

No. 22-9908

In the

SUPREME COURT OF THE UNITED STATES
October 2023 Term

FAKEBLOCK, INC., MAEBY FÜNKE,
Petitioners,

v.

LUCILLE AUSTERO,
Respondent.

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

BRIEF FOR THE PETITIONERS

November 20, 2023

Team 83

QUESTIONS PRESENTED

- I. Does the reference to “any law pertaining to intellectual property” in 47 U.S.C. § 230(e)(2) encompass state law right-of-publicity claims when the states vary greatly in their recognition of the right of publicity, there is no federal analogue, and § 230(b) states that the policy of the United States is to promote a prosperous and free market for the internet unfettered by federal or state regulation?

- II. Under Newport Beach state law, does a computer generated, artificial-intelligence character that resembles a real-life celebrity infringe the celebrity’s right of publicity when all the celebrity’s most identifiable traits are changed, or is that character protected under the First Amendment as the expressive speech of the character’s creator?

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OPINIONS BELOW

The judgment of the United States District Court for the District of Newport Beach is unreported but is available at No.-cv-5309 and is discussed in the Record. R. at 6a-7a. The judgment of the United States Court of Appeals for the Fifteenth Circuit is also unreported but can be found at No. 20-9804 and appears in full in the record. R. at 1a-67a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifteenth Circuit entered a final judgment on October 17, 2022. The petition for a writ of certiorari was timely filed, and it was granted on October 9, 2023. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment states, in relevant part, “Congress shall make no law... abridging the freedom of speech[.]”

47 U.S.C. § 230(b)(2), (c)(1), (e)(1)–(5), and (f)(3) are reprinted in the appendix. *See* App. A–B.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

FakeBlock is a startup social-media website. R. at 5a. In 2018, FakeBlock was in its beta phase and had only three officers: George Maharis, Paul Huan, and Maeby Fünke (“Fünke”). R. at 5a. These three did not hold offices one would expect to find in the average, functional corporation, such as chief executive officer or chief financial officer. R. at 5a n. 3; *see also* R. at 56a. Instead, Mr. Maharis was referred to as ‘Mr. Manager’ and Mr. Huan was referred to as ‘P-Hound.’ R. at 5a n. 3. Fünke’s association with FakeBlock began when she invested money in the business. R. at 56. She also advertised FakeBlock in a speech at a Hollywood industry event and tried to convince others to invest. R. at 56a. Fünke did not have a formal job title at FakeBlock, nor was she paid. R. at 5a n. 3, 6a.

Fünke, Harris, and Huan were the only ones who had the authority and ability to upload content to FakeBlock in 2018. R. at 5a. Fünke used this authority to upload several videos showing support for her mother’s congressional campaign. R. at 57a. One such video was a five-minute film of Moonie, an original character Fünke created. R. 5a. The film portrayed Moonie tap-dancing on stage in a burlesque outfit. R. at 5a. Moonie then lost her balance, stabilized herself against a set piece, and removed all her clothing, though the nudity was pixelated. R. at 5a. Then Moonie, slurring her words, sang a parodied version of “New York, New York”

from the musical and movie *On The Town*. R. at 5a; R. at 36a. Fünke created Moonie using her proprietary generative artificial intelligence software. R. at 4a.

Fünke uploaded the film exclusively to FakeBlock because she was an investor and wanted to bring traffic to the site. R. at 6a. Fünke titled the film “Moonie Bares All!!!” (“the film”) and wrote “VOTE 4 LINDSAY BLUTH” alongside a link to her mother’s website. R. at 6a. Fünke created Moonie for two reasons: to demonstrate her software’s ability to generate realistic simulacra of human beings and to help her mother’s congressional campaign against Lucille Austero (“Austero”). R. at 4a; R. at 66a.

Austero was an acclaimed actress, singer, and dancer. She retired over ten years ago after undergoing vocal-chord surgery in 1997 that changed her singing voice. R. at 3a, 26a. Austero’s last major film role was in 2009 and she released her last album in 2010. R. at 3a. In 2018 she reentered the public eye in an unsuccessful bid to represent Newport Beach in the U.S. Congress. R. at 3a; R. at 6a. Austero also has vertigo and is an alcoholic. R. at 55a.

There are general similarities between Austero and Moonie because Fünke used Austero as the starting point for Moonie’s appearance by having her software analyze Austero’s movies and albums. R. at 7a. Both Austero and Moonie are 5’4” and have the same general body shape, and the same color skin and hair. R. at 4a. Moonie’s tap-dance routine is also reminiscent of Austero’s routine at the Radio City

Music Hall. R. at 25a. In one of her movies, Austero played the titular character “Junie Moon.” R. at 26a. Fünke, however, testified at her deposition that she chose the name because of the striptease Moonie performs in the film. R. at 26a.

There are also notable differences between Moonie and Austero. R. at 4a. For example, although both have pixie haircuts, Moonie’s hair is flat while Austero’s hair is spikey. R. at 23a. Moonie also does not have Austero’s iconic beauty mark on her left cheek or her equally iconic open-mouth smile. R. at 23a, 24a. Moonie’s nose also has a notable downward dip. R. at 24a. Moonie’s left hand only has four fingers, and the index finger is not wrinkled like the rest of her hand. R. at 24a. More noticeably, Moonie’s mouth is disproportionately large for her face and her eyes are unusually wide set compared to Austero’s symmetrical eyes. R. at 24a. Moonie’s right eye also has an asymmetric slant that contrasts with her left eye. R. at 24a.

II. PROCEDURAL BACKGROUND

Austero lost the election and, on August 24, 2018, sued FakeBlock in Newport Beach district court. R. at 6a; R. at 2a. The district court sat in diversity under 28 U.S.C. § 1332(a)(1). R. at 2a. Austero claimed that Moonie so closely resembled Austero as to violate Austero’s right of publicity under Newport Beach law. R. at 2a. Austero sought an injunction requiring FakeBlock to remove the film, although FakeBlock did so on its own three days after Austero filed suit. R. at 6a. That same day, FakeBlock removed Fünke from her unpaid position. R. at 6a. After

losing the election, Austero amended her pleadings to add Fünke as a defendant. R. at 6a. Austero alleged that Fünke and FakeBlock appropriated her identity and “infringe[d] on her right to profit from her likeness and identity.” R. at 6a.

FakeBlock and Fünke moved for summary judgment, arguing Austero did not have a right-of-publicity claim and, even if she did, the film was protected by the First Amendment. R. at 7a. FakeBlock argued that 47 U.S.C. § 230 granted statutory immunity from Austero’s claim. R. at 7a. The district court rejected FakeBlock’s immunity claim but granted summary judgment in FakeBlock and Fünke’s favor on the merits of Austero’s right-of-publicity claim. R. at 7a.

Austero appealed to the U.S. Court of Appeals for the Fifteenth Circuit. Sitting en banc, the Fifteenth Circuit affirmed the denial of FakeBlock’s assertion of statutory immunity. R. at 18a. The Fifteenth Circuit held, however, that the district court erred in granting summary judgment on the merits of Austero’s right-of-publicity claim. R. at 39a. The Fifteenth Circuit also rejected FakeBlock and Fünke’s First Amendment affirmative defenses. R. at 39a. The Fifteenth Circuit entered judgment for Austero on October 17, 2022. R. at 1a.

FakeBlock and Fünke petitioned this Court for writ of certiorari. *FakeBlock, Inc. v. Austero*, 600 U.S. 22-9908 (2023). This Court granted the petition on October 9, 2023. *Id.*

SUMMARY OF THE ARGUMENT

FakeBlock is entitled to immunity under § 230(c)(1) because § 230(e)(2) should not be read to waive immunity for state law right-of-publicity claims. As an initial matter, FakeBlock qualifies under § 230(c)(1) because, for purposes of determining whether the content was “created or developed” by an internet service provider, there is a distinction between creating content and uploading content—the latter of which is a traditional editorial function that § 230(c)(1) protects. Fünke acted outside the scope of her agency when she created the film, so the film’s creation cannot be attributed to FakeBlock. Moreover, while uploading the film was within the scope of Fünke’s agency, uploading the film falls within a traditional editorial function and does not qualify as “creating or developing content.”

As to the intellectual property exception in § 230(e)(2), the word ‘any’ in the phrase “any law pertaining to intellectual property” is limited by the structure and enacted policies of § 230. The structure of § 230(e) creates ambiguity concerning whether Congress meant for state law claims to be exempted from immunity. The enacted policies in § 230(b) provide a further textual basis for limiting the meaning of the word ‘any’: they declare that the policy of the United States is to promote a prosperous free market for the internet that is unfettered by federal or state regulation. While some regulations must exist, a non-uniform mass of state right-of-publicity laws goes too far and necessarily conflicts with congressionally enacted policies. Accordingly, we ask this Court to adopt the rule that state intellectual

property laws are exempted from immunity only to the extent they are uniform across the states or closely analogous to federal law. As applied to this case, section 230(e)(2) should not be read to exempt state right-of-publicity claims because the right of publicity differs significantly across the several states and there is no federal analogue.

Additionally, the film does not infringe Austero's right of publicity for two reasons. First, the Fifteenth Circuit improperly expanded the right of publicity as recognized by the Supreme Court of Newport Beach. When the state recognized a right-of-publicity claim, it did not follow the majority rule that recognizes a cause of action for infringement of identity. Rather, it adopted a significantly narrower test solely for infringement of name or likeness.

Moreover, Austero's claim also fails on the merits. Austero cannot prove she has an enforceable property right in any of the traits used to create Moonie. Austero concedes that the film does not use her name and, as the Fifteenth Circuit unanimously agreed, there is no facial resemblance between Austero and the character of Moonie. The other generic traits used to create Moonie—such as body type, hair color and style, and outfit—are too generic to substantiate a right-of-publicity claim. Furthermore, the record does not support an inference that Austero owns enforceable rights to the choreography of a dance or to characters Austero has played. Similarly, Austero is not identifiable from the film. Most of the traits used

to create Moonie are substantially altered, such as Austero's voice, smile, and face. Further, other traits are too generic to render Austero uniquely identifiable as required to substantiate a right-of-publicity claim.

Even if Austero has stated a prima facie right-of-publicity claim, her claim fails because the First Amendment protects the film as a matter of law. Lower courts have developed four tests to balance the interest of the celebrity against society's interest in free speech. These tests are the transformative use test, the predominate use test, the *Rogers* test, and the public interest defense. The film is protected under all these tests because it is a transformative parody that comments on Austero's congressional campaign, a matter of public interest, and the references to Austero are essential to the film's message. Still, the limits of these four tests suggest that to appropriately balance the interests at stake in right-of-publicity litigation, this Court should revisit the right-of-publicity analysis through the lens of strict scrutiny. Under this test, there would need to be a compelling state interest in preventing the film and the means of restricting speech would have to be narrowly tailored to further that interest.

STANDARD OF REVIEW

A court must grant summary judgment where there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Summary judgment decisions are reviewed *de novo*. *Matsushita Elec.*

Indus. Co., LTD v. Zenith Radio Corp., 475 U.S. 574, 585–86 (1986). To succeed on the summary judgment standard, the movant must demonstrate there is no genuine issue of material fact. *Id.* All inferences are to be made in the non-movants favor but must be based on facts in the record. *Id.* at 587.

ARGUMENT

I. FAKEBLOCK HAS IMMUNITY UNDER § 230 OF THE COMMUNICATIONS DECENCY ACT.

Section 230(c)(1) of the Communications Decency Act provides that internet service providers shall not “be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Courts have interpreted this section to have three requirements: (1) the entity must be an interactive computer service; (2) the content must have been provided by another information content provider; and (3) the plaintiff must have sought to hold the information content provider liable as the publisher or speaker of that content. *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007). The parties to this case only dispute the second requirement. R. at 10a–11a. Under the scope-of-agency and material contributions tests, the film was provided by another information content provider.

When all the elements of § 230(c)(1) are met—as they presently are—an interactive computer service has immunity unless one of the exceptions in 230(e) applies. Section 230(e)(2) states that nothing in § 230 “should be construed to limit

or expand any intellectual property law.” 47 U.S.C. § 230(e)(2). The Ninth Circuit held that “any intellectual property law” does not include an exception to immunity for state law claims. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007). The Third Circuit, and a few district courts—on a less-than-convincing textual analysis—have held the opposite. See *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2009); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009). Where a statute contains policy declarations in its text, courts ought to read later provisions of the statute in a way that enacts the declared policy, especially when the structure and surrounding text of the statute raises questions regarding the meaning of a particular provision. *United States v. Turkette*, 452 U.S. 576, 588–90 (1981) (relying on RICO statement of findings and purpose).

Furthermore, the right-of-publicity claim at issue is not an intellectual property claim because the ordinary meaning of the term requires work product of the mind. Nor does the claim at issue resemble the state interests this Court laid out in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), as part of its analogy between the right of publicity and traditional intellectual property laws.

A. The Threshold requirements are met because Austero’s Claim is Based on Information Provided by Another Information Content Provider.

Section 230(f)(3) defines ‘information content provider’ as “any person or entity that is responsible, in whole or in part, for the *creation or development* of information provided through the internet.” 47 U.S.C. § 230(f)(3) (emphasis added). The circuits have applied the material contribution test to determine whether a person or entity is responsible in whole or in part for the creation or development of content. *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 n.4 (9th Cir. 2016); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014). When a plaintiff seeks to erase the distinction between a corporate officer and the corporation, the first question is whether the act at issue was within the scope of the corporate officer’s agency. *Cornelius v. DeLuca*, 709 F. Supp. 2d 1003, 1022–23 (D. Idaho 2010) (holding the plaintiff could survive a motion to dismiss because plaintiff’s complaint alleged a moderator, within the scope of the moderator’s employment, authored the content at issue). If the act was not within the scope of agency, the analysis ends. If it was, the next question is whether the act qualifies as a material contribution. *See Jones*, 755 F.3d 398.

Here, there are two relevant acts. The first is Fünke’s creation of the film. The second is Fünke decision to upload the film to FakeBlock.

1. Fünke was not acting within the scope of her agency when she created the film.

A corporate agent's act is within the scope of agency when the act is "so closely connected with [the servant's employment] and so fairly and reasonably incidental to it, that [the act] may be regarded as [a] method[], even though quite [an] improper one[], of carrying out the objectives of the employment." Prosser and Keeton, *The Law of Torts* 502 (5th ed. 1984); *see also* Restatement (Second) of Agency § 229. The Fifth Circuit considered the factors listed in Prosser and Keeton and the Restatement (Second) of Agency:

"(1) the time, place and purpose of the act; (2) its similarity to acts which the servant is authorized to perform; (3) whether the act is commonly performed by such servants; (4) the extent of departure from normal methods; (5) the previous relations between the parties; and (6) whether the master would reasonably expect such an act would be performed."

Domar Ocean Transp., Ltd., Div. of Lee-Vac, Ltd. v. Indep. Refining Co., 783 F.2d 1185, 1190 (1986).

The foundation of the agency test is the pre-existing employment relationship between agent and principal; if the goal is to determine whether an act is "so closely connected to what the servant is employed to do," it is essential to first determine what exactly the servant is employed to do. In answering that question, the Fifteenth Circuit in the opinion below labeled Fünke as FakeBlock's "director of investor relations" without engaging in an analysis of Fünke's responsibilities.

In a typical corporation, the roles and duties of the corporate officers are laid out in the corporation's bylaws. *Powers and Duties of Corporation Directors and Officers*, Wolters Kluwer, Feb 12, 2023, <https://www.wolterskluwer.com/en/expert-insights/powers-and-duties-of-corporation-directors-and-officers#7>. There is nothing in the record supporting an inference that FakeBlock—a student-ran corporation out of a college dorm room—had clearly defined corporate roles.

Instead, Fünke only had four connections to FakeBlock: she had, and had used, the ability to upload content, she invested in FakeBlock, she spoke about FakeBlock at a Hollywood industry event, and she attempted to use her Hollywood influence to get others to invest. R. at 56a–57a. Moreover, Fünke was unpaid and did not have a formal title.

In the present case, no factfinder employing the *Domer* scope-of-agency factors could reasonably conclude that creating a political attack video was within the scope of Fünke's agency. Fünke stated her purpose in creating the film was to demonstrate her generative AI software program and to advance her mother's campaign. R. at 41a. Although Fünke testified she *uploaded* the film for the purpose of bringing traffic to FakeBlock, Fünke's purpose in that regard—as her testimony indicates—was limited to why she uploaded the film; her testimony did not touch on why she created the film. R. at 42a. Instead, Fünke's stated purposes for creating the film are unrelated to FakeBlock.

The second *Domar* factor—similarity to authorized acts—also favors FakeBlock. In *Domar*, the Fifth Circuit held that a captain of a vessel engaged in selling stolen goods was acting similarly to what he was employed to do because he had frequently sold goods to third parties on behalf of his principal. 783 F.2d at 1190. The same cannot be said here. The creation of a political attack video bears no resemblance to advocating for FakeBlock in a Hollywood speech or using Hollywood influence to attract investors.

The fourth, fifth, and sixth factors yield the same outcome. Here, Fünke’s normal methods include Hollywood stump speeches and using her Hollywood influence to attract investors. R. at 56. Creating a short film is well beyond those methods. Moreover, Fünke had a limited relationship with FakeBlock and, accordingly, any act attenuated from previous acts arising out of the preexisting relationship was unexpected. Although Fünke uploaded similar content in the past, nothing in the record suggests that Fünke also created that content. *See* R. at 57(a).

From the scant evidence of Fünke’s relationship with FakeBlock, it is unreasonable to infer that creating the film was within the scope of Fünke’s agency.

2. Even if uploading the film was within the scope of Fünke’s agency, uploading the film did not materially contribute to the film’s content.

The material contribution test analyzes whether the alleged creator or developer directly or materially contributed to the illegal aspect of the content. *Henderson v. Source for Public Data, L.P.*, 53 F.4th 110, 128 (4th Cir. 2022). As the

Sixth Circuit stated, there is a “crucial distinction” between “taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable.” *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 414 (6th Cir. 2014). Actions traditional to publishers include “deciding whether to publish, withdraw, postpone, or alter content[.]” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

When an internet service provider’s agent selects third party-authored content for publication, the agent has not materially contributed to the content’s illegality solely because she selected the content for publication. *Jones*, 755 F.3d at 415–16; *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003). In *Jones*, the manager and founder of a website, Richie, solicited content through a form instructing submitters to “Tell us what’s happening. Remember to tell us who, what, when, where, why.” *Id.* at 402. Richie then decided which content to publish. *Id.* at 403. The Sixth Circuit held that selecting content for publication by itself is not a material contribution because it represents a traditional editorial function and the CDA “expressly bars lawsuits seeking to hold publishers liable... for traditional editorial functions[.]” *Id.* at 416. The Sixth Circuit noted that solicitation forms only qualify as a material contribution if the forms require illegal content, but the court held the form in *Jones* did not require illegal content. *Id.* at 415–17.

The case at hand rests on a stronger factual basis than *Jones* because, instead of soliciting content through a form, Fünke was selecting content from an open universe. As one of only three people with access to a developing social media platform, Fünke necessarily served as a funnel between the open universe of content and FakeBlock. *See R.* at 5a. It is immaterial that Fünke selected content she created because, for purposes of attributing Fünke’s actions to FakeBlock, there is a distinction between Fünke’s acts in her individual capacity and her acts in her corporate capacity. And, as discussed above, Fünke was not acting within her corporate capacity when she created the film. Accordingly, the film was provided by another information content provider and FakeBlock qualifies for immunity under § 230(c)(1).

B. The Phrase “any intellectual property law” in § 230(e)(2) Does Not Encompass the Right of Publicity Because the Structure of the Statute and the Enacted Policies Counsel Against Allowing a Non-Uniform Exemption to Immunity, and the Right of Publicity Across the Several States is Non-Uniform to a Significant Degree.

The starting point in statutory construction is the text of the statute. *United States v. Gonzalez*, 520 U.S. 1, 4 (1997). Although a particular word or phrase within a statute may be the focal point of a dispute, the word or phrase should be viewed considering the entire statute; the Court’s duty is to “construe statutes, not isolated provisions.” *Graham Cnty. Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010). Consequently, the meaning of certain words or

phrases depends in large part on the context in which they exist. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

1. The structure of § 230 and the enacted policies require exemptions from immunity to be based on a uniform body of law, despite the use of the word “any” in § 230(e)(2).

For 200 years, this Court has recognized that the word “any” does not always refer to a limitless category of the modified noun. *U.S. v. Palmer*, 16 U.S. 610, 631(C.J. Marshall) (1818) (reading “any” narrowly based on a judicial presumption); *Small v. United States*, 544 U.S. 385 (2005) (same); *Nixon v. Missouri Municipal League*, 541 U.S. 125, 132 (2004) (reading “any” narrowly to avoid an anomalous result); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) (reading “any” narrowly based on the surrounding text of the statute in dispute); *Flora v. United States*, 362 U.S. 145, 149 (1960) (same); *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 15–16 (1981) (same); *but see Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 587–89 (1980) (reading “any” broadly because there was no textual conflict or ambiguity); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (same); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008) (same).

In *Alvarez-Sanchez*, Justice Thomas—writing for seven—held that 18 U.S.C. § 3501(c)’s reference to “any law-enforcement officer” was limited to officials arresting or detaining someone for a federal crime. 511 U.S. at 357–58. In doing so, Justice Thomas focused on the text of § 3501(c), which states “[a confession made

while under arrest] in the custody of any law enforcement official... shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States[.] ” *Id.* at 357. Justice Thomas reasoned that a delay in bringing someone “before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States” presupposed a federal offense: without a federal offense, there is no delay to be had in bringing someone before a judicial officer of the United States. *Id.* at 358. For the statute to be internally consistent, “any law enforcement official” cannot literally mean *any* law enforcement official. *Id.*

The same textual considerations that existed in *Alvarez-Sanchez* exist here. The policy declarations in § 230(b)(2) mandate that the structurally created ambiguity of § 230(e) be read to narrow the provision within § 230(e)(2).

a. *The text and structure of § 230(e) create ambiguity as to the meaning of § 230(e)(2).*

There are three subsections within § 230(e) that create ambiguity as to whether “any intellectual property law” includes state law claims. Subsection (e)(5) allows state claims to the extent the claims would be viable under federal law. Subsection (e)(4) allows state claims “similar” to the Electronic Communications Privacy Act of 1986. The implication of these two subsections is twofold: Congress knew how to reference state law when it meant to, and when Congress referenced

state law, it did so to the extent state law tracks federal law. Moreover, subsection (e)(1) allows criminal prosecution under various federal criminal laws but makes no mention of analogous or similar state laws. Congress' decision not to exempt state law claims in (e)(1) evinces an overall intent to immunize internet service providers from state law claims unless there is a specific mention of state law claims.

The absence of any reference to state law in (e)(1), and the presence of state law only insofar as it tracks federal law in (e)(4) and (e)(5), raises ambiguity as to whether the phrase “any intellectual property law” in subsection (e)(2) literally means *any* intellectual property law. When three out of four provisions of the same nature either exclude or limit state law claims, it raises doubt as to whether the fourth provision, subsection (e)(2), exempts unfettered state law claims from immunity. *See Hepp v. Facebook*, 14 F.4th 204, 211 (3d Cir. 2021) (recognizing the structure of § 230(e) “cuts both ways”).

b. The Congressionally enacted policies in § 230(b)(2) require a narrow reading of § 230(e).

Explicit policies *in the text of the statute* bring this case further into the company of *Alvarez-Sanchez*—a point the lower courts recognize. *See Hepp*, 14 F.4th 204 at 211 (agreeing with Facebook that the congressionally enacted purpose was to encourage the free market and analyzing whether a broad reading of § (e)(2) conflicts with that policy); *Friendfinder*, 540 F. Supp. 2d at 300 (noting and attempting to explain why the congressionally enacted policy of promoting an

unfettered free market does not conflict with a broad reading of § 230(e)(2)); *but see Atlantic Recording*, 603 F. Supp. 2d at 702–04 (dismissing defendant’s textual argument, which relied on enacted policy, because it was not “support[ed] in the plain language of the CDA.”). Aside from the flawed reasoning in *Atlantic Recording*, the issue is not whether to give textual weight to the enacted policies in § 230(b)(2), but rather what exactly the enacted policies call for.

Although the Ninth Circuit did not expressly connect its analysis to the enacted policies, the court nonetheless correctly held that § 230(e)(2) ought to be read narrowly. *See Perfect 10*, 488 F.3d at 1118. Contrary to the holding and reasoning of the Third Circuit, considering the uniformity of a body of law is part of determining whether that body of law is consistent with the policy of maintaining a vibrant and competitive free market.

While the Third Circuit agreed that “Congress enacted a pro-free market policy,” the court mistakenly concluded that the “enacted policies” did not require a narrow reading of § 230(e)(2). *See Hepp*, 14 F.4th at 211. The Third Circuit reasoned that state property rights encourage market exchange, which is in line with Congress’ enacted pro-free market policy. *Id.* The immediate issue with the Third Circuit’s reasoning is that § 230 does not provide immunity to *everyone*, just to interactive computer services; state intellectual property rights remain enforceable through lawsuits against persons responsible for the creation or development of the

offending content, which in some cases—unlike the present case—may include the interactive computer service. *See* § 230(c)(1).

The second issue with the Third Circuit’s reasoning in *Hepp* is that a cacophony of state laws resulting in legal uncertainty hinders, rather than develops, the free market. *See Perfect 10*, 488 F.3d at 1118; *see also* Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 243 (“A basic maxim of American jurisprudence is that legal certainty promotes commercial efficiency. Negotiating licenses and pursuing infringers would be less costly and more predictable if the right of publicity was... [uniform]... rather than the present patchwork) (internal footnote and quotations omitted).

Friendfinder and *Atlantic Recording* stand on no stronger footing. The *Friendfinder* court rejected the Ninth Circuit’s approach because the exemption in § (e)(2) for intellectual property laws—considering Congress’ stated policy to preserve a free market “unfettered by *Federal or State* regulation”—demonstrated Congress’s preference to preserve intellectual property claims. *Friendfinder*, 540 F. Supp. 2d at 300 (italics in original). The *Friendfinder* court was right that Congress evidently thought a few exceptions to immunity would not fetter the market. Just as evident, though, is the notion that subjecting internet service providers to a wide swath of varying laws fetters the market. A uniform set of laws, like federal intellectual property law, does not burden a competitive free market, whereas a non-uniform set

of state intellectual property laws does. *See* Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 243.

Finally, the *Atlantic Recording* court mistook an argument based on the enacted policies as an argument based solely on extra-textual policy. *See* 603 F. Supp. 2d at 702–04. In doing so, the *Atlantic Recording* court ran afoul of what both the *Friendfinder* and *Hepp* courts properly recognized: the enacted policies are congressional mandates deserving of consideration in a textual analysis.

Accordingly, the structure and textually enacted policies of § 230 mandate a reading of § 230(e)(2) that respects the relationship between a vibrant and competitive free market and a uniform body of law applicable to that market. Reading § 230(e)(2) to include only state law insofar as it is uniform is the most faithful way to read § 230(e)(2).

2. The right of publicity is not uniform and should not be included as an exemption to immunity under § 230(e)(2).

Several professors across the nation have recognized the varying state right-of-publicity laws. Professor Lee-Richardson notes that states vary greatly in their protection of various attributes as well as in their protection of post-mortem rights. Brittany Lee-Richardson, *Multiple Identities: Why the Right of Publicity Should Be a Federal Law*, 20 UCLA Ent. L. Rev. 189, 196–97 (2013); *see also* Restatement (Third) of Unfair Competition § 46, Reporter’s Note, comment d (noting that some states only allow recovery for celebrities while others allow non-celebrities to

recover and that states vary widely in the attributes they protect). Professors Vick and Jassy also noted the wide divergence amongst state right-of-publicity laws.

Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 Comm. Law. 14, 15 (2011) (“[There] are dozens of... states whose laws combine to create a crazy quilt of divergent rights of publicity that confound any meaningful classification”) (internal quotation marks omitted); *see also* 1 J. Thomas McCarthy & Roger E. Schechter, *Rights of Publicity and Privacy* § 6:4 (2d ed. 2023) (“each [state] statute has its own peculiarities.”).

Furthermore, as Professor Goodman points out, just because several states have adopted the Restatement (Second) of Torts approach to the right of publicity does not mean that each state will interpret the Restatement in the same way. Eric J. Goodman, *A National Identity Crisis: The Need for a Federal Right of Publicity Statute*, 9 DePaul-LCA J. Art & Ent. L. & 227, 245 (1999) (“Even if each state judiciary or state legislature is willing to provide protection of individual personas, such a decentralized approach is inadequate because it will result in fifty different standards”); *see also* R. at 17a n.4

The Fifteenth Circuit, while recognizing the validity of concerns about an expansive reading of “any intellectual property law” based on varying laws across the states, nonetheless tried to play down the point by stating that those concerns “as applied to this case” are inapplicable because several other states have adopted

the Restatement (Second) of Torts § 652C. R. at 17a, 17a n.4. There are two problems with the Fifteenth Circuit's approach. The first is that not every state has adopted the Restatement (Second), and even in states that have, differing statutes alter the application of the Restatement. McCarthy & Schechter, *supra*, § 6:2 (noting that 33 states have adopted the right of publicity but that only 21 have done so through the common law); *See Id.* at § 6.6 (listing the 24 states that recognize the right of publicity through statute, ten of which also recognize a common law right).

The second problem is that the narrow nature of this case gives it greater force. Petitioners do not ask the Court to grant immunity from all state intellectual property claims. Instead, Petitioners only ask this Court to grant immunity from right-of-publicity claims because the right of publicity varies substantially in its form across the several states.

In cases involving other state intellectual property claims, it may be true that the claim involved is uniform because it closely tracks a federal claim or because the states are uniform in their application of the law at issue. On the present facts, where there is no analogous federal law and the states vary greatly in their application of the right of publicity, the right of publicity ought not to be included in § 230(e)(2)'s exceptions to immunity.

C. Even if § 230(e)(2) Includes the Right of Publicity, the Claim at Issue is Not an Intellectual Property Claim.

The Fifteenth Circuit’s basis for finding that Respondent’s right-of-publicity claim is an intellectual property claim was that Respondent had a proprietary interest in her name or likeness. However, the majority opinion made no attempt to discern the meaning of “intellectual property” as used in § 230(e)(2), even though “intellectual property” is undefined in the statute. *See* R. at 18a. Furthermore, the Circuit failed to read *Zacchini* in context and, instead, read it so expansively as to abandon the reasons this Court gave for analogizing certain right-of-publicity claims to other well-established intellectual property claims. *See Id.*

1. The common understanding of ‘intellectual property’ does not include the right-of-publicity claim at issue.

This Court has routinely consulted dictionaries to determine the meaning of an undefined statutory term. *New Process Steel L.P. v. NLRB*, 560 U.S. 674, 683–84 (2010) (relying on dictionary definitions of ‘quorum’); *Chamber of Commerce v. Whiting*, 563 U.S. 582, 595 (2011) (relying, in part, on dictionary definition to define ‘licensing’); *Tamiguchi v. Kan Pacific Saipan, LTD.*, 566 U.S. 560, 566–67 (2012) (relying on various legal and non-legal dictionaries from around the time of enactment to interpret ‘interpreter’ in the phrase “compensation of interpreters”).

Here, several legal dictionaries from the time § 230 was enacted indicate that one’s name or likeness is not intellectual property. Ballentine’s Legal Dictionary

and Thesaurus (1995) defines ‘intellectual property’ as “property that is the physical or tangible result of original thought.” The Random House Unabridged Dictionary (2d ed. 1993) defines ‘intellectual property’ as “property that results from original creative thought, as patents, copyright material, and trademark.” The Merriam Webster Collegiate Dictionary (11th ed. 2003) defines ‘intellectual property’ as “property (as an idea, invention, or process) that derived from the work of the mind or intellect.” All three of these dictionaries notably exclude the right of publicity as an example, and they also all converge on one key commonality: the work of the mind or intellect. One’s name or likeness, as the Judge Walt noted in his dissent in the opinion below, is not the product of one’s intellect. R. at 54a; *see also Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 163 n.13 (D. Mass 2015) (noting one’s image is not intellectual property).

Black’s Law Dictionary (7th ed. 1999) defines ‘intellectual property’ as “[a] category of intangible rights protecting commercially valuable products of the human intellect” and as “A commercially valuable product of the human intellect, in a concrete or abstract form, such as a copyrightable work, a protectable trademark, a patentable invention, or a trade secret.” Black’s first definition includes a list of examples: “The category comprises primarily trademark, copyright, and patent rights, but also includes trade-secret rights, publicity rights, moral rights, and

rights against unfair competition.” *Intellectual property, Black’s Law Dictionary* (7th ed. 1999).

The Third Circuit’s conclusion that all right-of-publicity claims are *ipso facto* intellectual property claims—solely because the first definition in Black’s includes rights of publicity as an example of intellectual property—is misguided. *See Hepp*, 14 F.4th at 212. The examples given begin with what the category is “primarily composed of,” which includes “trademark, copyright, and patent rights.” *Intellectual property, Black’s Law Dictionary* (7th ed. 1999). The next set of examples are of what the category “also includes,” namely, “trade-secret rights, publicity rights, moral rights, and rights against unfair competition.” *Id.* The distinction between the two groups, one primary and one non-primary, suggests a level of uncertainty as to whether the non-primary group always constitutes intellectual property. Considering several other dictionaries define intellectual property without reference to the right of publicity, it is more likely that the ordinary meaning of ‘intellectual property’ does not include every right-of-publicity claim, but instead only those relating to a product of the human intellect.

As applied here, Respondent’s appropriation claim is not an intellectual property claim because Respondent only alleged that Petitioner appropriated her likeness in violation of her right to profit from her likeness. Respondent did not allege or prove that her likeness is a product of the human intellect.

2. Under *Zacchini*, Respondent’s state law claim, as alleged, is not an intellectual property claim.

Several Circuits, including the Fifteenth Circuit, have cited *Zacchini* in support of the proposition that the right of publicity, without further analysis of the specific claim at issue, is an intellectual property law. R. at 18a; *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323 (11th Cir. 2006); *Hepp*, 14 F.4th at 413 (3d Cir. 2021); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 928 (6th Cir.2003). In the case at hand, this Court has an opportunity to correct the course.

In *Zacchini*, this Court faced the right of publicity for the first time. 433 U.S. 562. Although the issue was whether the First Amendment barred the right-of-publicity claim at hand, this Court answered that the specific right-of-publicity claim brought in *Zacchini* was analogous to other intellectual property laws and therefore survived the First Amendment. *Id.* at 573. This Court reasoned that the entire reproduction of a fifteen-second human-cannonball invoked the state’s interest “in protecting the proprietary interest of the individual in his act in part to encourage such entertainment,” which mirrored the goals of patent and copyright law. *Id.* Notably, this Court pointed out that the claim in *Zacchini* was not the average right-of-publicity claim but instead one of the strongest. *Id.* at n.10.

The present case, however, rests on a much different factual basis. Here, Petitioners did not show one of Respondent’s movies in its entirety—thereby disincentivizing others from paying to see one of Respondent’s movies—but instead

allegedly appropriated Respondent's likeness in the film. R. at 5a. To the extent Petitioners appropriated Respondent's likeness, Petitioners did not engage in the sort of appropriation that this Court analogized to well-established intellectual property claims. *See Zacchini*, 433 U.S. at 573.

Accordingly, the ordinary meaning of 'intellectual property' and the narrow facts of *Zacchini* make it clear that the right-of-publicity claim here is not an intellectual property claim.

II. THE FILM DOES NOT INFRINGE AUSTERO'S RIGHT OF PUBLICITY.

In Newport Beach, a celebrity's right of publicity is infringed where a defendant appropriates the celebrity's name or likeness for her own use. R. at 19a; *see also* Restatement (Second) of Torts § 652C. Here, the film does not infringe Austero's right of publicity because Newport Beach only recognizes right-of-publicity claims for infringement of name or likeness. Further, Austero's right-of-publicity claim fails under the broader test articulated in *Doe v. Friendfinder Network, Inc.*, because there is no dispute of material fact regarding two elements of her claim. 540 F. Supp. 2d 288, 304 (D.N.H. 2008).

A. Austero Has Not Stated a Right-Of-Publicity Claim Because Newport Beach Does Not Recognize a Cause of Action for Infringement of Identity.

A fundamental rule of the federal judiciary is that federal courts sitting in diversity apply the forum state's substantive law. *Erie R. Co. v. Tompkins*, 304 U.S.

64, 80 (1938). Federal courts are forbidden from expanding or creating state law without guidance from the highest court of the forum state. *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 311 (5th Cir. 2010). The purpose of *Erie* is to ensure federal courts reach the same result the parties would have reached in the forum state's courts, thereby preventing forum shopping, and ensuring the equitable administration of justice. *Erie*, 304 U.S. at 80.

Here, the Supreme Court of Newport Beach has not adopted appropriation of identity as an element for a right-of-publicity claim. R. at 19a. When the Supreme Court of Newport Beach recognized a cause of action for infringement of the right of publicity, it could have included language in its rule relating to the appropriation of identity. The absence of any reference to identity in Newport Beach's rule is significant because most jurisdictions have recognized right-of-publicity claims for appropriation of identity for decades. *See Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983) (stating elements for right-of-publicity claim in California). Therefore, the Fifteenth Circuit improperly consulted the majority rule because there is guidance from the highest court of Newport Beach: it chose not to recognize the majority rule when it recognized the right of publicity.

Erie's concern with forum shopping is especially relevant today because cases against out-of-state corporations are increasingly likely to occur, given the ubiquity of the Internet as a source of news and entertainment. The Fifteenth Circuit's

holding encourages forum shopping and inequitable administration of the law because now prospective litigants know the federal district court will grant relief where the state trial courts do not grant relief. Because the Fifteenth Circuit improperly expanded the law of Newport Beach to include appropriation of identity, this Court ought to vacate its opinion and grant summary judgment for FakeBlock and Fünke.

B. There is No Dispute of Material Fact Regarding Two Elements of Austero's Right-Of-Publicity Claim.

According to the Fifteenth Circuit, the elements of a right-of-publicity claim are: (1) the plaintiff owns an enforceable right in her name or likeness; (2) the defendant used an aspect of her name or likeness without her consent; and (3) the defendant's use is likely to cause damage to the commercial value of the plaintiff's name or likeness. R. at 21a. There is no dispute of material fact regarding the first two elements of Austero's right-of-publicity claim. The film does not appropriate Austero's name and even the Fifteenth Circuit noted there is no facial similarity between Austero and Moonie. R. at 24a. Even assuming a broad element of identity as in *Doe v. Friendfinder, Inc.*, Austero does not own an enforceable right in any of the traits Fünke used to create Moonie. 540 F. Supp. 2d 288, 304 (D.N.H. 2008). To the extent she does have such rights, Austero is not identifiable from the film.

1. The film does not appropriate an enforceable right of Austero's name, likeness, or identity.

Austero's right-of-publicity claim fails because the film does not appropriate her name or likeness. Austero concedes the film does not appropriate her name. R. at 23a. Additionally, the Fifteenth Circuit acknowledged there is no facial similarity between Austero and Moonie. R. at 24a. Moreover, Austero does not own an enforceable right to any of Moonie's characteristics, so her claim also fails under the broader test adopted by the Fifteenth Circuit.

a. *The film does not appropriate Austero's name or likeness.*

A celebrity's name or likeness is appropriated when her name or likeness is used without her consent. *Eastwood*, 198 Cal. Rptr at 347. The appropriation of a celebrity's name requires the use of her name without her consent. *ETW Corp. v. Jireh Pub., Inc.*, 332 F. 3d 915, 929–30 (6th Cir. 2003). The appropriation of a celebrity's likeness occurs where an image of the celebrity is used without her consent. *Id.*

In this case, Austero concedes the film does not appropriate her name. R. at 23a. Further, as the Fifteenth Circuit noted, there is no facial similarity between Moonie and Austero. R. at 24a. As such, no reasonable person could conclude that Moonie resembles Austero. Therefore, Austero's right-of-publicity claim fails because the film does not appropriate her name or likeness.

b. *Even if appropriation of identity suffices, the film does not appropriate Austero's identity.*

Appropriation of a celebrity's identity requires the use specific traits that are unique to the celebrity. *Midler v. Ford Motor Co.*, 849 F.2d 460, 663-64 (9th Cir. 1988); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (*White 1*); *Wendt v. Host Int'l, Inc.* 125 F.3d 806, 811-12 (9th Cir. 1997). The Fifteenth Circuit relied on *Midler*, *Davis*, *Hart*, *Keller*, *Wendt*, and *White* to support its conclusion that the film appropriates Austero's identity. R. at 28a–30a; *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268 (9th Cir. 2012). However, these cases are distinguishable from the present facts.

In *Midler*, Ford created an advertisement with a singer imitating Midler's singing voice. 849 F.2d at 461. Individuals testified that they believed Midler herself sang for the advertisement. *Id.* at 461–62. *Midler* held that imitation of a celebrity's voice violates her right of publicity where the imitation causes actual confusion regarding the identity of the voice. *Id.* at 462–63. *Midler* is consistent with the broader purpose of the right of publicity: to protect the commercial value of the celebrity's identity. *See Zacchini*, 433 U.S. at 573–74. However, that purpose is absent where there is no possibility of actual confusion regarding the identity of the singer's voice.

Here, there is no possibility of confusing Moonie's voice with Austero's voice. Although Austero's voice is the building block of Moonie's voice, Moonie's voice is

altered to be distinct from Austero's voice, which was not the case in *Midler*. R. at 27a; 849 F.2d at 461–62. Austero's expert testimony that Moonie's voice could be Austero's current voice fails to establish a likelihood of actual confusion because the public is not familiar with Austero's voice after her vocal-cord surgery. R. at 26a, n.7. Rather, the public would compare Moonie's voice to the voice it associates with Austero: her pre-surgery voice. There is no evidence in the record that Moonie's voice resembles Austero's voice before her vocal surgery. Accordingly, Moonie's voice does not appropriate Austero's voice.

Davis, *Hart*, and *Keller* also do not help Austero establish a prima facie right-of-publicity claim. The only issue in these cases was the First Amendment defense because EA conceded the prima facie right-of-publicity case on appeal. *Davis*, 775 F.3d at 1177; *Hart*, 717 F.3d at 148–49; *Keller*, 724 F.3d at 1273. The Fifteenth Circuit thus improperly relied on these three cases for Austero's prima facie claim. R. at 29a; see *Webster v. Fall*, 266 U.S. 507, 511 (1925) (holding cases are not authority for issues the court did not consider). The analysis of the players' likenesses in these cases pertained to whether the use of identifying characteristics was protected, not whether the players owned an enforceable right in those characteristics. *Davis*, 775 F.3d at 1176 n.1; *Hart*, 717 F.3d at 148–49; *Keller*, 724 F.3d at 1273.

To the extent the First Amendment analysis is relevant to the prima facie right-of-publicity case, *Davis*, *Hart*, and *Keller* are distinguishable. As the *Hart* court noted, gamers' ability to change the appearance of the players' avatars meant the changed avatar ceased to be a "use" of the players' likenesses once the avatar was changed. 717 F.3d at 168. The same is true here: Moonie is not a use of Austero's identity because she came with substantial changes to Austero's identity, such as her voice, haircut, and smile. R. at 23a–24a; 26a. Therefore, as in *Hart*, Moonie is not a "use" of Austero's identity. F.3d at 168.

White 1 similarly does not help Austero establish ownership of an enforceable right. In *White 1*, the court held that Samsung's use of a robot in a blonde wig on the set of the Wheel of Fortune evoked Vanna White's identity. 971 F.2d at 1399. The court reasoned that the advertisement could refer to no one except White because of how closely associated she is with her role on the famous game show. *Id.* Thus, the case does not stand for the proposition that a celebrity owns an enforceable right in attributes such as hairstyle, outfits, or even the characters she played. Instead, a celebrity owns an enforceable right in such attributes only where they render her uniquely identifiable. *Id.* In the words of the *White 1* court, "[White] is the only one" to whom Samsung's advertisement could refer. *Id.*

Here, Austero does not own the pixie-cut hairstyle, brunette hair, or her body proportions because she is not the only star to wear her hair in that style, to have

brown hair, and to have her body proportions. Allowing recovery based on these generic similarities would exponentially increase the number of plaintiffs who could recover for appropriation of their right of publicity. Further, these generic similarities do not find support in the policies underlying recognition of a right of publicity: there is no appropriation of the commercial value of a celebrity's identity where a depiction draws on such generic characteristics because the celebrity is not uniquely identifiable. *Id.*

The same is true of Moonie's outfit. Many burlesque performers wear an outfit like Moonie's: a halter vest, short shorts, a derby hat, garters, and lace-up boots. R. at 25a. This outfit is so common in burlesque performances, it is unlikely the actual owner of Austero's character in *Cabaret* could substantiate a copyright claim for use of the outfit in other performances. (*Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363–64 (1991) (holding works require minimum level of creativity to receive copyright protection)). The lack of creativity or uniqueness also undercuts recognizing a right-of-publicity claim because there is no commercial value to protect. *See Zacchini*, 433 U.S. at 573–74 (discussing the policies favoring recognition of the right of publicity). Therefore, Austero does not have an enforceable right in this outfit either.

Austero also does not have an enforceable right in Moonie's tap-dance routine. The record does not support an inference that Austero choreographed the

show at Radio City Music Hall. Thus, the choreography is more analogous to portraying a character than an aspect of Austero's identity. Since no property right attaches to performing a character written by another person, neither would a property right attach to performing a dance choreographed by another person. *See Wendt*, 125 F.3d at 811 (acknowledging actors do not have enforceable rights to the characters they portray). Further, the tap-dance routine in the film here is not identical to Austero's routine at Radio City Music Hall. R. at 25a. Allowing recovery for attenuated similarities would significantly broaden the scope of a right-of-publicity claim without protecting the commercial value of the celebrity's identity. *Zacchini*, 433 U.S. at 573–74.

The Fifteenth Circuit also erred by inferring that the name "Moonie" refers to a character Austero played in a film. The only statements in the record referring to the source of Moonie's name directly contradicts this inference. R. at 25a n.6. More importantly, Austero does not own an enforceable right in the name of the character she played. *See Wendt*, 125 F.3d at 811.

Finally, the fact that Moonie acts, dances, and sings is insufficient to evoke Austero's identity. R. at 25a. Many stars achieve fame through these mediums of expression: such success is not unique to Austero. Despite her success in these fields, Austero does not have an enforceable right in dancing, acting, and singing.

Accordingly, Austero does not have an enforceable right in any of the elements used in the film.

2. Austero is not identifiable from the film.

A celebrity is identifiable where the defendant uses specific, identifying information that could only refer to the celebrity. *White 1*, 971 F.2d at 1399. Accordingly, a “fringe actor” who is not identifiable does not have a claim for appropriation of her identity. *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 621, 625–26 (6th Cir. 2000) (holding “fringe actor” did not establish right-of-publicity claim because he was not identifiable from defendant’s use). Further, the relevant test should be an actor’s present-day identifiability, not her identifiability of previous decades. *Bi-Rite Enterprises, Inc. v. Bruce Miner Poster Co.*, 616 F. Supp 71, 76 (D. Mass. 1984) (noting the effect of the “ephemeral nature” of stardom for celebrities and its effect on the commercial value of identity).

Here, Austero was not identifiable from the film. As the Fifteenth Circuit noted and as described above, there is no facial similarity between Moonie and Austero. R. at 24a. Thus, this case is not like *White 1*, where the robot’s gown, wig, and presence on the Wheel of Fortune set uniquely identified White. 971 F.2d at 1399. Here, any identifiability depends on generic physical traits and vague similarities between Moonie’s performance in the film and Austero’s performances: Austero is not “the only one” Moonie could be. *Id.* These generic traits and vague

similarities are insufficient to render Austero uniquely identifiable from Moonie’s performance.

More importantly, Austero has only made small appearances since her retirement over a decade ago. Thus, Austero is more like the “fringe actor” in *Landham* who could not support his right-of-publicity claim because he was not identifiable. 227 F.3d 621, 625–26. Unlike the singer in *Midler*, Austero has not submitted evidence that viewers identified Moonie with Austero. 849 F.2d at 662. Further, the record does not support an inference that viewers on a cutting-edge social media platform like FakeBlock would identify Austero based on her performances from thirty to fifty years ago. *Bi-Rite Enterprises*, 616 F. Supp. at 76. Moreover, the record does not support an inference that any viewers did in fact identify Austero. Because Austero is not uniquely identifiable from the film, and there is no evidence that she was actually identified, the film did not infringe the commercial value of her identity.

III. EVEN IF AUSTERO HAS STATED A RIGHT-OF-PUBLICITY CLAIM, THE FIRST AMENDMENT PROTECTS THE FILM.

In *Zacchini*, this Court called for a test to balance society’s interest in free expression against a celebrity’s interest in protecting the commercial value of her identity. *See Zacchini*, 433 U.S. at 573–75 (discussing the policies favoring recognition of the right of publicity and the need to balance against the First Amendment). Since *Zacchini*, lower courts have developed four balancing tests: the

transformative use test, the predominant use test, the *Rogers* test, and the public interest defense. The film is protected under all these tests because it is a transformative parody that references Austero's career to comment on her congressional campaign. Nevertheless, the limits of these tests suggest that this Court should analyze right-of-publicity claims through the lens of strict scrutiny to ensure a celebrity's right of publicity does not become a broad means of chilling free expression.

A. If this Court Adopts the Transformative Use Test, the First Amendment Protects the Film Because the Parody Adds Significant Transformative Elements.

Under the transformative use test, a work is worthy of First Amendment protection when it adds "significant transformative elements" to the celebrity's identity. *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001). Courts applying the transformative use test have distilled five factors to determine whether a work contains sufficiently transformative elements. *See Keller*, 724 F.3d at 1274. First, whether the celebrity's identity is one of the work's "raw materials" or if it is the "sum and substance" of the work. *Id.* A second factor is whether the work is primarily the defendant's own expression, which addresses the likelihood a consumer would purchase the reproduction as a substitute for the celebrity's own works. *Id.* A third factor is whether the economic value of the work derives from the depiction of the celebrity. *Id.* The fourth factor is whether the

imitative or creative elements of the work predominate. *Id.* The final factor is whether the artist has subordinated her skill to creating a literal depiction of the celebrity or if she has created something new. *Id.*

1. Austero's identity is one of the film's raw materials.

The first factor of the transformative use test is whether the depiction of the celebrity is one of the work's "raw materials" or whether it is the "sum and substance" of the work. *Comedy III*, 21 P.3d at 809. This ambiguous factor has proven difficult for courts to apply, but courts have generally held that parody of a celebrity is sufficiently transformative. *See, e.g., Winter v. DC Comics*, 69 P.3d 473, 479 (Cal. 2003) (holding celebrity depictions as "half-human and half-worm" cartoon characters was transformative). Depictions recreating a celebrity's image fail to meet the test, despite the social value of such depictions. *Comedy III*, 21 P.3d at 811.

In this case, Moonie is so transformed that she ceases to be a depiction of Austero. As the Fifteenth Circuit stated, there is no facial resemblance between Austero and Moonie. R. at 24a. Further, Moonie's voice is unrecognizable from the voice audiences associate with Austero because of Austero's vocal-chord surgery. R. at 26a. The public does not know Austero's post-surgery voice because Austero retired from singing thirteen years ago. R. at 3a. As Fünke testified, Austero's voice is the "raw building blocks" of Moonie's voice, the raw materials from which Moonie

was created. R. at 27a. Thus, this factor weighs in Petitioners' favor because the changes render Austero the raw material of Moonie, not Moonie's sum and substance.

2. The film is primarily Fünke's own expression.

The next factor analyzes whether audiences would buy the work as a substitute for the celebrity's expression. *Comedy III*, 21 P.3d at 809. In this case, the Fifteenth Circuit's reasoning that Fünke was selling her software, rather than the film, is irrelevant: Austero's suit is based on the film, not on future films. R. at 2a. Audiences would not find the film an appealing substitute for Austero's work because Moonie is a bad dancer, has a different voice from Austero's voice, and performs a striptease rather than a burlesque show. R. at 5a, 26a. This factor also weighs in Petitioners' favor.

3. The film has artistic, technological, and economic value independent from Austero's identity.

The next factor analyzes the economic value of the work itself, whether it is solely from the celebrity depiction or has its own distinct economic value. *Comedy III*, 21 P.3d at 810. In this case, the film is a parody of a public figure—a socially valuable form of expression. *Hustler Magazine v. Falwell*, 485 U.S. 46, 54–55 (1988) (holding parody advertisement is protected under First Amendment as socially valuable expression). Like *Falwell*, the film provides entertainment and commentary on a public figure, which was one of Fünke's purposes in creating the

film. R. at 4a. Further, as an exhibition of the capabilities of Fünke’s proprietary software, the film has value as a demonstration of the capabilities of new technology. R. at 4a. As such, the film could drive investment in new technology and fuel economic growth. Thus, the film has substantial social value that is independent of any association with Austero.

4. The creative elements of the film predominate over the imitative.

This factor requires courts to conduct a “quantitative” analysis to determine whether the creative or the imitative elements of a work predominate. *Comedy III*, 21 P.3d at 810. In *Comedy III*, the imitative elements of the depiction of the Three Stooges predominated because they were literal drawings of the celebrities. *Id.* In this case, there are no purely imitative elements in the film. All the aspects of Austero’s likeness, from her face to her voice, are modified to create Moonie, an entirely new character. R. at 24a, 26a. Thus, the creative elements of the film predominate over the purely imitative aspects.

5. Fünke has not subordinated her skill to creating a literal depiction of a celebrity because she has created a distinct parody.

The final factor of the transformative use test analyzes if the creator has attempted to recreate the celebrity’s literal image. *Comedy III*, 21 P.3d at 811. In *Comedy III*, the California Supreme Court held that lithographs of the Three Stooges simply recreated the likenesses of the iconic trio of celebrities and were unprotected by the First Amendment. *Id.* On the other hand, *Winter* held a comic

book that depicted celebrities as worms was protected by the First Amendment. *Winter*, 69 P.3d at 479. Finally, *ETW Corp.* held that a depicting Tiger Woods was transformative because the depiction combined numerous images to convey a message about the significance of Woods's accomplishments. 332 F.3d at 938. Thus, even literal recreations of a celebrity's image are protected where they provide commentary or are minimally creative. *Id.*

Here, Moonie is not a literal depiction of Austero because Austero's most recognizable features are changed. Moonie does not share Austero's name and there is no facial resemblance between the two. R. at 23a–24a. Austero's iconic hair and smile are different from Moonie's. R. at 24a. Austero's voice is changed, so Moonie's voice does not resemble the voice that made Austero famous. R. at 27a. These changes make the film more like the transformative expression in *Winter* than the derivative depictions in *Comedy III*. See *Winter*, 69 P.3d at 479; *Comedy III*, 21 P.3d at 810–11. Further, like the commentary in *ETW Corp.*, the film comments on Austero's political campaign using parodied song lyrics. R. at 35a–36a; 332 F.3d at 938. Given these changes to Austero's identity, the film contains significant transformative elements such that Moonie is protected as transformative expression.

B. If This Court Adopts the Predominant Use Test, the First Amendment Protects the Film Because the Creative and Commentative Purposes of the Film Predominate.

The Supreme Court of Missouri developed the predominant use test as an alternative to California's transformative use test. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (2003). The court concluded that the outcome should depend on the speaker's purpose in using the celebrity's identity. *Id.* The court reasoned that the transformative use test failed to account for the commercial purposes underlying some expressive speech. *Id.* The court stated the transformative use test allowed appropriations of a celebrity's likeness that were in any way expressive, regardless of the exploitative purpose inherent in the use. *Id.* Where a purpose to exploit the commercial value of the celebrity's identity predominates, the celebrity's right of publicity prevails. *Id.* If, however, the use of the celebrity's identity predominantly served to "make an expressive comment on or about the celebrity," free speech prevails over the celebrity's right of publicity. *Id.*

Critics of the predominant purpose test have claimed the test requires judges to act as "discerning art critics." *Hart*, 717 F.3d at 154. However, the same could be said of the transformative use test, which requires judges to determine whether a work has "significant transformative elements," which also requires artistic discernment. *Comedy III*, 21 P.3d at 809–810.

A greater problem with the predominate use test is that it provides courts little guidance for determining which purpose predominates. For example, in *Doe* the court held that the purpose of a comic book artist's decision to name a character

after a celebrity was purely commercial because the artist wanted to reach a wider audience for his comic book. 110 S.W.3d at 374. However, the court did not identify any factors it considered in reaching this conclusion. *Id.* Further, the outcome was likely due to the artist's concession that his use of the celebrity's name was neither parody nor expressive comment about the celebrity. *Id.* That concession left only one possible outcome for the court: since the use of the celebrity's name was neither a literary device nor an expressive comment, the commercial purpose necessarily predominated. *Id.*

Here, Fünke referenced Austero and her career to create an expressive parody that comments on Austero's political campaign. R. at 4a. The film accomplishes this purpose through its use of the song's lyrics, which the Fifteenth Circuit unanimously agreed were parody. R. at 35a. In doing so, the film satirizes Austero and comments on her apparent contempt for the voters of Newport Beach. R. at 35a. Thus, the film is precisely the expression the *Doe* court contemplated when it stated that works making an expressive comment on or about a celebrity are protected by the First Amendment. 110 S.W.3d at 374.

C. The Film is Protected Under the *Rogers* Test Because Austero's Likeness is Not Wholly Unrelated to the Subject Matter of the Film and the Film is Not a Disguised Advertisement for Goods or Services.

Under the *Rogers* test, use of a celebrity's name or identity in the title of a work is presumptively protected by the First Amendment, unless the use of the

name or identity is wholly unrelated to the work or simply an advertisement for the sale of goods. *Rogers v. Grimaldi*, 875 F.2d 994, 1004–05 (2d Cir. 1988); *see also Park v. LaFace Records*, 329 F.3d 437, 461 (6th Cir. 2003).

Because this test arose where a celebrity’s name was used in the title of a work, courts have often declined to expand the *Rogers* test into other contexts. *See Keller*, 724 F.3d at 1280–82; *but see Park*, 329 F.3d at 461 (concluding use of identity in expressive work is protected unless the use is simply a ploy to attract attention to a work wholly unrelated to the identity used). Such an expansion of the *Rogers* test would limit a celebrity’s recovery to two, narrowly tailored contexts: where her name or likeness is either wholly unrelated to the subject matter of the work or is a thinly veiled attempt to appropriate the celebrity’s likeness to sell goods or services. *Rogers*, F.2d at 1004–05. Although courts have balked at this outcome, it is entirely consistent with the purpose of the right of publicity, which arose to protect the commercial value of the celebrity’s name and likeness. *See Zacchini*, 433 U.S. at 573–74. Allowing recovery where the commercial value of a celebrity’s name and likeness is not expressly appropriated chills socially valuable expression because artists and commentators will choose not to speak out of fear of legal liability. *Falwell*, 485 U.S. at 56.

Thus, expanding the *Rogers* test would allow celebrities to defend the commercial value of their identities without the risk of chilling socially valuable

expression. The risk of chilling speech is inherent in the transformative use and predominant purpose tests because they set a much higher bar for First Amendment protection, an outcome contrary to this Court's First Amendment jurisprudence. *See Comedy III Productions*, 21 P.3d at 809–810 (protecting only speech that adds “significant transformative elements”); *Doe*, 110 S.W.3d at 374 (holding commercial uses of celebrities' identities are not protected, even though the First Amendment protects commercial speech); *but see Falwell*, 485 U.S. at 56 (discussing the importance of providing breathing space for expressive speech).

In this case, Austero's identity was not wholly unrelated to the subject matter of the film. The purpose of the film was to parody Austero's career to comment on her political campaign. R. at 4a. Such parody is socially valuable speech that allows artists and commentators to express their views on current events in an entertaining manner. *Falwell*, 485 U.S. at 56. Thus, Austero's identity is not wholly unrelated to the film because the use of her identity furthers the socially valuable purpose of commenting on current events. *Id.*

Neither is the film a disguised attempt to sell goods or services. Although Fünke wanted to demonstrate the capacities of her software, the film is not commercial speech because it is not solely related to the economic interests of the speaker and her audience. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561 (1980) (defining commercial speech as “expression

related solely to the economic interests of the speaker and its audience”). More importantly, the film does not give the impression that Austero approves of or endorses any product because there is no product in the film. Since there is neither commercial speech nor a false endorsement of a product, the film does not appropriate Austero’s identity to sell goods or services. Rather, it makes use of Austero to comment on current events. Because the use of Austero’s likeness is neither wholly unrelated to the purpose of the film nor a disguised attempt to sell goods or services, the film is protected under the *Rogers* test.

D. The Film is Protected Under the Public Interest Defense to Right-Of-Publicity Claims Because the Film Comments on Austero’s Political Campaign, which is a Matter of Public Concern.

Where the use of a public figure’s identity comments on a matter of public concern, the public interest defense protects the commentary. *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 640–42 (Ct. App. 1995); see *Gertz v. Robert Welch*, 418 U.S. 323, 343 (1974) (including individuals of notable achievement and vigorously seeking public attention in “public figure” definition). First Amendment protection attaches to such commentary because the right of publicity developed to protect the commercial value of a celebrity’s identity, not to suppress commentary on the celebrity in news media. *Id.* at 795, quoting *Jackson v. MPI Home Video*, 694

F. Supp. 483, 492 (N.D. Ill. 1988); *see also New York Times v. Sullivan*, 376 U.S. 254, 279 (1964) (discussing the ills of self-censorship in democratic society).

Here, the public interest defense protects the film. Austero entered the political arena when she ran for Congress, making herself a public figure. R. at 1a; *Gertz*, 418 U.S. at 343. As a public figure, Austero was a target for commentary, criticism, and parody—expression the First Amendment protects—such as the film. *Id.* To hold otherwise would expand the right of publicity beyond the public policy favoring its recognition—to protect the commercial value of a celebrity’s identity—while simultaneously curtailing the protections of the First Amendment by forcing creators to engage in self-censorship. *Zacchini*, 433 U.S. at 573–74; *Sullivan*, 376 U.S. at 279; *see also Jackson*, 694 F. Supp. at 492. Accordingly, this Court should find the film is protected by the public interest First Amendment defense.

E. Austero’s Right-Of-Publicity Claim Does Not Pass Strict Scrutiny.

The limits of the foregoing analyses demonstrate the need to revisit the right-of-publicity analysis through the lens of strict scrutiny. The *Zacchini* Court recognized that, in certain cases, there is a compelling state interest in protecting a celebrity’s right of publicity despite the freedom of speech. *Zacchini*, 433 U.S. at 573–74. The Court did not undertake to balance the interests because it was immaterial to the outcome in *Zacchini*: “wherever the line in particular situations is to be drawn . . . we are quite sure . . . the First and Fourteenth Amendments do not

immunize the media when they broadcast a performer’s entire act without his consent.” *Id.* at 574–75. The *Zacchini* Court thus left it to lower courts to develop the appropriate balancing test. *Id.*

However, the tests lower courts have developed are highly flawed, confusing in application, and fail to adequately balance the interests at stake in most right-of-publicity claims. In part, this failure is due to the lower courts’ tacit avoidance of the touchstone of this Court’s First Amendment jurisprudence: where a government act functions as a content-based restriction of speech, the act must survive the strictest scrutiny. *See Sarver v. Chartier*, 813 F.3d 891, 905–06 (9th Cir. 2016) (holding right-of-publicity claims must demonstrate compelling state interest to prevent appropriations of identity). Thus, to survive, Auster’s right-of-publicity claim must further a compelling state interest and the means of restricting speech must be narrowly tailored to restrict as little speech as possible.

1. Austero’s right-of-publicity claim does not further a compelling state interest.

Protecting the commercial value of a performer’s entire act undoubtedly furthers a compelling state interest. *Zacchini*, 433 U.S. at 574–75. However, as one court noted, *Zacchini* is a “red herring” for most right-of-publicity cases because *Zacchini* involved a claim for appropriation of a performance, not a claim for appropriation of identity. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 973 (10th Cir. 1996). Further, the *Zacchini* Court expressly declined to

balance the interests, noting “wherever the line is to be drawn” did not impact the outcome of *Zacchini*. 433 U.S. at 574–75. Therefore, this Court should determine whether protecting Austero’s right of publicity rises to the level of a compelling state interest.

In *Cardtoons*, the Tenth Circuit held that parody baseball trading cards warranted First Amendment protection. 95 F.3d at 976. The court acknowledged the state interest in protecting the right of publicity but concluded courts and commentators had exaggerated the importance of protecting the right. *Id.* at 974. The court reasoned that some justifications, such as preventing false endorsement or consumer deception, are only compelling in the context of commercial speech. *Id.* at 975; see *Central Hudson*, 447 U.S. at 561 (defining commercial speech as “expression related solely to the economic interests of the speaker and its audience”).

However, the *Cardtoons* court concluded that the primary justification for protecting the right of publicity—the incentive it provides for creativity and achievement—had been overstated. 95 F.3d at 974. Without the right of publicity, the court reasoned, celebrities would still generate substantial income from the activities that made them famous. *Id.* Thus, in most right-of-publicity cases, the ability of celebrities to earn income from the activities that made them famous dilutes the state interest in protecting the right of publicity. *Id.* Further, it is the

income and fame from those activities that incentivizes creativity and achievement in those fields, not the right of publicity. *Id.* Thus, outside the contexts of *Zacchini* and commercial speech, it is unclear whether there is a compelling state interest in protecting a celebrity's right of publicity. *Id.*

Like the trading cards in *Cardtoons*, the film here is a celebrity parody, and there is no legitimate state interest in suppressing parody. *R.* at 35a; see *Falwell*, 485 U.S. at 54–55 (holding parody protected under First Amendment as socially valuable expression). Because the film is not commercial speech and does not appropriate an entire act, the full protection of the First Amendment attaches to the film. *Sarver*, 813 F.3d at 905–06 (holding full protection of First Amendment attaches to expressive film). Thus, the state can only impose liability for the film if doing so advances a compelling state interest. *Id.* Since the film is neither commercial speech nor appropriative of an entire act, there is no compelling interest.

Further, imposing liability for the film would not incentivize creativity or achievement. On the contrary, should Austero prevail, it would disincentivize Austero from returning to her creative pursuits because she could pursue litigation anytime new works remind the public of her. Similarly, as noted in *Cardtoons*, barring recovery in this case would not disincentivize aspiring actors, singers, and dancers from creating new works: the fame and fortune associated with stardom is

the primary incentive for such achievements, not the right of publicity. 95 F.3d at 974. Therefore, because allowing recovery for this film would not prevent consumer confusion, deter appropriation of entire acts, or incentivize creativity, Austero's right-of-publicity claim does not further a compelling state interest.

2. The means of restricting the film are not narrowly tailored.

The means of restricting speech must be narrowly tailored to restrict as little speech as possible. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In *Zacchini*, the means of restricting speech were narrowly tailored because the only speech restricted was the speech that appropriated a performer's entire act. 433 U.S. at 574–75.

However, where the appropriation is not of a performance but of a celebrity's identity, any restriction necessarily chills more speech because of the breadth of speech that could, intentionally or not, draw on the celebrity's identity. For example, in *White*, the majority held that an advertisement appropriated White's identity because, given the unique context of the Wheel of Fortune set, White was the only person to whom the advertisement could refer. *White 1*, 971 F.2d at 1399.

In his dissent from the Ninth Circuit's denial to rehear *White 1* en banc, Judge Kozinski noted, "intellectual property rights [are not] free," but are instead "imposed at the expense of future creators and of the public." *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993) (*White 2*). Judge Kozinski framed the

majority's holding as an attack on parody, a vital component of the free marketplace of ideas. *Id.* at 1517; *see also Falwell*, 485 U.S. at 54–55 (holding parody protected under First Amendment as socially valuable expression). Most importantly, Judge Kozinski discussed the ability of intellectual property rights to suppress speech because of the accrual of cultural expression from the public domain. *Id.* at 1516–17. As he stated, an excessively broad right of publicity will deprive our society of the “valuable safety valve that parody and mockery create.” *Id.* Thus, Judge Kozinski's dissent demonstrates the risk that an overly broad right of publicity chills too much socially valuable speech. *Id.* at 1517.

Here, unlike the advertisement in *White*, the film does not refer uniquely to Austero. *See White 1*, 971 F.2d at 1399. Rather, the film parodies Austero's performance of a burlesque show, a medium of expression with a rich history that Austero herself drew upon in *Cabaret*. Austero's film *Cabaret* and the character she claims Moonie appropriates demonstrate Judge Kozinski's argument in his *White 2* dissent that creators use the public domain to build on each other's work. 989 F.2d at 1517. Therefore, if Austero succeeds on her right-of-publicity claim it would necessarily mean *Cabaret* breached the publicity rights of the burlesque performers that inspired Austero's performance. This result demonstrates the risk a broad right of publicity poses to socially valuable speech. *Id.* at 1518. The film here draws

on all these influences, not just Austero. For these reasons, the film does not refer uniquely to Austero, but to a form of dance with a rich history of expressive parody.

Because restricting the film is not narrowly tailored to further a compelling state interest, Austero's right-of-publicity claim fails strict scrutiny, and the film is protected by the First Amendment.

CONCLUSION

Section 230(e)(2) ought to be read considering the policy that Congress enacted in § 230(b)(2). That policy requires insulating qualifying interactive computer service providers—like FakeBlock—from the hectic patchwork of state right-of-publicity claims. Even if this Court finds otherwise, the exception to immunity in § 230(e)(2) does not apply because the claim at hand is not an intellectual property claim.

Moreover, Austero's right-of-publicity claim fails on the merits because there is no dispute of material fact regarding two elements of her claim. More importantly, the film is protected by the First Amendment. Any contrary holding would chill socially valuable creative expression and political commentary. For these reasons, this Court should reverse the Fifteenth Circuit and uphold the district court's grant of summary judgment in Petitioners' favor.

APPENDIX

1. In pertinent part, 47 U.S.C. § 230 provides:

b. **Policy.** It is the policy of the United States—

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

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 a 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... 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**

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.
