No. 22-9908

IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 2024

FAKEBLOCK, INC. AND MAEBY FÜNKE,

Petitioners,

v.

LUCILLE AUSTERO,

Respondent.

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

BRIEF FOR THE PETITIONER

TEAM NO. 59
BRIEF FOR THE PETITIONER

ISSUES PRESENTED FOR REVIEW

I. Whether the Communications Decency Act of 1996 immunizes FakeBlock from a state-law right of publicity claim when FakeBlock did not create the content.

II. Whether *Moonie Bares All* infringed Austero's right of publicity when the content does not appropriate Austero's likeness or when the content qualifies as creative expression, a parody, or political speech.

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The opinion of the United States District Court for the District of Newport Beach is not yet published but can be located at D.C. No. 18-cv-5309. The United States Court of Appeals for the Fifteenth Circuit opinion is unpublished but can be located at No. 20-9804 and is reprinted in the Record.

STATEMENT OF JURISDICTION

The U.S. District Court for the District of Newport Beach ruled that it had jurisdiction under 28 U.S.C. § 1332. *Austero v. FakeBlock, Inc.*, No. 20-9804, op. at 2a (15th Cir. Oct. 17, 2022). The U.S. Court of Appeals for the Fifteenth Circuit had jurisdiction under 28 U.S.C. § 1291 and entered judgment in this case on October 17, 2022. *Id.* at 1a. Petitioners timely filed a petition for writ of certiorari, which this Court granted pursuant to 28 U.S.C. § 1254(1) on October 9, 2023. *Id.* at 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The central constitutional provision is the First Amendment to the United States Constitution, U.S. CONST. amend. I. This case also involves the Communications Decency Act of 1996, 47 U.S.C. § 230.

STATEMENT OF THE CASE

FAKEBLOCK, INC AND MAEBY FÜNKE. FakeBlock, Inc., is an interactive computer service that provides a social media platform where individuals may post their own content and have it distributed nationwide. *Id.* at 2a. FakeBlock is a new start-up company that was still "in beta" in 2018. *Id.* at 5a. At that time, only three corporate officers were working for the company, including Maeby Fünke. Fünke worked at FakeBlock in 2018, holding an unpaid and unnamed position for the social

media company. *Id.* at 5a. In her free time, however, she is a digital artist and programmer, having designed unique software capable of producing artificial intelligence (AI) models of human beings. *Id.* at 3a. Fünke desired to show off her software's ability to create AI models that could dance and sing. *Id.* at 4a.

MOONIE BARES ALL. To promote her new software and assist her mother's political campaign against Austero, Fünke created a five-minute-long comical short film titled *Moonie Bares All*. *Id.* at 5a. The film starred a fictional singing and dancing character named Moonie, which Fünke created using her software. *Id.* at 4a. Fünke's software analyzed various albums and movies starring Austero. *Id.* at 4a. From that starting point, Fünke crafted the physical traits and actual voice for her comical character Moonie. *Id.* Moonie and Austero shared some similarities, such as basic biographical features, but they also had several distinct physical differences. *Id.* at 23a–25a.

In the film, Moonie appeared on stage wearing a costume similar to one that Austero had once worn in a movie called *Cabaret*. *Id.* at 25a. The AI character then danced and appeared to strip off all of her clothing. *Id.* at 5a. Though only an AI representation, Moonie's "body" was pixelated. *Id.* at 5a. Fünke incorporated this scene to appeal to prurient users, as she was attempting to broadly advertise her new software. *Id.* at 6a. Once "naked," Moonie performed a song with four verses, mimicking the tune "New York, New York" from Leonard Bernstein's *On the Town*. *Id.* at 5a. The song's creative lyrics, written by Fünke, contained facetious messages about Newport Beach. *Id.* at 36a. The video's viewers commented on Moonie's

"fails"—responding to the video's ironic and comedic nature. *Id.* at 6a. When Fünke posted the video to FakeBlock in 2018, she wrote in the post's caption, "VOTE 4 LINDSAY BLUTH," and included the internet link to her mother's campaign website. *Id.* Fünke's mother eventually won the election. *Id.*

PROCEDURAL HISTORY. Austero sued FakeBlock in the District Court of Newport Beach, claiming appropriation and seeking an injunction to require FakeBlock to remove *Moonie Bares All*. *Id.* at 2a, 6a. That injunction, however, was unnecessary because FakeBlock removed the video and terminated Fünke from the company. *Id.* at 6a. Austero then added Fünke as a defendant and argued that both parties infringed upon her right of publicity under Newport Beach law. *Id.* at 6a. Both defendants moved for summary judgment, arguing that Austero did not have a viable claim for infringement upon her right to publicity as a matter of law. *Id.* at 7a. The defendants also argued that even if *Moonie Bares All* appropriated some of Austero's identity, the video is protected under the First Amendment. *Id.* at 7a. Additionally, FakeBlock moved for summary judgment on its affirmative defense of immunity under the Communications Decency Act of 1996, 47 U.S.C. § 230 (CDA). *Id.* at 7a.

The District Court of Newport Beach rejected FakeBlock's affirmative defense of immunity but granted summary judgments to both defendants on the merits of Austero's right-of-publicity claim. *Id.* at 7a. Austero appealed to the Court of Appeals of the Fifteenth Circuit, which addressed (i) whether FakeBlock was immune under the CDA, and (ii) whether *Moonie Bares All* appropriated Austero's identity and thereby infringed on her right of publicity. *Id.* at 7a–8a, 19a.

The Fifteenth Circuit held that section 230(e)(2) excepted immunity for Austero's state-law right-of-publicity claim and affirmed the denial of FakeBlock's immunity. *Id.* at 17a–18a. The Fifteenth Circuit held that there was enough similarity between Austero and Moonie to raise at least a fact issue sufficient to avoid summary judgment on her right-of-publicity claim, so the Fifteenth Circuit reversed the district court's holding on the merits of Austero's claim. *Id.* at 31a.

Using the transformative test, the Fifteenth Circuit also assessed whether Fünke's work was protected under the First Amendment. *Id.* at 32a. Applying that test, the Fifteenth Circuit divided *Moonie Bares All* into components and held that some were protected, while others were not. *Id.* at 35a–38a. Thus, the Fifteenth Circuit concluded that *Moonie Bares All* was not protected under the First Amendment. *Id.* As a result, the Fifteenth Circuit reversed the district court and remanded Austero's claim for further proceedings. *Id.* at 39a. FakeBlock and Fünke appealed to the United States Supreme Court, and this Court granted the writ of certiorari on October 9, 2023.

SUMMARY OF THE ARGUMENT

This Court faces an important task in deciding this case—determining how the internet's advancement and creative expression will remain protected in this age of rapid innovation that allows ideas to be shared instantly across the nation. Facing that task, this Court should follow the goals set forth by Congress and this nation's framers—promoting innovation and protecting free speech. Thus, protecting FakeBlock, a new company offering innovative online opportunities, is pivotal.

Similarly, safeguarding political and creative expression, such as parodies, is also crucial. Recognizing that, this Court should reverse the Fifteenth Circuit's decision on both issues.

First, the CDA immunizes interactive computer service providers from liability based on what others create and share. Congress only excepted the CDA's grant of immunity for federal intellectual property claims in section 230(e)(2). That exception is limited, however, and does not permit state-law claims. Austero brought a state-law right-of-publicity claim and alleged that FakeBlock is not immune under the CDA. Austero's claim fails to qualify for the section 230(e)(2) exception because it is not brought under federal law. Further, that claim is not one pertaining to intellectual property; rather, it is only based on privacy rights. Therefore, section 230(e)(2) does not apply in this case. Additionally, FakeBlock is immune under the CDA because it did not create *Moonie Bares All*. When Fünke created the AI film, she acted purely for personal gain, not on FakeBlock's behalf. Thus, this Court should reverse the Fifteenth Circuit because FakeBlock is immune under the CDA.

Second, Austero did not prove a prima facie case of infringement on her right of publicity. To constitute appropriation, a work must clearly identify the celebrity; thus, appropriation cannot be found when the celebrity and the new character are sufficiently different. Moreover, one must have a protectable interest in appropriated characteristics. An actor has no protectable interest in creative elements owned by another copyright holder. Austero did not show that the character Moonie appropriated her likeness because Moonie was substantially different from her.

Austero has no protectable interest in the creative elements used in *Moonie Bares All*. Also, *Moonie Bares All* was not a commercial opportunity Austero would have pursued personally, so the right-of-publicity claim's purpose does not support her claim. Thus, Austero did not prove her claim.

Additionally, Fünke's work is protected under the First Amendment. The First Amendment protects works that are transformative, parody, or political speech. Fünke's work was transformative because *Moonie Bares All* was her own creative expression, not a portrait or replica of Austero. And even if Fünke evoked Austero's identity, she created a parody or conveyed political speech. *Moonie Bares All* is an example of free expression protected under the First Amendment. Thus, this Court should reverse the Fifteenth Circuit and grant the work its appropriate First Amendment protection.

ARGUMENT

The birth of the internet introduced individuals to possibly the most dynamic forum that human society has ever seen. A seemingly immeasurable realm of information now stands at the fingertips of almost anyone wishing to access it. Gone are the days of American citizens entering the streets to voice their opinions, share their cultures, and teach their knowledge—they instead look to their internet-connecting devices. Recognizing that rapid societal transformation, Congress enacted the Communications Decency Act of 1996, 47 U.S.C. § 230. Notably, the internet and other interactive computer services have thrived from a largely hands-off approach, creating a lively sphere of unique opportunities. *Id.* § 230(a).

The CDA embraces that approach, granting the wide latitude that interactive computer services need to foster technological advancement. *Id.* Specifically, Congress immunizes interactive computer service providers from certain civil liability. *Id.* § 230(c). The CDA also expressly preempts any state law that would impose liability on providers when liability is inconsistent with the section. *Id.* § 230(e)(3). Although some exceptions exist, Congress's express intent indicates that they should be construed narrowly.

Flowing from the exponential expansion of the internet, citizens nationwide engage in more diversified civil discourse, exposing them to a myriad of perspectives previously inaccessible. Despite the transformative nature of online expression, the fundamental rights safeguarding citizens' voices remain steadfast. Regardless of whether it's the traditional public square or the ever-evolving digital landscape, the First Amendment stands as an unwavering guardian, ensuring the preservation of free expression. A vital part of that freedom in the modern age includes protecting creative expressions, parodies, and political speech. Any work—whether through traditional or digital communication—on that list would enjoy the First Amendment's protections from liability.

FakeBlock is immune under the CDA, because section 230(e)(2) does not except state-law claims, and FakeBlock is not responsible for creating *Moonie Bares All*. Additionally, Austero did not plead a prima facie right-of-publicity claim because Fünke's work did not appropriate Austero's actual identity or any of her protectable interests and did not take a commercial opportunity away from Austero. Fünke's

work is also protected under the First Amendment as a creative expression, a parody, and political speech. Thus, this Court should reverse the Fifteenth Circuit and grant summary judgment to defendants FakeBlock and Fünke.

I. This Court should reverse because the Communications Decency Act of 1996 grants FakeBlock immunity from Austero's state-law right-of-publicity claim.

Under the CDA, interactive computer service providers are not considered the speakers or publishers of any information provided by that content's creator. 47 U.S.C. § 230(c)(1). Thus, those service providers avoid any liability that the content may produce, even if the content appears through its service. *Universal Commc'n Sys. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007). Congress specified, however, that the CDA's immunity leaves "any law pertaining to intellectual property" untouched. 47 U.S.C. § 230(e)(2). Although the section fails to expressly define which intellectual property laws fall out of the CDA's reach, the section's purpose resolves the uncertainty. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007). Section 230(e)(2) removes only federal intellectual property claims from the CDA's sweeping immunity—authorizing claims under state law undermines the section's operation. *Id.* In this case, the Fifteenth Circuit adopted a view that reduced immunity under the CDA, improperly holding that FakeBlock is not entitled to immunity because section 230(e)(2) allowed Austero to bring her state-law right-of-publicity claim. *Austero*, No. 20-9804, op. at 11a. Section 230(e)(2)'s immunity exception, however, does not apply to state-law claims. *Perfect 10*, 488 F.3d at 1119. Thus, because FakeBlock is an interactive computer service provider that received

Moonie Bares All from another content provider, the company is immune from Austero's claim under state law.

A. FakeBlock retains immunity because section 230(e)(2)'s exception only applies to intellectual property claims brought under federal law.

The CDA expressly forbids state-law claims which are inconsistent with its provisions. 47 U.S.C. § 230(e)(3). That is, the section preempts any state law that holds interactive computer service providers liable for information provided by a third-party provider. *Id.* § 230(e)(3). Because those state claims would treat the service providers as the publisher or speaker of third-party content, the claims contradict the CDA's grant of immunity. *Lycos*, 478 F.3d at 418, 422. Section 230(e)(2), however, eliminates immunity for intellectual property claims—specifically, those brought under federal law. *Perfect 10*, 488 F.3d at 1119; *see also* 47 U.S.C. § 230(e)(2).

1. Section 230(e)(2) only excepts federal intellectual property claims because permitting state-law liability frustrates the CDA's express purpose.

It is well-established that a statute's plain language serves as a starting point for interpretation. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019). As this Court has acknowledged time and again, however, the plain language will yield in instances where Congress has clearly expressed a purpose that contradicts a possible interpretation. *Id.*; *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983); *Watt v. Alaska*, 451 U.S. 259, 266 (1981). The statute's literal wording is often sufficient to interpret the law's meaning, but it does not necessarily curb the Court's ability to look deeper. *Bob Jones Univ.*, 461 U.S. at 586.

If reliance on plain language alone would undermine Congress's clear purpose, then a court may look to that purpose to guide its interpretation. *Id.* Courts must look to the whole statute when determining its meaning, which includes the statute's goals and policies. *Id.* The present case does not require the Court to guess what Congress intended to accomplish because Congress clearly expressed its intentions within section 230. *See* 47 U.S.C. § 230(b) (listing five policy reasons for enacting the CDA). When interpreting section 230(e)(2)'s exception, the Court need not sift through committee reports or debate transcripts—the CDA's purpose appears not only within the statute itself, but mere lines above that exception. The Fifteenth Circuit's decision in the present case, however, ignored Congress's clear directives.

Congress's purposes clarify that the intellectual property exception only applies to federal claims. *Perfect 10*, 488 F.3d at 1119. In *Perfect 10*, the plaintiff filed a right-of-publicity claim against an interactive computer service provider for offering services to websites that published stolen images. *Id.* at 1108. The Ninth Circuit decided the exception only encompassed federal intellectual property claims because Congress sought to insulate the internet's development from varying state law regulations. *Id.* at 1118. Federal intellectual property law has a relatively well-established scope which creates predictable boundaries around section 230(e)(2)'s exception. *Id.* State intellectual property laws, on the other hand, are far from uniform, which would disturb those boundaries whenever state-law litigants desire. *Id.* Of course, section 230(e)(2) states that "any" intellectual property law falls within its exception to immunity. 47 U.S.C. § 230(e)(2). But many different claims could

possibly sit under the intellectual property umbrella and states often disagree on those claims. *Id.* at 1119.

Assuming, for a moment, that it even qualifies as intellectual property, the right of publicity is a prime example of state disagreement. Some states have statutorily protected rights to publicity, while others leave protection to the common law. *See, e.g.*, *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992). For example, right-of-publicity claims in New York are statutory causes of action with unique exceptions, while these claims in New Jersey are non-statutory. *Cf.* N.Y. Civ. Rights Law § 51 (statutory) *with Faber v. Condecor, Inc.*, 195 N.J. Super. 81, 86 (App. Div. 1984) (common law). If section 230(e)(2)'s exception included state claims, then the liability that interactive computer service providers might face would constantly be at odds, even between neighbors. Service providers, such as FakeBlock, would be forced to trudge through a network of confusion, unknowingly collecting various claims governed by different standards.

Furthermore, the internet itself provides unique complications, since website material can be viewed by users across the internet, in more than one state at a time. *Perfect 10*, 488 F.3d at 1119. At any point, a website could even be subjected to liability in some states while remaining completely unaccountable in others. Just one state's unique protections for intellectual property would have the power to spoil the CDA's grant of immunity. *Id.* Because Congress sought to foster the internet's development, the Ninth Circuit balanced these concerns with the CDA's purposes and

properly held that to allow contradicting and highly individualized state-law claims would tarnish the CDA's purpose.

Even so, the scope of the intellectual property exception generally remains unsettled among the circuits. In particular, the First Circuit presumed state-law claims fell within section 230(e)(2)'s exception but avoided a thorough analysis. *See, e.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 26 (1st Cir. 2016) (assuming without deciding that state law claims could be brought under section 230(e)(2)); *Lycos*, 478 F.3d at 423 (allowing a state trademark action to be brought under section 230(e)(2) without supporting analysis). In *Backpage.com*, the First Circuit even recognized that its original decision in *Lycos* operated on an assumption "without detailed analysis." 817 F.3d at 26 n.9. A federal district court in New Hampshire expanded upon the *Lycos* opinion, stating that it felt no need to disregard its own circuit's presumption and that it disagreed with the Ninth Circuit's approach.

A federal district court in New Hampshire also disagreed with the Ninth Circuit's approach and decided to follow dicta from the First Circuit. *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008). Resting its analysis on plain language interpretation, the *Friendfinder* court decided that the intellectual property exception included state claims. *Id.* The court found the statute's literal wording ended its inquiry, thus ignoring the CDA's larger purpose. *See id.* at 300. As this Court has repeated, however, the language does not cut off the statute's purpose when an interpretation clearly contradicts the purpose. *Jam*, 139 S. Ct. at

769. The *Lycos* and *Friendfinder* decisions did just that—cut Congress's enumerated purposes away from the statute's pages.

Recently, the Third Circuit held that section 230(e)(2) excepts state-law claims from the CDA's immunity. *See Hepp v. Facebook*, 14 F.4th 204, 211 (3d Cir. 2021). Unlike the First Circuit, the *Hepp* court did acknowledge the CDA's free-market purpose. *Id.* The court erred, however when it overlooked the inconsistencies among state intellectual property laws and asserted that state property rights—as a general category—facilitate market exchange. *Id.* Although that proposition may have some truth, it is a generality that does not resolve the many discrepancies among state intellectual property rights. Moreover, the *Hepp* court agreed that the CDA's immunity is designed to encourage service providers to enact their own moderation schemes, free from strict government regulation. *Id.* However, the court curbed Congress's design by subjecting those supposedly independent moderation schemes to unpredictable state liability. Those inconsistencies hinder the internet's purpose and Congress's purpose for the CDA.

The CDA grants immunity to interactive service providers, and, akin to internet content itself, those providers' services are distributed across the nation. Congress, in enacting the CDA, did not intend to qualify immunity by subjecting it to every state's possible iteration of intellectual property rights. *See Perfect 10*, 488 F.3d at 1118. Congress's purpose would not simply be curbed—it would be completely undermined by excepting immunity for state-law right-of-publicity claims. The CDA explicitly forbids state law claims that are inconsistent with the section's grant of

immunity. 47 U.S.C. § 230(e)(3). Immunity would be rendered entirely ineffective if state intellectual property claims could still be brought under 230(e)(2). Therefore, the proper interpretation of section 230(e)(2) is a narrow one.

Austero's right-of-publicity claim arises under Newport Beach state law, so it is not a claim that falls under the section 230(e)(2) exception. Thus, FakeBlock is immune from liability.

2. Austero's right-of-publicity claim is a privacy-based claim, not an intellectual property claim.

Notably, however, Austero's right-of-publicity claim is also barred because it is not an intellectual property claim at all. Under Newport Beach common law, the right of publicity is not an in intellectual property right. States have different approaches to the right of publicity, some states finding it stems from a privacy-based right, others from intellectual property rights. The right-of-publicity claim's purpose is instructive for such debate. Intellectual property claims protect a person's right to profit from their own intellectual property. *White*, 971 F.2d at 1398. A right-of-publicity claim generally protects a person's commercial interest in their name and likeness, but a person's image is not a product of human intellect. *Doe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, at n.13 (D. Mass. 2015), *aff'd*, 817 F.3d 12 (1st Cir. 2016). Thus, the right-of-publicity claim flows from privacy rights and is not an intellectual property-based claim. *Id.*

In *Zachinni v. Scripps-Howard Broadcasting Company*, this Court discussed the right of publicity under Ohio law, stating that a performer's right was infringed upon when a company broadcasted his show for free. 433 U.S. 562, 575–76 (1977).

The Court distinguished a right-of-publicity claim from a "false light" privacy claim, explaining the claims protect different interests. *Id.* at 573. The Court referenced the nuances of privacy law, and William Prosser's articles on the subject that divide privacy law into four branches. *Id.* at 571, n.7. The Court then distinguished the two claims based on the interests they protect. *Id.* at 573. The Court did not distinguish a right-of-publicity claim as being property-based, rather than privacy-based, though it was in the position to clearly articulate that. Because the Court did not distinguish the claims' basis in privacy law, a right-of-publicity claim is a privacy-based claim.

Further, Newport Beach adopted the Restatement (Second) of Torts § 652C definition for the claim. *Austero*, No. 20-9804, op. at 9a. In section 652C, each comment and illustration refer to an invasion of privacy. RESTATEMENT (SECOND) OF TORTS § 652C cmt. b, illus. 1–10 (AM. L. INST. 1977). Comment b, explaining how the invasion occurs, states that it is invasion of privacy. *Id.* at cmt b. Each illustration outlines a brief set of facts, then concludes by stating whether or not one person's privacy was invaded. *Id.* at illus. 1–10. The first example parallels a standard right-of-publicity claim: A is an actress famous for her figure, B is advertising his bread by publishing A's photograph in a newspaper with a caption promoting B's bread—B invaded A's privacy. *Id.* at illus. 1. Section 652C describes this claim as privacy-based.

It is also worthy to note that California treats the right of publicity as an offshoot from the common law right of privacy. *Wendt v. Host Int'l Inc.*, 125 F.3d 806, 811 (9th Cir. 1997). The Ninth Circuit in *Wendt* explained that the right of privacy includes protection of one's name or likeness against appropriation for another's

advantage. *Id.* As Newport Beach has freshly seceded from California, it once operated under this rule. Because Newport Beach has not clearly taken a new position on the issue, this Court should find that the right-of-publicity claim is properly classified as a privacy law matter. Therefore, Austero's claim does not fall under the statutory exception for intellectual property claims, and FakeBlock maintains immunity from her claim.

B. FakeBlock has immunity under the Communications Decency Act because Fünke provided the content in her personal capacity.

The CDA's immunity is sweeping to prohibit placing liability on interactive computer service providers acting only as intermediaries rather than the creators of harmful content. *See Lycos*, 478 F.3d at 418. Service providers are shielded from liability so long as the information is created by another individual. 47 U.S.C. § 230(c)(1). Thus, immunity requires that: (1) the party is a provider or user of an interactive computer service; (2) the claim is based on information provided by another information content provider; and (3) the claim would treat the party as the publisher or speaker of that information. 47 U.S.C. § 230(c)(1); *Lycos*, 478 F.3d at 418. Here, the parties do not dispute that FakeBlock is an interactive computer service provider under the CDA, or that Austero's claim would hold the company liable as a publisher of *Moonie Bares All*. *Austero*, No. 20-9804, op. at 11a. Because Austero's claim concerns information provided from another content provider—specifically, Fünke—FakeBlock is immune under the CDA.

The CDA defines "information content provider" to include any person or entity responsible for "the creation or development of information." 47 U.S.C. § 230(f)(1).

Thus, the information must be the service provider's own message, not third-party content. *Lycos*, 478 F.3d at 420. In *Lycos*, the First Circuit held that the service provider was immune under section 230, despite evidence that the provider knew of postings containing illegal content on its platform. *Id.* The *Lycos* court held that mere notice of the information's unlawful nature did not transform it into the provider's own content. *Id.* Nothing suggested that the provider should have been considered responsible—even in part—for the creation or development of the alleged misinformation. *Id.* According to the court, even if the service provider's conduct made it easier for another to develop and disseminate the misinformation, that is not enough to overcome immunity under the CDA. *Id.* Thus, liability is only imposed upon creation or development of content, not upon providing a platform for that content's distribution. *Id.*

Examining whether a corporation should be liable for its officers' acts, agency law and vicarious liability principles are instructive. *See Meyer v. Holley*, 537 U.S. 280 (2003) (holding the Fair Housing Act did not extend traditional vicarious liability rules beyond traditional agency principles). An employer, as the principal, is not liable if the employee as an agent has no intent to act on his master's behalf. *Beech v. Hercules Drilling Co.*, LLC, 691 F.3d 566, 573 (5th Cir. 2012). Even if the tortious act arises while the agent is acting in the course of employment, without any intent by the agent to act on the principal's behalf, the principal is not liable. *Id.*

Vicarious liability is limited because one should not easily have to pay for another's wrong. *Parker v. Carilion Clinic*, 335 Va. 319, 335 (2018). Respondeat

superior should only impose liability on a principal when the principal can be charged with some neglect in the very transaction from which the injury arose. *Id.* Examining vicarious liability for intentional torts, in most cases an employee's intentional tort is a purely personal act and not within the scope of employment. See *id.* at 338. Respondeat superior will not extend liability to a principal for an agent's unauthorized intentional torts arising entirely from the agent's independent and personal motives. *Id.* at 340. Infringing one's right of publicity is an intentional tort claim. Thus, it is less common for a principal to be liable for an agent's intentional tort, unless the agent committed the tort to serve the principal.

Austero alleged *Moonie Bares All* appropriated her right of publicity, and such appropriation would be an intentional tort committed by Fünke. However, Fünke was not acting on behalf of a principal when she created *Moonie Bares All*, and her role as a corporate officer does not changes that conclusion. Fünke lacked an official title at FakeBlock, but the Fifteenth Circuit deemed her the "director of investor relations" based on deposition evidence describing her duties. *Austero*, No. 20-9804, op. at 5a. Fünke's AI creations are entirely unrelated to relationships with investors and thus are unconnected with her job duties. Moreover, the Court should not conflate Fünke's creation of the video with her uploading it. *Id.* at 41a. Those two acts must be separated to evaluate her motivation for each.

Isolating the video's creation, Fünke created *Moonie Bares All* to showcase her AI software and to promote her mother's political campaign, and simply posted it to FakeBlock. The video did not refer to FakeBlock as a source of the content, and its

caption was a statement supporting Fünke's mother's political campaign—a purely personal matter. *Id.* at 6a. Notably, Fünke even testified her primary motives for creating the video were to advertise her software's capabilities and assist her mother's campaign. *Id.* at 4a. Fünke did not add any reference to FakeBlock in the video, its title, or its caption. Simply, there is no evidence showing that Fünke acted on FakeBlock's behalf, or that creating or uploading the film was a component of her job duties. *Id.* at 56a–57a. Thus, creating *Moonie Bares All* was unrelated to Fünke's professional role at FakeBlock. Rather, the video was created solely to serve Fünke's personal interests.

When uploading the video to FakeBlock, however, Fünke did expect to generate web traffic for the interactive service provider. *Id.* at 58a. Agency law could arguably attribute that action to serving FakeBlock. Even so, that argument bears no weight in this case because Fünke's motivation to bring web traffic to FakeBlock does not contaminate her separate, distinct motivation for creating the video itself. Agency law demands that courts independently analyze all conduct to identify the specific wrongful act. *Parker*, 335 Va. at 335. That wrongful act is only the video's creation. Fünke created the video to serve herself and her mother, not to serve FakeBlock, so it cannot be held responsible for her conduct. Fünke thus acted as another information provider under the CDA, which satisfies the second requirement for immunity.

In conclusion, FakeBlock is immune under the CDA. Section 230(e)(2) applies only to federal intellectual property claims, so Austero's state-law claim does not

except FakeBlock from immunity. FakeBlock is not responsible under agency principles for the creation or development of the video, because Fünke created the video to serve wholly personal motives, not to serve FakeBlock in her capacity as a corporate officer. Therefore, this Court should reverse and recognize FakeBlock's immunity.

II. This Court should reverse because Austero failed to prove a prima facie case of infringement on her right of publicity and because the First Amendment protects Fünke's expressive work.

The Fifteenth Circuit incorrectly held that Austero established a prima facie case of infringement on her right of publicity because it found mere similarities and unprotected traits supported the claim, all while ignoring the work's First Amendment protection. The overprotection of intellectual property rights raises serious First Amendment concerns because it hinders creativity and the public domain. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting). If Newport Beach recognizes a right-of-publicity claim as an intellectual property-based claim, then it should similarly adopt a narrow view on what traits may be used to constitute appropriation. Thus, a right-of-publicity claim fails unless a plaintiff's own likeness and intellectual property were appropriated.

This Court should reverse the Fifteenth Circuit's decision and reinstate the trial court's summary judgment on Austero's right-of-publicity claim. First, Austero's infringement claim failed to show that Fünke appropriated Austero's likeness through her work *Moonie Bares All*. Second, Fünke's work qualifies as transformative creative expression, or alternatively, a parody or political speech—all of which are protected under the First Amendment.

A. Austero's infringement claim fails because she did not show appropriation of her likeness.

Newport Beach has adopted the Restatement (Second) of Torts's definition for a right-of-publicity claim, which imposes liability on a person "who appropriates to his own use or benefit the name or likeness of another." RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977). Even though Newport Beach has never defined what "likeness" means, the Fifteenth Circuit improperly assumed that Newport Beach would have adopted a broad definition for "likeness." *Austero*, No. 20-9804, op. at 20a. Under the Fifteenth Circuit's broad definition, the scope of a right-of-publicity claim is greatly expanded beyond "name or likeness" to encompass the indefinite "identity or persona" of the claimant. *Id.* at 20a. This difference represents an enlargement of the text of Newport Beach's right-of-publicity claim, and it expands protection potentially past the line the Supreme Court of Newport Beach would have drawn if given the chance.

That said, even under the Fifteenth Circuit's broad definition, Austero still failed to prove a prima facie case of infringement on any protectable interests because she cannot show that Fünke appropriated her likeness. To start, Austero's likeness was not appropriated—the video contained sufficient differences from Austero to avoid appropriation. Second, Austero did not have a protectable interest in the music, costuming, or dance featured in the video. Finally, Austero's likeness could not have been appropriated because Fünke did not take any commercial opportunity away from Austero.

1. Austero failed to show *Moonie Bares All* featured an actual representation of herself, because the video had sufficient differences to avoid appropriation.

The right-of-publicity claim ensures that a celebrity maintains full control over her identity, allowing her to control her image through her own marketing decisions. Under the broad definition, a person's likeness is appropriated when another invokes their identity. *See McFarland v. Miller*, 14 F.3d 912, 921 (3d Cir. 1994). Courts following the broad definition have intentionally not defined what specifically constitutes appropriation. *See White*, 971 F. 2d at 1398 (Alacorn, J., dissenting). These courts have emphasized that the focus in an appropriation of likeness analysis is not how the defendant appropriated the plaintiff's likeness but whether the defendant has appropriated the likeness at all. *Id.*

A right-of-publicity claim based on appropriation of likeness should require that a plaintiff's unique characteristics were the only features used to identify the alleged appropriating individual. For example, in *White*, Judge Alacorn's dissent argued that for a right-of-publicity claim to be viable, attributes of a plaintiff's identity should be used such that it appears the plaintiff was the person being identified. *Id.* at 1404 (Alacorn, J., dissenting). In short, a genuine dispute of material fact only exists "where identifying characteristics unique to a plaintiff are the only information" as to the identity of the individual appearing in the work in question. *Id.* (Alacorn, J., dissenting).

Judge Alacorn also explained that a plaintiff's likeness was not appropriated if there were efforts to dispel the impression that the plaintiff was featured in a piece. *Id.* (Alacorn, J., dissenting). A strict view on what constitutes appropriation of

likeness prevents unharmed plaintiffs from recovering and allows the defendants to dispel any impression of appropriation by creatively changing an image. When a defendant makes efforts to change an image, so it will not appropriate the plaintiff, they are not attempting to exploit the plaintiff's image. In such a case, the defendant has tried to avoid appropriation, and the plaintiff's commercial interests in her image are not exploited.

Austero failed to prove that Fünke appropriated her likeness because *Moonie Bares All* had sufficient differences such that it was not appropriation. The video's depiction of the character "Moonie" had sufficient differences from Austero to avoid appropriating her identity. To show that her likeness was appropriated, Austero needed to show that the video was an actual representation of her identity rather than something bearing a close resemblance. *Nurmi v. Peterson*, No. 88-5436-WMB, 1989 U.S. Dist. LEXIS 9765, at *9 (C.D. Cal. Mar. 29, 1989). Admittedly, Austero may have shown some aspects of a close resemblance between herself and Moonie. Austero and Moonie both have similar body types, hair color, hair style, skin tone, and may be known as performers. *Austero*, No. 20-9804, op. at 29a. However, appropriation requires actual representation, meaning that her actual features were used to identify her. *Nurmi*, 1989 U.S. Dist. LEXIS 9765, at *9. A close resemblance alone cannot by itself show that the video constituted an actual representation. Without showing that level of representation, Austero did not that show Fünke appropriated her likeness.

Importantly, Moonie was physically different from Austero in substantial ways. Moonie's hair was styled "flat" across her head, unlike Austero's signature style of hair with "points." *Austero*, No. 20-9804, op. at 23a. Moonie has no beauty mark, while Austero has one on her left cheek. *Id.* at 23a. Moonie's nose had a different shape from Austero's. *Id.* at 24a. Moonie's mouth was disproportionately large for her head, and Moonie smiled very differently from Austero. *Id.* at 24a. Moonie's left hand had only four fingers and showed odd aging patterns, unlike Austero's. *Id.* at 24a. Moonie's eyes were wideset and asymmetrical, unlike Austero's symmetric eyes. *Id.* at 24a. Taken altogether, these differences show that Moonie bore no more than a mere resemblance to Austero. These differences prevent Moonie from being an actual representation of Austero based on physical aspects.

When the issue is the likeness of one's voice, actionable appropriation occurs when a distinctive voice is deliberately imitated for commercial gain. *Midler v. Ford Motor Co.*, 849 F.2d 460, 464 (9th Cir. 1988). The *Midler* court emphasized that not "every imitation of a voice" is actionable. *Id.* In *Midler*, the imitation was actionable because the defendant hired a "sound-alike" and instructed the singer to imitate the plaintiff's unique voice. *Id.* The defendants had specifically told the sound-alike to sound as much as possible like the plaintiff's record. *Id.* at 462. In that case, several people thought it was the plaintiff signing in the defendant's commercial. *Id.* This similarity was supported by an affidavit from a manager in the entertainment business stating that he thought it was the plaintiff's voice. *Id.* Thus, the focus when

analyzing the appropriation of the plaintiff's voice is the affirmative impression that the plaintiff is actually speaking or singing in the defendant's work.

Here, Austero's voice was not appropriated by Moonie's voice. Fünke purposefully digitally altered the voice used for Moonie to be distinct from Austero's. *Austero*, No. 20-9804, op. at 27a. Even if recordings from Austero served as raw building blocks for the voice, Fünke did not attempt to portray her voice exactly as the defendant in *Midler*. The *Midler* court intentionally delivered a narrow holding, and Austero's claim falls outside the *Midler* holding. Austero's voice was not intentionally mimicked such that she could present affidavits showing listeners thought it was her. Moonie's voice was intentionally different from Austero's, so she cannot claim her voice was appropriated to support her right-of-publicity claim.

In cases of when a celebrity portrays a character, the celebrity's identity is appropriated only if the character is so inextricably identified with the celebrity that the use of the character invokes the celebrity's own identity. *McFarland*, 14 F.3d at 920–21. The test for character work is whether the character has become so associated with the celebrity that it is inseparable from the celebrity's own public image. *Id.* If one's association with a character does not meet this standard, then a mere portrayal of the character is not appropriation.

Finally, Austero did not show that she was so closely connected with any of her characters that the use of a previously portrayed character would necessarily lead the public to identify Austero personally. Unlike in *McFarland*, Austero did not show that the character Moonie was indistinguishable from herself in the public's

perception because Austero did not show she was inseparable from the character Moonie. Austero raised similarities between Moonie and herself based on performance style and a similar genre of song performance. That said, she failed to show that the public would commonly associate Moonie with Austero as an individual. On top of the differences in physical appearance, Moonie was not a name clearly associated with Austero, as it was likely derived from a movie that did not reach a large audience. *Austero*, No. 20-9804, op. at 64a. Further, Moonie sang an entirely different song from "(Theme from) New York, New York," a song that the public might have associated with Austero. *Id.* at 26a. Thus, Austero failed to show a strong enough connection between herself and the character Moonie to overcome their many differences.

2. Austero did not have ownership over the name, music, costuming, or dance used in *Moonie Bares All*, so they were not her protectable intellectual property.

An actor may not claim their identity was appropriated by relying on characteristics that are another's property. *Wendt*, 125 F.3d at 811. In *Wendt*, the Ninth Circuit recognized that the plaintiffs could only claim appropriation of identity based on their own likeness, not the television characters they played, since they did not own the rights to said characters. *Id.* If this Court holds that a right-of-publicity claim is an intellectual property claim, it should then recognize the implications of copyright law. Copyright law governs ownership of creative material, and one who does not own the copyrights to a creative work does not have a protectable interest in that creative work. *See Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 716

(9th Cir. 1970). Austero did not own the creative aspects shown in *Moonie Bares All*—such as Moonie's name, song, costume, or dance—so she cannot claim appropriation on those grounds.

Copyright law is a barrier for plaintiffs claiming appropriation if they do not own the characteristics at issue. *Id.* The Ninth Circuit addressed this in *Sinatra*. *Id.* In *Sinatra*, the plaintiff complained that the defendants deliberately used her mannerisms and dress by selecting a singer whose voice and style were intended to imitate her own. *Id.* at 712. The plaintiff claimed the song used in the defendant's commercial had "acquired a secondary meaning" that was connected to her identity. *Id.* The court reasoned that the plaintiff had not claimed her sound was uniquely personal to her, but rather, she had claimed that she had a personal connection to the sound when combined with the music, lyrics, and arrangement featured in the commercial. *Id.* at 716. The court stated that she had no protected interest in the music, lyrics, or arrangement because she did not own those copyrights. *Id.* Because she did not have rights to the items at issue, the court dismissed her claim. *Id.* at 718.

There is no evidence that Austero had copyright ownership over the characters, costumes, or choreography associated with her famous performances. To prevail on her claim, Austero needed to show that she had copyrights for the creative components of the video. *Wendt*, 125 F.3d at 811. Austero's appropriation claim is like the plaintiff's in *Sinatra*. Austero argues that her image in connection with the song titled "New York, New York," combined with a halter vest with short shorts, the derby hat, garters, lace-up boots, and tap dance steps, all created a clear personal

connection to Austero herself. *Austero*, No. 20-9804, op. at 25a. However, Austero did not show that she owned any rights to the song, the costume, or the tap dance steps Moonie portrayed in the video. Therefore, Austero could not claim that those elements of the video appropriated her identity in any way.

Due to copyright law and her lack of ownership of those elements, Austero may only claim appropriation of her unique biographical features and distinct voice. *See Sinatra*, 435 F.2d at 716. Austero only had a protectable interest over her name, physical attributes, and voice to show appropriation. Thus, Austero's argument that *Moonie Bares All* appropriated her likeness cannot be supported by Moonie's name, costume, song, or choreography because Austero did not have a protectable interest in those aspects. Additionally, as discussed above, Moonie's features and voice were sufficiently different from Austero's to avoid appropriation. Therefore, Austero failed to prove her Fünke appropriated her likeness because Fünke infringed none of her protectable interests.

3. Fünke did not take a commercial opportunity away from Austero, so her right of publicity was not appropriated.

Assessing the viability of a right-of-publicity claim should involve analyzing the purpose of such a claim. *See McFarland*, 14 F.3d at n.11 (holding that in New Jersey, a commercial purpose must be present to sustain an action claiming misappropriation of one's image). The right-of-publicity claim has developed to protect celebrities' commercial interests in their own identities. *White*, 971 F.2d at 1398. A celebrity should be able to pursue commercial opportunities personally and profit from her own identity. *Id.* A right-of-publicity claim protects celebrities when

an opportunity they would have had a commercial interest in is taken away because someone has exploited the celebrity's likeness for personal gain. *Id.*

In *White*, the court stated that Vana White's likeness was appropriated because the advertisement at issue had to evoke her identity to be effective. *Id.* at n.3. The *White* court justified its holding by citing cases where the defendants' actions directly implicated the celebrity's commercial interests in their own identity. *Id.* at 1398. A right-of-publicity claim, therefore, should only arise when the defendant has appropriated the plaintiff's likeness for a commercial endeavor, which the plaintiff could have personally pursued for commercial gain.

Austero's claim does not fit within the purpose of a right-of-publicity claim. Fünke did not appropriate Austero to sell a product. Fünke wanted to attract attention to her AI software and advertise its capabilities. *Austero*, No. 20-9804, op. at 37a. Fünke was not implying that Austero endorsed her product. Fünke's video did not need to invoke Austero's identity to be effective—it could have depicted any human-like AI figure to effectively showcase the software. Thus, Fünke's video did not commercially exploit Austero's identity.

Furthermore, Fünke's political video was not a commercial opportunity that Austero would have ever pursued for her own commercial gain. Austero would not have profited from a similar opportunity, so her claim that the video infringed on her right to profit was misplaced. Austero's complaint did not raise the same issues foundational to a right-of-publicity claim. Therefore, Austero's claim should not

continue on remand—the District Court of Newport Beach properly granted summary judgment.

Moonie Bares All contained sufficient differences between Austero and Moonie to avoid appropriating Austero's likeness. Austero also failed to establish that she owned a protectable interest in any relevant elements of the video. Further, Fünke did not commercially exploit Austero's identity, and the video was not a commercial opportunity taken away from Austero. All these points reveal that this Court should reverse the Fifteenth Circuit's holding because summary judgment should be granted to the defendants.

B. The First Amendment protects *Moonie Bares All* because it was Fünke's creative expression.

Similar to how the CDA ensures that the internet can remain a vibrant and growing space for free expression, the First Amendment ensures that society may benefit from individuals' free expression of creative ideas and political statements without undue censorship. In works that involve the use of a celebrity's likeness, there is a required "balancing test" for First Amendment protection and the right of publicity determined by "whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 391 (2001). As a form of expression, a parody will necessarily "conjure up enough of an original to make the object of its critical wit recognizable." *Jack Daniel's Props. v. VIP Prods. LLC*, 143 S. Ct. 1578, 1592 (2023). A parody will be protected under the First Amendment if the parody creates enough contrast to make its message of ridicule or

pointed humor clear. *Id.* at 1592–593. Interactive communications concerning political change are "core political speech," protected under the First Amendment. *See Buckley v. Am. Const. L.*, 525 U.S. 182, 186–87 (1999). Fünke's work was both a parody and political speech, and it was therefore protected under the First Amendment.

1. Fünke's work was sufficiently transformative to be a creative expression protected under the First Amendment.

Tension exists between the First Amendment's goal to foster a marketplace of ideas and individual expression and a celebrity's right of publicity. *Kirby v. Sega of Am.*, 144 Cal. App. 4th 47, 58 (2d Cal. Ct. App. 2006). A defendant accused of appropriation may raise the First Amendment as an affirmative defense if the work at issue adds something new, with another purpose or different character, such that the defendant's work has a new meaning or message. *Id.* A test for whether a new work contains sufficient "transformative elements" is the "transformative test," which balances the right of publicity and the First Amendment. *Id.* The transformative use test protects works that add significant new expression and are not mere portraits or replicas of the celebrity's identity. *Id.*

In *Kirby*, the plaintiff celebrity was a lead singer of a musical group claiming a video game character appropriated her likeness. *Id.* at 52. The court found the video game character, though sharing similarities to the plaintiff, contained sufficient expressive content to constitute a transformative work. *Id.* at 56. The court analyzed physical similarities between the plaintiff and the character and stated that the character's facial features, clothing, hair color and style, and use of certain

catchphrases suggested imitation of the plaintiff. *Id.* The court also analyzed differences between the plaintiff and the character, the plaintiff's lack of consistent apparel style, differences in hair length, and the difference of the plaintiff clipping "tendrils" back while the character did not. *Id.* The court concluded that the video game character was protected speech, so the plaintiff's claims were barred. *Id.*

Courts analyzing the balance between First Amendment protection and the right of publicity discuss the work at issue as a whole rather than its individual components. *See Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1273 (9th Cir. 2013) (applying the transformative use test). Therefore, it was improper for the Fifteenth Circuit to divide components of Fünke's work for the First Amendment analysis. The Fifteenth Circuit recognized that the song and lyrics used in the work qualified as parody, protected under the First Amendment, but found that appropriation of costuming, dancing, and vocal imitation constituted infringement on Austero's right of publicity. *Austero*, No. 20-9804, op. at 37a. The First Amendment does not protect only pieces of a work—it protects the entirety of a creative expression if it is shown to be sufficiently transformative, a parody, or political speech. This Court should reject the Fifteenth Circuit's *a la carte* approach and assess Fünke's work in its entirety to determine whether the First Amendment shields Fünke from liability.

Courts use a five-factor approach outlined by the Ninth Circuit to determine whether a work is "sufficiently transformative to obtain First Amendment protection." *Keller*, 724 F.3d at 1273. Based on that test, a defendant may show that it is entitled to an affirmative defense under the First Amendment. If the defendant

shows the First Amendment protected its work, a right-of-publicity claim must be barred. Applying the transformative use test to this case, almost all the factors favor Fünke's work being sufficiently transformative to avoid appropriation.

The first *Keller* factor deals with whether the celebrity's likeness is either the "raw materials" from which the original work is built upon or if the substance of the work is a mere imitation. *Id.* at 1274. The Fifteenth Circuit improperly held that Austero was the sum and substance of the work rather than one of the raw materials used in creating Moonie. *Austero*, No. 20-9804, op. at 27a. Fünke's work was a video with an AI model of Austero. *Id.* at 2a. Austero was not the "substance" of the work—no person could have been. Fünke's video was conveyed via an electronic medium—AI. That electronic medium does not use actual video footage or photographs of people. Fünke's work could only use human images as raw materials to synthesize into an AI figure. And, as discussed above, Fünke's work featured sufficient differences that avoided appropriation, so her work was not a depiction or imitation.

The second *Keller* factor concerns whether the work is the creator's own expression rather than just the celebrity's likeness. *Keller*, 724 F.3d at 1274. The standard here is whether a purchaser of the work would be primarily motivated to buy a reproduction of the celebrity or to buy the creator's work. *Id.* The Fifteenth Circuit improperly held that Moonie was a literal depiction of Austero's likeness. *Austero*, No. 20-9804, op. at 37a. However, Austero has never performed the same tune, "New York, New York," that Moonie sang. *Id.* at 26a. Nor has Austero ever sung the same lyrics Moonie sang, performed the same choreography as Moonie, or worn

the same costume as Moonie. *Id.* at 26a. Moonie could not have depicted Austero's likeness by acting and performing in a way Austero had never publicly done. Applying *Keller*'s test for this factor, no fan of Austero would seek out Fünke's video as a reproduction of the celebrity. A member of the public would seek out the video to see Fünke's technology mimic a person dancing and listen to the lyrics Fünke wrote.

The third *Keller* factor asks whether the work features predominantly literal and imitative elements or creative elements. *Keller*, 724 F.3d at 1274. The *Keller* court explained that this factor is judged as a quantitative inquiry. *Id.* The Fifteenth Circuit improperly held that imitative elements predominated over creative elements. *Austero*, No. 20-9804, op. at 38a. However, the only imitative elements, if any, were basic biographical features—allegedly Austero's hair color, hair style, skin tone, and body type. *Id.* at 29a. The creative elements of the video—the song, dance, costuming, and stumbling motions—predominated over any basic biographical features that were allegedly imitated.

The fourth *Keller* factor, which is only used for in close cases, focuses on whether the work's marketability and economic value derive primarily from the depicted celebrity's fame. *Keller*, 724 F.3d at 1274. The Fifteenth Circuit improperly held that because the economic value of the video is to market the software's capacity to create celebrity depictions, that factor weighed in Austero's favor. *Austero*, No. 20-9804, op. at 38a. That is an inquiry to be made only in close cases, and this is not a close case. Notwithstanding the factor's inapplicability here, that factor would still favor First Amendment protection. The economic value of the work derives from

Fünke's creative input, which includes her creation and use of the AI software, her composition of the lyrics, and her creative direction to make the film comical.

Finally, the fifth *Keller* factor deals with whether the artist's skill was used for the primary goal of creating a conventional portrait of the celebrity, in order to commercially exploit the celebrity. *Keller*, 724 F.3d at 1274. The Fifteenth Circuit conflated the second and fifth *Keller* factors, holding that Moonie was a literal depiction of Austero. *Austero*, No. 20-9804, op. at 37a. However, as discussed above, Moonie was Fünke's creative work, not a mere portrait of Austero. Further, Fünke's talent contributed toward writing four verses to a song Austero never sang and programming this character on her new AI software. Thus, the fifth *Keller* factor weighs in Fünke's favor. Therefore, the five factors weigh in Fünke's favor, showing that her work was transformative and protected under the First Amendment.

2. If Fünke's work appropriated Austero's identity, it was a parody or political speech, which is protected under the First Amendment.

A work's purpose is also central to determining whether the First Amendment protects media's use of a person's identity, and if "the purpose is 'informative or cultural' the use is immune" under the First Amendment. *Midler*, 849 F.2d at 462. Parody and political speech are two forms of expression regularly protected by the First Amendment. *See Jack Daniel's Props.*, 143 S. Ct. at 1592 (a parody is protected if it creates contrasts so its message of ridicule or pointed humor is clear); *see also Buckley*, 525 U.S. at 186–87 (political speech is when First Amendment protection is at its "zenith"). The First Amendment protects parody and political speech as forms

of free expression because the First Amendment exists to protect the marketplace of ideas and cultivate self-expression. *Kirby*, 144 Cal. App. 4th at 57–58.

The Supreme Court of California explained why the balance between the First Amendment and the right of publicity favors First Amendment protection regarding parody. *See Comedy III Prods.*, 25 Cal. 4th at 405. The *Comedy III* court explained that works with sufficient transformative elements to constitute parody warrant First Amendment protection and are also unlikely to interfere with a celebrity's economic interest, which the right of publicity protects. *Id.* Because a celebrity's fans would not consider works of parody suitable substitutes for a conventional depiction of the celebrity, parodies do not threaten the market protected by the right of publicity. *Id.* The right of publicity allows celebrities to monopolize conventional uses of their image when it is used commercially. *Id.*; *see also White*, 971 F.2d at 1398 (explaining a right-of-publicity claim's purpose).

The First Amendment also provides substantial protection to political speech. *See Peterman v. Republican Nat'l Convention*, 369 F. Supp. 3d 1053, 1062 (D. Mont. 2019). In *Peterman*, the court described the "fair use" test for copyright infringement balanced against First Amendment protection. *Id.* That test assesses the purpose and character of use, and use can be compared to appropriation in a right-of-publicity claim. *Id.* If the purpose of use or appropriation is commercial, it looks more like infringement. *Id.* That said, if use or appropriation is for nonprofit educational purposes, it looks more like protected speech. *Id.* The *Peterman* court cited cases holding that political advertisements were not "commercial." *Id.* The court recognized

the distinction between commercial and political speech, and stated that political speech "[receives] the highest level of protection" under the First Amendment. *Id.*

Even if Fünke's work appropriated aspects of Austero's identity, the First Amendment protects her work as a parody or as political commentary. As explained by this Court in *Jack Daniel's Properties*, a successful parody must conjure up some image of the relevant person. 143 S. Ct. at 1592. Here, Fünke's work could have appropriated Austero's likeness and still be a parody protected under the First Amendment. The video featured a comedic song in which four verses purported to describe Austero's thoughts on Newport Beach. *Austero*, No. 20-9804, op. at 36a. Even without naming the character, the costuming and musical number of a celebrity running for office in Newport Beach could lead the audience to recognize who was depicted. Further, the character stumbling across the stage could have represented Austero's history of vertigo and substance abuse, which would also lead the audience to conjure a connection to Austero. *Id.* at 55a. As a parody, conjuring the connection to Austero was necessary for the work's purpose. Even so, an audience would also recognize the video as a parody because the character was singing a song different from any of Austero's well-known works and performing in an embarrassing manner, falling across the stage.

Further, Fünke's work as a parody did not infringe on Austero's right to exploit her image commercially because the video would not be considered a reasonable substitute for her depiction by a fan. The right of publicity protects Austero's right to profit from her image so that others do not commercially exploit her image without

consent. *White*, 971 F.2d at 1398. Had the video depicted a character resembling Austero singing one of her well-known songs, or even singing a song in a style resembling her standard Broadway performances, Austero could claim that infringed on her right of publicity because she could have profited from that if she created it and sold it to fans. However, this video vastly differs from a depiction that Austero would personally market. Fünke's video portrays Austero in a negative light. *Austero*, No. 20-9804, op. at 44a. Austero would not reasonably market this kind of portrayal of herself, so it does not harm her economic interests in her own identity. This video was a clear parody, so even if it appropriated Austero to conjure her image for the audience, it was protected under the First Amendment.

Alternatively, Fünke's video constitutes political speech, which the First Amendment fiercely protects. *Buckley*, 525 U.S. at 186–87. Fünke stated she wanted to help her mother's political campaign by revealing the 'darker side' of a political candidate whom Fünke believed was receiving too favorable attention from the media. *Austero*, No. 20-9804, op. at 4a. The Fifteenth Circuit, as part of improperly dividing components of the video for analyzing First Amendment protections, held that the song was protected as parody. That said, because the video was not publishing or reporting factual data, it could not qualify for the defense of First Amendment protection. *Id.* at 39a. And as earlier stated, the work must be analyzed as a whole, and its purpose and character assessed, to determine whether it should be treated as commercial or character.

In conclusion, the transformative use test shows that Fünke's work was predominately her creative expression rather than a mere portrayal of Austero's likeness. And even if Fünke appropriated Austero's likeness to conjure up her image for the audience, her work is protected under the First Amendment as a parody or political speech. This Court can and should hold that Fünke's work is protected under the First Amendment for any of those three reasons.

CONCLUSION

Both defendants, as a matter of law, are shielded from liability against Austero's right-of-publicity claim. FakeBlock is immune under the CDA because the section 230(e)(2) exception does not apply and FakeBlock is not responsible for the video's creation. Fünke's work, *Moonie Bares All*, both does not appropriate Austero's likeness and is protected under the First Amendment. Thus, this Court should reverse the holdings of the Fifteenth Circuit, and grant summary judgment for the defendants.