Since this country’s founding, its laws have protected property rights. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). It has protected these fundamental rights because property “empowers persons to shape and to plan their own destiny.” *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017). Indeed, without such rights, “liberty cannot exist.” *Cedar Point Nursery*, 141 S. Ct. at 2071 (quotations omitted). Among these liberty-preserving property rights is a person’s right of publicity. *Zacchini*, 433 U.S. at 569. States often protect this right through the common law—enabling States to preserve this right as society changes. *Joe Dickerson*, 34 P.3d at 999. And through the common law, the right of publicity has expanded. *See, e.g., White v. Samsung Elecs. Am.*, 971 F.2d 1395, 1399 (9th Cir. 1992).

Since its expansion, the right of publicity has come into tension with the First Amendment. *Zacchini*, 433 U.S. at 574–75. Indeed, some infringers use components of celebrities’ persona for commercial purposes and label it “expression.” *Id.* Under the guise of expression, creative infringers put fundamental right of publicity rights in a perilous state. *Id.* So this Court declared that a line must be drawn between expression and right of publicity theft. *Id.* This case provides this Court the opportunity to draw that line.

Here, the Fifteenth Circuit correctly concluded that a reasonable jury could find that Fünke and FakeBlock crossed that line through Austero’s artificial

intelligence replica, Moonie. First, Fünke and FakeBlock violated Austero’s common-law right of publicity. This right, subsumed into Newport Beach common law, is expansive. People violate this right when they use any aspect of another’s identity to exploit that identity for personal gain. And the *Moonie Bares All* video exploited Austero’s persona for commercial gain. Second, the First Amendment does not protect Fünke and FakeBlock’s violation. This Court should adopt the transformative use test to balance right of publicity claims with the First Amendment. Applying the transformative use test to this case shows that Moonie was a mere imitation of Austero. Thus, this Court should affirm the Fifteenth Circuit’s decision.

A. A Computer-Generated Artificial Intelligence Model That Resembles a Real-Life Celebrity Infringes the Right of Publicity.

State common law is flexible. *McCormack v. Oklahoma Pub. Co.*, 613 P.2d 737, 740 (Okla. 1980). This flexibility allows judges to adopt rules that respond to society’s evolving conditions. *Id.* The common-law right of publicity is no exception. *Joe Dickerson*, 34 P.3d at 999; *see also White*, 971 F.2d at 1399 (allowing a right of publicity claim when someone used a robot in advertisements that resembled a celebrity). As technology developed and infringers became more creative, courts extended the common law to forbid more than just name and likeness appropriations. *Id.* Indeed, courts began to impose liability on appropriators who used any indicia of a person’s identity or “persona” for their own benefit. *Id.*

This persona rule is expansive. For example, under this rule, the right of publicity has barred using a similar-sounding voice to appropriate someone’s identity. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988). It has barred using a

recognizable catchphrase. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836–37 (6th Cir. 1983). And it has barred using a digital replica in a video game. *E.g., Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 150 n.12 (3d Cir. 2013).

Here, the Fifteenth Circuit correctly concluded that a reasonable jury could find that Fünke and FakeBlock's artificial intelligence replica of Austero, Moonie, infringed Austero's right of publicity. First, the common-law right of publicity is expansive and prohibits people from using any aspect of a person's persona or identity without permission. Newport Beach adopted the RESTATEMENT (SECOND) OF TORTS § 652C, recognizing a common-law right of publicity. Most states that retain a common-law right of publicity have recognized that the common-law right of publicity embraces the persona rule. Further, a later published Restatement, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995), expressly encompasses this expansive understanding of the right of publicity. And the leading right of publicity treatise includes the persona rule in the right's elements. Newport Beach's common-law right of publicity thus subsumes the persona rule.

Second, using an artificial intelligence model to replicate a real-life celebrity infringes the right of publicity. Under the persona rule, the right of publicity does not require exactness for liability to lie. Rather, it requires only that a celebrity's identity be identifiable in the infringing work. And reverting the right of publicity to an exactness standard would create a perverse incentive—one for creative infringers to use advanced technology to exploit celebrities' identities. At bottom, a reasonable jury could find that Austero's persona was identifiable in the Moonie video.

Third, the Fifteenth Circuit’s decision satisfied the *Erie*-Prediction doctrine. Newport Beach did not have a case addressing whether its common-law right of publicity incorporates the persona rule. Nor did it have one addressing whether that rule bars misappropriating a celebrity’s persona with an artificial intelligence replica of that celebrity. As a result, the Fifteenth Circuit properly consulted the larger body of law to discern the majority rule, using other jurisdictions and treatises to do so. This Court, then, should affirm the Fifteenth Circuit’s decision that the Moonie video may have infringed Austero’s right of publicity.

1. *The Common-Law Right of Publicity is Expansive and Prohibits People from Using Any Aspect of a Person’s Persona or Identity Without Permission.*

The right of publicity is the “inherent right of every human being to control the commercial use of his or her identity.” *Henley*, 46 F. Supp. 2d at 590. This right found a home in the RESTATEMENT (SECOND) OF TORTS § 652C. *Id.* Although the right first prevented people from exploiting another’s name or likeness for gain, courts expanded the right’s scope. *Joe Dickerson*, 34 P.3d at 999–1000. They expanded it to prohibit people from exploiting another’s persona for gain. *Carson*, 698 F.2d at 836–37. And where, as here, courts must identify the scope of a state’s common-law right without on-point state authority, they must make an *Erie* prediction, looking to other jurisdictions, restatements, and treatises to discern and apply the majority rule. *SMI Owen Steel Co. v. Marsh USA, Inc.*, 520 F.3d 432, 436–37 (5th Cir. 2008). That

analysis reveals that Newport Beach subsumed the expansive persona rule when its Supreme Court adopted § 652C.²

A jurisdictional survey reveals that the dominant common-law rule is the persona rule. Twenty-four jurisdictions retain a common-law right of publicity. *See* McCarthy & Schechter, § 6.2 (collecting states).³ Over half of those jurisdictions—fifteen—have recognized or applied the persona rule. *Id.* These states often recognize that the persona rule guards against crafty infringers who seek to exploit celebrities’ identities without paying a licensing fee. *See, e.g., White*, 971 F.2d at 1399 (“A rule which says that the right of publicity can be infringed only [by using] nine different methods of appropriating identity . . . challenges the clever . . . strategist to come up with the tenth.”). What is more, just two states have rejected it. *Brill v. Walt Disney Co.*, 246 P.3d 1099, 1102-04 (Okla. Civ. App. 2010) (reasoning that § 652C’s text is limited to “name and likeness”); *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 380 (Utah Ct. App. 1997) (same). The remaining states have not addressed the persona rule.

² The Fifteenth Circuit’s dissent contends that the majority’s *Erie*-Prediction was flawed. R. at 59a. Not so. *Erie* predictions require looking to other jurisdictions, restatements, and treatises for the majority rule. *SMI*, 520 F.3d at 436-37. The majority looked to other jurisdictions. R. at 19a-21a. It looked to restatements. R. at 19a. It identified the leading right of publicity treatise. R. at 20a. It then applied the majority rule.

³ *See also* Jennifer Rothman, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY: THE LAW (2021), <https://rightofpublicityroadmap.com/law/> (last visited Nov 12, 2023). Between the two sources, these jurisdictions retain a common-law right of publicity: Alabama, Arizona, California, Colorado, Connecticut, D.C., Florida, Georgia, Iowa, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, Texas, West Virginia, Wisconsin.

A later Restatement also adopts the persona rule. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). To that end, § 46 imposes liability on anyone who misappropriates a person’s “name likeness, or *other indicia of identity*” for commercial benefit. *Id.* (emphasis added). This later articulation of the right does not differ in scope from § 652C. *Id.* cmt b., repr’s note (tracing the limited differences between § 652C and § 46). Rather, the only difference between § 46 and § 652C is that § 652C provides redress for both personal and commercial injuries, such as emotional distress, while § 46 provides redress only for commercial injuries. *Id.*

And a key right of publicity treatise accepts the persona rule. *See* McCarthy & Schechter § 3.2. This treatise, *The Rights of Publicity and Privacy*, is the “leading treatise on the right of publicity.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, reporter’s note; *see also* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 Yale L.J. 86, 108 (2020) (noting that this treatise is “the authoritative treatise on the right of publicity”); *Henley*, 46 F. Supp. 2d at 597 (describing one of the authors as “one of the foremost legal commentators” on the right of publicity and noting that the treatise is “well known and oft-cited”). Under the treatise, there are three elements in a right of publicity case. McCarthy & Schechter § 3.2. The second element reflects the persona rule: the (1) “[p]laintiff owns an enforceable right in the identity or persona of a human being;” (2) “[d]efendant, without permission, has used *some aspect of identity or persona in such a way that plaintiff is identifiable* from defendant’s use;” and (3) “use is likely to cause damage to the commercial value of that persona.” *Id.* (emphasis added).

Here, the persona rule applies to Austero's right of publicity claim under Newport Beach's law. Because Newport Beach does not have a case expounding the right of publicity under § 652C, the majority rule must apply as it is reflected in other jurisdictions, restatements, and treatises. *SMI*, 520 F.3d at 436-37.

First, other jurisdictions favor applying the persona rule to Newport Beach law. Fifteen of the twenty-four common-law right of publicity states have adopted the rule, *see supra* note 3, while just two have rejected it. The two outlier courts' reasoning explains this fifteen-to-two blowout. The two courts rejected the persona rule because § 652C's text discusses only name and likeness as ways to appropriate someone's identity. *Brill*, 246 P.3d at 1102–04. That rigid approach stiffens the common law's flexibility that guards against modern problems, driving common-law rights like the right of publicity to extinction. *McCormack*, 613 P.2d at 740. Further, § 652C is a synthesis of judge-made law from pre-1977. Not only has it evolved beyond § 652C's text, but parsing judge-made law like a statute is a disfavored approach to discerning the law. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

Second, the restatements support the persona rule under Newport Beach law. The newest restatement bars using another's "name likeness, or other indicia of identity." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46. True, Newport Beach could have adopted § 46 after it became a state in 2014 had it wanted a restatement with the persona rule in its text. R. at 3a. But there is no limiting reason to adopt § 46 over § 652C. Despite their text, §§ 46 and 652C do not differ in scope. § 46, cmt. b. There is, however, a reason for a state to adopt § 652C over § 46: § 652C provides

states' citizens redress for both personal and commercial injuries, while § 46 provides redress only for commercial harm. *Id.*

Third, the leading right of publicity treatise clinches the contest for applying the persona rule. The treatise prohibits all identity appropriation, no matter the method. McCarthy & Schechter § 3.2. Indeed, under the treatise, a defendant infringes another's right of publicity when the defendant "used some aspect of [another's] identity or persona in such a way that plaintiff is identifiable from defendant's use." *Id.* In effect, it restyles §§ 46 and 652C and incorporates the persona rule.

In sum, the sources that a court must examine to discern and apply the majority common-law rule advance the persona rule. Most common-law jurisdictions adopt it. A later published restatement adopts it. And the authoritative treatise on the right of publicity embraces it. Newport Beach's common-law right of publicity thus absorbed the persona rule.

2. *Fünke and FakeBlock's Artificial Intelligence Replica of Austero, Moonie, Infringed Austero's Right of Publicity.*

Right of publicity infringements started with names and pictures. *Joe Dickerson*, 34 P.3d at 999-1000. They moved to robot replicas. *White*, 971 F.2d at 1399; *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997). They then moved to pixilated digital replicas in video games. *Hart*, 717 F.3d at 151. They now advance to realistic, artificial intelligence replicas. R. at 3a. Under the relevant persona rule, which prohibits using "some aspect of identity or persona in such a way that plaintiff is identifiable from defendant's use," *Friendfinder*, 540 F. Supp. 2d at 303-04, these

replicas have infringed plaintiffs' right of publicity, *see, e.g., Wendt*, 125 F.3d at 811. They violated plaintiffs' right of publicity because plaintiffs were "identifiable" from the infringing work. *Carson*, 698 F.2d at 835–37 (holding that using a celebrity's recognizable catchphrase infringes the right of publicity); *McFarland v. Miller*, 14 F.3d 912, 919–21 (3d Cir. 1994). Thus, the analysis of whether one infringed another's right of publicity turns on whether a plaintiff is identifiable from the work. *Id.* Here, a reasonable jury could conclude that Austero is identifiable from the Moonie video.

Identifiability does not require exactness. *Wendt*, 125 F.3d at 811 (stating that the question is "the degree to which" robots looked like plaintiffs—not whether they are an exact match). It requires only resemblance. *Id.* For example, in *Midler*, the infringer asked a famous singer to use her singing voice to advertise its products with one of her songs. 849 F.2d at 461. The singer declined. *Id.* In response, the infringer hired someone with a voice that resembled the singer's. *Id.* *Midler* held that this violated the singer's right of publicity because allowing one to impersonate a singer's voice would allow a studious infringer to pirate the singer's identity for commercial gain. *Id.* *White* adopted similar reasoning to hold a company liable for using a robot resembling a famous game show hostess in several advertisements. 971 F.2d at 1398–99. The robot infringed the hostess's right of publicity because, despite dissimilarities, the similarities identified the hostess. *Id.* This finding, *White* reasoned, guards against creative infringers. *Id.* It also evades eviscerating the right of publicity with technology that can replicate someone without the exactness found in photographs. *Id.*

Context can solidify identifiableness. *Id.*; *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 727 (S.D.N.Y. 1978). For example, in *White*, the robot dressed like, stood like, and had the same hair color as the hostess. 971 F.2d at 1396. Yet *White* noted that alone, that may not have identified the hostess. *Id.* at 1399. Indeed, context solidified the right of publicity infringement—the robot was placed on the hostess’s game show set. *Id.* Likewise, context solidified the infringement in *Motschenbacher*, 498 F.2d at 827 (holding that even though one could not see plaintiff’s likeness in a commercial, plaintiff was identifiable as the person in a car that he famously drove). And context solidified infringement in *Ali*, 447 F. Supp. at 727 (holding that a famous boxer was identifiable in a magazine that featured a “mystery man” with similar features in a boxing ring with the boxer’s nickname in the caption).

In every case featuring digital replicas where resemblance and context combine, a right of publicity infringement claim is upheld. See *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1176-79 (9th Cir. 2015) (upholding claim when a digital avatar resembled a football player in a football video game); *Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1272 (9th Cir. 2013) (same); *Hart*, 717 F.3d at 151 (same). The common thread between these cases is that the digital replicas not only resembled real-life people’s physical features but also appeared in the same context as these people. And one court emphasized that the less pixelated a digital replica is, the more willing a court should be to find a right of publicity infringement because the resemblance is enhanced. *Hart*, 717 F.3d at 166 n.38.

Yet the Fifteenth Circuit’s dissent emphasized the dissimilarities between Austero and the replica, Moonie. R. at 65a. Indeed, the dissent noted that Moonie’s voice was not identical to Austero’s singing voice. *Id.* The dissent also deemphasized Austero’s similarities to Moonie, noting their similarities were not unique to Austero. R. at 62a–64a. Instead, the dissent stated that Moonie shares these similarities with other women, not just Austero. *Id.* Thus, the dissent would have denied Austero’s right of publicity claim. *Id.*

But a reasonable jury could conclude that Moonie infringed Austero’s right of publicity; Austero is identifiable in the replica. Identifiability does not require exactness—just resemblance. *Midler*, 849 F.2d at 463–64. As in *Midler*, Moonie’s voice resembled Austero’s. R. at 26a. It might have been just one octave higher. *Id.* Further, like *White*, 971 F.2d at 1396–99, Moonie’s physical appearance resembled Austero’s, R. at 23a–26a. Their skin color, height, hair color, hairstyle, body style, and proportions resembled one another. *Id.* Moonie wore the same outfit Austero once wore in a movie. R. at 25a. Their tap-dance performances resemble one another’s. *Id.*

Context further supports Fünke and FakeBlock violated Austero’s right of publicity. To that end, context combines with resemblance, like the video game replica cases, *e.g.*, *Davis*, 775 F.3d at 1176-79, bolstering Austero’s identifiability. Moonie appears in a singing, acting, and dancing context—the three contexts in which Austero, unlike anyone else, generated her fame. R. at 25a. Moonie also sings about Newport Beach, further outing Austero as the identity in the video. R. at 36a. The video’s caption references voting for Austero’s opponent, narrowing who the identity

in the video replicates even further. R. at 6a. And all this resemblance and contextual support appears in a far less pixelated setting than a video game. Indeed, they appear in a realistic, artificial intelligence-generated video. In that vein, *Hart*'s observation—that the less pixelated a video, the more probable it is that it infringes one's right of publicity—provides perspective. *Hart*, 717 F.3d at 166 n.38. For if a pixelated video game replica violates one's right of publicity, *id.*, so too does a realistic artificial intelligence replica. And the Fifteenth Circuit's dissent cannot undermine that reality.

The Fifteenth Circuit's dissent, piece by piece, emphasized dissimilarity and deemphasized resemblance. R. at 62a–64a. That isolated analysis, however, disregarded context in that it discounted the resemblance as a whole when determining whether Austero was identifiable. True, as the dissent noted, there are many “short-cut, raven-haired American woman of average height.” R. at 63a. But there is only one identifiable person with those physical features who is a singer, dancer, and actress, who is from Newport Beach, who ran against Lindsay Bluth, who has a particular singing voice, and who wore the very outfit Moonie wore. That person is Austero.

What is more, the dissent's exactness, no-context analysis would open the door that *White* shut—one for creative infringers, like Fünke, to use modern technology to exploit others' identities for commercial gain. In a world with artificial intelligence, it would allow someone to use these products to survey multiple use digital voices that resemble real voices to create music without paying those people. And it would

permit people to make movies using real-life actors' identities so long as they modify a few minor aspects of the actors' appearance.⁴ This Court should not reopen that door, which would eviscerate the right of publicity.

At bottom, a reasonable jury could conclude that Fünke and FakeBlock's Moonie infringed Austero's right of publicity, given the resemblance between Moonie and Austero and context. Applying a different standard, like a no-context, exactness standard, would incentivize creative infringers to use advanced technology to exploit celebrities' identities.

B. The First Amendment Does Not Protect Right of Publicity Violations Executed with Realistic Artificial Intelligence Replicas.

The First Amendment does not protect property theft for commercial purposes—even when the thief labels it “expression.” *Eldred*, 537 U.S. at 219. To be sure, the First Amendment shelters many forms of expression. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011). It even allows people to burn their property to express themselves. *Texas v. Johnson*, 491 U.S. 397, 406 (1989). But it does not authorize people to steal another person's property and burn it to advertise how well their lighter fluid works. *See Jack Daniel's Properties, Inc. v. VIP Prod. LLC*, 599 U.S. 140, 145 (2023) (holding that the First Amendment does not protect using another's trademark for commercial purposes—even when expressive elements are present—if the commercial purpose is to advertise one's goods).

⁴ Jennifer Rothman, https://rightofpublicityroadmap.com/wp-content/uploads/2023/10/Prof-Rothman-Comments-to-Copyright-Office-on-Right-of-Publicity-and-AI_October-2023.pdf (2023) (Comments in response to the U.S. Copyright Office's Notice of Inquiry and Request for Comments on Artificial Intelligence and Copyright)

Yet the line between theft and expression can be blurry in some intellectual property contexts. *Eldred*, 537 U.S. at 219–21. Among those contexts is the right of publicity. *Zacchini*, 433 U.S. at 574–75. In *Zacchini*, this Court noted that the line between expression and right of publicity infringement might be unclear in some cases. *Id.* But this Court did not draw a line. *Id.* (holding that the First Amendment does not shield a broadcaster from a right of publicity claim when a broadcaster appropriates someone’s entire performance). Over time, this Court has, however, supplied line-drawing tools.

For example, Courts must watch their step when adopting tests on First Amendment and technology. *Brown*, 564 U.S. at 806 (Alito, J., concurring). And where commercial interests and expression collide, objective tests are preferred. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (noting that the Supreme Court rejected a subjective, actual malice test in *Zacchini*). Further, when intellectual property rights are at play, a court should not presume that expression trounces these rights—for intellectual property rights are fundamental and are often a vehicle for more expression. *Eldred*, 537 U.S. at 219; *see also Hart*, 717 F.3d at 167 (“*Zacchini* demonstrated [that] the right of publicity can triumph even when an essential element for First Amendment protection is present.”).

So absent a right of publicity line from this Court, lower courts went to the drawing board. *Hart*, 717 F.3d at 153–170. They drew up three tests: the (1) “transformative use,” (2) “predominant use,” and (3) “relatedness” tests. *Id.*

In this case, the Fifteenth Circuit correctly decided that Moonie falls outside the First Amendment’s safety. To that end, of the balancing tests that the lower courts have crafted, the transformative use test best balances the tension between the right of publicity and the First Amendment. It heeds the right of publicity’s importance, is an objective, workable test, unifies precedent, applies well to modern technology, and does not over- or under-protect the right of publicity. Applying that test to this case, Moonie is less transformative than imitative of Austero.

1. *The Transformative Use Test Is Balanced, Objective, Consistent, and Not Over- or Under-Protective, and This Court Should Thus Adopt It.*

In response to *Zacchini*, California’s Supreme Court forged the transformative use test. *Comedy III*, 21 P.3d at 808 (using copyright’s fair use defense to craft the test). This test probes for whether an infringing work adds significant expressive elements to transform a celebrity’s identity, making it more than a mere celebrity imitation. *Id.* at 799. To guide the probe, courts employ five objective factors: whether (1) the celebrity’s persona is one “of the ‘raw materials’ from which an original work is synthesized” or if “the depiction or imitation of the celebrity is the very” essence of the work; (2) most of the work is the defendant’s expression, so long as that expression “is something other than the” celebrity’s likeness—this requires determining whether a probable purchaser’s primary motivation would be to buy the product for the reproduction of the celebrity, or the expressive work; (3) the “imitative or creative elements predominate in the work;” (4) the work derives most of its economic value from the celebrity’s fame; and (5) the work shows that the artist’s skill is “subordinated to the overall goal of creating a conventional portrait” of the celebrity

to exploit the celebrity's fame. *Id.* at 809–10. This Court should adopt this superior framework.

A.

The transformative use test is the leading test among lower courts. Along with California courts, the Third, Ninth, and Sixth Circuits have adopted the test. *Hart*, 717 F.3d at 165; *Keller*, 724 F.3d at 1274; *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 934–36 (6th Cir. 2003). These courts reason that this test is superior for a few reasons. *Hart*, 717 F.3d at 163. First, it embraces the right of publicity's importance, even when it squares off with the First Amendment. *Id.* at 163 (noting that the transformative use test is better than the relatedness test because it provides more flexible protection for the right of publicity). Second, it is objective, “focusing on specific aspects of a work.” *Id.* It does not leave judges to their own devices. *Id.* at 163–64. Third, it squares with other courts' balancing precedents. *Id.* at 164. Indeed, *Comedy III* examined preexisting case law to ensure that the test aligned with it before creating the test. 21 P.3d at 806-09.

Courts have also applied the transformative use test to modern digital technology that employs realistic digital replicas of people. *E.g.*, *Keller*, 724 F.3d at 1274. This modern technology includes high-definition video games. *Id.* (permitting a right of publicity claim when the video game avatar replicated the celebrity's characteristics, with trivial modifications, and appeared in a context for which he became famous in real life); *Hart*, 717 F.3d at 168 (same); *Davis*, 775 F.3d at 1178 (same); *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. App. 4th 1018, 1022 (Cal. Ct.

App. 2011) (same); *Kirby v. Sega of Am., Inc.*, Cal. App. 4th 47, 50 (Cal. Ct. App. 2006) (barring a claim under the transformative use test when the avatar had substantial physical differences and appeared in a context outside of where the celebrity generated her fame); *Hamilton v. Speight*, 827 F. App'x 238, 241 (3d Cir. 2020) (same).

And the transformative use test has spawned substantial case law with various fact patterns for future guidance. *Hart*, 717 F.3d at 166–68. Under some fact patterns, courts have barred right of publicity claims. *E.g.*, *Cardtoons, L.C.*, 95 F.3d 959, 969 (barring claim involving parody baseball cards with caricatures of baseball players, when the entire work was a parody); *ETW Corp.*, 332 F.3d at 938 (barring a claim involving a collage of pictures to make a single piece of artwork that was not a literal image of the celebrity). Under others, courts have retained right of publicity claims. *Hart*, 717 F.3d at 160–163.

Yet one court snubbed the transformative use test. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003). In *TCI*, Missouri's Supreme Court rejected the transformative use test. *Id.* It declared that the test precludes right of publicity claims whenever someone uses another's persona "in any way expressive, regardless of its commercial exploitation." *Id.*

Here, this Court should adopt the transformative use test for five reasons. First, the transformative test heeds the right of publicity's importance. *Hart*, 717 F.3d at 163. A proper balancing test must not favor expression over intellectual property rights because property rights are fundamental. *Eldred*, 537 U.S. at 219. The transformative use test does not play. *Hart*, 717 F.3d at 163. Rather, it puts

expression and the right of publicity on equal footing. *Id.* This equal footing allows the right of publicity to foster more expression, *see supra* Section I(B)(2), protecting the “creative fruits of intellectual and artistic labor,” *Comedy III Prods., Inc.*, 21 P.3d at 808.

Second, the transformative use test is objective and workable. A test involving both expressive and commercial components should be objective. *Hustler Mag., Inc.*, 485 U.S. at 52. The transformative use test is objective, probing five factors “focusing on specific aspects of a work.” *Hart*, 717 F.3d at 163-64. And these factors circumscribe judicial discretion, providing lower courts with guideposts. *Id.*

Third, the test is the only test that tracks preexisting precedent. There is a constitutional policy favoring uniformity in intellectual property laws. *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 623 (6th Cir. 2000) (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989)). To foster uniformity, *Comedy III* considered preexisting case law before formulating the transformative use test using intellectual property analogs. 21 P.3d at 806-09. To that end, *Comedy III* crafted the test to incorporate existing case law, unlike other tests. *Id.*

Fourth, the transformative use test can handle modern technology. True, courts must proceed with caution when selecting tests that deal with the First Amendment and modern technology. *Brown*, 564 U.S. at 806 (Alito, J., concurring). But the transformative use test has a proven record with modern technology. *See Hart*, 717 F.3d at 161–63. The lower courts have applied the test many times to video games with realistic avatars that infringe the right of publicity. *Keller*, 724 F.3d at

1274. This promises that as computer-generated replicas of celebrity personas become more realistic, like this case, the transformative use test can continue to balance the First Amendment and the right of publicity. *See Hart*, 717 F.3d at 166.

Fifth, the transformative use test avoids over- or under-protecting the right of publicity. Indeed, since *Comedy III* articulated the test, the lower courts have decided many cases using the transformative use test. *See Keller*, 724 F.3d at 1274–77 (examining transformative use cases). Those cases show that the test will protect both the right of publicity and the First Amendment when proper. *E.g.*, *Davis*, 775 F.3d at 1178 (protecting the right of publicity); *cf. ETW Corp.*, 332 F.3d at 938 (protecting the First Amendment). It is doing what balancing tests are supposed to do—balancing.

Further, *TCI's* transformative use critique is miscalculated. *TCI*, 110 S.W.3d at 374. *TCI* underestimated the transformative use test's ability to balance commercial and expressive speech. 110 S.W.3d at 374. *TCI* speculated that the transformative use test precludes right of publicity claims whenever someone uses another's persona "in any way expressive, regardless of its commercial exploitation." *Id.* But that has proven false. *Hart*, 717 F.3d at 160. Rather, several courts have applied the transformative use test to works containing expression and sustained right of publicity claims. *See id.*

B.

Applying the transformative use test here reveals that the First Amendment does not shelter *Moonie Bares All*. The test focuses on whether the infringer added substantial elements of expression to a celebrity's identity to transform that celebrity,

making it more than a mere celebrity imitation. *Hart*, 717 F.3d at 168. It employs five guiding factors. *Comedy III*, 21 P.3d at 809-10. In some cases in which these factors are used, someone generated a digital avatar that replicates a celebrity's characteristics, with only trivial modifications, and that digital avatar appears in a context for which the celebrity became famous in real life. *Keller*, 724 F.3d at 1274. These factors negate First Amendment protection in these cases. *Id.*; *Hart*, 717 F.3d at 168; *Davis*, 775 F.3d at 1178; *No Doubt*, 192 Cal. App. 4th at 1022. This is such a case.

The first factor favors Austero. That factor assesses whether the celebrity's persona is one "of the 'raw materials' from which an original work is synthesized" or if "the depiction or imitation of the celebrity is the very" essence of the work. *Comedy III*, 21 P.3d at 809. Like *Hart* and other video game cases, Austero's physical appearance resembled Moonie, with only trivial differences, in the same context for which she became famous: a dancing and singing video. 717 F.3d at 168. To that end, Austero's persona was not just one of *Moonie Bares All's* "raw materials"—it was the video's essence. R. at 4a. Indeed, Fünke used Austero's persona to generate Moonie's appearance to advertise her software. R. at 4a. Fünke used Austero's voice and image—pulling from Austero's work—to replicate Austero. R. at 4a. In effect, Moonie mirrored Austero: Their skin color, height, hair color, hairstyle, body style, and proportions resembled one another. *Id.* Moonie wore the same outfit Austero once wore in a movie. R. at 25a. Their tap-dance performances resemble one another's. *Id.*

The only differences between the two were trivial—some of which were the software’s technological limitations. R. at 23a.

The second factor backs Austero. It analyzes whether most of the work is the defendant’s expression, so long as that expression “is something other than the” celebrity’s likeness—this requires determining whether a probable purchaser’s primary motivation would be to buy the product for the reproduction of the celebrity, or the expressive work. *Comedy III*, 21 P.3d at 809–10. Moonie—Austero’s replica—was the entire show. R. at 5a. Indeed, most of the work was Austero’s likeness, dance routine, and singing voice. *Id.* It was an imitation of Austero. *Id.* The only expressive components came later in the video or appeared in a statement on the post. R. at 5–6a. In any event, Fünke made *Moonie Bares All* to advertise the artificial intelligence software, and the probable purchaser after that would buy the software to replicate celebrities like Austero. R. at 4a. That is what Moonie Bares All told the world the software could do.

The third factor benefits Austero. This factor probes whether “imitative or creative elements predominate in the work.” *Comedy III*, 21 P.3d at 809-10. The imitative factors predominate here. Moonie had few creative elements relative to the imitative factors. R. at 23–26a. True, the song’s lyrics were creative. R. at 5a. It is also true that some parodies establish that a work’s creative elements dominate. *Cardtoons, L.C.*, 95 F.3d at 969. But that is not the case. This case deals not with total parody on a baseball card, like *Cardtoons*. R. at 5a. This case deals with a video

that depicts celebrities, a high-tech, realistic, imitative replica of a person for the entire film, while just a portion of it contains a parody song. R. at 4–5a.

The fourth factor also supports Austero. The fourth factor considers whether the work derives most of its economic value from the celebrity’s fame. *Comedy III*, 21 P.3d at 809–10. *Moonie Bares All*’s economic value is Austero’s fame. Indeed, without Austero’s easy identifiability in the video, Fünke’s advertisement would not have sold the idea that others could use the software to recreate celebrity performances. R. at 37a.

Finally, the fifth factor goes to Austero. This last factor observes whether the work shows that the artist’s skill is “subordinated to the overall goal of creating a conventional portrait” of the celebrity to exploit the celebrity’s fame. *Comedy III*, 21 P.3d at 809–10. The work does not depict Fünke’s skill, but it advertises her product’s skill. R. at 37a. Fünke’s skill is subordinated to her goal to exploit Austero’s persona. *Id.* If she wanted to advertise her own skill, which is developing software, Fünke could have made an organic avatar without using Austero’s person. But it was Austero’s persona Fünke was after. *See* R. at 4a.

Because all transformative use factors favor Austero, the First Amendment does not protect Fünke and FakeBlock and this court should affirm the Fifteenth Circuit’s decision.

2. *The Predominant Use Test Is Too Subjective and Unworkable.*

The second test to surface after *Zacchini* is the predominant use test. *TCI*, 110 S.W.3d at 374. This test gauges whether one’s predominant purpose for using a

celebrity's persona was to exploit its commercial value to create an artistic or literary expression. *Id.* Only Missouri's Supreme Court has espoused this test. *Id.* And federal courts have rejected it. *Hart*, 717 F.3d at 154; R. at 32a. Likewise, this Court should reject it.

Charging forward as an outlier, Missouri's Supreme Court espoused the predominant use test in *TCI*. 110 S.W.3d at 374. To justify this test, the court stated that it best "addresses the cases where speech is both expressive and commercial." *Id.* In the court's mind, the predominant use test provides a suitable balance between expressive and commercial speech. *Id.* On one hand, if a work's predominant purpose is expressive, speech wins. *Id.* Contrarily, when the primary purpose of the use is a "ploy" to sell products, "free speech must give way to the right of publicity." *Id.*

The Third and Fifteenth Circuit's disagree. *Hart*, 717 F.3d at 154; R. at 32a. *Hart* evaluated the predominant use test. 717 F.3d at 154. *Hart* declined to embark down the dangerous road it sensed the predominant use test leads. *Id.* This dangerous road, the court reasoned, was one that led to judges acting as "both impartial jurists and discerning art critics." *Id.* Under the test, when someone uses a celebrity's identity for both commercial and expressive purposes, judges must evaluate the work to divine what expressive value the use adds. *Id.* This approach, then, is "subjective at best" and "arbitrary at worst." *Id.* What is more, under this approach, a large swath of expression could have no First Amendment protection if a court decides that it has little value. *Id.* For the same reasons, the Fifteenth Circuit, like *Hart*, chose a different road. R. at 32a.

So too should this Court—for the predominant use test is subjective and unworkable. Starting with the subjective component, this Court prefers objective over subjective in right of publicity cases and cases involving commercial speech. *Hustler Mag., Inc.*, 485 U.S. at 52. Yet the predominant use test is just that. *Hart*, 717 F.3d at 154. It first asks courts to crawl inside defendants’ minds to reveal whether they used a celebrity’s identity for both commercial and expressive purposes. *Id.* If it learns that the defendant did, then the court must fall back on its own artistic preferences. *Id.* The court must then declare what has expressive value to determine whether the predominant purpose is expressive or commercial. *Id.* To that end, judges who love music may conclude that the First Amendment protects a song generated with artificial intelligence and exploits their favorite singer’s voice for commercial gain. In those judges’ minds, his favorite singer’s voice adds substantial expressive value.

Moving on, the test is unworkable. Even the judges who have no artistic preferences must still act as “discerning art critics.” Courts are left with little guidance on that mission—just that they must assess how much expressive value using someone’s identity adds to the work. *Hart*, 717 F.3d at 154. As *Hart* identified, this leaves a slew of expressive speech and, just as important, intellectual property claims in a perilous state. *Id.* Thus, because the predominant use test is subjective and unworkable, this Court should reject it.

3. *The Relatedness Test Does Not Apply Beyond Cases Involving the Title of a Work, and If It Did, It Would Relegate Right of Publicity to a Second-Class Right.*

The third test that lower courts have conjured up is the relatedness test. *Rogers v. Grimaldi*, 875 F.2d 994, 1004–05 (2d Cir. 1989). This relatedness test puts a thumb

on the scale in favor of expression. *Id.* Under this test, courts reject right of publicity claims when a work contains expressive elements unless the expression is unrelated to the celebrity or is a disguised advertisement. *Id.* So far, courts have cabined this test to right of publicity cases involving a celebrity's name in the title of a work. *Hart*, 717 F.3d at 156. This Court should not remove the relatedness test from this cabin.

Three courts have given some variant of the relatedness test approval. *Rogers*, 875 F.2d at 1004–05; *Parks v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003); *Matthews v. Wozencraft*, 15 F.3d 432, 440 (5th Cir. 1994). Of those courts, the Second Circuit established the test in a case in which a movie title contained two celebrities' names. *Rogers*, 875 F.2d at 1004–05 (barring the celebrities' right of publicity claims because the names in the title related to the movie and were not disguised as an advertisement). The Sixth Circuit applied it once, *Parks*, 329 F.3d at 461 (holding that there were genuine issues about whether defendants used a celebrity's name in the title of a song as a disguised advertisement), before later applying the transformative use test, *ETW Corp.*, 332 F.3d at 934–36. And the Fifth Circuit gave the test a nod of approval before applying a different test. *Matthews*, 15 F.3d at 440. To defend the test, these courts rely on the “broad protection” that the First Amendment provides. *Rogers*, 875 F.2d at 1004–05. They do not give intellectual property rights equal weight. *Id.*

Several courts have denounced the relatedness test for right of publicity claims. *Hart*, 717 F.3d at 156; *TCI*, 110 S.W.3d at 374; *Davis*, 775 F.3d at 1180. Their reasons are two-fold. *Hart*, 717 F.3d at 156. First, courts have applied the relatedness

test only to names in titles of a work. *Id.* Second, the relatedness test risks paralyzing an important intellectual property right—the right of publicity. *Hart*, 717 F.3d at 157. Indeed, it favors expression over the right of publicity with two narrow exceptions. *TCI*, 110 S.W.3d at 374.

Here, this Court should decline any invitation to expand the relatedness test. Courts have only applied this test in a narrow context; cases involving names in titles of work. *Hart*, 717 F.3d at 156. It does not, then, apply here, which does not involve one using someone’s name in the title of an expressive work.

Further, adopting the relatedness test would relegate the right of publicity to a second-class right. But courts should not presume that expression trounces intellectual property rights like the right of publicity. *Eldred*, 537 U.S. at 219. Yet the relatedness test does just that. *Hart*, 717 F.3d at 157. It rejects right of publicity claims when a work contains expressive elements *unless* the expression is unrelated to the celebrity or is a disguised advertisement. *Rogers*, 875 F.2d at 1004–05. That is, there is a presumption against a right of publicity claim any time someone infringes a celebrity’s identity and adds *any* expressive element to the persona. *Id.* Under that test, courts “turn the right of publicity on its head.” *Hart*, 717 F.3d at 157. Thus, this Court should not adopt the relatedness test.

At bottom, the transformative use test is the best balancing test. It heeds the right of publicity’s importance. It is objective and workable. It tracks precedent. It extends well to cases with sophisticated, modern technology. And it does not over- or under-protect the right of publicity. As a result, this Court should adopt the

transformative use test. And because, under the transformative use test, the First Amendment cannot shield Fünke and FakeBlock’s right of publicity infringement, this Court should Affirm the Fifteenth Circuit’s decision.

CONCLUSION

For these reasons, Respondent Lucille Austero asks this Court to AFFIRM the Fifteenth Circuit’s decision.

Dated: November 20, 2023

Respectfully submitted,

/s/ Team 56
Team 56, Attorneys for Respondent