

No. 22-9908

IN THE

**Supreme Court of the United States**

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FAKEBLOCK, INC and

MAEBY FÜNKE,

*Petitioner,*

*v.*

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 PETITIONER

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## QUESTIONS PRESENTED

- I. Whether varying state-law claims of the right of publicity are exempt from immunity granted to social media companies by the Communications Decency Act, when Congress enacted the Act to protect social media companies from differing state-law regimes.
- II. Whether a celebrity has a right of publicity over an AI-created character and film, when that character is based off bits and pieces of a celebrity's career and films are protected by the First Amendment.

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## **OPINIONS BELOW**

The United States Court of Appeals for the Fifteenth Circuit’s opinion has not been published in the Federal Reporter but can be found at No. 20-9804 and reprinted in the record at Pet. App. 1a–39a (majority opinion); Pet. App. 40a–43a (Ping, C.J., concurring); Pet. App. 44a–67a (Walt, J., dissenting). Similarly, the United States District Court for the District of Newport Beach’s opinion has not been published but can be found at No. 18-cv-5309.

## **STATEMENT OF JURISDICTION**

The Fifteenth Circuit entered its judgment on October 17, 2022. This Court granted certiorari, Pet. App. 1a, and has jurisdiction in accordance with 28 U.S.C. §1254(1).

## **CONSTITUTIONAL PROVISIONS AND RULES INVOLVED**

This case concerns the proper interpretation of the Communications Decency Act of 1996 (“CDA”): 47 U.S.C. §230. The pertinent provisions of §230 are reproduced in the Appendix.

Additionally, this case implicates the Supremacy Clause, which states that “[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2. It also requires consideration of the Intellectual Property Clause of the Constitution, which states that Congress has the sole right “[t]o promote the progress of science and useful arts, by securing for limited times to authors . . . the exclusive right to their respective writings and discoveries.” U.S. Const. art. I, §8, cl. 8. Finally, this case centers around the First Amendment to the United States Constitution, which in pertinent part states that “Congress shall make

no law . . . abridging the freedom of speech, or of the press . . . .” U.S. Const. amend.

I.

## STATEMENT OF THE CASE

### I. Factual Background

Petitioner FakeBlock is a startup social-media website created to allow people to post and share content with their communities. *Austero v. FakeBlock, Inc.*, No. 20-9804, op. at 5a (15th Cir. Oct. 17, 2022). At the relevant time of the events leading to this lawsuit, FakeBlock was in the “beta” stage of development for video posting, meaning that only a specific group of people could post videos to the platform. *Id.* Maeby Fünke (“Fünke”), the second petitioner, was one of those people allowed to post videos to the platform. *Id.* Fünke is a digital artist and programmer, currently working on the development of realistic Artificial Intelligence (“AI”)-generated models. *Id.* at 3a. Relevant here, is her creation of AI model Moonie. *Id.* Fünke also helps FakeBlock with the recruiting of investors. *Id.* at 42a.

Respondent Lucille Austero (“Austero”), a citizen of Newport Beach, is a famous actor, dancer, and singer. *Id.* at 3a. Throughout her career she was in twenty-two movies, had seven studio albums, acted on Broadway and on television. *Id.* Only two of these appearances were as herself and not as character created by screenwriters. *Id.* Austero has won many awards such as a Grammy, Emmy, and Tony. *Id.* After retiring from her acting career, Austero unsuccessfully ran for Congress in the 2018 election against Lindsay Bluth, Fünke’s mother. *Id.*

### **A. AI Creation of Moonie**

Prior to the election, Fünke created an AI model, Moonie, using images from Austero's appearances as a "starting point." *Id.* at 4a. Although Fünke used pictures of Austero's portrayed characters, Moonie has significant differences from Austero.

Moonie, like most American women, (including Austero) is approximately 5'4" with short black hair and bangs. *Id.* at 5a. While Austero has a *signature* spiky pixie haircut, Moonie has straight hair. *Id.* at 23a. Austero has a *signature* beauty mark on her left cheek, Moonie does not. *Id.* Austero has an average nose, Moonie's nose has a prominent downward tip. *Id.* at 24a. Austero's *signature* smile shows her teeth, while Moonie's smile sits on a disproportionately large mouth with no teeth. *Id.* Moonie also displays abnormalities characteristic of AI models, such as only having four fingers on her left hand, asymmetric eyes and inconsistent aging of the skin. *Id.*

### **B. The AI created short film: *Moonie Bares All***

Fünke did not stop at creating AI models. To aid Bluth's campaign efforts, Fünke created a five-minute short film called *Moonie Bares All*. *Id.* at 5a. This short film featured Moonie wearing a burlesque outfit while tap dancing and singing on stage. *Id.* Later, Moonie stumbles and strips off her clothes before singing a cover of "New York, New York" from the musical *On the Town* – a film not associated with Austero. *Id.* at 26a. The song criticizes Austero as a political candidate by highlighting her substance dependency, and disregard for the citizens of her state. *Id.* at 5a, 44a. Austero posted *Moonie Bares All* exclusively to FakeBlock on May 29, 2018, with the

caption “Moonie Bares All!!! VOTE 4 LINDSAY BLUTH” and added a link to Bluth’s campaign site. *Id.* at 6a.

## II. Procedural History

Austero brought forward a claim of infringement on her right of publicity, under Newport Beach state law, against FakeBlock and Fünke for the creation of Moonie. *Id.* at 2a. FakeBlock claimed immunity under §230 of the CDA; and both FakeBlock and Fünke moved for summary judgment. *Id.* at 7a. The district court rejected FakeBlock’s claim of immunity but granted summary judgment for both defendants finding no plausible infringement on Austero’s right of publicity. *Id.* It also held that if a claim existed, Moonie had First Amendment protection. *Id.*

Austero appealed the district court’s judgment to the Fifteenth Circuit Court of Appeals. *Id.* at 2a. The Fifteenth Circuit affirmed the district court’s denial of FakeBlock’s immunity under §230 and reversed the grant of summary judgment on the merits of Austero’s claim. *Id.* First, the Fifteenth Circuit joined the Third Circuit in holding that §230’s carve out of liability for intellectual property (“IP”) law claims include state-law claims of right of publicity. *Id.* at 17a. Therefore FakeBlock did not have immunity. *Id.* Second, the Fifteenth Circuit found that there was a sufficient issue of fact regarding *Moonie Bares All* to avoid summary judgment, and that Fünke and FakeBlock did not prove their affirmative defense under the First Amendment. *Id.* at 31a, 39a.

FakeBlock and Fünke petitioned this Court for a writ of certiorari, which was granted on October 9, 2023.

## SUMMARY OF THE ARGUMENT

### I.

The Fifteenth Circuit erred in finding that §230 does not extend immunity to social media companies, like FakeBlock, when facing claims based on state intellectual-property law. Accordingly, this Court should reverse the Fifteenth Circuit's decision and grant immunity to social media companies for state-law claims of right of publicity based on content posted by their users.

First, appropriate statutory interpretation requires that courts consider the intent of Congress when enacting the statute if a plain reading of the text would lead to a result completely at odds with the statute. Through §230, Congress intended to protect social media platforms from state-law regulation by providing broad immunity over various state-law claims. Because holding social media companies liable under various state-law claims for content posted by users is directly at odds with the enactment of §230, this Court must consider the intent of the CDA and find that state-law claims of right of publicity are not included in the IP exception to immunity.

Further, the doctrine of preemption effectively trumps these claims as applied to social media companies. Because under the CDA, Congress expressly rejected state laws inconsistent with the statute, and these stand as an obstacle to Congress's regulation of the Internet, publicity claims are not exempt from immunity.

Finally, even if this Court finds that state-law claims alleging infringement upon a right of publicity are exempt from immunity, the diverse nature of these laws requires determination of whether the claim is based on a right of privacy or property.

Only those claims based on a right of property should be found to be exempt from immunity. Because Austero's claim is based on her right of privacy, and not a property right, this Court should find that claims alleging infringement upon a right of publicity, such as Austero's claim, are not exempt from immunity under §230(e)(2).

## II.

The Fifteenth Circuit wrongly upheld Austero's claim of right of publicity. This Court should reverse the lower court's ruling and find that Fünke and FakeBlock are protected under the First Amendment.

First, Moonie was created from "bits and pieces" of character's portrayed by Austero. Because Austero was cast for numerous roles, she cannot be inextricably linked to one specific character. No specific character portrayed by Austero has made her a household name. Therefore, Austero cannot claim a right of publicity over every character that she played, and in turn claim that the "bits and pieces" that were used to create Moonie infringe on her likeness.

Second, even if this Court finds that Austero has the right of publicity over different characters, Moonie satisfies the transformative use test. The transformative use test analyzes whether a creator's artistic ability is on display, or if the creator relies on the celebrity's likeness for publicity. Moonie satisfies the five-factor transformative use test because Fünke's artistic creativity outweighs the similarities with Austero.

Finally, Moonie and *Moonie Bares All* must be awarded First Amendment protection as a form of creative speech. Fünke's parodic creation is a film, an art form that this Court has vigorously protected. AI generated films do not lose their First



Amendment protection. If this Court does not find that this artistic medium is protected under the Constitution, the future of the creative world is doomed.

## ARGUMENT

Both issues before this Court present questions of law. This Court reviews questions of law *de novo*. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

### **I. SOCIAL MEDIA COMPANIES, LIKE FAKEBLOCK, WHO PROVIDE A PLATFORM FOR A FREE MARKET OF IDEAS ARE PROTECTED FROM STATE-LAW CLAIMS OF PUBLICITY UNDER THE BROAD IMMUNITY OF THE CDA.**

It is impossible to imagine a time when the Internet did not exist. When news from across the globe, and multiple sources of information were not at our fingertips. Social media has become an essential part of the free market, and Congress recognized the important role the Internet would play in society from its inception. Congress enacted the CDA in recognition of the important role, and the potential liability that social media websites, like FakeBlock, could face when providing a platform for every idea to be exposed to the world.

The CDA laid the boundaries between internet computer service providers (“service providers”) and the creators of content posted on these platforms. In its great wisdom, Congress chose to alleviate service providers from liability arising from the content posted by users to social media. With this same wisdom, Congress recognized the potential danger of an unregulated and boundless Internet and thus created specific exceptions to this broad immunity. At issue before this Court is the scope and interpretation of §230(e)(2): “Nothing in this section shall be construed to limit or

expand any law pertaining to intellectual property.” In accordance with Congress’s purpose and intent in enacting the CDA, this Court must find that §230(e)(2) does not include inconsistent state-law claims allegedly based on IP, such as the right of publicity. Not only does appropriate statute interpretation lead to this result, but the doctrine of preemption requires that inconsistent state-law claims be preempted by the CDA.

**A. This Court should remedy the erroneous interpretation of §230(e)(2) by the Third and Fifteenth Circuits by adopting the Ninth Circuit’s application of immunity.**

This Court should adopt the Ninth Circuit’s approach to §230(e)(2) immunity and exclude claims of infringement on the right of publicity, and in turn, reject the erroneous approach to §230(e)(2) immunity by the Third and Fifteenth Circuits.

In *Hepp v. Facebook*, the Third Circuit misread precedent<sup>1</sup> and created the circuit split that this Court must resolve today. 14 F.4th 204, 217 (3d Cir. 2021) (Cowen, J., concurring in part and dissenting in part). In *Hepp*, after an unfounded assumption of what the First Circuit would have decided on a similar case, the Third Circuit decided that based on a plain reading of the CDA, “§230(e)(2) can apply to federal and

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<sup>1</sup> *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007). In *Lycos*, the First Circuit did not decide or consider whether state claims of IP are included in the §230(e)(2) exception. The claim at issue was a trademark dilution under Florida trademark law. Rather than analyze the scope of immunity under §230(e)(2), the First Circuit dismissed the claim as “a matter of trademark law.” *Id.* at 423 n.7. Based on dicta in the *Lycos* opinion, the Third Circuit merely relied on decisions by lower courts outside of its jurisdiction to reach its holding that state-law claims are included within the exception. See *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 299 (D.N.H. 2008) (holding that §230(e)(2) included state and federal claims of intellectual property); *Atl. Rec. Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009) (“if Congress wanted the phrase ‘any law pertaining to intellectual property’ to actually mean ‘any federal law pertaining to intellectual property.’ It knew how to make that clear, but chose not to.”).

state laws that pertain to intellectual property.” *Id.* at 210. The Third Circuit failed to correctly conduct an analysis of statutory interpretation. Rather than consider the congressional intent expressly stated in §230(a) and (b), it relied solely on Congress’s writing ability by expressing that “when Congress wanted to cabin the interpretation about state law, it knew how to do so.” *Id.* at 211.

Even when the Third Circuit attempted to consider the intent of Congress when enacting the CDA, it completely misinterpreted the clear words on the text—that the goal of the CDA was to promote a free market. §230(b)(2). The Third Circuit distorted Congress’s attempt to protect the development of the Internet “unfettered by . . . state regulation,” §230(b)(2), by stating that “state property rights can facilitate market exchange” and encourage the free market that Congress attempted to have for the Internet. *Hepp*, 14 F.4th at 211.

This mistaken analysis by the Third Circuit also led the Fifteenth Circuit to erroneously apply and interpret the CDA. *Austero*, No. 20-9804, op. at 17a. An application based on a plain reading of a statute that leads to absurd and futile results—completely at odds with what Congress envisioned to protect. *U.S. v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940). Instead, this Court should adopt the Ninth Circuit’s interpretation of §230(e)(2) in *Perfect 10* and that was implored by the Fifteenth Circuit’s dissent to ensure that the CDA is upheld. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *Austero*, No. 20-9805, op. at 50a (Walt, J., dissenting).

**B. Proper statutory interpretation of the CDA requires the exclusion of state-law claims of the right of publicity from exceptions to immunity under §230(e)(2).**

When constructing the meaning of a statute, courts usually start with the plain meaning of the text. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). And most times, when the language is clear, the inquiry into the statute’s meaning ends there. *Id.* However, sometimes even when a statute seems plain on its face, that plain reading can go against the effect Congress intended with the statute. *Am. Trucking Ass’ns*, 310 U.S. at 543. In those cases, when a plain interpretation leads to “absurd or futile results, . . . , this Court has looked beyond the words to the purpose of the act.” *Id.*; *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). Because a plain reading of §230(e)(2), “any law pertaining to intellectual property” leads to absurd results—excessive litigation and liability contrary to the purpose of the Statute—this Court must consider the intent of the CDA and find that “any law pertaining to intellectual property” only includes federal IP law.

*i. Congress’s intent in enacting the CDA must be considered to avoid absurd and futile results.*

There is an absurd result from the interpretation of a statute when the result would be “so bizarre that Congress could not have intended it.” *Demarest v. Manspeaker*, 498 U.S. 184, 190–91 (1992). Exposing service providers to fifty plus state-law regimes of their own creation of publicity rights<sup>2</sup>—disguised as intellectual

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<sup>2</sup> See Rachel A. Purcell, *Is That Really Me?: Social Networking and the Right of Publicity*, 12 VAND. J. OF ENT. AND TECH. L. 611, 620 (2020) (every state has its own creation of right of publicity claims, with different elements and potential damages).

property—effectively makes the CDA futile. Congress simply could not have intended this result.

A plain reading of “any law pertaining to intellectual property” to include state claims of IP leads to the opposite result of what Congress envisioned when enacting the CDA: social media platforms being sued for content that is posted and created by third parties. *See e.g. Hepp*, 14 F.4th at 206 (allowing Facebook to be sued under Pennsylvania right of publicity for content posted by an user); *Friendfinder Network*, 540 F. Supp. at 302 (service providers can be liable under state laws of invasion of privacy and property rights for content posted by their users); *Atl. Rec. Corp.*, 603 F. Supp. at 704 (state law claims are included as IP in regard to service providers and content posted by their users).

Further, Congress explicitly stated that inconsistent state-laws do not have an effect on immunity in §230(e)(3)<sup>3</sup>, demonstrating that it did not intend for over-reaching state-laws to be part of the exclusions. By contrast, the increased likelihood of lawsuits in various forums, under different claims, and requirements, would have a chilling effect on the Internet and service providers such as FakeBlock. *See Hepp*, 14 F.4th at 220 (Cowen, J., concurring in part and dissenting in part); *see also* Barbara Ortutay, *The rule that made the modern internet*, AP (Oct. 28, 2020, 11:49 AM), <https://shorturl.at/afxUV>. This Court cannot ignore that the CDA was enacted to protect providers, like FakeBlock, from exactly these kinds of suits.

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<sup>3</sup> *See infra* Part I.C. (discussing the preemptive function of this section).

FakeBlock is a provider of an interactive computer service who simply provides a platform for users to post content. *Austero*, No. 20-9804, op. at 10a. Without considering the intent of the CDA, it would be treated as the publisher of content that other users, like Maeby Fünke<sup>4</sup>, upload to their site. Thus, being held liable under various state-law claims for something they did not create, but simply provided a platform to exist. A result directly at odds, and bizarre considering the enactment of the CDA. *See* §230(e)(1).

ii. *The CDA was enacted to encourage the free development of the Internet by providing broad immunity to service providers.*

Congress enacted the CDA as a result of the disparate regulation of state laws on the Internet, which in turn inhibited its free development. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (“Congress enacted § 230 to remove the disincentives to selfregulation [sic] created by the *Stratton Oakmont* decision”<sup>5</sup>). The free development of the Internet, unregulated by individual state regimes, was of the utmost importance to Congress that they included the rationale for granting immunity in two different parts of the Statute.

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<sup>4</sup> Although not at issue, when posting *Moonie Bares All* to FakeBlock, Fünke was acting as an individual, a daughter helping her mother win a political campaign, and not within her role at FakeBlock. *Austero*, No. 20-9804, op. at 3a. Although she was one of few people allowed to post videos to FakeBlock, this is due to FakeBlock being in the beta stage of testing, also known as the stage when a platform is being tested for bugs or other issue. *Id.* Therefore she was not acting as an agent of FakeBlock when posting the video, but instead in her individual capacity.

<sup>5</sup> In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the New York Supreme Court decided to hold service providers as creators of the content at issue, if they attempted to monitor the content posted and thus liable for any problematic third-party created content. Thus, if any website tried to regulate inappropriate content posted to their platform, the website would immediately be considered the publisher of content. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). *See also Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (interactive computer service providers treated as distributors in suits arising from third-party generated material).

First, under §230(a) titled “Findings,” Congress stated that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a *minimum* of government regulation.” §230(a)(4) (emphasis added). The “findings” section often, and as it does here, documents the circumstances for the statute’s enactment. Victoria L. Killion, Cong. Rsch. Serv., R46484, *Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations* 32 (2022) [hereinafter *Understanding Federal Legislation*]. There, Congress also emphasized that the Internet is the place where “true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,” can be maintained. §230(a)(3). Further highlighting the importance of protecting the freedom of the Internet and the separation between a publisher and a service provider.

Congress, however, did not stop there to emphasize its intent to provide broad immunity over divergent state regulation. It also included provisions under the “Policy” section to explain its intent or goals in enacting the Statute. *See Understanding Federal Legislation, supra* at 28 (“[t]his section [policy] may identify the general purpose of the legislation or the intent of Congress”). Under §230(b), Congress stated that the CDA was enacted 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*.” §230(b)(2) (emphasis added).

The CDA was not only a reactive measure to courts’ treatment of service providers, but it also sought to liberate the Internet from government regulation. Congress could

not have made its intentions clearer, it explicitly stated that its goal in enacting the CDA was to keep government regulation to a minimum. *See Zeran*, 129 F.3d at 330 (“Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”). Thus, granting immunity to FakeBlock for state-law claims of publicity based on content created, and posted by third parties, is the only appropriate application of the CDA.

This broad immunity and intent of Congress is also supported by various circuit courts, even those that have erroneously concluded that varying state-law claims based on IP law are exempt from immunity. These courts have repeatedly asserted that the immunity granted to service providers, like social media companies, must be interpreted broadly. *See Lycos*, 478 F.3d at 419 (“we too find that Section 230 immunity should be broadly construed”); *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1123–24 (9th Cir. 2003) (collecting cases<sup>6</sup>). Here, to effectuate the broad immunity, this Court must resolve that the interpretation of “intellectual property” should be narrowed to include only federal rights of IP, or at maximum those state-law claims of IP that are co-extensive with federal law. Otherwise, an interpretation like that of the Third and Fifteenth Circuits, would open the flood gates of litigation to innumerable state-law based claims against social media companies. Social media companies that were meant to be immune according to Congress.

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<sup>6</sup> *Green v. America Online*, 318 F.3d 465, 470–71 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F. 3d 980, 985–86 (10th Cir. 2000); *Zeran*, 129 F.3d at 328–29; *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003).



Further, even if state-law claims of right of publicity are included in the carve out to immunity, no right of publicity across states is the same. Thus, increasing the regulatory power of states over the Internet—significantly at odds with the express findings and policy of Congress when creating the CDA.

*iii. Including state-law claims of right of publicity in the exception would effectively swallow §230(e)(2) immunity.*

Allowing varying state’s definitions of right of publicity to sidestep immunity would directly swallow the protection created by Congress. Despite granting broad immunity to service providers, Congress identified certain areas of the law to which immunity did not apply. These exceptions under §230(e) include very specific and well-established claims such as those arising from: (1) laws in the Federal criminal law statute; (2) the Electronic Communications Privacy Act or *similar* State laws; and (3) sex trafficking laws under Title 18 of the U.S. Code. §§230(e)(1), (e)(4), (e)(5). At issue is the interpretation of “any law pertaining to intellectual property” under §230(e)(2)’s exception.

Claims under the right of publicity are neither based on uniform law, nor on federal law, thus lower courts have erred in denying immunity based on the IP exception. *See Purcell, supra* at 620 (“The right of publicity originates exclusively from state statutory or common law and has no federal counterpart.”). These claims are strikingly in contrast with the other laws included in §230(e), all which follow a uniform code, or are similar to claims under federal law.

There is no uniform right of publicity. *Id.* In fact, jurisdictions vary on the recognition of this right: some jurisdictions have enacted statutes to establish this

right<sup>7</sup>, others have adopted the Restatement (Second) of Torts section 652C known as the “appropriation of name and likeness”<sup>8</sup>, and other jurisdictions do not recognize the right all together<sup>9</sup>.

The disparity in these claims is so notable that no claim is the same. The myriad of claims available would effectively swallow the uniform immunity granted by Congress. For example, in some jurisdictions, claims of infringement on the right of publicity can only be raised by celebrities, in others only by members of the armed forces, and in others by all people. Purcell, *supra*, at 626; Right of Publicity Committee, *Right of Publicity State of the Law Survey*, Int’l Trademark Ass’n, <https://shorturl.at/azJKS> (last visited Nov. 5, 2023) [hereinafter *Right of Publicity Committee*]. The difference in claims can also apply to the availability of damages, and even the elements of a claim. *See Perfect 10*, 488 F.3d at 1118 (“Such laws [state laws characterized as IP] may bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals.”).

Further, imposing liability on service providers for these claims would have a chilling effect on the Internet and websites such as FakeBlock. *See Hepp*, 14 F.4th at

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<sup>7</sup> States granting right of publicity through statute include: Alabama, Arkansas, Florida, Hawaii, and Illinois. Right of Publicity Committee, *Right of Publicity State of the Law Survey*, Int’l Trademark Ass’n, [https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA\\_2019\\_rop\\_survey.pdf](https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA_2019_rop_survey.pdf) (last visited Nov. 5, 2023).

<sup>8</sup> As explained by the Fifteenth Circuit, some of the states who have adopted the right of publicity based on the Restatement (Second) of Torts Section 652C through the common law include: Connecticut, Michigan, Minnesota, New Hampshire, New Jersey, Texas, Oklahoma, Ohio, and the State of Newport Beach. *Austero*, No. 20-9805, *op. at* 9a–10a; *see* RESTATEMENT (SECOND) OF TORTS (AM. L. INST. 1977).

<sup>9</sup> At least fifteen states do not recognize any right of publicity claims, these states include: Alaska, Colorado, Delaware, Idaho, Iowa, Kansas, Maine, Maryland, Mississippi, Montana, North Carolina, North Dakota, Oregon, Vermont, and Wyoming. *Right of Publicity Committee, supra* note 7.

220 (Cowen, J., concurring in part and dissenting in part) (“permitting litigation and liability under such a tangle of disparate state law schemes would threaten ‘the continued development of the Internet’ . . .”). The reach of social media is vast both nationally and internationally. Thus, imposing liability for claims that significantly vary by state would inhibit the “vibrant and competitive free market . . . for the Internet” that Congress sought to protect through the CDA. §230(b)(2); *see also Carafano*, 339 F.3d at 1123–24 (“Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering.”).

At the fear of lawsuits arising from the content that users post on sites such as FakeBlock, these social media companies will likely stop their services and close the free market that Congress valued at the time of enactment. *See Perfect 10*, 488 F.3d at 118; *Batzel*, 333 F.3d at 1027. Not only will social media companies limit access to their platforms, but the immunity granted by Congress would be effectively swallowed by individual state regimes. *Hepp*, 14 F.4th at 220 (Cowen, J., concurring in part and dissenting in part).

Most importantly, this Court must construe the statute “as to give effect to the intent of Congress.” *Am. Trucking Ass’ns*, 310 U.S. at 542. This Court ought to hold Congress’s desire to grant broad immunity to service providers to a higher regard than the individual laws of states in areas that Congress chooses to regulate. U.S. Const. art. VI, cl. 2.; *see also Carafano*, 339 F.3d at 1125 (“[D]espite the serious and utterly deplorable consequences that occurred in this case, we conclude that Congress

intended that service providers such as Matchmaker be afforded immunity from suits.”).

*iv. The “intellectual property exception” should be limited to Congress’s robust and uniform system of Intellectual Property.*

Although Congress did not define the scope of the immunity exception to laws related to IP in the Act, §230(e)(2), Congress’s power and regulation over IP is well established, and this Court should not depart from that. Over two hundred years ago, the Founding Fathers of our Nation granted Congress the enumerated power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” U.S. Const. art. I, §8, cl.8. Also known as the IP Clause of the Constitution, this is the cornerstone of IP rights in the United States. *See Intellectual Property Clause*, Legal Information Institute (June 2023), [https://www.law.cornell.edu/wex/intellectual\\_property\\_clause](https://www.law.cornell.edu/wex/intellectual_property_clause). It is by and through this clause that Congress can regulate IP, expand and limit those rights. *Id.* These IP rights granted by Congress include patents, copyrights, and trademarks.<sup>10</sup> *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1448 (11th Cir. 1998) (explaining the principal forms of IP). Because Congress has created such a robust and uniform system of IP, the definition of intellectual property under §230(e)(2) should be similar to that which Congress has the power to regulate. Congress, through its legislative power and exclusive control over IP, has not established a federal right of publicity;

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<sup>10</sup> Although Congress regulates patents and copyrights through the powers granted by Article I, Section 8 of the Constitution, Congress regulates trademarks through the Lanham Act, 15 U.S.C. §§1051 et seq. based on Congress’s power over interstate commerce.

thus, the statute cannot be read to excuse from immunity claims over which Congress does not include in its own definition.

Further, when Congress has defined “intellectual property” in other statutes, it has consistently left out the right of publicity.<sup>11</sup> Thus, this Court should not now expand these well-established rights to include state created claims of right publicity. These claims of right of publicity disguise themselves as IP, and if Congress in its power to protect IP has not recognized a federal right of publicity, then this Court cannot, and should not expand these rights.

**C. The CDA effectively preempts state-law claims based on the right of publicity.**

Time and time again, this Court has upheld the well-established principle that the Supremacy Clause trumps state laws that “interfere with or are contrary to federal law.” U.S. Const. art. VI, §1, cl.2; see *Hillsboro v. Cnty v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985); *Pac. Gas & Elec. v. St. Energy Resources Consev.*, 461 U.S. 190, 203 (1983) (“It is well established that within constitutional limits Congress may preempt state authority by so stating in express terms.”). This Court must uphold that principle, and preempt state-law claims of the right of publicity as applied to the CDA because they stand contrary to Congress’s regulation of the Internet.

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<sup>11</sup> See Bankruptcy Code, 11 U.S.C. §101 defines “intellectual property” as: “trade secret, invention process, design, or plant protected under Title 35 [patents], patent application, plant variety. Work of authorship protected under Title 17 [copyrights], mask work protected under Ch. 9 of title 17”; the Trade Act of 1974, 19 U.S.C. §2242(d)(2) defines “intellectual property” as: “rights relating to patents, process patents, registered trademarks, copyrights, trade secrets, and mask works”.

Here, Congress intended to give service providers, such as FakeBlock, broad immunity over content that users posted on their platforms. §230(e)(1). Yet a state-law claim of publicity, disguised as a right of IP, interferes with Congress’s desire to grant immunity for exactly these kinds of claims. In determining preemption, “the purpose of Congress is the ultimate touchstone in every preemption case.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Therefore, because Congress intended to protect service providers from liability over differing state-law claims, state claims of the right of publicity must be preempted as applied to the CDA.

Preemption can occur through three different avenues—explicit, conflict, and field—the first two being relevant for the right of publicity under the CDA. Because state-law claims of right of publicity are expressly rejected in the Statute, and stand as an “obstacle” to the objectives of Congress when enacting the CDA, those claims are preempted and cannot be raised against social media companies. *Arizona v. U.S.*, 567 U.S. 387, 399 (2012); *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941).

*i. Claims based on the right of publicity are explicitly preempted.*

The CDA contains explicit language of preemption, and therefore any state law that goes against the CDA is effectively preempted. §230(e)(3); *Arizona*, 567 U.S. at 399; *see also Doe v. GTE Corp.*, 347 F.3d 655, 658 (7th Cir. 2003) (§230(e)(3) preempts state laws not consistent with the CDA). Explicit preemption occurs when Congress explicitly states that any inconsistent state laws are not to have any effect on the statute. *Arizona*, 567 U.S. at 399 (“[c]ongress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.”).

When Congress explicitly defines the extent to which the legislation preempts state law, this Court must consider the preemption language and cannot avoid the power of Congress to trump state laws. *Id.* This Court thus cannot ignore explicit preemptive clauses because of ambiguous language in other parts of the statute. *English v. General Elec. Co.*, 496 U.S.72, 78 (1990). Here, Congress explicitly stated: “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.” §230(e)(3).

Claims of infringement on publicity rights are claims based on state law—some based on common law and others based on a statutory right. *Right of Publicity Committee, supra*. These claims, as evidenced by the claim brought forward by Austero against FakeBlock, seek to impose liability on a provider that Congress intended to be immune to these sorts of suits. *Austero*, No. 20-9804, op. at 11a. Federal law does not recognize the right of publicity, instead it is a state based claim. Therefore, any state right to publicity is explicitly preempted as it interacts with immunity granted by the CDA. Regardless of whether courts around the United States agree that immunity should apply or not, the intent of Congress to preempt any conflicting laws is clear. Therefore, this Court cannot oversee the explicit preemption, as the courts in the Third and Fifteenth Circuit have erroneously done.

*ii. Right of publicity claims are also preempted by the doctrine of conflict preemption.*

State law must be preempted when it conflicts with federal law. *English*, 496 U.S. at 79. Specifically, conflict preemption occurs when either (1) it is impossible for a private party to comply with state and federal requirements, or as it does here, (2)

where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines*, 312 U.S. at 61. Because state-law claims of right of publicity are an obstacle to the broad immunity granted to social media companies for content posted by third parties, these claims must be preempted.

Congress made its intent clear when enacting the CDA. §230(b). To preserve and promote “the vibrant and competitive free market ... for the Internet and other interactive computer services, *unfettered* by Federal or State regulation.” §230(b)(2) (emphasis added). To preserve the free market and avoid websites, such as FakeBlock, from stopping their services due to countless litigation, Congress explicitly granted immunity to service providers for content that was posted to their servers by third parties. §230(c)(1). Content that service providers did not create, but that simply provided a platform to see the light of the free market.

Understanding the potential dangers that this broad immunity could have on certain matters, Congress in its great wisdom, created a limited carve out for immunity as it applied to specific federal laws, and other federally co-extensive state laws. *See* §230(e) (carve out of immunity for federal laws relating to obscenity and sexual exploitation of children, communications privacy law under relevant federal statute and similar state laws, and lastly intellectual property claims as understood by Congress<sup>12</sup>).

Noticeably absent from the list of exceptions is the right of publicity. This right is not a federal law included in the exceptions, nor is consistent with other federal laws,

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<sup>12</sup> *See supra* Part I.B.iv (explaining the robust system of IP regulated by Congress).



thus it stands as an obstacle to the broad immunity that Congress intended to grant service providers. Although certain courts, such as the Third and Fifteenth Circuit, have included this right within the IP law exception, as explained *supra*, this right is not consistent with IP rights as regulated by Congress. Therefore, these claims cannot be included under that exception. Further the courts who found state-law claims of publicity fell within the IP exception did not consider preemption, thus their reasoning cannot stand.

State-law claims of infringement of publicity rights directly impose liability to websites that host information for content that is imagined, created, published, and shared by third parties; as the Fifteenth Circuit did by imposing liability on FakeBlock for the creation and publishing of one of their users. *Austero*, No. 20-9805, *op. at* 4a–6a. These claims are in direct contrast with the intent of Congress to protect service providers for what is posted on their platforms, and thus under the conflicts doctrine these claims must be preempted. *See e.g., Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1274 (W.D. Wash. 2012). Otherwise, service providers like FakeBlock, who provide a platform for individuals to post their thoughts, pictures, videos, and creations would be liable for content that they did not create. Content that they simply provided a platform to be expressed.

Allowing state claims of publicity stands as a complete obstacle to the enforcement of the CDA. Not only would this imposed liability leave service providers vulnerable to an overwhelming amount of litigation, but Congress, in its great wisdom, foresaw potential challenges and explicitly stated that inconsistent state laws would not

defeat the immunity granted to service providers. Therefore, the Third and Fifteenth Circuit erred in deciding that inconsistent state-law claims, such as the right of publicity, were excluded from §230 immunity and now this Court must right those wrongs by limiting the scope of interpretation.

**D. Alternatively, only claims of right of publicity based on property rights, and not privacy, can be part of §230(e)(2) exception.**

Even if this Court finds that state-law claims of publicity fall within the immunity exception, then the claims allowed to proceed must be limited to those claims that are based on a property right, and not a privacy right. Unfortunately, many states “conflate and confuse the rights [of publicity and privacy],” even though those rights do not protect the same interests. Meryl Gordon, *Right of Publicity*, Practical Law: The Journal (Oct. 2023), <https://www.reuters.com/practical-law-the-journal/litigation/right-publicity-2023-10-02/>. Thus, since there is no uniform right of publicity, if §230(e)(2) is considered to apply to state-law claims of infringement on the right of publicity, courts must decide whether the specific state law, and the claim brought forward is one based on privacy or property rights.

The right of publicity and the right of privacy are not rooted in the same principles. The right of publicity protects the financial interest people have on monetizing their image. *Haelan Laboratories, Inc., v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). While the right of privacy protects the reputation and well-being of a person because of their image or identity being used by others. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

A true claim of publicity protects “the proprietary interest of the individual” in their own creations. *Id.* For example, in *Zacchini*, this Court considered that an act created by a performer and his family, and broadcasted on television despite the claimant’s objections to the broadcasting, was an infringement on his right of publicity. *Id.* at 564. The Zacchini family created the human cannonball act at issue in the case. *Id.* at 563–64. The Zacchinis were the only family to ever perform this act, and the act occurred in a location where patrons paid an admission fee to the fair, and the fair paid Zacchini for performing his original act. *Id.* at 564. By broadcasting and profiting from the Zacchini act, the TV station profited from a creation of the performer and his image being shown on national television. *Id.* Thus, this was a claim based on a property right – a right over a creative performance and Zacchini’s desire to not have his act broadcasted.

By contrast, some states, including Newport Beach, have adopted an alleged “right of publicity” based on the Restatement (Second) of Torts section 652C. *Austero*, No. 20-9804, op. at 9a. The Restatement itself, refers to this right as one of “privacy” based on “one who appropriates to his own use of benefit the name or likeness of another.” RESTATEMENT (SECOND) OF TORTS §652C (AM. L. INST 1977). By its very language, this right does not protect a property right, a creation, or a new art form, but instead just the name and reputation that follows a person. *See id.* Thus, claims based on the Restatement, and claims of purely “privacy” issues do not fit within any definition of IP.

Austero's claim based on *Moonie Bares All* is not based on any property right over any of Austero's creations or acts. *Austero*, No. 20-9804, op. at 6a. Instead, it is simply an action born out of her outrage over her poor representation towards potential voters. Her reputation might have been ruined, just as it is in a right of publicity claim, but no interest in property was harmed. *Zacchini*, 433 U.S. at 573. Austero did not lose a financial interest on her property, she lost voters. *Austero*, No. 20-9804, op. at 6a. Austero did not lose the right to control her image, she lost her secrets of substance abuse and vertigo illness. *Id.* at 55a. None of these losses represent a property interest on her persona or creation, only a right of her privacy and emotional distress. Thus, even if this Court decides that state-law claims of right of publicity are not protected by §230(e)(2) immunity, Austero's claim and those based on the right of publicity cannot be considered exempt of immunity without violating the standards of the CDA.

Based on proper statutory interpretation and preemption principles, this Court must narrowly interpret §230(e)(2) to exclude state-law claims of right of publicity. Further, because Austero's claim is based on her right of privacy and not property, this Court must reverse the Fifteenth Circuit's ruling and find that FakeBlock has immunity under §230.

## **II. AUSTERO DOES NOT HAVE A RIGHT OF PUBLICITY CLAIM BECAUSE FÜNKE'S AI MODEL IS NOT INEXTRICABLY LINKED TO AUSTERO'S LIKENESS AND FÜNKE'S WORK IS SHIELDED BY THE FIRST AMENDMENT.**

Since 1971 the United States has embraced freedom of speech through the First Amendment. Genevieve Lakier, *The Non-First Amendment Law of Freedom of*

*Speech*, 134 HARV. L. REV. 2299, 2300–01 (2021) (noting that the First Amendment “has for decades now served as one of the most powerful mechanisms of individual rights protection in the Federal Constitution”). This Court has continuously interpreted the First Amendment to broadly protect the artistic world. Protecting the creative development of human intellect, the creation of a space for art to flourish, and the progress of the artistic world. Artists and creators have used the First Amendment to shield their creations from court interference. If this Court allows Austero’s claim to stand, the future of the artist world is doomed. Not only is Moonie not linked to Austero’s likeness, thus denying her a right of publicity claim, but the First Amendment shields Moonie.

Austero is not inextricably linked to Fünke’s AI model. Moonie is based off “bits and pieces” of characters during Austero’s career. *Austero*, No. 20-9804, op. at 27a. Austero is not a household name based on one character that she portrayed in a performance. Therefore, Austero cannot claim the right of publicity over pieces of characters she portrayed, otherwise courts will be flooded with right of publicity claims.

Fünke’s creation must be awarded First Amendment protection because it satisfies the transformative use test. If a piece of art has enough transformative elements that showcase the artist’s creativity, then the piece can have First Amendment protection. Moonie must be awarded First Amendment protection because of the significant transformative elements that are present. If this Court does not find that Moonie has First Amendment protection, then no AI creations will.

**A. Austero cannot claim a right of publicity over Moonie because she is not inextricably linked to a specific character.**

Austero does not have the right of publicity over the characters that she has portrayed in numerous movies, television shows, and Broadway performances. She is not inextricably linked or closely associated with any of those characters. Only one court has found that an actor was inextricably linked or closely associated with a character they portrayed, and this Court should not set such an ill-founded precedent. Angela D. Cook, *Should Right of Publicity Protection be Extended to Actors in the Characters Which They Portray*, 9 DEPAUL J. ART. TECH. & INTELL. PROP. L. 306, 313 (1999) [hereinafter *Cook Article*]. Conversely, actors' rights of publicity are based on the association between the actor and the character. *Id.* There is only a claim when the public associates the character and the actor as one.

Austero would only have a legal claim over a character that she played in a production if the public inextricably links her to the character. There is not one character that the public associates with Austero. The district court of New Jersey stated, “[t]he right of publicity has come to signify the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his [or her] name and picture or likeness and to prevent others from unfairly appropriating this value for commercial benefit.” *See Estate of Presley v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981). However, Austero and Moonie are not inextricably linked nor closely related. Austero has played too many characters to make her linked to a specific character. The purpose of the right of publicity is to protect an individual from exploitation. But courts also must recognize who the right

of publicity belongs to, whether that is the actor or the person who created the character. *Id.* at 1353–54; *see also Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (indicating that Young & Rubicam had the license to use the song from the copyright holder). Austero does not have a right of publicity over the past characters that she has played and therefore cannot claim a violation of her rights.

The legal prosperity of a right of publicity claim is based on a fact issue that has been analyzed under three elements listed in *Friendfinder*. As relevant to this case, those three elements are: (1) Austero owns an enforceable right in the identity or persona of a human being of a character, (2) Fünke and FakeBlock, without permission, have used some aspect of identity or persona in such a way that Austero is identifiable from their use, and (3) Fünke and FakeBlock’s use is likely to cause damage to the commercial value of Austero. *Friendfinder Network*, 540 F. Supp. 2d at 304; *Austero*, No. 20-9804, op. at 20a–21a.

Austero lacks a legally enforceable right to all characters that she has portrayed. Moonie is an AI model with similarities to Austero’s various characters over her fifty-year career. *Austero*, No. 20-9804, op. at 64a. However, there are differences between Moonie and Austero that make Moonie unrecognizable from Austero. For example, Moonie’s eyes are significantly apart, with Moonie’s right eye having an unnatural and asymmetric slant, which is distinct from Austero’s symmetric eyes. *Id.* at 24a. Therefore, Moonie is not identifiable from the AI model that was created by Fünke. The last element is not at issue and therefore will not be discussed. *Id.* at 21a.

i. *Austero's fame and recognition is not based on a single character.*

Austero had a fruitful career with roles in numerous performances, not one making her a household name, therefore she cannot be inextricably linked with one character. Austero is a decorated actor, dancer and singer due to her roles in television, Broadway shows and movies. *Id.* at 3a. Furthermore, she is one of few who has won an Oscar, Emmy and Tony awards. *Id.* Due to her success, in many different mediums, Austero cannot be linked to one specific character. Austero became a household name because of her fruitful career, not because she is recognized for one specific role.

In *McFarland v. Miller*, the Third Circuit analyzed whether an actor has the right of publicity over a character they portrayed. 14 F.3d 912, 915 (3d Cir. 1994). McFarland played a character in *Our Gang*, a series of short films, in which he appeared ninety-five times over the course of five years. *Id.* at 914–15. McFarland played a beloved and mischievous character named “Spanky.” *Id.* at 914. Most importantly, in seven out of the eight other films he was in, he was always featured as Spanky. *Cook Article, supra* at 327. McFarland sued a restaurant owner for infringing on his right of publicity over his character, Spanky. *McFarland*, 14 F.3d at 914. The restaurant used McFarland’s image from *Our Gang* throughout the establishment and operated under the name “Spanky McFarland’s.” *See id.*; *Cook Article, supra* at 328. The Third Circuit found that the restaurant owner was improperly using McFarland’s name and likeness and infringing on his right of publicity as Spanky McFarland. *McFarland*, 14 F.3d at 914. Reasoning that “where an actor’s screen persona becomes so associated with him that it becomes inseparable



from the actor's own public image" the actor has a right of publicity over the character. *Id.* at 920; *Cook Article, supra* at 328.

Unlike McFarland and Spanky, Austero is not closely associated with one specific character. *McFarland*, 14 F.3d at 915. Austero was an actor in twenty-two different movies, portraying even more characters during her Broadway and television career. *Austero*, No. 20-9804, op. at 3a. She only portrayed herself in "two brief cameo appearances." *Id.* Austero did not build a likeness for herself through one specific character. She is not like McFarland because of all of her various roles and characters throughout her career.

Austero is more similar to Whoopi Goldberg. Whoopi Goldberg is a world-renowned actress, comedian, radio host and television personality. Jazmine Hughes, *Whoopi Goldberg Will Not Shut Up, Thank You Very Much*, N.Y. TIMES (Sept. 28, 2022) (noting that "Goldberg appears to everyone in a different way. Someone who has found her through "The Color Purple" or "Ghost" or "Sister Act," and "her resume [is] stacked with weighty achievements") [hereinafter *Hughes Article*]. Whoopi, like Austero, is part of an elite club of professionals who have won an Emmy, Oscar and a Tony Award. *Id.*; *Austero*, No. 20-9804, op. at 3a. Whoopi Goldberg is not famous because of her role in one specific performance, nor has she accumulated accolades based on one character she portrayed. *Hughes Article, supra* (describing someone may know Goldberg as the daytime talk show host of "The View" for fifteen years). Austero's career is like Whoopi Goldberg's in that they are both famous for their tremendous talents across many different platforms portraying numerous characters.

*Id.*; *Austero*, No. 20-9804, op. at 3a. Neither Austero nor Whoopi can claim a right of publicity over a single character they portrayed because they are not inextricably linked to one character.

In *Wendt v. Host International*, the Ninth Circuit decided that an actor did not have rights to a character they portrayed. 125 F.3d 806, 810 (9th Cir. 1997) (stating “[a]ppellees argue that the figures appropriate only the identities of the characters Norm and Cliff, to which Paramount owns the copyrights, and not the identities of Wendt and Ratzenberger, who merely portrayed those characters on television and retain no licensing rights to them.”). The actor has that right if their character is so intertwined with their own persona that the director or filmmaker does not own that right anymore. *See Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 625 (6th Cir. 2000). If an actor and character are not inextricably linked, then the question becomes: does the rights of publicity over the character belong to the actor or the screenwriter? *See generally Wendt*, 125 F.3d at 811; *see also Austero*, No. 20-9804, op. at 21a. Here the rights over characters belong to the screenwriters not to Austero.

ii. *An actor’s right of publicity claim must be based on a close association between the actor and a character, which Austero does not have.*

At the heart of a right of publicity, is the public’s association between an actor and a character. *McFarland*, 14 F.3d at 919 (“[a]t its heart, the value of the right of publicity is associational. People link the person [with the character]”). Thus, to determine whether an actor has the right of publicity over a character they portrayed, or whether the screenwriter owns that right, there must be a showing that the nature of the character is closely associated with the actor. *Cook Article, supra* at 314. Based

on how closely associated the character and actor are, the actor has a higher burden to prove that they are inextricably linked with that character. A sliding scale approach is used to evaluate the closeness of the association.

The levels of this scale include: (1) the actor played themselves, (2) the actor created the character they portray, (3) the character is premised around the actor, (4) the character has the same name as the actor, but with fictional elements, (5) the character has the same name as the actor but no fictional elements, and (6) the character does not revolve around the actor whatsoever. *Id.* at 314–15. The further an actor is from their character, the stronger proof of association is needed. Because Moonie was created from pieces of characters that Austero played, and none of those characters are based on Austero, there needs to be a strong showing that Austero is inextricably linked to a character. Austero is not inextricably linked with any of the characters used to create Moonie, such as those from *Cabaret*, *New York, New York*, or *Tell Me That You Love Me*, *Junie Moon*. She simply is the actress that portrays those characters. *Austero*, No. 20-9804, op. at 30a. Because there is no strong association between these character and Austero, there is no valid claim.

Based on the sliding scale of the associated value test shown in *McFarland*, Austero does not have a claim over the many roles that she has performed in her long career and cannot hold the right of publicity to a singular one. *McFarland*, 14 F.3d at 920 (“[A] court should also consider the association with the real life actor. Where an actor’s screen persona becomes so associated with him [or her] that it becomes inseparable from the actor’s own public image, the actor obtains an interest in the

image. . .”). If this Court were to find that Austero and Moonie were sufficiently similar, as for Austero to have a right of publicity, this Court would be opening the doors for any actor to claim rights over any character they have ever played. This would severely limit artists’ market because the right of publicity for a celebrity would always trump First Amendment protection. Therefore, this Court should find that the first element, laid out in *Friendfinder*, fails.

*iii. Moonie’s appearance does not have an identifiable aspect to Austero as to support a right of publicity claim.*

Austero does not have a right of publicity claim over Moonie because Moonie does not have an identifiable aspect or persona of Austero. As stated by the Fifteenth Circuit “[t]his case requires that we consider the legal propriety of a right-of-publicity case based on a Frankenstein monster of sorts.” *Austero*, No. 20-9804, op. at 27a. Moonie is not a carbon copy of Austero. *Id.* Austero must have an identifiable aspect or persona within Moonie to claim a right of publicity, however that is not the case here. *Friendfinder Network*, 540 F. Supp. at 304. As the Fifteenth Circuit stated, “fans who want to purchase videos of Austero would find *Moonie Bares All* unsatisfactory” to replace the productions Austero was a part of. *Austero*, No. 20-9804, op. at 37a.

In *Wendt*, an actor claimed their publicity rights were violated because robotic figures were based upon their likeness and modeled after a famous television show, *Cheers*. See *Wendt*, 125 F.3d 809. The Fifteenth Circuit claimed that Moonie was similar to Austero in height, body style, proportions, skin tone, hair color and hair

style. *Austero*, No. 20-9804, op. at 28a. Thus it erroneously gave Austero a right over features that are common to the human body.

For example, Moonie is 5'4" which is statistically the average height for a female. Ashley Marcin, *What's the Average Height for Women and How Does That Affect Weight*, Healthline, <https://www.healthline.com/health/womens-health/average-height-for-women> (last visited Nov. 12, 2023). Austero does not uniquely own the height 5'4." *Austero*, No. 20-9804, op. at 28a. Moonie has a black pixie hair style, common to many American women. Brianna Lapolla, *Presenting: The 58 Best Haircuts for Women in 2023*, PWBeauty (Oct. 2, 2023), <https://www.purewow.com/beauty/best-haircuts-for-women> (various forms of pixie cuts are some of the most popular hairstyles). Austero cannot claim the pixie cut as her own. The Fifteenth Circuit also pointed out that Moonie only has four fingers on her left hand, while Austero has all five fingers on both hands. *Id.* at 24a. Furthermore, the Fifteenth Circuit pointed that, contrary to Austero's symmetrical face, Moonie's eyes are significantly wideset and asymmetrical. *Id.*

In *White v. Samsung Electronics*, the Ninth Circuit discussed that what infringes on a celebrity's right of publicity depends on how an individual celebrity has made a name for themselves. *See* 971 F.2d 1395, 1403 (9th Cir 1992). White is famously known for her role on the *Wheel of Fortune*, one of the most popular game shows on television. *Id.* at 1396. In this case, White alleged that her right of publicity was infringed when a robot "impersonated her" by mimicking her presentation of the wheel. *Id.* at 1397. Because the robot looked like White, and was imitating what she

did on the *Wheel of Fortune*—what she is famous for—she could have a claim against Samsung’s robot for infringing on her right of publicity. *Id.* at 1402.

By contrast to White, Austero is not known for playing one specific role or portraying herself in productions. *Austero*, No. 20-9804, op. at 3a. Austero has had so many different roles and is not explicitly known for her portrayal of a single character. *Id.* Further, Moonie is not inspired by one specific character but instead pulls from different parts of Austero’s entire career. *Id.* at 27a. Moonie is not a carbon copy of what Austero currently looks like, or a carbon copy of what Austero ever looked like at a single time. *Id.* Austero does not have a claim for a right of publicity because the *FriendFinder* elements fail. If this Court finds that Austero can claim a right of publicity over any animated creation that is 5’4”, with black short hair, that can sing and dance, then artists’ creativity will be limited forever.

**B. Under the transformative use test Fünke’s work was so transformative from any image of Austero that her right of publicity claim fails.**

Courts apply the transformative use test to determine when a party’s use of a likeness transforms enough to be an expressive work that can be protected by the First Amendment. *No Doubt v. Activision Publ’g, Inc.*, 192 Cal. App. 4th 1018, 1022 (Cal. Ct. App. 2011). When analyzed under the factors from *Comedy III*, Fünke’s work prevails as transformative because *Moonie Bares All* is an artistic expression and should be protected by the First Amendment. *See generally Comedy III Prod., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 399 (Cal. 2001).

There are three tests that courts have used to analyze if a work should be protected under the First Amendment. In order to prevail, Fünke and FakeBlock need to “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); *Austero*, No. 20-9804, op. at 31a. The three tests courts have employed when balancing right of publicity claims and First Amendment protection are the “predominant use” test, the trademark-based *Rogers* test, and the “transformative use” test. *Austero*, No. 20-9804, op. at 31a. The transformative use test is the appropriate test for this Court to analyze *Moonie Bares All* because the test is flexible to analyze claims for the celebrity while balancing traditional First Amendment defenses. *Id.* at 32a; *see generally Comedy III Productions*, 21 P.3d at 391 (“We formulate . . . a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”).

As laid out by the Ninth Circuit, there are five factors that came from *Comedy*

### *III.*

(1) Whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized (and thus is transformative) rather than the celebrity’s depictions being “the very sum and substance of the work in question”;

(2) Whether the work is primarily the defendant’s own expression where such “expression” amounts to something more than just the celebrity’s likeness. That is, would a likely purchaser’s primary motivation be to buy a reproduction of the celebrity or instead the artist’s expressive work;

(3) Whether the literal and imitative elements, or the creative elements, predominate;

(4) Whether the economic value of the work derives primarily from the celebrity's fame; and

(5) Whether the artist's skill and talent are superior to the overall goal of creating a conventional portrait of the celebrity.

*Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1274 (9th Cir. 2013). This test provides the analytical balance between protecting a citizen's right to publicity as well as protecting a citizen's First Amendment rights. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 161 (2013).

*i. Moonie is a creation of "raw materials" rather than a mere portrayal of Austero.*

The first element of the test considers whether the celebrity's likeness is being used as raw material of the work or is a mere depiction of the celebrity. *See Keller*, 724 F.3d at 1274. This case is different from other cases that the Fifteenth Circuit relied on to justify its erroneous decision.

In *Keller*, the Ninth Circuit discussed that if a piece of work adds significant creative elements, then the work does not infringe on a person's right of publicity. *Keller*, 724 F.3d at 1273. Samuel Keller was a quarterback for Arizona State University in 2005 and the University of Nebraska in 2007. *Id.* at 1271. EA Sports produced NCAA Football video games which had avatars of college football players. *Id.* EA Sports attempted to replicate all college football teams as accurately as possible. *Id.* The difference between real college football games and the video game, other than the game being virtual, is that the college players did not have names associated with their avatars. *Id.* Keller alleged he was part of the 2005 edition of the



video game because the starting quarterback for the University of Arizona was wearing his numbered jersey and was the same height, weight, skin tone, hair color, hair style, home state, play style, visor preference, facial features, and school year. *Id.* at 1272. The Ninth Circuit found that EA Sports did not have enough transformative elements to entitle them to the First Amendment defense because the avatar was an exact replica of the player. *Id.* at 1276.

Unlike the avatars in *Keller*, which sought to give users an exact real game experience, Moonie is a brand-new character in a production entirely different than any of Austero's. Fünke's purpose in creating Moonie was not to replicate Austero in a specific movie setting. Instead, small elements from Austero's long career were used to form a whole new creation in a short film. *Austero*, No. 20-9804, op. at 4a–5a. Moonie sings an original cover of "New York, New York." *Id.* at 26a. A song Austero has never performed, and is undisputedly protected by the First Amendment. *Id.* at 35a. Moonie's voice is not a carbon copy of Austero's. *Id.* at 27a. It is a digitally created and altered voice, made from "raw building blocks" of Austero's long career. *Id.* Moonie stumbles on stage. *Id.* at 5a. Austero has never stumbled on stage. *Id.* Moonie strips off her burlesque outfit. *Id.* Austero wore a burlesque outfit in *Cabaret* but never took her clothes off in that production. *Id.* Austero once stripped off her clothes in *Tell Me That You Love Me, Junie Moon*, but was not wearing a burlesque outfit. *Id.* These differences are significant because they do not replicate one specific performance by Austero. But instead, raw bits and pieces of Austero's career inspired a new creation.

In contrast to Keller’s avatar, Moonie is a brand-new creation, significantly transformed from any one of Austero’s appearances. Keller argued that his physical appearance was so intertwined with his avatar in the video game that his right of publicity was infringed. *Keller*, 724 F.3d at 1286–87. But Moonie is not intertwined with Austero as to infringe on Austero’s right of publicity. Therefore the first element of the transformative use test is satisfied.

*ii. The public would not be satisfied with Moonie as a replacement for Austero.*

The second element requires there to be enough transformative elements as to not be a replacement for the celebrity’s likeness or performances. As discussed in *Cardtoons v. MLB* and *Winter v. DC Comics*, a piece of work can be protected under the First Amendment if the primary element used is not the celebrity’s fame. 95 F.3d 959 (10th Cir. 1996); 30 Cal.4th 881 (Cal. 2003). Customers would not buy *Moonie Bares All* if they wanted to see Austero because Moonie is not a replica of Austero, nor are they similar enough to be. *Austero*, No. 20-9804, op. at 27a. “[A]n artist depicting a celebrity must contribute something more than a ‘merely trivial’ variation, [but must create] something recognizably ‘his own’” to afford themselves legal protection under the law. *Winter*, 30 Cal.4th at 888. Because Moonie is a completely new creation, the second element is satisfied.

In *Cardtoons*, the Tenth Circuit discussed the idea of parody trading cards and whether those infringed on professional baseball players’ right of publicity. *Cardtoons*, 95 F.3d at 959 (10th Cir. 1996). *Cardtoons* created parody trading cards that featured caricatures of high-profile major-league players. *Id.* at 962. The featured players were well known that, “a person reasonably familiar with baseball

can readily identify the players.” *Id.* The Tenth Circuit concluded that absent an affirmative defense, such as a First Amendment protection for a creative creation, the trading cards would infringe upon the MLB players publicity rights. *Id.* At 968–69. Because the parody cards provided social commentary on public figures, even if not in the traditional medium of newspapers or books, the court reasoned that there were enough transformative elements in the cards to warrant First Amendment protection. *Id.* at 969.

The five-minute short film in which Moonie dresses in burlesque and dances may also be seen as parody. *Austero*, No. 20-9804, op. at 5a. Parody is defined as “a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule.” Parody, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/parody#:~:text=Synonyms%20of%20parody-1,a%20feeble%20or%20ridiculous%20imitation> (last visited Nov. 12, 2023). As decided by the Tenth Circuit, parody is covered by the First Amendment because of the transformative work that is done by the creators. *Cardtoons*, 95 F.3d at 967. *Moonie Bares All* is protected by the First Amendment because it does not mimic *Austero* but provides parody through the transformative changes Fünke made.

The Supreme Court of California has ruled that the First Amendment protects an artist’s work from right of publicity claims, if the work contains significant transformative elements, and is not primarily derived from the celebrity’s fame. *Winter*, 30 Cal.4th at 890–92. The California court considered whether comic books that depicted pictures of well-known musicians, such as the Winter brothers,

infringed on the rights of the celebrities. *Id.* at 886. The Supreme Court of California found that the DC Comics’ artistic work was not just mere pictures of the Winter brothers, but “fanciful, creative characters” and therefore passed the transformative use test. *Id.* at 892.

Similarly, *Moonie Bares All* is Fünke’s fanciful and creative artistic work. Fünke created Moonie with a software that took parts of Austero’s career and placed them into one new AI image character. The artistic ability and creativity to pull different parts of a person, from different stages in their life, and put them together to make a new character, is in itself transformative. The second element of the transformative use test is satisfied.

*iii. Moonie is a creative piece of work and dominates over characteristics specific to Austero.*

The third element of the transformative use test is satisfied because the creative elements of Moonie predominate over characteristics specific to Austero. The Ninth and Sixth Circuits have analyzed whether celebrities’ depictions receive First Amendment protection due to the artists creativity. *See generally Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2011); *ETW Corp., v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003). Both circuits emphasize the difference between a creative piece of work, where the creator’s work dominates over characteristics specific to the celebrity. *See generally id.* This distinction is necessary to satisfy the third element of the transformative use test.

In *Hoffman*, the Ninth Circuit considered whether artistic characteristics in a creator’s work are transformative. 255 F.3d at 1184. *Hoffman* was an actor in a

famous movie, *Tootsie*, where he played a male character that dressed as a woman in parts of the series. *Id.* at 1182. A specific image in which Hoffman’s character was in a long sleeve red sequined dress with high heels in front of an American Flag became famous. *Id.* A few years after the show aired, Los Angeles Magazine (“LAM”) published an article titled “Grand Illusions.” *Id.* The article used computer technology to alter famous scenes in productions to make the characters appear in current fashion. *Id.* at 1183. One of the characters was Hoffman’s Tootsie. However, the image was altered. *Id.*

LAM’s representation of Tootsie had a different body and dress. *Id.* Instead of Tootsie appearing in the infamous red sequined dress, LAM’s image showed a male model wearing a spaghetti-strapped, cream-colored dress with high-heeled sandals. *Id.* The Ninth Circuit noted that “there is no question that LAM’s publication of ‘Tootsie’ photograph contained ‘significant transformative elements’” due to the changes in Tootsie’s body and outfit. *Id.* at 1184 n.2. Just like LAM’s image, Moonie has a different body than Austero has ever had. *Austero*, No. 20-9804, op. at 27a. Moonie portrayed enough creative characteristics to be transformative such as different physical features, hair style and clothing as to not mimic Austero. *Id.* at 23a–24a.

In *ETW Corp. v. Jireh Publishing, Inc.*, the Sixth Circuit likewise grappled with the same question of what constitutes enough creativity to demonstrate a creator’s work under the transformative use test. 332 F.3d at 915. This circuit considered whether Tiger Woods, a world-class golfer, had the “exclusive right to exploit his

name, image, likeness and signature and all other publicity rights.” *Id.* at 918. Jirah Publishing represented Rick Rush, who is also known as “America’s sports artist.” *Id.* Rush created a work of art titled “The Masters of Augusta,” which showed Wood’s win at the Masters Tournament held in Augusta, Georgia. *Id.* The court found that since the work was a collage of images, in conjunction with Tiger Woods’ image, there were enough transformative aspects that would satisfy the transformative use test. *Id.* (“Rush’s work consists of a collage of images in addition to Woods’s image which are combined to describe, in artistic form, a historic event.”).

Fünke’s work, just like Rush’s, is a collage of images put together into one body to create Moonie—a fictional character. *Austero*, No. 20-9804, op. at 25a. Therefore, this Court must find that Fünke’s work predominates over specific characteristics of *Austero* and thus third element of the transformative use test is satisfied.

*iv. Moonie’s economic value does not derive from Austero’s fame.*

The fourth and fifth elements of the transformative use test are satisfied by the artistic and political nature of Moonie. Moonie does not derive a monetary value from *Austero*’s fame, and Moonie’s creation was part of a political campaign, and not in efforts to make a “conventional portrait” of *Austero*. *Comedy III*, 25 Cal.4th at 406.

This Court has defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.” *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980). Thus, a creation’s profit based solely on a celebrities’ likeness to the creation would be considered commercial speech.

In *C.B.C. Distrib. & Marketing, Inc. v. MLB*, the Eight Circuit clarified the distinction between monetizing from a person’s likeness, and monetizing from providing information about a person. 505 F.3d 818, 824 (8th Cir. 2007). C.B.C.’s website provided users with MLB players’ biographical data and game statistics. *Id.* at 823. The Eight Circuit reasoned that C.B.C. profited from the information they provided and not from players’ likeness. *Id.*

Similarly, Moonie’s value derives from the public’s interest in a political race, and the innovation of Fünke’s software, not the similarities between Austero and Moonie. *Austero*, No. 20-9804, op. at 4a. The public did not watch *Moonie Bares All* to satisfy their desire to watch movies in which Austero appeared. *Id.* at 25a, 64a. Or to enjoy the melodies and voice of Austero and her music. *Id.* at 64a. Instead, the public watched *Moonie Bares All* in the course of the Bluth-Austero race to determine the best fit for Newport Beach’s next Congressional seat.

Further, Moonie does not serve as a portrait of Austero. Moonie’s flat pixie-cut is significantly different from Austero’s signature spiky pixie cut. *Id.* at 23a. Moonie’s asymmetrical face features, do not compare with Austero’s aesthetically pleasing face. *Id.* Austero’s beauty mark is evidently absent in Moonie. *Id.* Austero’s fan base would not replace Austero’s posters, products, or pictures for one of Moonie. Thus, Moonie cannot be said to be a “conventional portrait” of Austero, and instead highlights the potential for creation of AI models with Fünke’s software. Therefore, the last two elements of the transformative use test are satisfied.

Fünke satisfied the five-factor transformative use test as set out in *Comedy III*. The transformative use test enables creators to use celebrity’s images as a starting point while still being protected under the First Amendment. Because Fünke’s creation satisfies the five-factor test, Moonie should be eligible for First Amendment protection.

**C. The First Amendment shields Fünke’s creative work even if *Moonie Bares All* was generated through AI.**

In its wisdom, Congress enacted the First Amendment so creators and artists could have a space to produce their work without fear of repercussion. Seventy-one years ago, this Court established that “expression by means of motion pictures is included within the free speech and free press guaranty of the First . . . Amendment[s].” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). This is a broad protection that cannot be limited by any one person’s fame or status. *Winters*, 30 Cal.4th at 889. *Moonie Bares All* is a film that should not be an exception to this broad First Amendment Protection, and Austero’s claim of fame cannot limit Fünke’s creative freedom. Even if AI was the final producer, the content creator is Fünke, therefore the First Amendment protection still applies.

Austero exposes herself to the limelight due to her fruitful career and she must be prepared for artists and creators to use her characters as a basis for their creative work. She is not awarded more policing power over her image, simply due to her fame. Even if she is unhappy with her depiction in *Moonie Bares All*, it is a work that is protected under the First Amendment.



The use of AI to generate *Moonie Bares All* does not limit First Amendment protection. In his concurring opinion, Justice Scalia said that the First Amendment was written to protect speech, regardless of the speaker. *Citizens United v. FEC*, 558 U.S. 310, 392–93 (2010) (Scalia, J., concurring). For example, to protect a movie, even though it is filmed through a camera. Eugene Volokh et al., *Freedom of Speech and AI Output*, 3 J. OF FREE SPEECH L. 651, 658 n.19 (2023). Or to protect a song, even though it is recorded and produced through a machine. *Id.* Similarly to directors and music producers, Fünke used technology to express her ideas. *Austero*, No. 20-9804, op. at 3a. It was her creative direction that was input, and then AI produced the output, just as a camera or machine produce the final output for movies or songs. *Id.* *Moonie Bares All* therefore must have the same protections that this Court provided movies seventy-one years ago.

Further, this Court has expanded First Amendment protections to speech by non-humans, such as corporations. *Citizens United*, 558 U.S. at 424; James B. Garvey, *Let's Get Real: Weak Artificial Intelligence Has Free Speech Rights*, 91 FORDHAM L. REV. 953, 975 (2022) [hereinafter *Garvey Article*]. In *Citizens United*, this Court emphasized that all courts are bound by the First Amendment, and it would be unconstitutional to draw lines, and then redraw lines, based on certain technology. 558 U.S. at 326. Corporate speech is protected by the First Amendment, even if the speaker is a “corporate identity.” *Id.* at 424. In corporate speech the actual content is input and created by a human member of the corporation but expressed by a company. *Id.* at 365. Similarly, Fünke entered information into a software that

ultimately put out the final content of *Moonie Bares All. Austero*, No. 20-9804, op. at 3a.

AI must be protected under the First Amendment. As the constitutionally protected right is written, the protection surrounds the speech, not the speaker. *Citizens United*, 558 U.S. at 392–93. AI is the future of this world, whether we like it or not. Citizens will continue to utilize this great technology to advance our world. This Court must find that AI is protected free speech as citizens will continue to use the tool for creative works—writing, art, media, and more—and without protection courts will be flooded with First Amendment protection claims. If this Court finds that this five-minute short film is not protected by the First Amendment, then citizen’s free speech will be limited for years to come.

### CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court reverse the judgment of the Fifteenth Circuit Court of Appeals on both issues.

*/s/ Team No. 75*

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Team No. 75  
*Counsel for Petitioner*

## APPENDIX

The CDA, 47 U.S.C. §230 provides in pertinent part:

### **(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.

...

**(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.