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No. 22-9908

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IN THE  
SUPREME COURT OF THE UNITED STATES  
JANUARY TERM 2024

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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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NOVEMBER 20, 2023

TEAM NUMBER 70  
*Attorneys for Respondent*

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## QUESTIONS PRESENTED

- I. Does the Communications Decency Act deny immunity for a state-law right-of-publicity claim against a social media platform arising from a video posted by its own corporate officer?
- II. Does a computer-generated artificial-intelligence model violate a celebrity's right of publicity when it appropriates her identity without transforming her likeness sufficiently for protection under the First Amendment?

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## **PARTIES TO THE PROCEEDING**

Petitioner FakeBlock, Inc. is a small Delaware corporation with its principal place of business in Irvine, California. It is operated by three corporate officers, including Petitioner Maebly Fünke, an individual.

Respondent Lucille Austero is an individual and citizen of Newport Beach.

## **CORPORATE DISCLOSURE STATEMENT**

Petitioner FakeBlock, Inc. is a Delaware corporation with its principal place of business in Irvine, California. As far as the record demonstrates, it has no parent companies, and its ownership interests may be divided among multiple investors.

## **OPINIONS BELOW**

The opinion of the United States District Court for the District of Newport Beach is unreported but can be located at D.C. No. 18-cv-5309. The United States Court of Appeals for the Fifteenth Circuit opinion is unreported but can be located at No. 20-9804 and is set out in the record. R. 1–68.

## **STATEMENT OF JURISDICTION**

The United States 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. R. at 1. Petitioner timely filed a petition for writ of certiorari, which this Court granted pursuant to 28 U.S.C. § 1254(1) on October 9, 2023. R. at 1.

## **CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS**

The central constitutional provision is the First Amendment to the United States Constitution. This case also involves provisions of Federal Rule of Civil Procedure 56 and the Communications Decency Act of 1996, 47 U.S.C. § 230. Each of these provisions is set forth in relevant part in the Appendix.

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

Lucille Austero is a world-renowned and award-winning actress, dancer, and singer. R. at 1, 3. Ms. Austero ran for Congress against Lindsay Bluth, but was unsuccessful after Ms. Bluth's daughter, Maebly Fünke, created and posted a short film, *Moonie Bares All*, that featured Ms. Austero's likeness through the use of artificial-intelligence technology ("AI"). R. at 1. In her deposition, Ms. Fünke testified that she intended for the AI-generated model, Moonie, to represent the latest iteration of her proprietary software. R. at 4. Ms. Fünke is a digital artist and programmer with a specific interest in creating realistic AI-generated models. R. at 3. She also served as one of FakeBlock, Inc.'s ("FakeBlock") three corporate officers. R. at 5.

FakeBlock is an upcoming social media website. R. at 5. Ms. Fünke was its director of investor relations, tasked with attracting more investors to the startup company. R. at 42. When *Moonie Bares All* was posted, FakeBlock was still in its beta-testing phase so that only its three corporate officers had the authority to post on the platform. R. at 5. Ms. Fünke posted the film on May 29, 2018, and it remained on the website for nearly three months until Ms. Austero brought suit. R. at 5–6. Another corporate officer, George Maharis, removed the post just three days after the lawsuit was filed. R. at 6. Ms. Fünke was also fired from FakeBlock following the lawsuit. R. at 6.

At the beginning of the AI-generated film, Moonie appears on stage in a burlesque outfit and begins tap-dancing. R. at 5. After performing for almost a minute, Moonie stumbles, regains her balance, and strips off her clothing. R. at 5. Shortly after, Moonie starts to sing a rendition of “New York, New York” from the film *On the Town*. R. at 5. Moonie does not sing the exact lyrics from “New York, New York” as the lyrics were altered by Ms. Fünke to refer to Ms. Austero’s “wealth and substance dependency” and her lack of care for the “citizens and voters of Newport Beach.” R. at 5. During her career, Ms. Austero was well-known for singing a different song titled “New York, New York” from a film of the same name. R. at 26.

Ms. Fünke confessed to consciously using Ms. Austero as the “starting point” for Moonie’s voice and directed her AI software to analyze Ms. Austero’s speaking and singing voices from Ms. Austero’s multiple albums and acting roles. R. at 4. Ann Veal, a vocal performance coach and opera singer, provided expert testimony that “Moonie’s voice *could very well* be Lucille’s *current* voice digitally raised by one octave.” R. at 26. Moonie’s tap-dancing performance is also remarkably similar to one of Ms. Austero’s previous tap-dancing performances at Radio City Music Hall. R. at 25, 37. In addition, Moonie shares many physical similarities to Ms. Austero including height, body proportions, and hairstyles. R. at 4. Lastly, the AI-generated model’s outfit was nearly identical to Ms. Austero’s in the movie *Cabaret*. R. at 25.

Ms. Fünke captioned the film “Moonie Bares All!!!” and wrote “VOTE 4 LINDSAY BLUTH” underneath the FakeBlock post. R. at 6. Ms. Fünke expressed multiple reasons for creating the AI-generated model. She first claimed the model

was created to be a realistic-looking simulacra to demonstrate and advertise her software's capabilities to potential licensees. R. at 4. She also admitted that the model was intended to help her mother's political campaign by revealing the "darker side" of Ms. Austero, because Ms. Austero was receiving favorable media attention. R. at 4. Ms. Fünke uploaded the short film featuring the AI-generated model solely to FakeBlock because she invests in FakeBlock and wanted to draw attention to the new website. R. at 6. Additionally, in only uploading to FakeBlock, she intended for the film to go viral and directed the anticipated web traffic to the new website due to her financial stake in the platform. R. at 42. Ms. Fünke also testified that she chose the striptease routine in the film to appeal to prurient internet users. R. at 6. Ultimately, Ms. Fünke achieved her objective as Ms. Austero lost the election and drew the attention of many viewers in internet message boards. R. at 6.

## **II. COURSE OF PROCEEDINGS**

Ms. Austero sued FakeBlock and Ms. Fünke in the United States District Court of Newport Beach under diversity jurisdiction, 28 U.S.C. § 1332. R. at 2. The lawsuit contended that Ms. Fünke's AI model bore such a striking resemblance to Ms. Austero that it violated Ms. Austero's right of publicity under state law. R. at 2. FakeBlock and Ms. Fünke both moved for summary judgment. R. at 2. Both defendants argued that Ms. Austero had no viable right-of-publicity claim and that Ms. Fünke's AI-generated model was protected by the First Amendment. R. at 2. FakeBlock further alleged immunity under 47 U.S.C. § 230, the Communications Decency Act ("CDA"). R. at 2. The District Court rejected FakeBlock's claim that it



was immune from liability but granted summary judgment in favor of both defendants on the merits. R. at 2.

Ms. Austero appealed the district court's grant of summary judgment to the United States Court of Appeals for the Fifteenth Circuit. R. at 2. In an en banc opinion, the Fifteenth Circuit held (1) FakeBlock was not entitled to immunity under the CDA, (2) Ms. Austero satisfied the likeness requirement for the right-of-publicity claim, and (3) the AI-generated model was not a transformative use and thus not protected by the First Amendment. R. at 39. FakeBlock and Ms. Fünke petitioned for writ of certiorari which this Court granted.

### **SUMMARY OF THE ARGUMENT**

The Fifteenth Circuit's ruling should be upheld because the Communications Decency Act ("CDA") does not immunize a social media platform from its own speech, and even if it did, the CDA provides an exception for right-of-publicity claims under state law. First, the CDA will not immunize a social media platform from its own content posted by its own corporate officer acting within the scope of their corporate responsibility. In the present case, the corporate officer posted content pursuant to her corporate responsibilities, as the post channeled new investors to the social media platform. While she also maintained personal reasons for creating the post, the CDA does not require a corporate officer to act exclusively in a corporate capacity. Second, the CDA exempts any law pertaining to intellectual property from immunity. A right-of-publicity claim under state law pertains to intellectual property because it involves a cognizable financial interest in one's likeness. Further, the broad exemption for any

intellectual property law encompasses claims arising under both state and federal law. Therefore, the CDA will not immunize the social media company from any right-of-publicity claim arising from its own speech.

Likewise, the Fifteenth Circuit correctly reversed the grant of summary judgment on Ms. Austero's right-of-publicity claim. Under Federal Rule of Civil Procedure 56(a), the burden is on the movant to first demonstrate that there is a genuine dispute of material fact. Petitioners have not met this burden as they ignore the obvious similarities between Ms. Austero and Moonie in Petitioners' film. Next, if Petitioners satisfy their burden under this first prong, the burden then shifts to Ms. Austero to demonstrate that she has evidence sufficient to satisfy all elements of her right-of-publicity claim. Since the Supreme Court of Newport Beach has adopted the Restatement for the right-of-publicity claim without identifying specific elements, the Fifteenth Circuit correctly looked to other jurisdictions for the appropriate test. Judge Walt's dissenting opinion in the Fifteenth Circuit criticizes the majority for doing so; this contention is misplaced, since the elements identified by the majority align with the Restatement's cause of action. Regardless of the test used, Ms. Austero's claim satisfies every element identified by the Supreme Court of Newport Beach.

Additionally, the First Amendment does not protect Petitioners from Ms. Austero's infringement claim since Petitioners have not met the higher threshold required. Petitioners failed to sufficiently transform Ms. Austero's likeness to receive First Amendment protection. Ms. Fünke's freedom of expression is minimized

because Petitioners' primary interest lies in their commercial gain and use of the AI-generated model as an advertising and marketing tool. Ms. Austero's likeness is integral to the essence of the AI-generated model. The evidence indicates that Ms. Fünke's AI-generation software extensively analyzed countless of Ms. Austero's performances with the AI-generated model programmed to embody Ms. Austero. Ms. Austero is the very sum and substance of Ms. Fünke's work. Ms. Fünke's objective was to attract traffic to FakeBlock and showcase to potential licensees her software's capacity to produce realistic human representations. Petitioners did not post the AI-generated model to publish factual information about Ms. Austero, but rather for commercial reasons. Therefore, the public-interest defense does not bar Ms. Austero's right-of-publicity claim.

## ARGUMENT

*Standard of Review.* This appeal addresses a grant of summary judgment and will be reviewed *de novo*. *In re La. Crawfish Providers*, 852 F.3d 456, 462 (5th Cir. 2017).

### I. THE COMMUNICATIONS DECENCY ACT (“CDA”) DOES NOT IMMUNIZE A SOCIAL MEDIA PLATFORM FROM A RIGHT-OF-PUBLICITY CLAIM UNDER STATE LAW CONCERNING CONTENT POSTED BY ONE OF ITS CORPORATE OFFICERS.

The Fifteenth Circuit's ruling should be upheld because a social media platform is not entitled to immunity under the CDA for either information the platform provides itself or information giving rise to any claim involving intellectual property. First, the CDA will not immunize the social media platform from its own content posted by its own corporate officer. In the present case, the corporate officer

posted the film within the scope of her corporate responsibilities, thus amounting to the platform's own speech. Second, even if this Court holds that the post was not provided by the social media platform, the CDA does not apply to Ms. Austero's intellectual property claim which pertains to the dilution of her public image. Here, Ms. Austero has a cognizable business interest in her publicity that her state-law claim seeks to protect as a matter of intellectual property. For both reasons, the CDA should not immunize the social media company from Ms. Austero's claim.

**A. The CDA does not immunize a social media platform from information posted by its own corporate officer.**

The Fifteenth Circuit's ruling should be upheld because the corporate officer posted the film while acting in the social media platform's interest. The CDA immunizes the social media platform if (1) it provides an "interactive computer service," (2) Ms. Austero's claim arises from content provided by an "information content provider" other than the social media platform, and (3) Ms. Austero's claim holds the platform responsible as the "publisher or speaker" of the content. *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); 47 U.S.C. § 230; *see also Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014) (recognizing that a defendant can be both an "information content provider" and an "interactive computer service provider"); *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1263 n.6 (N.D. Cal. 2006) (same). Here, the parties agree that the social media platform provides an "interactive computer service" under the CDA and Ms. Austero seeks to hold it responsible as the publisher of the film. 47 U.S.C. § 230(f)(2).

As to the second element, the social media platform will be held responsible as the “information content provider” if it “is responsible, in whole *or in part*, for the creation or development of [the film].” 47 U.S.C. § 230(f)(3) (emphasis added); *see FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016) (“This definition ‘cover[s] even those who are responsible for the development of content only in part.’”) (quoting *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009)). The CDA does not exculpate interactive content providers from their own speech. *Universal Commc’n Sys., Inc.*, 478 F.3d at 419; *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 297 (D.N.H. 2008). The social media platform is responsible for film’s development because it was created and posted by the platform’s own corporate officer acting to promote the platform and attract new investors, thus precluding immunity under the CDA.<sup>1</sup>

*1. The post reflected the social media platform’s own speech.*

The social media platform should not enjoy immunity from its own speech, particularly speech that its corporate officer used in channeling traffic to the platform. Courts have long recognized that corporations may only act through agents. *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 225 (3d Cir. 2007); *see also*

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<sup>1</sup> Resolving the dispute under the 47 U.S.C. § 230(f) further allows this Court to avoid the less-settled issue under 47 U.S.C. §230(e). *See Zine v. Mukasey*, 517 F.3d 535, 540 (8th Cir. 2008) (“[W]e need not enter this thicket because the issue presented in this case can be resolved more narrowly.”); *see also Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 26 n.9 (1st Cir. 2019) (highlighting the complexity of issues under 47 U.S.C. § 230(e)(2)); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1324 (11th Cir. 2006) (asserting that the lower court did not have to “address the difficult issues of application” of 47 U.S.C. § 230(e)(2)).

*Douglass v. Hustler Mag., Inc.*, 769 F.2d 1128, 1132–40 (7th Cir. 1985) (recognizing that a principal may be held liable for the actions of an agent for a right-of-publicity claim). Here, the incorporated social media platform acted through one of its only three agents. An agent’s conduct lies within their scope of employment if the agent is employed to perform similar conduct within authorized limits and “is actuated, *at least in part*, by a purpose to serve the [principal].” See RESTATEMENT (SECOND) OF AGENCY § 228 (1958) (emphasis added).<sup>2</sup> The social media platform’s corporate officer created, edited, and posted the film so it would go viral and attract viewers to the platform—the same platform that she was financially invested in. As one of only three people allowed to post content to the platform, the corporate officer exercised authority that far exceeded provider involvement in other cases that denied immunity under the CDA. See, e.g., *LeadClick Media, LLC*, 838 F.3d at 176 (holding defendant responsible as an information content provider when it merely paid affiliates who subsequently engaged in the unlawful activity); *Fair Hous. Council v. Roommate.com, LLC*, 521 F.3d 1157, 1167–69 (9th Cir. 2008) (denying immunity under the CDA when defendant designed its search engine so users could illegally discriminate against protected tenants).

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<sup>2</sup> The lower courts chose to neither engage in a full scope of employment analysis nor select a standard for determining whether the conduct fell within the corporate officer’s scope of employment. However, Ms. Austero contends that if a standard is selected, it should come from the Restatement, given that the publicity claim at issue also comes from the Restatement and there is no federal standard for scope of employment.

While the social media platform argues that its corporate officer also acted in her personal capacity when she uploaded the film, the CDA excludes immunity so long as she acted—at least partially—in the platform’s interest. *See* 47 U.S.C. § 230; RESTATEMENT (SECOND) OF AGENCY § 228 (1958). The CDA clarifies that the platform does not enjoy immunity if it “is responsible, *in whole or in part*, for the creation or development of [the film].” 47 U.S.C. § 230(f)(3) (emphasis added). Case law further supports Ms. Austero’s interpretation of this section. *See, e.g., LeadClick Media, LLC*, 838 F.3d at 176 (holding that defendant would not be immunized by the CDA because of its partial involvement in an unlawful scheme). Therefore, it makes no difference that the corporate officer may have posted the film to aid her mother’s campaign and demonstrate her artificial intelligence software’s capabilities—she sufficiently involved the social media platform by posting the film exclusively to its website to attract viewers and increase the platform’s popularity.

The social media platform likewise places misguided emphasis on its disorganized and “ragtag” operation, a fact that rather undermines immunity under the CDA. *See* R. at 56. The CDA provides an exchange of responsibility for immunity, as internet content providers must meet certain criteria and perform ongoing responsibilities to receive immunity. *See generally* 47 U.S.C. § 230 (a)–(d) (establishing policy goals, immunity from civil liability, and the obligations an interactive computer service must perform to receive that immunity). If the platform truly operates in “ragtag” fashion, it will likely be less capable of performing these obligations and thus less entitled to immunity under the CDA. *See* R. at 56. More

importantly, the relative lack of the platform’s business sophistication did not limit the damaging effects of the film it posted.<sup>3</sup> The post generated significant web traffic regardless of the platform’s lack of resources. Given the CDA’s goals, the platform should not be immunized from its own speech merely because it lacks business sophistication.

The social media platform also claims that because it eventually fired the corporate officer and deleted the post, the film did not reflect its own speech. However, the film remained on the platform for nearly three months, and by then—given that the website was in its beta-testing phase when only its corporate officers could post content—the remaining corporate officers had all likely seen the film. Rather, these actions taken by the platform reflect ameliorative attempts to protect itself shortly after the lawsuit was filed. These efforts occurred after the damaging effects of the film and do not relieve the social media platform from liability for its own speech under the CDA.

*2. The corporate officer’s contested intentions behind posting the film raise a fact issue amenable to a jury.*

Even if this Court questions Ms. Austero’s argument that the corporate officer acted in her corporate responsibility, this amounts to a reasonable inference that

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<sup>3</sup> It has likewise been contended that making the social media platform liable for any post on its website creates an excessive burden, particularly on its fledgling website. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (emphasizing how millions of postings provide a near-impossible expectation of the interactive computer service). While this may otherwise be a valid concern, the social media platform operated its website so that only its three corporate officers could post information. Therefore, by design, it eliminated the need to sort through “millions” of posts made by a variety of people. *Id.*



should be resolved in Ms. Austero's favor as the non-movant in a summary judgment motion. *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021); Fed. R. Civ. P. 56(a). This Court should deny a motion for summary judgment if any issues of material fact remain for a jury or if the social media platform fails to meet its burden given all reasonable inferences in favor of Ms. Austero. *Guzman*, 18 F.4th at 160; Fed. R. Civ. P. 56(a). Here, the corporate officer's underlying intentions for the film are a fact issue that rests with a jury and should not be determined as a matter of law. Thus, even if this Court believes that the corporate officer may not have acted in her corporate responsibility, it should resolve this uncertainty in Ms. Austero's favor and leave any remaining issues of material fact to a jury.

**B. The CDA does not immunize an interactive computer service against any intellectual property claims.**

The social media platform should not be immunized against Ms. Austero's publicity claim because the state law pertains to intellectual property and the CDA excludes any law pertaining to intellectual property from immunity. The CDA states that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property." 47 U.S.C. § 230(e)(2). Ms. Austero sued pursuant to a state-law right of publicity, claiming that the platform "appropriate[d] to [its] own use or benefit [her] name or likeness" and thus "is subject to liability . . . for invasion of [her] privacy." RESTATEMENT (SECOND) OF TORTS § 652C (1977). While the claim historically relates to the right of privacy, abundant authority shows how publicity currently involves intellectual property. *See Zacchini v. Scripps-Howard Broad Co.*, 433 U.S. 562, 573 (1977); *Hepp v. Facebook*, 14 F.4th 204, 212–14 (3d Cir. 2021);

*Intellectual Property*, BLACK'S LAW DICTIONARY (11th ed. 2019). Further, the language of the CDA supports a broad exception for “any law pertaining to intellectual property” so that—due to publicity’s pertinence to intellectual property—Ms. Austero’s claim should be exempted from the CDA regardless of its state-law origin. 47 U.S.C. § 230(e)(2).

1. *A state-law right-of-publicity claim involves intellectual property.*

Ms. Austero’s right-of-publicity claim under state law involves intellectual property because publicity is both commonly defined as an intellectual property right and analogous to other forms of legally recognized intellectual property. The CDA refuses immunity for a violation of “any law pertaining to intellectual property;” however, fails to define “intellectual property.” 47 U.S.C. § 230(e)(2). Many legal sources categorically define publicity as an intellectual property right. *See Hepp*, 14 F.4th at 212–14; *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323 (11th Cir. 2006) (“[T]here appears to be no dispute that the right of publicity is a type of intellectual property right . . . .”); *Intellectual Property*, BLACK'S LAW DICTIONARY (11th ed. 2019). While a uniform definition of intellectual property is not available, courts have recognized publicity as intellectual property where there is a cognizable business interest. *See Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 967 (10th Cir. 1996); *Zacchini*, 433 U.S. at 573. Because Ms. Austero maintains a financial stake in making public appearances as an entertainer and politician, her publicity involves a cognizable business interest and thus an intellectual property right for the purposes of the CDA.

This Court should find that publicity pertains to intellectual property as a categorical matter. Most relevant legal dictionaries define “intellectual property” as including “publicity rights.” *See Intellectual Property*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A category of intangible rights protecting commercially valuable products of the human intellect. The category comprises primarily trademark, copyright, and patent rights, but also includes . . . publicity rights . . . .”); *Intellectual Property*, MCCARTHY’S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY (1st ed. 1991). Even for those that do not, the definitions used for “intellectual property” would necessarily include publicity claims. *See Intellectual Property*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969) (“Those property rights which result from the physical manifestation of original thought.”); *Intellectual Property*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003) (“Property . . . that derives from the work of the mind of intellect . . . .”). Courts have also categorically considered the right of publicity to constitute intellectual property. *See Almeida*, 456 F.3d at 1323 (11th Cir. 2006) (“There appears to be no dispute that the right of publicity is a type of intellectual property right . . . .”). Here, Ms. Austero’s publicity derives value from her likeness, which is recognizable as a product of her award-winning work as a singer, actress, and dancer. Therefore, Ms. Austero’s claim involves intellectual property under most commonly used definitions of the term.

The social media platform will likely turn instead to definitions of intellectual property found in other congressional statutes, but these prove unavailing as the definitions are written in the context of specific statutes and often omit key aspects

of intellectual property law. For example, the Bankruptcy Code defines intellectual property in the context of its subject matter and omits trademarks, which are otherwise understood as a fundamental source of intellectual property. 11 U.S.C. § 101(35A); *see Sunbeam Prods., Inc. v. Chicago Am. Mfg., LLC*, 686 F.3d 372, 375 (7th Cir. 2012) (describing the inadequacies of this definition); *see also* 19 U.S.C. § 2242(d)(2) (describing a violation of intellectual property rights in the context of foreign affairs and omitting unregistered trademarks that would otherwise be protected in the U.S.). Because these descriptions are only illustrative of the term “intellectual property” as applied to their respective statutes, this Court should not place emphasis on descriptions from other statutes.

Rather, this Court should adopt the interpretation of other courts recognizing publicity as involving intellectual property by analogy to traditional forms of intellectual property. In *Zacchini*, this Court found that the right of publicity “is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors . . . .” 433 U.S. at 573. There, this Court reasoned that the plaintiff performer was “a person with a name having commercial value.” *Id.* at 572. In *Hepp*, the Third Circuit recently found that “the right of publicity and trademark are close analogues.” 14 F.4th at 213; *see also Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 393–94 (N.J. 1907) (recognizing the inherent similarities between the right to one’s likeness and trademark); *Von Thodorovich v. Franz Josef Beneficial Ass’n*, 154 F. 911, 913 (C.C.E.D. Pa. 1907) (granting an injunction to stop the use of plaintiff’s image because it falsely implied his

endorsement); *Tyne v. Time Warner Ent. Co.*, 901 So. 2d 802, 806 (Fla. 2005) (explaining how an individual can be harmed by the misappropriation of their name or likeness with something else). Because Ms. Austero should be able to reap the benefits of her marketable likeness, this Court should follow its precedent by recognizing her publicity as intellectual property.

The circumstances surrounding Ms. Austero’s publicity claim also highlight the cognizable business interest in her likeness, similar to other forms of intellectual property. Ms. Austero created a strong image of herself through her experience as a singer, dancer, and actress. She derived financial gain through her strong public recognition, as she became more desirable to appear, whether that be in advertisements, movies, or other forms of consumer entertainment. The development of her likeness reflects how companies use identifying marks and later protect them under trademark law. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767–770 (1992) (describing how trademark law protects the deceptive and misleading use of marks). Specifically, by posting a film showing an AI-generated version of Ms. Austero performing lewd acts (including a striptease), the social media platform diluted the value of her likeness similar to diluting a trademark. *See Jack Daniels Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 163 (2023) (holding that a dog toy company may have diluted a popular trademark by using a similar mark on a dog toy); *V Secret Catalogue, Inc., v. Moseley*, 259 F.3d 464, 477 (6th Cir. 2001) (suggesting that a “classic instance” of dilution would occur if a mark was misappropriated and used for “sex toys” or “lewd coffee mugs”). As with trademark, copyright, or patent

law, Ms. Austero should enjoy protection of her right to publicity so she may benefit financially from her likeness. *See Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1447 (11th Cir. 1998).

The social media platform may place undue emphasis on the state-law right of publicity's history as a privacy claim, but this ignores both recent developments in the law and assumes that intellectual property and privacy are mutually exclusive. First, as previously discussed, recent case law recognizes the relationship between intellectual property and publicity, distinguishing the right to be left alone from a cognizable financial interest. *Cardtoons*, 95 F.3d at 967. Second, even if the right of publicity relates to privacy, it does not preclude simultaneous relation to an intellectual property right.<sup>4</sup> For example, a trade secret is a form of intellectual property that is often misappropriated by breaching the owner's reasonable right to privacy. *See duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970) (emphasizing the importance of privacy when deciding whether flying a spy plane over a roofless building misappropriated a trade secret). Therefore, Ms. Austero's right-of-publicity claim involves intellectual property regardless of its past relationship with the right to privacy, thus subjecting it to the CDA's exception.

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<sup>4</sup> Importantly, the CDA's exception does not require that the law exclusively relates to intellectual property, but rather that it merely *pertains* to intellectual property. 47 U.S.C. § 230(e)(2). It thus makes no impact that Ms. Austero's claim may bear some relation to the right of privacy.

2. *The CDA exempts immunity from any law pertaining to intellectual property.*

The CDA exempts both state and federal laws pertaining to intellectual property from immunity because Congress intended the exception to have broad reach. The CDA declines to immunize interactive computer service providers from “any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2) (emphasis added). As a policy matter, statutory interpretation should give effect to Congress’s intent. *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542 (1940). Courts historically start with the statutory text, giving effect to the entire disputed section. *See Talley v. Wetzel*, 15 F.4th 275, 280 (3d Cir. 2021); *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013) (asserting that every word and provision should be given effect). Because the plain language of the CDA demonstrates Congress’s intent to exempt any and all laws pertaining to intellectual property, Ms. Austero’s claim should bypass the CDA.

A plain reading of the CDA dictates that all claims pertaining to intellectual property should be exempt from immunity, including those arising under state law. When drafting the CDA, Congress expressly determined that it would have no impact upon “any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2) (emphasis added). A common understanding of the word “any” suggests that the exception encompasses all of these laws, both state and federal. *See Any*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003) (describing how the word selects “indiscriminately of whatever kind” of the modified noun); *Any*, OXFORD ADVANCED LEARNER’S DICTIONARY (10th ed. 2020) (describing how the word modifies nouns so

“it does not matter which one”). This Court has historically interpreted “any” consistent with this plain meaning. *See Harrison v. PPG Indus.*, 446 U.S. 578, 589 (1980) (interpreting “any other final action” to “mean exactly what it says, namely, *any other* final action”); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218 (2008) (interpreting “any other law enforcement officer” broadly).

Several lower courts have recognized the plain reading of the exception, particularly in light of the surrounding provisions of the CDA. In *Hepp*, the Third Circuit “adhere[d] to the most natural reading of § 230(e)(2)” by holding that the exception applied to both state and federal laws. 14 F.4th at 212; *see id.* (“Simply put, a state law can be a ‘law pertaining to intellectual property,’ too.”); *see also Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 413–14 (S.D.N.Y. 2001) (finding the language of the statute to be unambiguously broad). The court emphasized that in other provisions, Congress elected to use “federal law,” “federal statutes,” “state law,” and “local law” but refrained from using a qualifier other than the word “any” in the intellectual property exception. *Hepp*, 14 F.4th at 210–212; 47 U.S.C. § 230(e)(2); *see also Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 703 (S.D.N.Y. 2009) (pointing out each instance Congress distinguished between federal and state laws in the CDA, showing that “it knew how to make that clear, but chose not to [in the intellectual property exception]”); *Friendfinder*, 540 F. Supp. 2d at 299–300 (same). Because the modifier “any” indiscriminately expands the intellectual property laws captured by the exception, Ms. Austero’s claim under state law should be exempt from the CDA.



While the social media platform argues that “any law pertaining to intellectual property” must instead mean “any *federal* law pertaining to intellectual property,” that interpretation departs from Congress’s plain expression of the text. The platform specifically relies on the Ninth Circuit’s interpretation of the CDA, which was fundamentally altered to—in the court’s view—better effectuate Congress’s desired policy. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 (9th Cir. 2007) (“[W]e construe the term ‘intellectual property’ to mean ‘federal intellectual property.’”) (citations omitted); *Curran v. Amazon.com, Inc.*, No. 2:07-0354, 2008 WL 472433, at \*11 (S.D. W. Va. Feb. 19, 2008) (recognizing immunity for right-of-publicity claims under the CDA) (citing *Perfect 10*, 488 F.3d at 1119 n.5). The court reasoned that although the plain language of the statute suggests otherwise, departure from the text was necessary to facilitate “Congress’s expressed goal of insulating the development of the Internet from various state-law regimes.” *Id.* at 1118 (citing 47 U.S.C. §§ 230(a), (b)); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (suggesting that the court may go beyond the text of a statute if “that language would defeat [its] plain purpose”); *Lewis v. Grinker*, 965 F.2d 1206, 1215 (2d Cir. 1992) (asserting that the language is not an “infallible proxy”) (citations omitted). However, the Ninth Circuit erred because the plain meaning of the statute (1) better effectuates Congress’s stated policy goals and (2) should not be displaced by judicial policy appraisals.

State laws protecting intellectual property should foster the successful development of internet markets because property holders will be incentivized to

create and expand upon their financial interests. State property laws have been recognized as successfully facilitating nationwide markets throughout this Court’s history. *See Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1029 (2021); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Specifically, state intellectual property laws have been recognized by this Court as protecting important financial interests. *See Goldstein v. California*, 412 U.S. 546, 570–71 (1973) (recognizing a state’s right to protect copyrighted material—in excess of federal copyright laws—to incentivize the creation of new works). While the social media platform suggests that permitting Ms. Austero’s claim would constitute an overprotection of intellectual property, the vast number of states that have adopted the same law instead shows that its protection is appropriate. *See, e.g., In re Jackson*, 972 F.3d 25, 38 (2d Cir. 2020) (Connecticut); *Wagner v. Gallup, Inc.*, 788 F.3d 877, 889 (8th Cir. 2015) (Michigan); *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 638 (5th Cir. 2007) (Texas). The uniformity suggests a nationwide recognition of the financial interest involved with the right of publicity—one that should be protected to foster a successful internet market pursuant to the CDA’s policy goals.

This Court should also decline departing from the plain language of the CDA because Congress made its intent clear and may choose to amend the statute’s language if necessary. Article One of the Constitution grants Congress the power to legislate. U.S. CONST. art. I; *see also Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (“The wisdom of Congress’ action, however, is not within [this Court’s] province to second-guess.”). This Court has historically respected the plain language of statutes,

choosing not to unilaterally conform the language to its desired policy goals. *See Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 126 (1989) (“Our task is to apply the text, not to improve upon it.”); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (recognizing that this Court’s appraisal of Congress’s selected action should not impact statutory interpretation). Given that Congress clearly exempted “any law pertaining to intellectual property” from the CDA, this Court should not provide an alternate interpretation of the plain language merely because it does not agree with the broad reach of the exception. 47 U.S.C. § 230(e)(2).

Therefore, the social media platform should not be granted immunity under the CDA because Ms. Austero seeks to hold it accountable for its own speech under a state-law claim for right of publicity.

## II. THE ARTIFICIAL INTELLIGENCE MODEL INFRINGES ON MS. AUSTERO’S RIGHT OF PUBLICITY AND DOES NOT QUALIFY FOR PROTECTION UNDER THE FIRST AMENDMENT.

The Petitioners argue that, since the AI-generated model does not appropriate any identifying characteristics unique to Ms. Austero, she has no right-of-publicity claim and summary judgment should be granted. Their argument is flawed: not only does the appropriation by Petitioners raise a fact issue for a jury to decide, but in addition, the Petitioners’ deliberate use of Ms. Austero’s likeness made her readily identifiable. In addition, Petitioners contend that the AI-generated model is protected by the First Amendment and the public-interest defense bars Ms. Austero’s claim. But, since the model neither transforms Ms. Austero’s likeness nor relates to the public’s interest, their argument falls flat.

**A. Ms. Austero is readily identifiable by the AI-generated model which infringes on her right of publicity.**

In the District Court of Newport Beach, Petitioners moved for summary judgment arguing that Ms. Austero has no viable right-of-publicity claim. The Fifteenth Circuit reversed the district court's grant of summary judgment, holding that the Petitioners made deliberate use of Ms. Austero's likeness and finding a valid right-of-publicity claim. R. at 25. Under Federal Rule of Civil Procedure 56, summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movants "bear[] the initial burden to show the district court that there are no genuine issues of material fact that should be decided at trial." *See Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Only after the movant has met its burden, the non-movant party bears the burden to "make a sufficient showing on [each] essential element of her case with respect to which she has the burden of proof." *Id.* Lastly, any "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Under these standards, there are two disagreements between the parties here. First, the parties disagree whether evidence of similarities between Ms. Austero and the AI-generated model, Moonie, raises a fact issue regarding the Petitioner's appropriation of Ms. Austero's identity. Though the Fifteenth Circuit did not decide this issue, the similarities and differences identified by the parties' experts lend to reasonable jurors disagreeing about the degree to which the AI-generated model resembles Ms. Austero. For the second disagreement, Petitioners argue that the

right-of-publicity claim should be decided as a matter of law, since the AI-generated model does not infringe on Ms. Austero’s unique and protectable interest. This assertion is not supported by the law and the deliberate forms of appropriation used by the Petitioners. *See Dupree v. Younger*, 598 U.S. 729, 737 (2023) (stating that Rule 56 allows courts to deny summary judgment when “the law does not support the movant’s position”). The critical issue is whether Ms. Austero is identifiable by the model. Lastly, the Fifteenth Circuit utilized a “three element test” from another jurisdiction to decide the right-of-publicity claim. Judge Walt’s dissenting opinion characterized the majority’s use of this test as an “*Erie* guess” and “an unjustified expansion” of the right of publicity. R. at 59. Realistically, this contention is based on a surface-level determination of the correct legal standards and disregards the case law from other jurisdictions regarding the protection of a plaintiff’s identity.

1. *The Fifteenth Circuit analyzed the right of publicity correctly under the Restatement (Second) of Torts by requiring appropriation of name or likeness.*

The dissent urges that the Fifteenth Circuit engaged in an unsuccessful “*Erie* guess” that led to an erroneous holding. This mischaracterizes the insignificant role identity plays in the right-of-publicity analysis. Even when courts consider identity in the analysis, it is not a required element but a term of art that does not have to be satisfied by the plaintiff.

The Supreme Court of Newport Beach recognizes the right of publicity and has adopted the cause of action in the RESTATEMENT (SECOND) OF TORTS § 652C. Under the Restatement, “[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 (1977). As a federal court sitting in diversity, the Fifteenth Circuit is required to apply the substantive law of the state in which it sits. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (establishing that a federal court is required to apply the substantive law of the state unless the matter before it is governed by federal law). Despite this requirement, the Supreme Court of Newport Beach has never identified a specific test or elements for a right-of-publicity claim, besides the rule from the Restatement. In response, the Fifteenth Circuit relied on a factually similar case from the District Court of New Hampshire, *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 304 (D.N.H. 2008); R. at 20–21. In that case, the district court used the following test for a right-of-publicity claim.

1. Plaintiff owns an enforceable right in the identity or persona of a human being;
2. Defendant, without permission, has used some aspect of identity or persona in such a way that plaintiff is identifiable from defendant’s use; and
3. Defendant’s use is likely to cause damage to the commercial value of that persona.<sup>5</sup>

*Id.* (citing 1 J. THOMAS MCCARTHY, RIGHT OF PUBLICITY, § 3:2 (2d ed. 2000)). The Fifteenth Circuit dissent chided the majority for using this test. Specifically, Judge Walt claimed that this test was a part of a rampant and unjustified expansion of the right of publicity. R. at 60 (citing *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395

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<sup>5</sup> The third element from *Friendfinder* was not challenged by the Petitioners in their summary judgment motion, so it was not addressed by the Fifteenth Circuit.

(9th Cir. 1992) (Alarcon, J., dissenting). This contention is misplaced in the present since identity plays a completely different role in *White*.

First, the majority's decision in *White* is an outlier and expanded the right of publicity outside the scope of the California common law. In that case, Vanna White sued Samsung Electronics America, Inc. in federal district court under the California common law right of publicity. *White*, 971 F.2d at 1396. California common law states that a right-of-publicity claim "may be [pled] by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Id.* at 1397 (citing *Eastwood v. Super. Ct.*, 149 Cal. App. 3d 409, 417 (1983)). The Ninth Circuit found "that the [advertisement] did not make use of White's name or likeness," but the "right-of-publicity is not so confined." *Id.* at 1397. In support of this, the court referenced precedent and secondary sources to reason that "[i]t is not important how the defendant has appropriated the plaintiff's identity, but whether the defendant has done so." *Id.* at 1399.

Judge Walt's dissenting opinion seeks to analogize the Fifteenth Circuit's use of the *Friendfinder* elements to the court in *White*, but their holdings are fundamentally different. The analogy goes as follows: The second element of the *Friendfinder* test states that "[d]efendant, without permission, has used some aspect of *identity* or persona in such a way that plaintiff is identifiable from defendant's use." *Friendfinder*, 540 F. Supp. 2d at 304 (emphasis added). The Ninth Circuit's expansion of the right of publicity to include "identity" in the *White* case is unjustified, so the

Fifteenth Circuit use of “identity” is also unjustified and ultimately the incorrect analysis. On the surface, this analogy seems plausible, but a deeper dive reveals a critical flaw. In the *White* decision, the Ninth Circuit created an entirely new element or way to infringe on the plaintiff’s right of publicity, since neither name nor likeness could be proven. *White*, 971 F.2d at 1397–99. Conversely, neither the Fifteenth Circuit’s majority nor dissent use “identity” as a distinct element with their holdings depending exclusively on “likeness.” *See* R. at 23 (“Whether the defendants have appropriated Austero’s likeness is a closer question.”); R. at 60 (stating that “the only proper question for the Court was whether Austero raised a fact issue about Fünke’s appropriation of Austero’s likeness”).

Another fact that distinguishes the Ninth Circuit’s opinion from the use *Friendfinder* is that “identity” was already an element of California’s right-of-publicity claim but played an insignificant role. The first element of California’s common law right-of-publicity claim states that “the defendant must have made use of the plaintiff’s *identity*.” *See Eastwood*, 149 Cal. App. at 417 (emphasis added). But neither the *White* majority nor dissent even discussed this element as a justification to expand the tort to include “identity.” This proves that “identity” is used as a legal term of art that is without force, and the only requirement is the infringement through “name or likeness.” *See* RESTATEMENT (SECOND) OF TORTS § 652C. The Fifteenth Circuit uses “identity” in an almost identical manner by still requiring Ms. Austero to prove appropriation of her likeness as required under the Restatement (Second) of Torts. Ultimately, Judge Walt’s dissenting opinion creates an issue where



the truly is none. Both lower court opinions decided the right-of-publicity claim on whether “likeness” is satisfied, not “identity.”

Second, Judge Walt still urges that the majority should have either “asked the Supreme Court of Newport Beach to identify the elements of a right-of-publicity claim” or “consulted decisions from other jurisdictions to determine the ‘majority’ rule.” R. at 59. Both procedures are unnecessary, since *Friendfinder’s* elements align with the principles from the RESTATEMENT (SECOND) OF TORTS § 652C. The Restatement declares that “[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.” *Id.* Primarily, this establishes that “name or likeness” are the main avenues to prove appropriation. Comment A of § 652C elaborates that the Restatement protects “the interest of the individual in the exclusive use of his own *identity*, in so far as it is represented by his name or likeness . . . .” *Id.* at cmt. *a.* This language is important as it still requires the appropriation of name or likeness. This Comment realizes that “identity” is an *end* to the right-of-publicity claim rather than a *means*. In response to the dissent’s contention that the majority should have consulted other jurisdictions, other courts that have adopted § 652C of the Restatement have cited this Comment, recognized the role identity plays, and still required the plaintiff to prove name or likeness. *Friendfinder* is a direct example. The New Hampshire courts adopted § 652C and cited Comment A to supplement the right of publicity but still required the plaintiff to prove name or likeness. *See Friendfinder*, 540 F. Supp. 2d at 303 (citing *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001 (N.H. 2003)).

2. *The alleged similarities and differences between the AI-generated model and Ms. Austero raise a fact issue amenable to a jury.*

Petitioners first argue that the similarities and differences between the AI-generated model and Ms. Austero do not raise a fact issue regarding their appropriation of Ms. Austero's identity. In similar cases, a genuine dispute of material fact is present when there is a disagreement about the degree of resemblance between the plaintiff and the alleged infringement. These cases show that disputes of fact are not restricted to conflicting stories as the Petitioners urge.

A decisive case on this issue is *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242 (1985). In further specifying the summary judgment standard, this Court first addressed that the substantive law "will identify which facts are material." *Id.* at 248. Next, this Court found that there is "genuine" dispute of fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

A probative case with similar facts to the present case was decided by the Ninth Circuit in *Wendt v. Host Intern., Inc.*, 125 F.3d 806 (9th Cir. 1997). In this decision, plaintiffs brought a state right-of-publicity claim against the defendants for "creating animatronic robotic figures based upon their likeness . . . ." *Id.* at 809. The district court granted summary judgment for the defendants, holding that "no reasonable jury could find that the robots are similar whatsoever to Plaintiffs." *Id.* at 810. On appeal, the Ninth Circuit reversed, holding that "material facts exist that might cause a reasonable jury to find [the robots] sufficiently 'like'" the plaintiffs. *Id.* In addition, the court held that summary judgment should be granted "only if no genuine issue of material fact concerning that degree of resemblance were raised by" plaintiffs. *Id.*

Other courts have recognized this principle and found that whether the appropriation satisfies likeness or resembles the plaintiff should be left to a jury. *See Jackson v. Odenat*, 9 F. Supp. 3d 342, 343 (S.D.N.Y. 2014) (“Whether a photo is recognizable likeness of the plaintiff is ordinarily a jury question.”).

Applying these principles to this case, Petitioners have not upheld their burden of demonstrating that there is no genuine dispute of material fact. First, the alleged similarities and differences between the AI-generated model and Ms. Austero are material, since they are the only evidence to support whether likeness is satisfied. Petitioners’ expert identified the following differences between the AI-generated model and Ms. Austero:

- Both Austero and Moonie have “pixie” haircuts; however, Moonie’s hair is mostly “flat” across her head, unlike Austero’s signature style (which features spiky hair, or as another witness described it, “points”);
- Austero has a beauty mark on her left cheek, but Moonie does not;
- Moonie’s nose features a prominent downward tip, but Austero’s does not;
- Moonie’s mouth is disproportionately large for her head;
- Austero’s famous smile usually displays her teeth, but Moonie’s smile does not;
- A close inspection reveals there are only four fingers on Moonie’s left hand, and the skin on that hand displays inconsistent aging (*i.e.*, the skin on the back of the hand and three of the fingers is wrinkled, but the index finger is smooth); and
- Perhaps most noticeably, Moonie’s eyes are rather wideset, and her right eye has an unnatural and asymmetric slant that is not only distinct from Austero’s (symmetric) eyes but also dissimilar even from Moonie’s left eye.

R. at 23–24. Like the Fifteenth Circuit stated, if this Court was only concerned with the minute differences between facial features and whether the AI-generated model is an exact copy of Ms. Austero, a reasonable jury would not find enough of a resemblance to conclude that Petitioners appropriated Ms. Austero’s likeness. But likeness is not confined to facial structure comparisons and there is a plethora of similarities identified by Ms. Austero’s expert including the following:

- Moonie’s skin color, hair color, hair style, height, body style, and body proportions are very similar to Austero’s;
- Moonie wears the identical outfit (*i.e.*, a halter vest, short shorts, a derby hat, garters, and lace-up boots) that Austero memorably wore in the movie *Cabaret*;
- Although Moonie’s tap dance is unlike Austero’s famous “Mein Herr” performance in *Cabaret*, it is remarkably similar to one of Austero’s tap-dancing performances in 1992 in the Radio City Music Hall;
- The name “Moonie” *may be* a play on the titular role played by Austero in the movie *Tell Me That You Love Me, Junie Moon*, in which Austero—like Moonie—strips off her clothes; and
- Moonie’s performance captures all three aspects of what makes Austero’s fame somewhat unique: acting, dancing, and singing performances for which Austero has won an Oscar, an Emmy, and four Tony awards.

R. at 24–25.

Like the facial features of the robots that were decisive in *Wendt*, the biographical similarities, identical outfits, tap dance routine, and song choice are all critical to whether AI-generated model resembles Ms. Austero. See *Wendt*, 125 F.3d at 810 (acknowledging that the facts “concerning the degree to which the robots are like” the plaintiff are material for summary judgment). The critical inquiry in right-

of-publicity claims is whether the plaintiff is identifiable by the appropriation. *White*, 971 F.2d at 1404 (stating that “identifying characteristics unique to plaintiff” create a triable issue of fact on whether their identity has been appropriated). Similar to the district court and the Ninth Circuit in *Wendt*, reasonable jurors could disagree whether Ms. Austero is identifiable by the AI-generated model. *See Wendt*, 125 F.3d at 810 (disagreeing whether the animatronic robots bear an “impressionistic resemblance” to the plaintiff). The evidence of resemblance in the present case has even more force since the artificial intelligence leads to only minute differences in facial structure, allowing a jury to find that Ms. Austero satisfies the likeness requirement. Although the AI-generated model uses many qualities that make Ms. Austero identifiable, if jurors could disagree, summary judgment should be denied.

3. *The AI-generated model appropriated qualities that made Ms. Austero identifiable, satisfying the likeness requirement under the Restatement.*

For the second prong of the summary judgment analysis, Petitioners argue that the right-of-publicity claim should be decided as a matter of law, because nothing about the AI-generated model appropriates a unique and protectable interest. Because there is no protectable interest, Ms. Austero is unable to satisfy “likeness” under the Restatement. Although the burden lies with Ms. Austero to prove likeness, Petitioners’ deliberate use of Ms. Austero’s biographical data, outfits, previous acting roles, and musical performances lend toward her being identifiable by the AI-generated model.

First, as the Fifteenth Circuit acknowledges, there is a circuit split among the courts of appeals about the “permissible scope of a right-of-publicity claim vis-à-vis

plaintiffs who primarily achieved their fame through acting.” R. at 21. This inquiry is important as it determines whether the plaintiff has an actual “right” in that character that can be enforced.<sup>6</sup> See *Wendt*, 125 F.3d at 811 (noting actors did not own rights to characters they played, and such characters belonged to the copyright owner). While acknowledging this principle, the Ninth Circuit in *Wendt* held that an “actress does not lose the right to control the commercial exploitation of . . . her likeness by portraying a fictional character.” *Id.* The critical inquiry here is the association between the actor and the role. See *McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994). The identity of the actress is more likely to be embodied in the character “if the fictional figure was played exclusively by its creator.” *Id.* The Sixth Circuit also recognized this principle by reasoning that “the identity of a fictional character [may] become[] so synonymous with the identity of the actor playing the role that the actor may challenge the character’s exploitation.” *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 625 (6th Cir. 2000).

In the present case, the AI-generated model strongly resembles Ms. Austero and the name Moonie is likely in reference to Ms. Austero’s film, *Tell Me That You Love Me, Junie Moon*. Petitioners argue that the name Moonie was only used because of Moonie stripping down nude in the film. But given the summary judgment

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<sup>6</sup> The first element of the *Friendfinder* test requires that “[p]laintiff own[] an enforceable right in the identity or persona of a human being.” *Friendfinder*, 540 F. Supp. 2d at 304. Although this element was not discussed by the Fifteenth Circuit, the parties’ disagreement regarding whether Ms. Austero has protectable interest stems directly from this element. Ultimately, as this section argues, she has a protectable interest as the forms of appropriation make her identifiable to the audience of the AI-generated model.

standard, the court must consider all reasonable inferences in favor of the nonmovant. *See Anderson*, 477 U.S. at 255. In this instance, Ms. Austero urges that there is no coincidence that Petitioners chose the name, Moonie, without any reference to Ms. Austero’s well-known role as Junie Moon. In addition, Ms. Austero is the only actress to play Junie Moon increasing the likelihood that Moonie will be considered in conjunction with Ms. Austero’s character.

Second, Petitioners argues that Ms. Austero seeks protection over her biographical data such as height, body proportions and hairstyle. This misses the mark on the correct inquiry—it’s not important whether someone can obtain a monopoly over their biographical features, but rather whether the appropriation of her biographical data makes her identifiable. Petitioners incorporated many aspects of Ms. Austero’s biographical data, including skin color, hair color, hair style, height, body style, and body proportions.

The Fifteenth Circuit relied on three cases dealing with “alleged appropriation of the identities of various college and professional football players for use in football video games.” R. at 29. A common theme in all three cases was the defendant’s use of the players’ physical statistics, like height, skin tone, hair style, hair color, and unique information related to their football careers. *See, e.g., Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1175–76 (9th Cir. 2015) (“[E]ach player is described by his position, years in the NFL, height, weight, skin tone and relative skill level in different aspects of the sport.”); *Hart v. Elec. Arts Inc.*, 717 F.3d 141, 166 (3d Cir. 2013) (stating that the digital avatar “matched Appellant in terms of hair color, hair style, and skin tone

. . . [and] also accurately tracked Appellant’s vital and biographical details”); *Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1271 (9th Cir. 2013) (same). Importantly, in each of these cases, Electronic Arts conceded that these characters infringed on the plaintiffs’ right of publicity and primarily argued that the video game avatars were protected by the First Amendment. Conversely, Petitioners did not concede the right of publicity.

Despite this critical difference, these cases are still probative to our analysis. The former players in the three cases do not claim that they have a monopoly over their biographical data. Again, the critical factor to the plaintiffs’ claims was that the appropriation of their biographical statistics made them readily identifiable. The court in *Hart* recognized that there are some limitations to the use of technology in right-of-publicity claims, since the graphics may look “dated or overly-computerized.” *Hart*, 717 F.3d at 166. But this limitation did not prevent the court from finding likeness between the plaintiffs and the video game avatars. The Third Circuit found that video game graphics do not have to “reach (let alone cross) the uncanny valley to support a right of publicity claim.” *Hart*, 717 F.3d at 166. Similar to the differences between the players and avatars being caused by the computerized graphics, the minute differences between Moonie and Ms. Austero are a result of the use of artificial intelligence technology and its inherent inaccuracy. Regardless of the minute differences, the infringement by the AI-generated model is on the extreme end of the sliding scale identified by the Third Circuit.



Third, Ms. Fünke appropriated Ms. Austero’s likeness through AI-generated model’s singing voice and song selection. As it relates to her singing voice, Ms. Austero’s expert witness testified that “Moonie’s voice *could very well* be [Ms. Austero’s] current voice digitally raised by one octave.” R. at 26. As the Fifteenth Circuit noted, these facts are similar to *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). In that case, the Eighth Circuit held that the plaintiff made a sufficient showing for a right-of-publicity claim when the defendants imitated the plaintiff’s singing voice. *Id.* at 463. While the court in that case stated that not “every imitation of a voice . . . is actionable,” it is actionable when there is a distinctive voice which is deliberately imitated. *Id.* Just like the defendants in *Midler*, Ms. Fünke was also deliberate in her voice appropriation. While refusing to disclose the technique used to create the voice, Ms. Fünke stated that she directed her software “to capture all of Ms. Austero’s widely available vocal performances” to create “raw building blocks for Moonie’s voice.” R. at 27.

Judge Walt’s dissent argues that “*Midler* is not on all fours with this case.” R. at 65. This is correct, but not for the reason Judge Walt urges. Specifically, the dissenting opinion makes a distinction that, in *Midler* “a number of people” believed the imitative voice “sounded exactly” like the plaintiff. *Midler*, 849 F.2d at 460. In the present case, there was no similar evidence presented. But, in *Midler*, that was the only source of appropriation; here, the dissent ignores the other evidence of similarities and misapplies the standard for summary judgment. Despite acknowledging that the court must draw all reasonable inferences in favor of Ms.

Austero, the dissent denied Ms. Austero's expert testimony since it was based on a "mere possibility." R. at 65. This assertion back tracks the requirement of Rule 56(a) and ignores the evidence of Ms. Fünke deliberately using Ms. Austero's voice to create the model's voice. Similarly, the dissent did not draw any reasonable inferences as it relates to the Petitioners' song selection. During Ms. Austero's career as a prominent actress and singer, she sang the song "New York, New York" in the film of the same name. In the Petitioners' film, Moonie sang "New York, New York" from the musical and movie *On the Town*. The Fifteenth Circuit majority correctly identified that these are two different songs with different lyrics. R. at 26. Petitioners and the dissent argue that, since the AI-generated model did not sing the exact song from Ms. Austero's film *New York, New York*, then there is no appropriation. This ignores the inference that the film's audience would still affiliate the song with Ms. Austero's previous vocal performances. Considering Ms. Austero's notoriety and success as an actress and singer, it is reasonable that she would be recognized by the AI-generated model's rendition.

Lastly, Moonie's dancing strongly resembles the dance steps from one of Ms. Austero's well-known tap-dancing performances in the Radio City Music Hall. Again, the dissent makes the same mistake as it did with the reliance on biographical data. Ms. Austero does not seek copyright protection of the literal choreography but urges this Court to recognize that this appropriation increases the likelihood that she is identifiable based on the film. The use of her tap-dance choreography lends more toward appropriation due to Ms. Austero's fame in the acting and dancing scene. As

recognized by Ms. Austero’s expert, the AI-generated model’s performance encompasses Ms. Austero’s acting, dancing, and singing performances for which she has won an Oscar, an Emmy, and four Tony awards.

Therefore, a genuine dispute of material fact exists and Ms. Austero is readily identifiable from the AI-generated model, thus satisfying “likeness” under the Restatement.

**B. Petitioners’ AI-generated model falls short of First Amendment protections.**

The Fifteenth Circuit got it right: Petitioners fail to prove their affirmative defenses under the First Amendment.

Petitioners’ assertion of affirmative defenses under the First Amendment bears a higher burden than the Petitioners must “establish beyond peradventure all of the essential elements of the claim or defense.” *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021) (citation omitted).

1. *The First Amendment does not protect Petitioners’ failure to transform Ms. Austero’s likeness in the AI-generated model.*

Petitioners fail to prove that the AI-generated model is a transformative use of Ms. Austero’s likeness. Therefore, it falls short of the First Amendment’s protections. *See* U.S. CONST. amend. I. Courts typically employ a balancing test to resolve claims involving tensions between the First Amendment and the right of publicity. *See Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 970 (10th Cir. 1996). In *Zacchini, v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–75 (1977), the Court called “for a balancing test to weigh the interest underlying the First

Amendment against those underpinning the right of publicity.” *Hart*, 717 F.3d at 152. In the present case, “[n]o social purpose is served by having [Petitioners] get free some aspect of [Ms. Austero] that would have market value and for which [Petitioners] would normally pay.” *Zacchini.*, 433 U.S. at 576 (quoting Harry Kalven, Jr., *The Right of Privacy in Tort Law – Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROB. 326, 331 (1966)) (internal quotations omitted).

The Fifteenth Circuit correctly applied the “transformative use” balancing test in its analysis of the AI-generated model.<sup>7</sup> The “transformative use” test accounts for various First Amendment defenses such as parody, factual reporting, fictionalized portrayal, heavy-handed lampooning, and subtle social criticism. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001). If Ms. Fünke had successfully transformed Ms. Austero’s likeness, her First Amendment rights would prevail. *Hamilton v. Speight*, 827 F. App’x 238, 240 (3d Cir. 2020). The test asks “whether the product containing [Ms. Austero’s] likeness is so transformed that it has become primarily [Ms. Fünke’s] own expression rather than [Ms. Austero’s] likeness.” *Hart*, 717 F.3d at 160 (quoting *Comedy III*, 21 P.3d at 809 (Cal. 2001)).

The AI-generated model has not transformed Ms. Austero’s likeness. There are five factors for courts to consider in determining whether a work is sufficiently

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<sup>7</sup> Neither Petitioners or Judge Walt in the dissent contest the Fifteenth Circuit’s use of the “transformative use” test instead of the “predominant use” or *Rogers* test. The “predominant use” test, not widely used, calls for courts to “act as both impartial jurists and discerning art critics” and decide if the “predominant purpose of the product is to make an expressive comment on or about a celebrity.” *Hart*, 717 F.3d at 154. Critics call it “subjective at best, arbitrary at worst.” *Id.* The *Rogers* test is typically used in infringement cases under trademark law. *Id.* at 155.

“transformed into something more than a mere celebrity likeness or imitation.”

*Comedy III*, 21 P.3d at 799. These factors are:

1. If the celebrity’s likeness is one of the “raw materials” from which an original work is synthesized (hence transformative) versus if the celebrity’s depiction or imitation is “the very sum and substance of the work in question”;
2. If the work is “primarily the defendant’s own expression”—such expression being “something other than the likeness of the celebrity.” This factor examines whether a likely purchaser’s primary motivation is to buy a celebrity’s reproduction, or the artist’s expressive work;
3. If the literal and imitative or the creative elements predominate;
4. If the work’s marketability and economic value derive primarily from the celebrity’s fame; and
5. If the artist’s skill and talent are “manifestly subordinated” to the overall goal of creating a conventional portrait of the celebrity so as to commercially exploit the celebrity’s fame (ergo not transformative).

*Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1274 (9th Cir. 2013) (internal citations omitted).

The Fifteenth Circuit reasoned that *Comedy III* set out a spectrum for the “transformative use” test. R. at 34. “[L]iteral depiction or imitation of a celebrity for commercial gain” infringes on the celebrity’s right to publicity while work such as parody, lampoon, or “other distortions” with “significant transformative elements” typically receives First Amendment protection. *Comedy III*, 21 P.3d at 808.

Rulings from other courts fall in line with this spectrum as well. Courts have found that the literal depiction of a celebrity for commercial gain without their permission violates their right of publicity, and courts have also held that there are certain exceptions to this rule, such as when the use is transformative. *Compare Davis*, 775 F.3d at 1177–78 (9th Cir. 2015) (former professional athletes’ likeness and physical characteristics in a video game); *Hart*, 717 F.3d at 165–70 (former collegiate athlete’s likeness, biographical information, and identifying information in a video game); *Keller*, 724 F.3d at 1276 (former collegiate athletes’ likeness in a video game); *Hilton v. Hallmark Cards*, 599 F.3d 894, 910–11 (9th Cir. 2010) (celebrity’s likeness and catchphrase from a television episode featured in a greeting card); *Comedy III*, 21 P.3d at 811 (literal depiction of The Three Stooges), *with*, *Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003) (worm-human hybrid cartoon versions of real-life musicians featured in a larger story); *Cardtoons*, 95 F.3d at 972–76 (parody trading cards featuring MLB players as caricatures along with various criticisms of the players), *and Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 n.2 (9th Cir. 2001) (noting that a photograph of an actor with his head being replaced on a differently clothed body as a false portrayal would be transformative). Some cases involve a mixture of both literal depictions and transformative use. *See ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (using a literal photographic depiction of Tiger Woods in a transformative montage of other photos).

Petitioners’ admitted use of Ms. Austero’s likeness was for commercial gain. Ms. Fünke testified that her primary purpose in creating the AI-generated model was

to demonstrate and advertise her software’s capabilities to potential licensees. Ms. Fünke also testified that she uploaded the AI-generated model solely to FakeBlock because she invests in FakeBlock and wanted to draw attention to the new website. Lastly, Ms. Fünke attested that she meant for the AI-generated model to represent the refined version of her proprietary software.

The protection of the song lyrics in the AI-generated model is not at issue. The Fifteenth Circuit reasoned that the lyrics qualify as “core political speech” protected by the First Amendment. *Buckley v. Am. Const’l L. Found., Inc.*, 525 U.S. 182, 183 (1999) (citation omitted); R. at 36. A song does not transform Ms. Fünke’s creation of the AI-generated model into something “more than a mere celebrity likeness or imitation.” *Keller*, 724 F.3d at 1273. The song is not what makes the AI-generated model. Moonie is what makes the AI-generated model. Ms. Fünke’s use of her AI-generation software in the creation of the AI-generated model is what is at issue, not the song lyrics.

The first factor of the “transformative use” test favors Ms. Austero. Her likeness is not merely used as the “raw materials” for Ms. Fünke’s creation, but rather Ms. Austero’s depiction is the “very sum and substance” of the AI-generated model. *Comedy III*, 21 P.3d at 809; *Keller*, 724 F.3d at 1274. The AI-generated model talks, sings, and dances like Ms. Austero. Ms. Fünke testified that she deliberately instructed her software to first analyze Ms. Austero’s spoken and singing voice from her multiple acting roles and musical albums before creating the AI-generated model’s voice. Petitioners offered no evidence to rebut expert testimony that “Moonie’s

voice *could very well* be Lucille’s current voice digitally raised by one active.”<sup>8</sup> The AI-generated model’s tap-dance performance is strikingly similar to Ms. Austero’s previous performance in the Radio City Music Hall. Ms. Fünke does not argue that she transformed Ms. Austero’s performance.

In *Young v. NeoContext, Inc.*, ---- F.Supp.3d ----, No. 223CV02496WLHPVCX, 2023 WL 6166975 (C.D. Cal. Sept. 5, 2023), the court reasoned that where the challenged work’s “very purpose” was to “transform a photo or video in which Plaintiff’s (or others) [sic] image appears into a new work in which Plaintiff’s face does not appear” then it was non-transformative. The court reasoned that the plaintiff’s face was “the only thing that changes in the end product” and “the end photograph still depicts the rest of [plaintiff’s] body in the setting in which he became a celebrity.” *Id.* at \*7. Likewise, in *Hilton*, the Ninth Circuit reasoned that even though the challenged work featured the celebrity’s body as a cartoon, with a different uniform, and in a different restaurant style, the work was not transformative because “[d]espite these differences, however, the basic setting is the same: we see Paris Hilton, born to privilege, working as a waitress.” *Hilton*, 599 F.3d at 911.

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<sup>8</sup> As the Fifteenth Circuit noted, Ms. Austero’s current voice is slightly lower than her original soprano voice due to vocal-cord surgery. R. at 26. The Circuit Court classified her voice as probably a mezzo soprano or perhaps an alto. Note, significant overlap exists between the soprano (B3-C6) and mezzo soprano (G3-A5) ranges which bolsters the conclusion that Ms. Fünke’s software uses the same voice as Ms. Austero’s former singing voice if digitally raised one octave higher than her current voice. *See* Rochdale Borough Council, *Learn About the Soprano Voice*, <https://www.rochdale.gov.uk/rochdale-music-service/learn-soprano-voice/2> (last visited Nov. 11, 2023); Rochdale Borough Council, *Learn About the Mezzo-Soprano Voice*, <https://www.rochdale.gov.uk/rochdale-music-service/learn-mezzo-soprano-voice/2> (last visited Nov. 11, 2023).



The very purpose of Ms. Fünke’s software is to create realistic AI-generated models. Ms. Fünke could have chosen to create a generic, human model, but she consciously did not. In creating Moonie’s model, Ms. Fünke testified that she wanted to create a realistic-looking simulacra of Ms. Austero. Ms. Fünke used Ms. Austero’s likeness, singing, dancing, and prior performance settings. Moonie is meant to be the digital Ms. Austero. In *Hart*, the court found the use of a digital avatar to be non-transformative because “[t]he digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game.” 717 F.3d at 166. This Court should find likewise that the digital Moonie does what the actual Ms. Austero did as a performer: she tap dances, sings, and performs while in a digital recreation of a stage, filled with all the trappings of a performance stage.

While Petitioners did not argue in the lower courts that the AI-generated model qualifies as a parody, Judge Walt asserted so in the dissent. R. at 67. However, the AI-generated model does not qualify as a parody. In *White*, the Ninth Circuit held that the parody defense did not apply because the challenged work was “subservient and only tangentially related” to the work’s “primary message” to promote sales. 971 F.2d at 1401. “Defendants’ parody arguments are better addressed to non-commercial parodies.[] The difference between a ‘parody’ and a ‘knock-off’ is the difference between fun and profit.” *Id.* Here, Ms. Fünke admittedly posted the AI-generated model solely to FakeBlock with the goals of going viral, driving web traffic to the website, and financially profiting as an investor and software creator.

Additionally, Judge Walt’s comparison of the AI-generated model to *Saturday Night Live* skits is distinguishable. R. at 67. In *Saturday Night Live*, actors portray the public figures at issue. These actors are physically recognizable in their own right and the likeness of the public figures at issue is not appropriated or the mere sum and substance of the skits. Petitioners’ AI-generated model is the opposite.

While the *Cardtoons* court found that the challenged trading cards featuring cartoons of baseball players along with criticisms was a parody and received First Amendment protections, the facts of that case are also distinguishable. 95 F.3d 959. A parody trading company produced the cards, included parody labeling which also disclaimed association with the plaintiff, and used a political cartoonist artist to draw the overstated depictions. *Id.* *Cardtoons* involved cartoon caricatures—not Ms. Fünke’s software that generates realistic human models.

Petitioners lose on the second and fifth factors as well because Ms. Fünke’s work is not “something other than the likeness of [Ms. Austero]” and Ms. Fünke’s skill is “manifestly subordinated” to her overall goal of creating a conventional portrait of Ms. Austero so as to commercially exploit Ms. Austero’s fame. *Comedy III*, 21 P.3d at 809–10. “[A] literal depiction of a celebrity, even if accomplished with great skill, may still be subject to a right of publicity challenge.” *Id.* at 809. Ms. Fünke argued to the Fifteenth Circuit that *Winter* supports the idea that fans of Ms. Austero looking to buy copies of her performances would not find the AI-generated model to be a sufficient substitute for Ms. Austero’s actual performances. 69 P.3d at 479; R. at 37. But as the Fifteenth Circuit did, this Court should see through Ms. Fünke’s

attempt to misguide the Court’s attention. First, *Winter* is distinguishable because the challenged work contained considerable transformative elements such as making the characters half-human and half-worm. Second, selling the AI-generated model as a film is not at issue. Ms. Fünke was advertising her software that created the film. Her declared goal was to advertise her software’s capabilities to potential licensees. The Fifteenth Circuit rightly reasoned that through the AI-generated model Ms. Fünke was also implicitly advertising and selling the idea that her software can create realistic models of well-known performers so that other movie producers could use her software to create works comparable to pre-existing films such as *Cabaret*. R. at 37.

The “transformative use” test’s third and fourth factors favor Ms. Austero for these reasons. The “literal and imitative” elements predominate over Ms. Fünke’s creative elements. The AI-generated model’s marketability derives primarily from Ms. Austero’s fame, and the software’s economic value also derives from Ms. Austero’s fame because of its purported ability to make even more celebrity depictions for commercial use.

The “transformative use” test thus yields an infringement finding.

2. *The public-interest defense does not apply.*

Ms. Austero’s right-of-publicity claim is not barred by the public-interest defense. This California common law defense states that “no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.” *Hilton*, 599 F.3d at 912 (citation

omitted). Petitioners argue that such defense bars Ms. Austero's claim because she is a political candidate running for office. However, this defense applies only to "publishing or reporting factual data." *Keller*, 724 F.3d at 1283; *Davis*, 775 F.3d at 1179; *Hilton*, 599 F.3d at 912.

In posting the AI-generated model, Petitioners did not publish or report factual data about Ms. Austero. Ms. Fünke posted the film to advertise her AI-generating software to potential licensees and drive viewers to FakeBlock's website. Ms. Fünke also testified that the film was meant to appeal to prurient internet users. Petitioners' decision to publish the AI-generated model to FakeBlock was primarily motivated by the desire for advertisement and garnering website traffic rather than the dissemination of factual information about Ms. Austero. Because Petitioners' publishing of the film was not for the purposes of publishing factual data about Ms. Austero, they lack protection under the public-interest defense.

## CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Fifteenth Circuit. The CDA does not immunize a social media platform from claims arising from the speech of its own corporate officer acting in her corporate responsibility. Even if the posted film did not constitute the platform's speech, the CDA broadly exempts both state and federal claims pertaining to intellectual property, including Ms. Austero's right-of-publicity claim. Further, since Ms. Austero is readily identifiable by the AI-generated model, she satisfies the likeness requirement under Newport Beach's right-of-publicity cause of action. Lastly, the film at issue does not sufficiently transform Ms. Austero's likeness and falls short of First Amendment protection.

Respectfully submitted,  
*/s/ Team #70*  
Team #70  
Counsel for Respondent  
November 20, 2023

## CERTIFICATE OF SERVICE

By our signature, we certify that a true and correct copy of Lucille Austero's brief on the merits was forwarded to Petitioners, FakeBlock, Inc. and Maeby Fünke, through counsel of record by certified U.S. mail, return receipt requested, on this, the 20th day of November, 2023.

*/s/ Team #70*  
Team #70  
Counsel for Respondent  
November 20, 2023

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1, the undersigned hereby certifies that the Brief of Respondent, Lucille Austero, contains 13,855 words, beginning with the Statement of Jurisdiction through the Conclusion, including all headings and footnotes, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendix.

**APPENDIX**

**Statutes** .....2A

**Rules** .....6A

**Constitutional Provisions**.....8A



## Statutes

### 47 U.S.C. § 230:

#### **(a) Findings**

The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

#### **(b) Policy**

It is the policy of the United States--

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

**(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.

**(2) Civil liability**

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

**(d) Obligations of interactive computer service**

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in

limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

**(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 title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

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

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

**(3) State law**

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

**(4) No effect on communications privacy law**

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

**(5) No effect on sex trafficking law**

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

**(A)** any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

**(B)** any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

**(f) Definitions**

As used in this section:

**(1) Internet**

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

**(2) Interactive computer service**

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

**(3) Information content provider**

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

**(4) Access software provider**

The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

- (A) filter, screen, allow, or disallow content;
- (B) pick, choose, analyze, or digest content; or
- (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

## RULES

### **FEDERAL RULE OF CIVIL PROCEDURE RULE 56**

(a) **MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT.** A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **TIME TO FILE A MOTION.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **PROCEDURES.**

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set

out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) **WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

(e) **FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or
- (4) issue any other appropriate order.

(f) **JUDGMENT INDEPENDENT OF THE MOTION.** After giving notice and a reasonable time to respond, the court may:

- (1) grant summary judgment for a nonmovant;
- (2) grant the motion on grounds not raised by a party; or
- (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **FAILING TO GRANT ALL THE REQUESTED RELIEF.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) **AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order

the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

### **Constitutional Provisions**

#### **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.