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No. 22-9908

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 2023

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FAKEBLOCK, INC.  
and  
Maeby FÜNKE,  
*Petitioners,*

— *against* —

Lucille AUSTERO,  
*Respondent.*

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

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BRIEF FOR RESPONDENT

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TEAM 68  
*Attorneys for Respondent*

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## QUESTIONS PRESENTED

- I. Whether the Communications Decency Act of 1996 confers immunity to an internet social media company, in a state-law right of publicity claim, when the internet company developed and posted its own objectionable content?
- II. Whether a celebrity's right of publicity is infringed when a third party created a short film featuring a computer-generated artificial-intelligence model that resembled the celebrity or, whether First Amendment protection is available for the film?

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## **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fifteenth Circuit is unpublished and may be found at *Austero v. FakeBlock, Inc.*, No. 20-9804, slip op. at 1a (15th Cir. Oct. 17, 2022).

## **STATEMENT OF JURISDICTION**

The United States Court of Appeals for the Fifteenth Circuit entered a final judgment on this matter on October 17, 2022. R. at 1a. Petitioners then timely filed a writ of certiorari, which this Court has granted. Order Granting Cert. Oct. 9, 2023, No. 22-9908. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The appendix contains the relevant text of the following constitutional and statutory provisions involved in this case: United States Constitutional Amendment I and 47 U.S.C. § 230.

## **STATEMENT OF THE CASE**

### **I. STATEMENT OF THE FACTS**

The case before this Court presents complex issues on the development of artificial intelligence (“AI”) technology and its correlation to intellectual property law and freedom of expression. Specifically, this case concerns an AI-generated short film, *Moonie Bares All*, posted to FakeBlock, a new internet social-media service. R. at 2a.

The film features an alleged fictitious AI-generated model,<sup>1</sup> Moonie, who bears several physical similarities to Lucille Austero (“Austero”), a world-renowned actress, singer, and dancer. R. at 4a. FakeBlock, Inc. and Maeby Fünke (collectively, “Petitioners”) have challenged the Fifteenth Circuit’s judgment on immunity and infringement on a right of publicity claim. Order Granting Cert., Oct. 9, 2023, No. 22-9908.

***The Parties.*** Lucille Austero is known for her Broadway roles, starring on television shows and in movies, and recording seven studio albums. R. at 3a. Notably, Austero is a member of an exclusive group of performers who have won Oscar, Emmy, and Tony awards. R. at 3a. However in 2018, Austero decided to run for office as a representative of Newport Beach in the United States Congress. R. at 3a. In the election, Austero ran against Lindsay Bluth (“Bluth”). R. at 3a.

Bluth’s daughter, Mabey Fünke (“Fünke”), is a digital artist and programmer interested in AI, particularly realistic AI-generated models. R. at 3a. Originally, Fünke developed an AI software that allowed parents to preview their unborn child’s appearance by morphing together physical features from two photographs. R. at 4a n.2. But after that business model failed, Fünke redeveloped the software to generate realistic AI models. R. at 4a n.2. In Fünke’s first attempt to demonstrate the ability of her software, she created an AI model who used a wheelchair. R. at 4a n.2. She has

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<sup>1</sup> In this case, the record refers to Moonie as an AI-generated model. An AI-generated model is a human-like character created by AI-generating software.

since been criminally accused of fraudulently using such model to raise money for fictitious charities that work to fight fake diseases. R. at 4a n.2.

In addition to software development, Fünke is an investor in and the director of investor relations at FakeBlock, Inc. R. at 6a, 42a. FakeBlock, Inc. is a startup social-media website incorporated in Delaware with a principal place of business in Irvine, California. R. at 5a. Fünke used FakeBlock as a platform to promote her mother's election campaign. R. at 2a. Specifically, Fünke used her AI software and authority as an officer to develop and post to FakeBlock, a short film *Moonie Bares All* featuring an AI-generated model, Moonie. R. at 2a. At that time, FakeBlock was still in the early stages of development with only three corporate officers: George Maharis ("Maharis"), Paul Huan, and Fünke. R. at 5a. The three officers had the exclusive authority and ability to upload videos to the website. R. at 5a.

***Moonie.*** In early 2018, Fünke used her software to develop an AI-generated talking, singing, and dancing model named Moonie. R. at 4a. Moonie is allegedly a fictitious AI model. R. at 2a. Yet coincidentally, Austero starred in the film *Tell Me That You Love Me, Junie Moon*. R. at 25a. Fünke even testified to purposefully using Austero as a "starting point" for Moonie's appearance and voice. R. at 4a.

As a result, Moonie has many physical similarities to Austero. R. at 4a. The two are both approximately 5'4" with the same body shape, style, and proportion. R. at 4a. Austero and Moonie have black, pixie-style haircuts and even similar skin tones. R. at 23a. Further, Moonie's outfit is identical to Austero's in her movie *Cabaret*—a halter vest with short shorts, a derby hat, garters, and lace-up boots. R. at 25a. But

Moonie’s similarities to Austero go even further than just physical appearance. R. at 24a. Fünke’s software used Austero’s previous vocal performances as the “raw building blocks” for Moonie’s voice. R. at 27a. Expert testimony from a vocal performance coach supports the conclusion that one could likely identify Moonie’s voice as Austero’s raised by only one octave. R. at 27a.

While the two have many similarities, the parties have acknowledged some dissimilarities. R. at 23a. Including Austero’s beauty mark, which does not appear on Moonie and Moonie’s left hand with only four fingers. R. at 23a. Additionally, Moonie’s facial features subtly depart from Austero’s: the prominent downward tip of Moonie’s nose, a disproportionately large mouth, and wideset eyes with an unnatural and asymmetric slant. R. at 23a–24a. However, AI image-generating software often causes such visual anomalies in the creation process. R. at 23a n.5 More specifically, this type of software has previously created uneven eyes, unnatural teeth, and even missing or disproportionately sized body parts. R. at 23a n.5.

Fünke alleges that she designed Moonie to illustrate the capability of the latest version of her software. R. at 4a. However, Fünke had a two-fold goal in creating Moonie. R. at 4a. First, to create a realistic representation of an individual that demonstrates and advertises her software’s capabilities. R. at 4a. Second, to assist her mother’s 2018 political campaign by revealing the dark side of a candidate she believed was receiving too much good press. R. at 4a.

***The Short Film.*** To accomplish these goals, Fünke created a five-minute short film, *Moonie Bares All*, in early 2018. R. at 5a. The movie opens with a scene picturing

Moonie on stage in a burlesque outfit performing a tap dance routine. R. at 5a. A routine very similar to one of Austero's 1992 Radio City Music Hall tap dance performances. R. at 25a.

Forty-five seconds into the film, Moonie stumbles on stage, loses her balance, and braces herself against a set piece. R. at 5a. Moonie then strips off her clothing and begins to sing, slurring altered lyrics to the song "New York, New York." R. at 5a. The exact name of a song widely correlated to Austero's role in a film, which is also called "New York, New York." R. at 26a. Repeating the chorus four times, Moonie sings lyrics referring to her wealth, substance dependency, and views suggesting that she thinks very little of Newport Beach citizens and voters. R. at 5a. Moonie's overall performance in the film captures all three aspects of Austero's unique claim to fame: singing, dancing, and acting. R. at 25a.

On May 29, 2018, Fünke uploaded the film to FakeBlock. R. at 5a. In her post titled, "Moonie Bares All!!!" Fünke wrote "VOTE 4 LINDAY BLUTH" and provided a link to Bluth's campaign website. R. at 6a. The film was only uploaded to FakeBlock, as Fünke was an investor hoping to draw attention and traffic to the site. R. at 6a, 58a. However, the short film drew significant interest across internet message boards. R. at 6a. It provoked many viewers to discuss Moonie's "fails" during her dancing and striptease routine. R. at 6a. And Austero ultimately lost the election. R. at 7a.



## II. PROCEDURAL HISTORY

**District Court.** On August 24, 2018, Austero sued FakeBlock in the District Court for the District of Newport Beach, seeking an injunction to remove the video. R. at 6a. Shortly after, on August 27, 2018, Maharis, one of FakeBlock's corporate officers, removed *Moonie Bares All* from the website and terminated Fünke from her position. R. at 6a. The removal of the video ultimately made the injunction unnecessary. R. at 6a. Thus, Austero amended her pleadings, adding Fünke as a defendant and accusing Fünke and FakeBlock of infringing upon her right of publicity under Newport Beach state law. R. at 6a. Newport Beach recognizes a common-law cause of action for infringement of an individual's right of publicity. R. at 9a. Specifically, Austero alleged Moonie so closely resembled her, appropriating her identity and infringing on her right to profit from her likeness and identity. R. at 6a.

After conducting discovery, Fünke and FakeBlock moved for summary judgment, arguing that Austero did not have a viable claim, and even if she did, the film was protected under the First Amendment. R. at 7a. Additionally, FakeBlock moved for summary judgment asserting immunity under section 230 of the Communications Decency Act. R. at 7a. The court rejected FakeBlock's immunity claim but granted summary judgment in favor of Fünke and FakeBlock for the right of publicity claim. R. at 7a.

**Circuit Court.** Austero appealed to the Fifteenth Circuit. R. at 7a. FakeBlock did not cross-appeal the denial of immunity but rather urged affirmation of the summary judgment on its immunity claim. R. at 7a. The Fifteenth Circuit affirmed

the district court's order in part and reversed it in part. R. at 39a. Specifically, the Fifteenth Circuit affirmed the district court's grant of summary judgment, holding that FakeBlock was not entitled to immunity against Austero's right of publicity claim. R. at 18a. But the Fifteenth Circuit reversed the district court's grant of summary as to the merits of Austero's claim. R. at 39a.

Instead, the Fifteenth Circuit held that Austero raised a fact issue sufficient to avoid summary judgment on the first two elements of her right of publicity claim. R. at 31a. Additionally, Fünke and FakeBlock did not conclusively prove their affirmative defenses under the First Amendment. R. at 39a.

***This Court.*** Following the Fifteenth Circuit's ruling, Fünke and FakeBlock appealed. Order Granting Cert., Oct. 9, 2023, No. 22-9908. This Court granted review over two specific issues: immunity under the Communications Decency Act and the merits of Austero's right of publicity claim.

## SUMMARY OF THE ARGUMENT

### I.

The United States Court of Appeals for the Fifteenth Circuit correctly held that FakeBlock was not entitled to immunity under section 230 of the Communications Decency Act ("CDA"). The CDA provides immunity for service providers publishing content on behalf of information content providers. But there is no immunity for actions that limit or expand *any* intellectual property law. Section 230's plain language is clear and unambiguously written to include state and federal claims. And Congress, through section 230(e), intended to promote intellectual development while

safeguarding intellectual property laws, like the right to publicity. The right to publicity is an intellectual property right because it serves the same purpose as other commonly recognized intellectual property rights. All of which protect individuals' interests and creations.

Even if section 230(e) immunity does not apply, a party may still be immune under section 230(c). But there is no immunity for a service provider under this section if the service provider is also the information content provider of objectionable information. A corporation can be its own information content provider when one of its employees or corporate officers acts on its behalf. Employees are presumed to act with authority on behalf of corporations. So, when an employee acts with proper authorization, the corporation itself has acted. The Fifteenth Circuit found no section 230 immunity when an employee acted on behalf of FakeBlock and published objectionable content that violated an individual's right to publicity.

## **II.**

The United States Court of Appeals for the Fifteenth Circuit correctly held that Austero has a viable right of publicity claim and Fünke and FakeBlock have no affirmative defense under the First Amendment. The common law right of publicity was created to protect a celebrity's right to exploit the commercial interests of his or her own identity. Specifically, the right of publicity protects a plaintiff's name, likeness, and identity or personality. Austero has a viable claim for the right of publicity because she owns an enforceable right to her identity that Fünke and

FakeBlock used, without her permission, in a way that caused damage to the value of her identity.

The First Amendment protects expressive speech. However, this protection is limited when the right of free expression conflicts with other protected rights. Thus, there is a constant tension between an individual's right to protect their image and freedom of expression under the First Amendment. Depending on how a defendant infringed an individual's right to publicity, courts will resolve this tension using one of three balancing tests. *Moonie Bares All* is not a transformative use of Austero's likeness. Therefore, the Fifteenth Circuit properly found that Austero had a viable right of publicity claim not barred by the First Amendment when Fünke and FakeBlock used her identity to create an AI-generated short film.

## ARGUMENT AND AUTHORITIES

***Standard of Review.*** This appeal involves a review of summary judgment decisions. This Court should review grants of summary judgment de novo. *In re La. Crawfish Producers*, 852 F.3d 456, 462 (5th Cir. 2017). In its review this Court should determine whether any genuine issues of material remain. *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 799 (9th Cir. 2003). A movant can prevail on its affirmative defenses only by establishing all of the defense's essential elements. *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021).

Further, this Court should view all evidence in the light most favorable to the nonmovant and construe all reasonable inferences in her favor. *Id.* And decide if a

reasonable jury, applying all inferences in the nonmovant's favor, could reach a verdict for her. *Id.*

**I. FAKEBLOCK IS NOT ENTITLED TO IMMUNITY UNDER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT.**

The first issue addresses the proper denial of FakeBlock's immunity claim. This dispute considers whether FakeBlock can claim section 230 immunity to avoid liability for the publication of *Moonie Bares All*, developed and posted by Fünke. R. at 2a. It cannot. Rather, this issue is resolved in two simple steps. First, section 230(e)(2) applies to state intellectual property claims. Second, Austero's claim is an intellectual property claim.

After Austero sued FakeBlock and Fünke for infringement on her right of publicity, FakeBlock asserted immunity under section 230 of the CDA. 47 U.S.C. § 230. Section 230 of the CDA 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.” *Id.* § 230(c)(1). The CDA further states 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).

These provisions grant immunity for service providers who publish content from another information content provider. To qualify for immunity under section 230, a service provider must prove three things. *Id.* § 230(c)(1). First, the party must be a “provider or user of an interactive computer service.” *Universal Commc’n Sys. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007) (citing 47 U.S.C. § 230(c)(1)). Second, the objectionable information was “provided by another information content

provider.” *Id.* Third, the claim must treat the party as a “publisher or speaker” of the objectionable information. *Id.*

But section 230 immunity is not without limit. There are several statutory exceptions that take service providers outside the scope of immunity. 47 U.S.C. § 230(e). Specifically, a service provider is not entitled to section 230 immunity when it would “limit or expand any law pertaining to intellectual property.” *Id.* § 230(e)(2). Section 230 clearly applies to state intellectual property claims. And Austero’s claim against FakeBlock is an intellectual property claim because the right of publicity protects the development of her marketable identity. Thus, the claim is exempted from section 230 immunity. But, even if section 230(e)(2) does not apply, FakeBlock is still not immune because FakeBlock itself provided the “objectionable information,” *Moonie Bares All*.

This Court should affirm the Fifteenth Circuit’s judgment and hold that FakeBlock is not immune from Austero’s claim under the CDA.

**A. FakeBlock Does Not Qualify for Immunity Because the Exception Under Section 230(e)(2) Applies to State Intellectual Property Claims.**

Section 230(e)(2)’s plain language and the importance of safeguarding intellectual property clearly indicates that Congress did not intend to allow immunity for service providers in state or federal intellectual property claims. Few federal courts have considered the effect section 230(e)(2) and have reached different conclusions on whether it allows a service provider immunity in a state intellectual property claim. But the division amongst the courts is not even. Only the Ninth

Circuit limits section 230(e)(2)'s application. *See Perfect 10, Inc v. CCBill, LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007).

Rather, most courts that have considered section 230(e)(2)'s scope found it applies to and eliminates immunity for service providers in both state and federal intellectual property claims. *See Lycos, Inc.*, 478 F.3d at 422–23 (finding that a state law intellectual property claim is exempted from section 230 immunity); *Hepp v. Facebook*, 14 F.4th 204, 212 (3d Cir. 2021) (holding that a law pertaining to intellectual property can be a state law); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302 (D.N.H. 2008) (holding that section 230(e)(2)'s denial of immunity applies to any law concerning intellectual property, not just federal law); *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009) (concluding that there is no CDA immunity for federal or state intellectual property claims).

The First and Third Circuits, along with district courts in New York and New Hampshire, hold that under section 230(e)(2), immunity does not extend to service providers in a state law intellectual property claim. These courts emphasize an analysis of section 230(e)(2)'s plain language and the entire CDA. *See, e.g., Atl. Recording Corp.*, 603 F. Supp. 2d at 704 (concluding that the term “any” used in section 230(e)(2) is expansive language without limitation); *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 299 (finding the language of section 230(e)(2) does not suggest a limitation to federal intellectual property law). Additionally, these courts focus on Congress's goal of protecting intellectual property. *Friendfinder Network, Inc.*, 540 F.

Supp. 2d at 300 (“Congress also believed that laws protecting intellectual property rights should nevertheless remain in effect . . .”). Because the plain language of the CDA and the importance of intellectual property clearly support it, these courts properly construe the application of section 230(e)(2) to state intellectual property claims.

Standing alone, the Ninth Circuit holds that the application of section 230(e)(2) is limited strictly to federal intellectual property claims. *See Perfect 10*, 488 F.3d at 1119 (construing the term “intellectual property” in section 230(e)(2) to apply to federal intellectual property claims only). These courts avoid focusing on the plain language of section 230(e)(2), only noting that the CDA has no express definition of “intellectual property.” *Perfect 10*, 488 F.3d at 1118. They instead rely on the idea that denying immunity to state law intellectual property claims would defeat Congress’s goal of “insulating the development of the Internet from various state-law regimes.” *Id.* These courts attempt to argue that Congress created immunity under the CDA specifically to prevent state law claims from halting the development of the internet. But this specific goal is not expressed within the text of the CDA. Further, it is commonly recognized by this Court that “statutory interpretation begins with the language of the statute.” *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). Thus, it was improper for these courts to avoid a plain language analysis when determining the meaning of section 230(e)(2).

Using this case, this Court should clarify section 230(e)(2)’s removal of immunity from service providers and support Congress’s effort to protect intellectual property.



First, this Court should review the plain language of section 230(e)(2) and the entirety of the CDA. Only after this, and in rare circumstances, should this Court look to the statute's policy or Congress's intention to clear up any vagueness. *Id.* at 242. Using the plain language of this statute this Court should conclude that CDA immunity is not available for service providers in state intellectual property claims. Should this Court decide to examine the statute further, its policy also supports that Congress intended to remove immunity in state intellectual property claims. Applying this approach, this Court should conclude that the lower courts did not err in denying FakeBlock immunity based on section 230(e)(2)'s plain language and Congress's intent.

**1. The plain language of section 230 demonstrates that section 230(e)(2) applies to state law intellectual property claims.**

This Court should start and end its analysis with the text of the relevant statute—47 U.S.C. § 230(e)(2). *See Ron Pair Enters.*, 489 U.S. at 241 (recognizing that courts interpreting statutes should begin with reading the language of the statute itself). Specifically, section 230(e)(2) states, “[n]othing in this section shall be construed to limit or expand *any* law pertaining to intellectual property.” *Id.* (emphasis added). The plain meaning of a statute controls its interpretation. *Greenery Rehab. Grp., Inc. v. Hammon*, 150 F.3d 226, 231 (2d Cir. 1998). And Congress is presumed to express its intent through the plain meaning of its language. *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 759 (3d Cir. 2009). From the plain language of section 230(e)(2) alone, this Court can and should conclude that immunity does not

extend to service providers facing a claim under *any* intellectual property law and that state intellectual property claims are within the scope of section 230(e)(2).

While the plain language of section 230(e)(2) does not explicitly mention state intellectual property claims, it also does not express a limitation to only federal intellectual property claims. Instead, it includes expansive language with no indication of limitation. *See* 47 U.S.C. § 230(e)(2) (emphasis added) (“*any* law pertaining to intellectual property”).

In *Gonzalez*, this Court recognized the expansiveness of the word “any.” *United States v. Gonzalez*, 520 U.S. 1, 5 (1997). There, this Court considered whether the phrase “any other term of imprisonment” meant what it said or should be limited to only federal imprisonment sentences. *Id.* Looking at the dictionary definition, this Court found that “any” has a naturally expansive meaning. *Any*, *Webster’s Third New International Dictionary* (1976) (“one or some indiscriminately of whatever kind”). Thus, because Congress did not include language that limited the breadth of “any[,]” this Court found that the statute referred to *all* terms of imprisonment, including those imposed by state courts. *Gonzalez*, 520 U.S. at 5. And this is not the only time this Court has reached such a conclusion. *See United States v. Alvarez-Sanchez*, 511 U.S. 350, 358 (1994) (stating that a statute that refers to “any law enforcement officer” includes “federal, state, or local” officers); *Collector v. Hubbard*, 79 U.S. (12 Wall.) 1, 15 (1870) (noting that a statute prohibiting a filing “in any court” includes federal and state courts).

The use of “any” in section 230(e)(2) is identical to these findings. There is no limiting language. By including the word “any,” it is clear Congress had no intention to limit the application of section 230(e)(2). Rather, Congress meant exactly what it said. Immunity under section 230 does not limit or expand any law pertaining to intellectual property. Thus, the plain language requires the application of section 230(e)(2) to all state and federal intellectual property claims.

Additionally, to avoid contradictory interpretations, it is important to give effect to section 230(e) as a whole, looking to “every word and every provision.” *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 622 (5th Cir. 2013). The plain language of other section 230(e) subsections contains limiting language that section 230(e)(2) does not. Throughout section 230(e), Congress specified whether it intended for a subsection to apply to local, state, or federal law. *See* 47 U.S.C. § 230(e)(1) (“Nothing in this section shall be construed to impair the enforcement of . . . any other *Federal* criminal statute.”), (e)(3) (“No cause of action may be brought and no liability may be imposed under any *State or local* law that is inconsistent with this section.”), (e)(4) (“Nothing in this section shall be construed to limit the application of . . . any similar *State* law.”) (emphases added). These provisions show that where Congress wished to differentiate between federal and state law, it did so. But, Congress did not specify an exclusive application to federal or state law. Instead, Congress simply used the word “any.”

Other courts have looked at the application of these provisions. In *Corbett*, the court interpreted section 230(e)(1), finding that the subsection only applies to federal

criminal statutes. *Voicenet Commc'ns, Inc. v. Corbett*, No. 04-1318, 2006 U.S. Dist. LEXIS 61916, at \*13 (E.D. Pa. Aug. 30, 2006). Stressing the importance of giving effect to every clause and word, the court compared the language of section 230(e)(1) to that of section 230(e)(2). *Id.*; *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The Court concluded that had Congress wanted section 230(e)(1)'s application to extend to state law, it could have written the section to apply to "any criminal statute." *Corbett*, 2006 U.S. Dist. LEXIS 61916, at \*14. Just like it wrote "any intellectual property law" in section 230(e)(2). Interpreting section 230(e)(2) in any other manner would contradict section 230(e).

FakeBlock improperly relies on the Ninth Circuit's decision in *Perfect 10*. In *Perfect 10*, the court limited section 230(e)(2)'s application to strictly federal intellectual property laws. 488 F.3d at 1119. Among many issues, the main problem with this conclusion is that the plain language of section 230(e)(2) does not support it. *See id.* First, the court did not attempt to address the existence of "any" in section 230(e)(2). *Id.* at 1118. The expansive language of section 230(e)(2) is deliberately ignored. *Perfect 10's* reading of section 230(e)(2) fails to give effect to its every word. Next, while it limits section 230(e)(2) to federal intellectual property law, the opinion does not acknowledge the absence of the term "federal" within the subsection. *Id.* The court instead focuses on the failure of section 230 to include an "express definition" of intellectual property. *Id.* But, the definition is not the issue here. The issue is Congress's inclusion of "federal" and "state" in some section 230(e) provisions and its omission in section 230(e)(2). In *Perfect 10*, the Ninth Circuit is going directly against

this Court’s instruction to interpret statutes as a whole so that terms are compatible rather than contradictory. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

This Court has well established that Congress presumptively acts “intentionally and purposely” when it “includes particular language in one section of a statute but omits it in another section of the same Act.” *Duncan*, 533 U.S. at 173. Congress knew how to limit a subsection’s application to only federal law. And it chose not to here. *Perfect 10* makes no effort to explain the differentiation between section 230(e)’s subsections. Instead of beginning with the plain language of the statute as this Court requires, the Ninth Circuit completely disregarded it. Thus, FakeBlock’s reliance on the conclusion that section 230(e)(2) is limited to federal intellectual property law is improper.

The plain language of section 230(e)(2) is unambiguous and supports Austero’s conclusion that it applies to both state and federal intellectual property law. When the language of the statute is clear and unambiguous, the inquiry is complete except in “rare and exceptional circumstances.” *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). So, courts should overlook the plain language of a statute only if its application is “so gross as to shock the general moral or common sense.” *Id.*

This case is not one of the rare and exceptional circumstances. So, this Court should not overlook section 230(e)(2)’s plain language. Allowing for its application to federal and state intellectual property claims does not shock the general moral or common sense. The provision says, “any law pertaining to intellectual property law.”

47 U.S.C. § 230(e)(2). And it should be applied as such—to any intellectual property law. Thus, looking no further than its plain language, this Court should conclude that section 230(e)(2) does not extend immunity to service providers subject to state and federal intellectual property claims.

**2. Section 230’s purpose is furthered by denying immunity in all intellectual property claims.**

Should this Court decide to go beyond section 230(e)(2)’s plain language, it will find that denying immunity to service providers in a state or federal intellectual property claim is consistent with section 230’s purpose. Section 230 was enacted to “promote the continued development of the Internet” with minimal government regulation. *Id.* § 230(b)(1). Yet, the mere existence of section 230(e)(2) signifies that Congress also believed in protecting intellectual property rights. *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 300. And Congress supported the idea that despite section 230’s enactment, “laws protecting intellectual property should nevertheless remain in effect.” *Id.* FakeBlock argues that exposing service providers to liability under section 230 would defeat the purpose of its enactment. However, it would not.

One of section 230’s policies is to “preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.” *Id.* § 230(b)(2). Recognizing the importance of a free market on the internet, Congress still chose to include section 230(e)(2), applying it to “any law pertaining to intellectual property.” *Id.* § 230(e)(2). Congress wanted to protect the free market of the Internet, while also protecting intellectual property. Yet, FakeBlock argues that section 230’s purpose is defeated if section 230(e)(2) is

extended to state intellectual property claims. But if denying immunity to service providers in any intellectual property claim would defeat the protection of the Internet's free market, Congress would not have created section 230(e)(2) in the first place. Section 230(e)(2) undoubtedly allows government regulation of federal intellectual property claims. And such regulation has not been alleged to destroy section 230's purpose. Therefore, the mere extension of section 230(e)(2) to state intellectual property claims cannot be said to destroy section 230's goal.

Rather, the extension of section 230(e)(2) to state intellectual property law promotes Congress's goal of protecting intellectual property. Specifically, state intellectual property rights help develop market exchange. *Hepp*, 14 F.4th at 211. So, if this Court were to interpret section 230(e)(2)'s application to extend to state intellectual property law, it would align with Congress's free market policy.

FakeBlock concludes that section 230(e)(2)'s extension to state intellectual property law would frustrate section 230's purpose because intellectual property laws differ greatly among the states. This conclusion is misplaced and lacks support. "In general, federal and state . . . [intellectual property] law[s] can coexist and cooperate without conflict." 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 22:2, at 22-8 (4th ed. 1992). That is because "[i]n most states, the state [intellectual property] statutes are given the same meaning and interpretation as the mainstream principle of common law and federal common law." *Id.* § 22:1, at 22-7. Additionally, the common law right to privacy has been adopted by many other states. R. at 17a n.4. While it is true that state intellectual property laws can differ slightly

from state to state, FakeBlock failed to offer evidence illustrating such great difference between such laws. Additionally, it is not this Court's job to second guess Congress's policy decisions. *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (holding that it is not within any court's jurisdiction to second guess Congress's actions).

This Court should find that denying immunity to service providers in a state or federal intellectual property claim is consistent with section 230's purpose. However, this Court may only rely on legislative history and other interpretation tools if the terms of the statute at issue are ambiguous. *See Aslandidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1073 (2d Cir. 1993). And as is the case here, "[w]here . . . the statute's language is plain, the 'sole function of the courts is to enforce it according to its terms.'" *Ron Pair Enters.*, 489 U.S. at 241 (citation omitted). The terms of section 230(e)(2) are clear and unambiguous. Thus, this Court should enforce it according to its terms and hold that the denial of immunity to service providers under section 230(e)(2) applies to both state and federal intellectual property claims.

**B. FakeBlock Is Not Immune Because Austero's Right of Publicity Claim Is an Intellectual Property Claim That Falls Under the Section 230(e)(2) Exception.**

This Court should hold that Austero's right of publicity claim is an intellectual property claim. Austero filed her claim in Newport Beach, which recognizes a common-law claim for infringement on the right of publicity. R. at 9a. And like Newport Beach, many states have adopted this version of the right of publicity claim. R. at. 10a. Specifically, the Second Restatement of Torts provides that under a common-law right of publicity claim, "[o]ne who appropriates to his own use or benefit



the name or likeness of another is subject to liability to other for invasion of his privacy.” Restatement (Second) of Torts § 652C (Am. L. Inst. 1977). Additionally, the right of publicity is “an intellectual property right that protects against the misappropriation of a person’s name, likeness, or other indicia of personal identity—such as nickname, pseudonym, voice, signature, likeness, or photograph—for commercial benefit.” *Right of Publicity*, Int’l Trademark Ass’n (2023), <https://www.inta.org/topics/right-of-publicity/#:~:text=The%20right%20of%20publicity%20is,or%20photograph—for%20commercial%20benefit> (emphasis added). Thus, a right to publicity claims arises out of a “law pertaining to intellectual property” under section 230(e)(2). 47 U.S.C. § 230(e)(2).

The right of publicity has traditionally been considered an intellectual property right. Ericka H. Spears, Comment, *Strangers with Our Faces: How the Communications Decency Act Can Prevent Right of Publicity Stunts*, 79 U. Cin. L. Rev. 409, 428 (2010). FakeBlock argues against this, but many courts hold otherwise. See *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323 (11th Cir. 2006) (recognizing there is no dispute that the right of publicity is widely recognized as an intellectual property right); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003) (“The right of publicity is an intellectual property right . . .”). Further, legal scholars and even dictionaries recognize this right is an intellectual property claim. J. Thomas McCarthy, *Melville B. Nimmer and the Rights of Publicity: A Tribute*, 34 UCLA L. Rev. 1703, 1712 (1987) (“The right of publicity matured into a distinctive legal category occupying an important place in the law of intellectual property.”);

*Intellectual Property*, *Black's Law Dictionary* (7th ed. 1999) (defining intellectual property as: “A category of intangible rights . . . includ[ing] . . . publicity rights.”).

Further, the right of publicity and conventional forms of intellectual property laws serve a similar purpose. Under section 230(e)(2), any law pertaining to intellectual property refers to at least three commonly recognized forms of intellectual property: copyright, patent, and trademark. *Almeida*, 456 F.3d at 1322. But, these laws are not a static concept. *See id.* at 1323. Therefore, section 230(e)(2) is not limited to the traditional intellectual property laws that existed at the time of its enactment. Because section 230(e)(2) is not limited in this manner and the protection that the right of publicity provides is similar to conventional intellectual property laws, it is proper for this Court to find that the right of publicity is an intellectual property claim.

The right of publicity allows an individual to protect an interest in the ownership of her fame. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977). Protecting such interest is “closely analogous to the goals of patent and copyright law.” *Id.* Patent and copyright laws protect an inventor’s inventions and an author’s writings. *Spears*, *supra*, at 428. And the right of publicity protects an individual’s development of a marketable identity. *Id.* Essentially, the right of publicity is an intellectual property claim because it focuses on and protects an individual’s development of their own identity. Austero’s claim seeks to protect the value of her identity, the direct result of her lifelong work and a product of her intellect. Thus,

Austero's claim is grounded in the law of intellectual property; therefore, section 230 immunity is not implicated.

This Court should find that state-created rights of publicity claims are also intellectual property rights and that right of publicity claims are exempted from CDA immunity under section 230(e)(2). Such a conclusion is consistent with section 230(e)(2)'s plain language and policy and the right of publicity's legal history. Allowing Austero to bring a right of publicity claim against FakeBlock protects Austero's identity while maintaining the CDA's goals.

**C. Even Without the Section 230(e)(2) Exception, FakeBlock Is Still Not Immune from Austero's Claim.**

Even if this Court decides that the section 230(e)(2) exception does not apply to Austero's claim, FakeBlock has still failed to conclusively prove it is immune under section 230(c). Without immunity under section 230(e)(2), FakeBlock is only immune from Austero's claim if it can prove that 1) FakeBlock is a "provider or user of an interactive computer service," 2) Austero's claim is based on "information provided by *another* information content provider," and 3) Austero's claim would treat FakeBlock "as the publisher or speaker" of that information. 47 U.S.C. § 230(c)(1) (emphasis added); *Lycos, Inc.*, 478 F.3d at 418. All the parties agree that FakeBlock provides an interactive computer service. R. at 10a. Further, the parties do not dispute that Austero seeks to hold FakeBlock responsible as the publisher or speaker of *Moonie Bares All*. *Id.* at 11a. Rather, the dispute is whether Austero's right of publicity claim is based on "information provided by *another* information content provider." 47 U.S.C. § 230(c)(1) (emphasis added); R. at 11a. But it is not. Fünke acted on FakeBlock's

behalf when she developed, created, and then posted *Moonie Bares All* to FakeBlock. Thus, Austero’s claim arises from information that FakeBlock itself posted. R. at 11a. And “[a]n interactive computer service provider remains liable for its own speech.” *Lycos, Inc.*, 478 F.3d at 419. Therefore, even if the section 230(e)(2) exception is not applicable, this Court should still find that FakeBlock is not entitled to the immunity provided by section 230(c).

**1. Fünke was acting on FakeBlock’s behalf when she posted *Moonie Bares All*.**

FakeBlock’s immunity claim fails because Fünke posted *Moonie Bares All* to FakeBlock while acting on its behalf. Basically, FakeBlock itself posted the film. And a key limitation of section 230(c) is that a service provider is only entitled to immunity when the objectionable information is provided by “*another* information content provider.” 47 U.S.C. § 230(c)(1) (emphasis added). Here, there is no other information content provider. There is only Fünke, one of FakeBlock’s corporate officers. Nonetheless, FakeBlock argues Fünke was “another information content provider” because she posted *Moonie Bares All* to FakeBlock in her personal capacity. This argument is erroneous, and this Court should not reach such a conclusion. Rather, this Court should hold that because Fünke acted on its behalf, FakeBlock is liable for its own speech.

At the time Austero filed her claim, FakeBlock was a start-up corporation founded by college students. And as many courts have recognized, a corporation acts through its agents and employees. *See Bus. Guides, Inc. v. Chromatic Commc’ns*

*Enters., Inc.*, 498 U.S. 533, 548 (1991); see also *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 225 (3d Cir. 2007).

Fünke was an employee with the authority to act on FakeBlock’s behalf and she did so. See *Publication 15-A: Employer’s Supplemental Tax Guide*, Internal Revenue Serv. (Dec. 19, 2022), <https://www.irs.gov/pub/irs-pdf/p15a.pdf> (“An officer of a corporation is generally an employee . . .”). Fünke was one of only three corporate officers with the ability and authority to upload videos to FakeBlock. Justice Walt’s dissent argues that it is improper to assume Fünke was a corporate officer with authority to act on FakeBlock’s behalf just because she had upload authority. R. at 57a. However, Fünke’s role in FakeBlock clearly involved much more than merely upload authority. At the time in question, Fünke was directly involved with the development of FakeBlock. Specifically, she served as founder, investor, and director of investor relations.<sup>2</sup>

FakeBlock argues that Fünke acted without corporate authority when she developed and uploaded *Moonie Bares All*. But, as the director of investor relations, Fünke was responsible for advertising the site and attracting additional investors. And authority should be implied when “it is reasonably necessary and proper to effectuate the purpose” of the individual’s position. *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 128 (3d Cir. 1998). Acting as the director of investor relations, Fünke uploaded the film to only FakeBlock and nowhere else. She testified to doing

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<sup>2</sup> “Director of investor relations” was not Fünke’s official job title. It was assigned by the Fifteenth Circuit based on her testimony in the corporate officers’ depositions. R. at 5a & n.3.

so because “she was an investor” and “wanted to draw attention to the new site.” R. at 6a. Such a goal effectuated the purpose of her position. Thus, Fünke’s actions were within her corporate capacity. Because corporations can only act through its employees and officers, Fünke had the authority to act on FakeBlock’s behalf and did so when she posted the film.

In defending itself, FakeBlock argues that removing the film from the site and terminating Fünke illustrates that Fünke did not have corporate authority for her actions. But this argument ignores the timeline of events. Fünke uploaded *Moonie Bares All* on May 29, 2018. Maharis did not remove it and fire Fünke until August 27, 2018—three days after Austero filed her claim. Thus, the video was on FakeBlock and Fünke was employed there for almost three months after she posted it. If Fünke had acted outside the scope of her corporate authority, it is not likely nor reasonable to assume that FakeBlock would have taken three months to act on it. Especially if FakeBlock was acting in good faith, as it suggests. Instead, the removal and termination were a damage control method employed by FakeBlock after Austero filed her claim. The timeline of these events does not support a conclusion that Fünke was outside of her corporate authority.

Because of summary-judgment practice, this Court should construe all reasonable inferences in Austero’s favor. *See Guzman*, 18 F.4th at 160. Given this standard, this Court should find that Fünke acted on FakeBlock’s behalf. And so, her actions, developing, creating, and posting *Moonie Bares All*, are FakeBlock’s actions. Thus, there is not *another* information content provider, only FakeBlock itself.

## **2. FakeBlock itself created and developed the objectionable content.**

This Court should hold FakeBlock responsible as an information content provider and find that it is not entitled to section 230 immunity. Section 230 defines an “information content provider” as “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.” 47 U.S.C. § 230(f)(3). Thus, to qualify for immunity, FakeBlock must show that Austero based her claim on information provided by *another* information content provider. But it cannot because FakeBlock is its own information content provider. “Information content provider” is a broadly defined category, including those responsible for the content’s development, even if only in part. *Lycos, Inc.*, 478 F.3d at 418. So, if FakeBlock was a creator or developer, even “in part,” of *Moonie Bares All*, then it is an “information content provider.” *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019). Acting through Fünke, FakeBlock created and posted *Moonie Bares All*. Thus, FakeBlock is responsible “in whole” and not entitled to immunity.

FakeBlock is liable for its own speech because its actions extend far beyond what Congress intended to protect under section 230. FakeBlock developed a five-minute-long film featuring an AI model intended to depict and mock Austero. Yet the film’s creation was not enough for FakeBlock. It then posted the film to its site that only its corporate officers could post to. As a result, FakeBlock is not immune because section 230 immunity is unavailable for a service provider who develops or creates objectionable content. *See Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998);

*Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1262–63 (N.D. Cal. 2006) (ruling that section 230 immunity was not available to an online dating service that “manufactured false profiles” and “sent profiles of . . . former subscribers whose subscription had expired”); *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 297 (holding that the CDA does not protect a service provider for publishing tortious content it created itself).

Fünke’s actions taken on FakeBlock’s behalf reveal that FakeBlock is its own information content provider. In *Lycos*, the internet service provider was immune because the individual posters on its website were information content providers. 478 F.3d at 419. There, website users generally created each of the message boards. *Id.* None of the provider’s actions indicated that the objectionable content was its own. *Id.* at 421. Specifically, there was no evidence suggesting the provider was responsible, even in part, for the creation or development of the content. *Id.* at 420. FakeBlock and Fünke’s actions do not allow this Court to make such a clear-cut decision. Fünke, acting on FakeBlock’s behalf, created and posted the objectionable content. Fünke is not merely a user of the website. She is a developer and investor in FakeBlock. Further, FakeBlock did not allow for third parties to post. Instead, it allowed only its three corporate officers to post their chosen information. Thus, this Court can easily conclude that FakeBlock is, in fact, its own information content provider. And because of this, they are not entitled to immunity.

Admittedly, courts have broadly interpreted section 230 immunity to effectuate Congress’s Internet protection. *Id.* at 418. Thus, a service provider may take a wide



range of actions without liability. For example, a service provider would not be liable for creating or developing content when it provides a neutral means for third parties to post their own information. *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014). Nor would a court impose liability for a service provider’s editing or selection process as long as a third party provides the objectionable content. *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003). Clearly, FakeBlock blatantly acted outside of section 230’s scope. Its actions were not mere self-regulatory or editorial actions, and therefore are not protected under section 230.

Congress enacted section 230 to provide immunity to service providers who “make good faith efforts to block and screen offensive content.” *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016). FakeBlock is not the type of service provider that Congress intended to protect. FakeBlock did not make a reasonable effort to block or screen offensive content. Instead, it developed and showcased offensive content. Section 230’s grant of immunity “depends on the source of the *information* in the allegedly tortious statement, not on the source of the statement itself.” *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 295. FakeBlock is clearly the source of the offensive content in *Moonie Bares All*. Thus, FakeBlock is its own information content provider. Should this Court consider FakeBlock’s immunity under section 230(c), it should find that FakeBlock is not immune from Austero’s claim and affirm the Fifteenth Circuit’s judgment.

## II. MOONIE, A COMPUTER-GENERATED AI MODEL INFRINGES ON AUSTERO'S RIGHT TO PROFIT FROM HER OWN PUBLICITY.

This Court should affirm the Fifteenth Circuit's judgment and hold that Austero has a viable right of publicity claim that Fünke and FakeBlock will not be able to avoid with the First Amendment. This issue addresses the proper denial of summary judgment for Fünke and FakeBlock on the merits of Austero's right of publicity claim. Specifically, this dispute considers whether Moonie, a computer-generated AI model resembling Austero, appropriated her identity in violation of her right to publicity.

Newport Beach recognizes a common-law right of publicity, which states, “[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.” Restatement (Second) of Torts § 652C. The right of publicity was created to protect a celebrity's right to exploit the commercial interests of his or her own identity. *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 624 (6th Cir. 2000). And it is not limited to the appropriation of one's “name or likeness,” instead it is now understood to cover the appropriation of any aspect of the plaintiff's identity or personality. *Id.* Austero has the right to prevent the unlawful use of her identity. And Fünke and FakeBlock, without Austero's permission, appropriated her identity when they created Moonie, an AI-generated model that so closely resembles many of Austero's features.

Fünke and FakeBlock improperly claim that their rendition of Austero does not infringe on her right of publicity. In the alternative, they argue that even if their use did infringe on her right of publicity, the First Amendment protects their actions. It is true that the First Amendment “protects much of what [the] media do[es] in the

reproduction of a [celebrity's] likeness.” *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988). But Fünke and FakeBlock’s use of Austero’s identity exploits her, and thus, the First Amendment will not protect their actions. Peter Felcher & Edward Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 Yale L.J. 1577, 1596 (1979).

Because case law on the right of publicity is “exceedingly rare,” when deciding right of publicity cases, courts may turn to any available case law and precedent as a vehicle to ensure consistency in intellectual property. *Landham*, 227 F.3d at 622. Thus, this Court should affirm the Fifteenth Circuit’s judgment because Austero’s right of publicity claim raised sufficient evidence for this Court to conclude that Moonie infringes on her right of publicity.

**A. The Right of Publicity Includes the Appropriation of Any Aspect of Identity or Persona.**

This Court should affirm the Fifteenth Circuit’s conclusion that when a defendant appropriates any aspect of an individual’s identity, they have infringed upon that individual’s legal right to publicity. In other words, this Court should conclude that a right of publicity claim is not strictly limited to the appropriation of name or likeness.

In 1953, *Haelan Laboratories* first recognized an individual’s right of publicity in a photograph and paved the way for claims preventing the appropriation of an individual’s “name” and “likeness.” *Haelan Lab’s, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). Since that decision, technology has developed drastically, and so have the number of ways a defendant may appropriate an

individual's identity. This case is a prime example. Fünke's software generated a "realistic looking AI model," Moonie, who clearly appropriated Austero's identity and did so without using her name or picture. R. at 3a n.2. Thus, an individual's identity can be exploited even if his or her name or picture is not used. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (3d Cir. 1983). And an infringement on the right of publicity exists whether or not the appropriator uses an individual's name or likeness. *Id.* at 698.

Since its creation, courts and legal scholars have recognized the importance of the right of publicity and what it protects—an individual's interest in the exclusive use of his or her own identity. Restatement (Second) of Torts § 652C cmt. a. The right of publicity prevents the unauthorized use of a person's individuality when it would interfere with how he controls his identity or even how the public views him. In other words, an individual's identity is personal; it is their own, and they should have the right to control it and how others perceive it. Specifically, "[e]ach and every human should be given control over the use of his or her identity." 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 2:1 (2d ed. 2009). Further, it is a generally accepted principle that an individual who sacrifices their privacy to enter the public eye should, in return, be allowed to benefit from the value of their identity. *Id.* The right of publicity was created to protect an individual's commercial interest in their identity. *Carson*, 698 F.2d at 835. Limiting how an individual can do so goes against the very reason for its creation. After all, what is important is *whether* the defendant appropriated the plaintiff's identity, not *how* the defendant did so. *White v. Samsung*

*Elects. Am., Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992). In fact, limiting the means of appropriation to name and likeness “merely challenges the clever advertising strategist to come up with” the next means of appropriation. *Id.* In fact, treating the means of appropriation, name and likeness, “as dispositive in [an] analysis of the right of publicity . . . would not only weaken the right but effectively eviscerate it.” *Id.* Given its importance, it would be improper for this Court to limit the means by which a plaintiff can bring a claim to protect their identity.

Further, recognizing an expansion beyond “name” and “likeness” will not drastically change the application of right of publicity case law because a majority of courts have already recognized it. *See Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129, 137 (Wis. 1979) (finding an infringement on right of publicity when the defendant used the nickname of a famous football player); *Carson*, 698 F.2d at 837 (holding that the defendant’s use of the plaintiff’s catchphrase was an illegal appropriation of plaintiff’s identity); *Midler*, 849 F.2d at 463 (holding that under the right of publicity, the plaintiff’s distinctive voice is protected from appropriation); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974) (holding that the plaintiff professional race car driver’s right of publicity claim should go to the jury when the defendant’s advertisement pictured an image of a car with distinctive markings like that of the plaintiff’s car). Thus, this Court should hold that when a defendant appropriates any aspect of an individual’s identity, they have infringed upon that individual’s legal right to publicity.

**B. Austero’s Right of Publicity Claim Is Sufficient to Survive Summary Judgment Because Fünke and FakeBlock Appropriated Her Identity.**

The right of publicity consists of state common law and statute and many courts have recognized “its consistency with federal intellectual property laws and the First Amendment.” *Landham*, 227 F.3d at 622. In Newport Beach and many other states, a claim for the right of publicity comes from the Restatement (Second) of Torts § 652C. Thus, to succeed in an infringement on the right of publicity claim, a plaintiff must prove three things. *Friendfinder Network, Inc.*, 540 F. Supp. 2d at 304. First, the plaintiff must establish that he or she “owns an enforceable right in the identity or persona of a human being.” *Id.* Second, without the plaintiff’s permission, the defendant “used some aspect of [that] identity or persona in such a way that [the] plaintiff is identifiable from the defendant’s use.” *Id.* And third, the “defendant’s use is likely to cause damage to the commercial value of that persona [or identity].” *Id.* This brief will only address the first two elements because Fünke and FakeBlock did not challenge the third element of this claim. R. at 21a.

The most famous celebrities have the easiest identities to evoke and appropriate without using such obvious means. *White*, 971 F.2d at 1399. Moonie’s appearance and performance in *Moonie Bares All* did precisely this: identified Austero without blatantly copying her name or using her identical resemblance. Nonetheless, Austero has raised genuine issues of material fact concerning the degree to which Moonie evokes her identity. Because she has done so, Austero has also raised triable issues of fact as to whether or not Fünke and FakeBlock sought to appropriate her likeness

for their own advantage. Thus, this Court should affirm the Fifteenth Circuit's decision, holding that Austero's right of publicity claim is sufficient to avoid summary judgment.

**1. Austero owns an enforceable right in the identity or persona of herself.**

Austero pled sufficient facts for this Court to conclude that she owns an enforceable right in her identity. Courts often view the first element of a right of publicity claim simply as the "validity" element. Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 Marq. Sports L.J. 23, 34 (1999). In other words, a plaintiff's right is enforceable, and thus valid, when "the plaintiff's own identity is at issue[,] or that plaintiff is the assignee . . . of someone else's right of publicity." *Id.* Here, Austero has an enforceable right because *Moonie Bares All* depicts an AI-generated model based on and closely resembling her. Thus, she clearly has a valid claim for infringement on her right to publicity. Typically, in a right of publicity case, the validity of the right asserted is not a material issue. *Id.* Thus, issues *usually* only arise when a plaintiff asserts a claim that is either not for her own identity or for an identity that she has not been assigned the right to use. *Id.*

However, some judges are hesitant to recognize the validity of an actor or actress's right of publicity claim when he or she achieved their fame through acting. *White*, 971 F.2d at 1404 (Alarcon, J., dissenting). Those who support this conclusion argue that "recognition of [a] distinction between a performer and the part he or she plays is essential for a proper analysis." *Id.* But, this view does not affect the validity of Austero's claim. And recognizing a distinction between Austero and the roles she

has played is not necessary for this Court's analysis to be proper. Acting is a part of Austero's fame, but there is much more to her fame than her acting career. She is also a world-renowned *dancer* and *singer*. She has released seven studio albums and won four Tony awards. R. at 25a. She has even performed tap-dance routines at Radio City Music Hall. R. at 25a. There should be no issue recognizing Austero's right of publicity. While notable, her acting career is not her only claim to fame and not the sole way she achieved such fame. Further, this Court has recognized that the strongest case for a right of publicity claim involves "the appropriation of the very activity by which the entertainer acquired his reputation in the first place." *Zacchini*, 433 U.S. at 567.

Nonetheless, it is generally true that an actress does not own the rights to a character she once portrayed, but that is not a bright-line rule. *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997). In other words, an actress will not always lose her right to claim an infringement on her right of publicity by simply portraying a fictional character. *Id.* And there have been circumstances where courts have recognized this. *See Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 371 (S.D.N.Y. 1988) (finding that a look-alike was enjoined from misappropriating Woody Allen's "schlemiel" persona, which he cultivated in the film *Annie Hall*). Thus, the more precise analysis for this Court does not recognize a distinction between an actress and her role but instead considers the *association* between the actress and her role. *McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994). In other words, an actress may challenge the unlawful use of a fictional character she played when the use of such



character also evokes her identity. *Landham*, 227 F.3d at 625. This was the case in *White*. 971 F.2d at 1399 (finding that the plaintiff had a right of publicity in her television character when the defendant used a robot that dressed like the plaintiff, turned block letters on a game board like plaintiff, and did so while standing on what appeared to be the Wheel of Fortune game show set, just like plaintiff).

It is also the case here. Moonie was dressed identically to Austero's character in *Cabaret*. But, Austero can assert her right to publicity because while Moonie may evoke the character's identity in *Cabaret*, she also evokes Austero's. The dissent argued that Austero cannot assert her right to publicity because she has no interest in the character's identity that Moonie evokes. But as the court in *White* found, this conclusion is improper. Moonie's outfit was indeed identical to a character Austero once portrayed. But Moonie wore this outfit while performing acts that are unique to Austero. Specifically, Moonie's performance captured all three aspects of Austero's fame: acting, singing, and dancing. And her tap-dance routine was remarkably similar to Austero's 1992 Radio City Music Hall performance. Moonie's use of Austero's character from *Cabaret* and her act in the film evokes Austero's identity, just as it did for the plaintiff in *White*.

Even if this Court finds Austero achieved her fame through acting, she still has an enforceable right because her claim is based on her overall identity and not just a specific role she played. Further, Austero may assert her right of publicity to challenge Fünke and FakeBlock's use of Moonie because Moonie's appearance and performance in *Moonie Bares All* evokes Austero's identity. Thus, this Court should

find that Austero has sufficiently pled facts to show she owns an enforceable right in her identity.

**2. Fünke and FakeBlock's use of Austero's identity in the creation of *Moonie Bares All*, without her permission, identifies Austero.**

Moonie's appearance and performance in *Moonie Bares All* is an unauthorized use of Austero's persona that clearly identifies her. A plaintiff can show her right of publicity has been infringed when the defendant, without her consent, used a characteristic of her identity in a manner that identifies her. *See* Matthew Minora, Comment, *Rumor Has It That Non-Celebrity Gossip Web Site Operators Are Overestimating Their Immunity Under the Communications Decency Act*, 17 *CommLaw Conspectus* 821, 855 (2009). A use is identifiable when it is more than an incidental or coincidental similarity. *Id.*

First, Austero clearly did not consent to Fünke and FakeBlock's use of her identity. Nothing in the record suggests otherwise. Next, Fünke and FakeBlock created an AI-generated model using multiple aspects of Austero's identity in a manner that intentionally identified her. Austero concedes that Fünke and FakeBlock did not misuse her name. R. at 23a. However, the appropriation of her likeness and identity is a different issue, and Austero does not concede it.

Exactness is not the legal standard here. R. at 27a. Appropriation can exist even though Moonie does not precisely copy Austero. Fünke and FakeBlock attempted to avoid liability under an exactness standard by piecing together bits and parts of Austero's identity. But, while each bit or piece individually may not be sufficient, the

combination of those bits and pieces is certainly sufficient to identify Austero. *See Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 726–27 (S.D.N.Y. 1978) (finding that the defendant use identified the plaintiff through a combination of the likeness used, the context of such likeness, and caption for the likeness). Further, Austero can object to Moonie and the film as a whole, “pointing to any and all aspects of the [her] identity” used. *Minora, supra*, at 855.

Using another’s likeness does not have to be identical or photographic to infringe on that individual’s right to publicity. *See Wendt*, 125 F.3d at 809 (finding for plaintiffs in a right of publicity claim when defendant evoked their identities with robots that were *not identical* copies of them). Moonie is not an *identical* copy of Austero. The two have dissimilar facial features, and Austero has acknowledged this. However, they share numerous similarities, including very similar skin colors, hair colors, hairstyles, and even body styles. *See Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1271 (9th Cir. 2013) (finding appropriation where the defendant used the plaintiff’s almost “identical height, weight, build, skin tone, [and] hair color”). Further, Moonie wears an outfit identical to Austero’s in one of her movies. *See Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013) (finding appropriation where the “avatar’s accessories mimic those worn by [plaintiff] during his time as a Rutgers player”).

While these similarities alone could lead a reasonable jury to find that Moonie identifies Austero, there is more. Moonie’s performance in the film captured all three aspects of Austero’s unique fame: singing, dancing, and acting. Her tap dance routine resembled Austero’s performance at Radio City Music Hall. And Moonie performed a

song with the same name as one widely attributed to Austero. All these things are not coincidental. *See White*, 971 F.2d at 1399 (“Viewed separately, the individual aspects of an advertisement . . . say little. Viewed together, they leave little doubt about the celebrity the ad is meant to depict.”).

Additionally, Moonie’s voice has a striking resemblance to Austero’s. R. at 26a (“Moonie’s voice *could very well* be [Austero’s] *current* voice digitally raised by one octave.”). And an individual’s “voice is as distinctive and personal as [her] face.” *Midler*, 849 F.2d at 463. It is “one of the most palpable ways identity is manifested.” *Id.* Austero’s identity is manifested through Moonie’s use of her voice. Fünke even testified that her software captured Austero’s widely available vocal performances over the years and used them as the “raw building blocks” for Moonie’s voice. Fünke deliberately imitated Austero’s voice and used it to evoke her identity in *Moonie Bares All*. *See id.* (“[W]hen a distinctive voice of a professional singer is widely known and is deliberately imitated . . . , the [imitators] have appropriated what is not theirs . . . .”).

Moonie used multiple aspects of Austero’s identity in a manner that intentionally identified her. Thus, this Court should find that Austero has sufficiently pled facts to show that without her consent, the defendants used her identity in a manner that she is identifiable from it.

### **C. *Moonie Bares All* Is Not Protected by the First Amendment.**

Austero has a viable right of publicity claim and Fünke and FakeBlock did not conclusively prove an affirmative defense under the First Amendment. The First

Amendment protects films like *Moonie Bares All* as expressive speech. *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952). As a result, films receive First Amendment protections, but this protection is limited in cases “where the right of free expression necessarily conflicts with other protected rights.” *Hart*, 717 F.3d at 148. The violation of Austero’s right of publicity is one of those cases. Nonetheless, Fünke and FakeBlock argue that the First Amendment protects *Moonie Bares All*. A defendant asserting such defense must establish beyond a doubt “all the essential elements of the . . . defense.” *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). Fünke and FakeBlock did not.

To resolve the tension between an individual’s right to publicity and the First Amendment, courts will “balance the interests underlying the right to free expression against the interests in protecting the right of publicity.” *Hart*, 717 F.3d at 149. There are currently three balancing tests: the predominant use test, the *Rogers* test, and the transformative use test. *Id.* at 153. This Court should avoid applying the predominant use test as it is “subjective at best [and] arbitrary at worst.” *Id.* at 154. Additionally, because courts use the *Rogers* test for infringement involving matters protected by trademark, such as a person’s name or image, it is improper. *Id.* at 155. Austero’s name nor literal image is at issue. The remaining and most fitting test is the transformative use test.

Under the transformative use test, five factors determine if *Moonie Bares All* is sufficiently “transformed into something more than a mere celebrity likeness or imitation.” *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001).

First, whether Austero’s likeness is one of the “raw materials” from which *Moonie Bares All* is synthesized or rather Austero’s imitation is the “very sum and substance” of the film. *Keller*, 724 F.3d at 1274. Second, whether the film is primarily Fünke’s expression—something more than Austero’s likeness. In other words, whether a fan would buy the film because it is a reproduction of Austero or because it is Fünke’s expressive work. *Id.* Third, whether the literal and imitative elements of the film predominate the creative elements. *Id.* Fourth, whether the economic value of the film comes from Austero’s fame. *Id.* And finally, whether Fünke’s skill is manifestly subordinate to her overall goal of creating a conventional portrait of Austero. *Id.* Based on the outcome of these factors, the use of Austero’s identity is either a literal depiction or imitation of her and thus an infringement or it is a parody and protected by the First Amendment. *Comedy III*, 21 P.3d at 808. All these factors sway in favor of Austero. Except for Moonie’s song lyrics, *Moonie Bares All* is an infringement.

Moonie’s song lyrics are the only part of *Moonie Bares All* protected by the First Amendment because they are a parody and political speech. Specifically, the lyrics are a parody because they rely “upon a difference from the original” song, “*New York, New York.*” *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 967 (10th Cir. 1996). The tune of the original song stays the same. However, Fünke modified its lyrics to the song critique Austero’s candidacy, criticizing her wealth, history of substance abuse, and political beliefs. R. at 36a. The lyrics expressed a view of Austero as a public figure in politics. Thus, the First Amendment protects them as

“core political speech,” or interactive communication concerning political change. *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 183 (1999).

However, the First Amendment does not protect all of *Moonie Bares All*. Considered as a whole, *Moonie Bares All* is not a transformative use of Austero’s likeness. Specifically, the First Amendment will not protect those scenes in *Moonie Bares All* where Moonie wore Austero’s identical costume, copied Austero’s Radio City Music Hall tap-dance performance, and imitated Austero’s voice because they are infringements under the transformative use test. Under the first element, Austero’s identity is the “very sum and substance” of these scenes. *Comedy III*, 21 P.3d at 809. Moonie’s appearance in these scenes is not “so transformed” as to become Fünke’s expression. Instead, Moonie imitates Austero’s likeness.

Under the second and fifth elements, Moonie is indeed Fünke’s artistic expression. But that expression is only Austero’s likeness and nothing more. Further, Fünke argues that fans would find *Moonie Bares All* an unsatisfactory substitute for Austero. *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003). This is not likely, given the similarities between Austero and Moonie. But even if it was, Fünke was not trying to sell the film. Instead, she was promoting her software’s ability to make “a literal depiction” of Austero. *Comedy III*, 21 P.3d at 809. Specifically, using the film, Fünke was advertising the capabilities of her AI-generating software to create realistic portrayals of celebrities. Thus, her goal was to create an almost identical model of Austero.

Because her goal was to create an identical model of Austero to showcase her software's capability, the third element also falls in Austero's favor. The only creative element in *Moonie Bares All* is the song lyrics. Moonie's outfit, tap-dance performance, and voice are all imitative elements copied directly from Austero. Lastly, under the fourth element, the value of *Moonie Bares All* result from Austero's fame. Here, the economic value of the film is not in the sale of the film but rather in the film's promotion of Fünke's software. Austero is a widely recognized celebrity. Fünke based Moonie on Austero in hopes that when individuals viewed the film, they would first mistake Moonie for Austero and only later realize that Moonie is an AI model of Austero—thus recognizing the capability of her software. Without someone of Austero's fame to compare her to, Moonie is merely an AI-generated model, and the capability of Fünke's software is not recognized. If Austero's identity were not the subject of it, the film would have no economic value. Considered as a whole, *Moonie Bares All* is not a transformative use of Austero's likeness.

Further, Austero's right of publicity claim is not barred because she was a political candidate running for office. A defendant properly asserts the public interest defense for "the publications of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell." *Hilton v. Hallmark Cards*, 599 F.3d 894, 912 (9th Cir. 2010). This defense is typically asserted against a plaintiff who has attracted public attention to her doings. *Id.* Austero, a celebrity and political candidate, is presumably the type of person this defense would apply to. However, it fails because it is limited to "publishing or reporting" factual data. *Id.* *Moonie Bares*



*All* does not publish or report factual data. It is a film meant to entertain viewers and advertise Fünke’s AI-generating software. It depicts Moonie, an AI-generated model that resembles Austero, on stage performing all three aspects of Austero’s fame: singing, dancing, and acting. All of which is entertainment, and none of which is factual data. Austero’s claim therefore is not barred by the public-interest defense. Fünke and FakeBlock failed to establish “*all* the essential elements of the[ir] . . . defense” beyond a doubt. *Fontenot*, 780 F.2d at 1194. Thus, *Moonie Bares All* improperly infringes on Austero’s identity and is not entitled to First Amendment protection.

Therefore, this Court should affirm the Fifteenth Circuit’s judgment that Austero has a viable right of publicity claim and Fünke and FakeBlock did not conclusively prove their affirmative defenses under the First Amendment.

### CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Fifteenth Circuit.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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## **APPENDIX A**

### **PERTINENT CONSTITUTIONAL PROVISION**

#### **U.S. Const. amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

## APPENDIX B

### PERTINENT STATUTORY PROVISIONS

#### **47 U.S.C. § 230(b)(1)**

(b) Policy. It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

#### **47 U.S.C. § 230(b)(2)**

(b) Policy. It is the policy of the United States—

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation

#### **47 U.S.C. § 230(c)(1)**

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

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

#### **47 U.S.C. § 230(e)(1)**

(e) Effect on other laws.

(1) No effect on criminal law. Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

#### **47 U.S.C. § 230(e)(2)**

(e) Effect on other laws.

(2) No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

#### **47 U.S.C. § 230(e)(3)**

(e) Effect on other laws.

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

**47 U.S.C. § 230(e)(4)**

(e) Effect on other laws.

(4) No effect on communications privacy law. Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

**47 U.S.C. § 230(f)(3)**

(f) Definitions. As used in this section:

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