

No. 22-9908

IN THE

Supreme Court of the United States

OCTOBER TERM 2023

FakeBlock, Inc. and Maeby Fünke,
Petitioners,

v.

Lucille Austero,
Respondent.

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

BRIEF FOR THE RESPONDENT

NOVEMBER 20, 2023

TEAM NUMBER 87
COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

- I. Is an interactive computer service provider immune, under 47 U.S.C. § 230, from state intellectual property law claims that arise from content it helped create or develop?
- II. Does a computer-generated artificial-intelligence model that copies the physical appearance and the activities closely associated with a celebrity infringe upon the celebrity's right of publicity, or is the violation of this property right protected by the First Amendment?

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PARTIES TO THE PROCEEDING

Petitioner FakeBlock, Inc. is incorporated in Delaware. Its principal place of business is Irvine, California. Petitioner Maybe Fünke, FakeBlock's director of investor relations is an individual and a citizen of the state of Newport Beach.

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

DECISIONS BELOW

The Fifteenth Circuit Court of Appeals' decision affirming in part and reversing in part the district court's holding is not reported. The opinion is available at *Austero v. FakeBlock, Inc.*, No. 20-9804 (15th Cir. Oct. 17, 2022) and reprinted at pages 1a-67a of the record. The district court's opinion is not reported and is unavailable.

STATEMENT OF JURISDICTION

The judgment of the Fifteenth Circuit Court of Appeals was entered on October 17, 2022. The petition was timely filed and granted. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254 (1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 230 of the Communications Decency Act, 47 U.S.C. § 230, is reprinted in relevant part in the appendix of this brief. App. 1.

The First Amendment of the United States Constitution provides, in relevant part: “Congress shall make no law... abridging the freedom of speech, or of the press.” U.S. Const. amend. I.

STATEMENT OF THE CASE

A. Statement of Facts

Tragedy struck the city of Newport Beach, California, in 2014 when the “La Habra” earthquake separated the city from the California mainland. R. at 3 n.1 Spurned by California’s indifference to their plight in the earthquake’s aftermath, the city’s residents voted to secede and form their own state. R. at 3a.

Lucille Austero, one of Newport Beach’s most famous residents, stepped forward to lead her young state as it continued to rebuild. R. at 3a. Austero is a legendary actor, singer, and dancer. R. at 3a. She starred in Broadway plays, television programs, and twenty-two movies while recording seven studio albums

during her career. R. at 3a. She ran for congress against Lindsay Bluth in 2018. R. at 3a.

Bluth's daughter, Maybe Fünke, created an artificial-intelligence (AI)-generated caricature of Austero early in the 2018 election cycle. R. at 4a. Fünke purposefully used Austero as the "starting point" for the caricature, which she named "Moonie." R. at 4a.

Fünke then created a five-minute video featuring Austero's virtual doppelgänger titled *Moonie Bares All*. R. at 5a. In the video, Moonie stumbles around a stage naked before singing an altered version of a popular showtune. R. at 5a. Her nude body was pixelated to avoid online content filters. R. at 5a. She slurs her words as she sings about her own wealth, addiction issues, and animosity toward the citizens of Newport Beach. R. at 5a. Fünke admitted that she created the video to assist her mother's political campaign and that hoped to reveal the "darker side of a political candidate" who received favorable coverage from the media. R. at 4a.

Moonie and Austero are both 5'4" and share the same general body shape, proportions, and hairstyles. R. at 4a. There are several miniscule differences between their appearances. R. at 4a. These include the tip of the nose, shape of the eyes, presence of a beauty mark, and other small discrepancies that are generally attributable to the process of creating an image AI. R. at 23a n.5.

Fünke, however, went beyond facial features and hairstyles in copying Austero's look. Moonie is dressed in the iconic outfit Austero's character wore in the film *Cabaret*. R. at 25a. The tap dance that Moonie performs is "remarkably similar" to one of Austero's performances. R. at 25a. Moonie's name is also exceptionally similar to that of Austero's

titular role in *Tell Me That You Love Me, Junie Moon*. R. at 25a. In that film, Junie Moon, like Moonie, strips off her clothes. R. at 25a.

Fünke also used recordings of Austero's voice, pulled from her various television appearances, film roles, and studio albums, to create Moonie's voice. R. at 4a. Ann Veal, an opera singer and Austero's vocal coach, testified that Moonie's voice "could very well be" Austero's current voice raised by a single octave. R. at 26a. Fünke claimed privilege and refused to explain how she created Moonie's voice. R. at 27a. She admitted that her software used Austero's vocal performances to create Moonie's voice, and that she digitally altered Moonie's voice so it would be distinct from Austero's. R. at 27a. Additionally, Moonie sings an altered version of the song *New York, New York* from Leonard Bernstein's hit musical *On the Town*. R. at 5a. Austero famously sang a song that shares that title in a film. R. at 26a.

Fünke uploaded *Moonie Bares All* to social-media website FakeBlock on May 29, 2018. R. at 5a. Her post read "Moonie Bares All!!! . . . VOTE 4 LINDSAY BLUTH" and included a link to Bluth's campaign website. R. at 5a. *Moonie Bares All* flooded internet message boards, where users commented on Moonie's stumbling and striptease routine. R. at 6a. FakeBlock CEO George Maharis personally removed the video from FakeBlock on August 27, 2018, three months after Fünke originally posted it. R. at 6a.

Fünke served as FakeBlock's director of investor relationships when she uploaded *Moonie Bares All* to the website. R. at 5a. She testified that she uploaded the video to FakeBlock because she wanted to draw attention to the website. R. at 6a. Fakeblock is incorporated in Delaware, but its principal place of business is in Irvine,

California. R. at 5a. When Fünke uploaded the film, the site was still in “beta” development. R. at 5a. Only the company’s officers could upload videos to FakeBlock. R. at 5a. Maharis fired Fünke the same day he removed *Moonie Bares All* from FakeBlock. R. at 6a.

B. Procedural Background

On August 24, 2018, Austero sued FakeBlock in the Federal District Court for the District of Newport Beach. R. at 6a. Austero sought an injunction requiring FakeBlock to remove the video. R. at 6a. After she lost the election and Maharis voluntarily removed the video, Austero amended her pleadings and added Fünke as a defendant. R. at 6a.

Austero alleges that Fünke and FakeBlock infringed on her right of publicity under Newport Beach state law. R. at 6a. The complaint alleges that Fünke and FakeBlock violated Austero’s right to profit from her own identity because Moonie’s appearance is practically identical to Austero’s. R. at 6a.

After discovery, the defendants moved for summary judgment. R. at 7a. They argued that Austero failed to present a viable claim of an infringement on her right to publicity and offered two affirmative defenses. R. at 7a. First, both defendants argued that the video *Moonie Bares All* is protected expression under the First Amendment. Second, FakeBlock argued that § 230 of the Communications Decency Act shielded it from liability. R. at 7a. The district court granted summary judgment to both defendants on the merits of the right-of-publicity claim and dismissed FakeBlock’s § 230 immunity defense. R. at 7a.

Austero appealed, and FakeBlock urged the Fifteenth Circuit to affirm summary judgment on its immunity claim. R. at 7a. The Fifteenth Circuit affirmed the district court’s dismissal of FakeBlock’s § 230 defense, reversed the district court’s grant of summary judgment for FakeBlock on the merits of Austero’s right-of-publicity claim, and remanded the case for further proceedings. R. at 2a.

SUMMARY OF THE ARGUMENT

This case is about an extortive company using the identity of a Hollywood star, cultivated through years of hard work and memorable performances, to drive investments and raise profits. This Court should affirm the Fifteenth Circuit’s denial of FakeBlock’s motion for summary judgment based on the company’s immunity under 47 U.S.C. § 230. FakeBlock is liable as the speaker or publisher of the video *Moonie Bares All* because the video infringes Austero’s right of publicity under Newport Beach common law. FakeBlock may not claim § 230 immunity as a defense to a claim arising from a law pertaining to intellectual property. The plain language of § 230(e)(2) indicates that it makes no difference whether that claim arises from state or federal law.

Moreover, the common-law right of publicity is an intellectual property right that qualifies as a “law pertaining to intellectual property” under § 230(e)(2). For decades, this Court and others have recognized that the right of publicity protects an intellectual property interest, similar to the interest protected by trademark law. Even if the Court finds that Austero’s right of publicity claim is barred under § 230(e)(2), it should still deny FakeBlock’s motion for summary judgment because

FakeBlock’s own corporate officer uploaded the video to its site, and a reasonable jury could conclude that she did so pursuant to her official duties as a corporate officer.

Furthermore, Fünke infringed on Austero’s right of publicity by creating *Moonie Bears All*. The Fifteenth Circuit correctly ascertained the proper scope of the right of publicity in Newport Beach. Austero has a valid, enforceable right in her identity. Fünke violated that right by using AI to create a model that looks, acts, sings, and dances like Austero. Fünke’s infringement does not receive First Amendment protection. The First Amendment requires a balancing of speech and property rights when considering right-of-publicity claims. Under the transformative use test, the inquiry used by most courts, *Moonie Bears All* fails to sufficiently transform Austero’s identity. The video uses Austero’s singing, dancing, and acting as its “sum and substance.”

ARGUMENT

Standard of Review: This Court reviews questions of law *de novo*. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 867 (2005). When considering a motion for summary judgment, this Court “draw[s] all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence.” *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 520 (1991).

I. THE FIFTEENTH CIRCUIT CORRECTLY HELD THAT § 230 IMMUNITY DOES NOT PRECLUDE AUSTERO’S RIGHT-OF-PUBLICITY CLAIM

FakeBlock is not immune to Austero’s right-of-publicity claim because § 230 immunity does not apply to tort claims arising from state or federal intellectual property law, and the common-law right of publicity is an intellectual property right.

Even if the Court finds that § 230(e)(2) bars Austero’s claim, FakeBlock is still liable under § 230(c)(1) because it contributed to the creation and development of *Moonie Bares All*.

Congress passed § 230 of the Communications Decency Act to both preserve the free expression and market dynamics of the internet while encouraging internet service providers to screen and moderate offensive content. 47 U.S.C. § 230(b)(1)-(4). The statute’s drafters wished to incentivize internet providers to remove content without expanding the government’s regulatory authority over the internet itself. *Id.* It offers interactive computer service providers an affirmative defense against claims arising from the third-party content they host. *Id.* § 230(c)(1). The statute specifically bars tort claims that seek to hold a provider liable as a publisher of third-party content. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

Under § 230, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). An “information content provider” is “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.” *Id.* § 230(f)(2).

The immunity conferred by § 230 is limited. Among other exceptions, the statute does not “limit or expand any law pertaining to intellectual property,” meaning that interactive computer service providers are liable, as a speaker or publisher, for content that violates intellectual property law. *Id.* § 230(e)(2). And

interactive computer service providers remain liable for content that they are responsible for creating or developing. *Id.* § 230(c)(1); *see Federal Trade Comm’n v. LeadClick Media, LLC*, 838 F.3d 158, 176 (2nd Cir. 2016).

Lower courts subject claims of § 230 immunity to a multi-part test derived from these statutory provisions. *See* R. at 10a. Under this test, FakeBlock may only claim § 230 immunity if (1) an exception to the statute’s overall grant of immunity does not apply to Austero’s claim, (2) FakeBlock qualifies as a provider of an interactive computer service, (3) Austero’s claim is based on content provided by another information content provider, and (4) Austero’s claim would treat FakeBlock as the publisher or speaker of that information. R. at 10a (quoting *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007)). The parties agree that FakeBlock provides an “interactive computer service.” R. at 4a. And Austero’s claim seeks to treat FakeBlock as the publisher or speaker of *Moonie Bares All*. R. at 11a.

FakeBlock’s defense fails on prongs one and three. The plain meaning of § 230(e)(2) indicates that claims arising from both state and federal intellectual property law are exempt from § 230 immunity, and this reading of the statute is consistent with Congress’s stated intent. The history of the right of publicity and the interest it protects indicate that it is an intellectual property right. And even if this Court finds that FakeBlock is immune to Austero’s claims under § 230(e)(2), the company remains liable under § 230(c)(1) because it contributed to the creation and development of *Moonie Bares All*. Therefore, § 230 provides no safe harbor for

FakeBlock, and this Court should affirm the dismissal of the company’s motion for summary judgment.

A. FakeBlock is not immune from intellectual property claims arising under state law.

FakeBlock’s § 230 immunity defense fails because the plain meaning of the statute is clear. Section 230 does not “limit or expand any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2). Finding that § 230 precludes claims arising from state intellectual law would clearly limit a law pertaining to intellectual property. *Id.* Therefore, the question before the court is whether the term “any law pertaining to intellectual property” includes state intellectual property laws. *Id.*

This Court is not the first to answer this interpretive question. With its opinion below, the Fifteenth Circuit joins the Third Circuit in finding that § 230(e)(2) removes claims arising from state intellectual property law from the immunity proscribed by § 230(c)(1), thus widening a growing circuit split. R. at 39a; *Hepp v. Facebook*, 14 F.4th 204, 215 (3rd Cir. 2021). The First Circuit addressed § 230(e)(2)’s application to state-law intellectual property claims in *Jane Doe No. 1 v. Backpage.com, LLC*, assuming in dicta that § 230(e)(2) exempted those claims from § 230 immunity. 817 F.3d 12, 26 (1st Cir. 2016). The Ninth is the only circuit to reach the opposite conclusion, and it did so by ignoring the statutory text and imputing a broad purpose onto § 230. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007).

This Court should affirm the Fifteenth Circuit’s holding and adopt the reasoning of the circuit split majority because that side of the debate remains true to both the text and purpose of § 230. Congress used the term “any” to clarify the

meaning of the term “intellectual property,” so the Court must interpret that term broadly to include claims arising from state intellectual property law. 47 U.S.C. § 230(e)(2). Additionally, Congress chose not to distinguish between state and federal law in drafting § 230(e)(2) despite inserting that distinction in other provisions of the same act. *See id.* §§ 230(e)(2)-(3).

FakeBlock encourages the Court to examine congress’s purpose in enacting the § 230. R. at 16a. But this Court looks to legislative history and purpose only if the textual meaning of the statute is unclear. *See Rubin v. United States*, 449 U.S. 424, 430 (1981). Additionally, finding that state law claims are exempt from § 230(e)(2) does not contradict Congress’s stated purpose in promoting the internet’s growth.

1. The plain language of the statute dictates that § 230 immunity does not bar claims arising from state intellectual property law.

The text of § 230(e)(2) can bear only one meaning; interactive computer service providers are liable for state-law intellectual property claims that treat them as the speaker or publisher of third-party content. The Court’s goal in interpreting a statute is to effectuate congress’s intent, and the most reliable indicator of congressional intent is the plain language of the statute. *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says.”). When the terms of the statute are unambiguous, “judicial inquiry is complete.” *Rubin*, 449 U.S. at 430. To determine whether the terms of the statute are ambiguous, “[t]his Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by

Congress and approved by the President.” *Bostock v. Clayton County*, 590 U.S. ___, 140 S.Ct. 1731, 1738 (2020).

The plain language of § 230(e)(2), specifically its use of the modifier “any” and the lack of any language limiting the provision to federal law, requires this Court to find that § 230 does not bar state law intellectual property claims. *See* 47 U.S.C. § 230(e)(2). FakeBlock suggests the Court read “any intellectual property laws” to mean only “federal intellectual property laws.” R. at 13a. But this argument ignores the ordinary meaning of the terms of the statute and requires the Court to interpret words that are not on the page.

When Congress uses the modifier “any” in a statute, the Court reads the term that follows broadly. *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218 (2008). In *Ali*, the petitioner argued that the phrase “any other law enforcement officer” as it appeared in the Federal Tort Claims Act meant only “law enforcement officers acting in a customs or excise capacity.” *Id.* The Court rejected this argument, holding that the use of the word “any” suggested a broad meaning without the limitations inserted by the petitioner. *Id.* “Congress’ use of ‘any’ to modify ‘other law enforcement officer’ is most naturally read to mean law enforcement officers of whatever kind.” *Id.* Therefore, the modifier “any” is meant to be read broadly. *Id.*

Courts interpreting § 230(e)(2) emphasize congress’s use of the term “any” in holding that state intellectual property claims are excluded from the scope of § 230 immunity. In *Doe v. Friendfinder Network, Inc.*, the plaintiff brought a state-law right-of-publicity claim against a website operator. 540 F.Supp.2d, 288, 291-92

(D.N.H. 2008). The operator claimed § 230 immunity as an affirmative defense. *Id.* at 294. The Court held that the presence of the term “any,” with no accompanying limiting provision, indicated that Congress intended to include intellectual property claims arising from both state and federal laws. *Id.* at 299 (citing *Ali*, 552 U.S. at 835-37). Ruling on a state copyright claim, another district court reached the same conclusion in *Atlantic Recording Corp. v. Project Playlist*. 603 F.Supp.2d 690, 703-04 (S.D.N.Y. 2009).

The Fifteenth Circuit found both cases persuasive, and correctly held that Congress included “any” to signify a broad reading. R. at 14a. This Court should affirm that holding because it comports with the ordinary meaning of the terms of the statute and this Court’s precedent.

In addition to this narrow analysis of § 230(e)(2), a contextual reading of § 230(e)(2) confirms the Fifteenth Circuit’s holding. This Court follows the “cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.” *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991). When Congress uses specific language in one section of the statute but omits that language in a different section, the Court “presumes that Congress intended a difference in meaning.” *Loughrin v. U.S.*, 573 U.S. 351, 358 (2014) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). This presumption is so well-settled as to be dubbed the “meaningful-variation canon.” *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 457 (2022).

The Court relied on this canon in *Duncan v. Walker*. 533 U.S. 167, 172-74 (2001). There, the respondent argued that the Court should read the phrase “application for State post-conviction or other collateral review” as it appears in the Antiterrorism and Effective Death Penalty Act (AEDPA) as referring to both federal and state collateral review. *Id.* The Court examined the rest of the AEDPA and noted that, where Congress intended to refer to both state and federal law, it did so expressly. *Id.* at 173-74. The absence of the term “federal” was indicative of Congress’s intent to refer only to state post-conviction and collateral review in the statute. *Id.*

The meaningful-variation canon should also guide this Court’s reading of § 230(e)(2). Congress distinguished state and federal law in multiple provisions of § 230. Congress emphasized that the policy motivating the law’s passage is to protect the internet’s free market from “Federal or State regulation.” 47 U.S.C. § 230(e)(2). A section titled “state law,” prevents liability imposed by “any state or local law that is inconsistent with this section.” *Id.* § 230(e)(3). Another provision directs that the Electronic Communications Privacy Act “or any similar state law” remain unaffected by § 230. *Id.* § 230(e)(4). A third section specifies that it applies to “any federal criminal statute.” 47 U.S.C. § 230(e)(1).

The Fifteenth and Third circuits correctly relied on this context. In *Hepp v. Facebook*, the Court held that § 230(e)(2) did not preclude a state right-of-publicity claim. 14 F.4th 204, 215 (3rd Cir. 2021). The Court recognized that Congress’s explicit references to state law throughout § 230(e) are coextensive with its references to

federal law. *Id.* at 212. “But those references also suggest that when Congress wanted to cabin the interpretation about state law, it knew how to do so—and did so explicitly.” *Id.* at 211. The Fifteenth Circuit also employed the meaningful-variation canon. R. at 14a (quoting *Hepp*, 14 F.4th at 211).

The absence of any distinction between state and federal intellectual property law in § 230(e)(2) indicates that Congress meant for claims arising from either category to be exempt from § 230 immunity. The Court should affirm the Fifteenth Circuit’s holding because that holding is faithful to the statute’s text.

2. Finding that § 230(e)(2) exempts state intellectual property claims from § 230 immunity does not undermine the statute’s purpose.

Allowing individuals to protect their property rights, regardless of whether those rights are derived from state or federal law, comports with the purpose of § 230. FakeBlock argues that the Fifteenth Circuit’s holding undermines Congress’s intent to protect the free market of the internet. R. at 16a. This interpretation of the statute ignores the plain meaning of the text and misstates the policy objectives that motivated the law’s passage.

No legislative history describing the drafting of § 230(e)(2) exists. *Gucci Am., Inc. v. Hall & Assocs.*, 135 F.Supp.2d 409, 417 (S.D.N.Y. 2001). Congress codified the policy goals it hoped the statute would achieve. 47 U.S.C. § 230(b)(1)-(4). Those objectives include promoting the internet’s development, encouraging the development of technology that allows for greater user control of internet usage, bolstering the free market of ideas inherent to the new medium, and incentivizing

interactive computer service providers to implement technology that removed obscene and offensive material. *Id.*

Most courts correctly recognize that this purpose cannot override the plain language of the rest of the statute. Of the three circuits who have addressed the question before the Court, only the Ninth held that § 230(e)(2) exempted claims arising from federal, but not state, intellectual property laws. *Perfect 10*, 488 F.3d at 1119. In *Perfect 10*, the Court determined that § 230 barred a website operator's state law claims—including a state-law right-of-publicity claim—against an interactive computer service provider. *Id.* at 1119. Congress did not explicitly define the term “intellectual property law” in § 230(e)(2), so the court based its holding entirely on Congress's stated purpose of protecting “freedom of speech in the new and burgeoning internet medium.” *Id.* at 1119 (quoting *Zeran*, 129 F.3d at 330). The Court noted that state intellectual property laws offer a range of diverse causes of action, and “permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes.” *Id.*

The Ninth Circuit skipped a crucial interpretive step in its analysis of § 230. It extrapolated an unstated purpose from policy considerations listed in § 230(b) without considering the plain meaning of the rest of the statute. *Id.* at 1119. If the language of § 230(e)(2) was ambiguous, the Ninth Circuit would be justified in considering the principals listed in § 230(b) to determine the scope of the term

“intellectual property.” But here, the use of the term “any” and the lack of limiting language remove ambiguity from the statute’s meaning. 47 U.S.C. § 230(e)(2). Without a “clearly expressed legislative intention to the contrary,” Congress’s intent and the purpose of the law are “expressed by the ordinary meaning of the words used.” *Jam v. Int’l. Fin. Corp.*, 586 U.S. ___, 139 S.Ct. 759, 769 (2019) (internal quotation marks omitted). When statutory meaning is clear, the court’s inquiry ends, and the question of purpose is never asked. *Id.*

Additionally, the Ninth Circuit’s definition of § 230’s purpose is incorrect. The Court listed Congress’s stated purpose in passing § 230 as “insulating the development of the internet from the various state-law regimes.” *Perfect 10*, 488 F.3d at 1118. Congress’s expressed policy objective, however, was to insulate the internet from “federal or state regulation.” 47 U.S.C. § 230(b)(2). The statute contains no language suggesting Congress was uniquely concerned with the damage that diverse state intellectual property laws could cause the growth of the internet. *See Doe*, 540 F.Supp.2d at 300. Instead, the language suggests that, although Congress intended to protect the internet from overregulation, it also “believed that laws protecting intellectual property rights should nevertheless remain in effect—that the potential costs to those rights, in essence, outweighed the benefits of the alternative.” *Id.*

Moreover, the conflict between state intellectual property laws and the internet’s growth is not as clear as the Ninth Circuit suggests. The current reality of the internet landscape shows no indication of collision between the two concepts. In *Atlantic Recording*, the Court held that internet service providers are not immune

from state intellectual property claims under § 230. 603 F.Supp.2d at 703. That case remains good law in the Southern District of New York, where there exists a “plethora of litigants . . . who have massive amounts of commercial goodwill associated with their name and/or image and can easily bring a claim under diversity jurisdiction.” John Paul A. Galgano, Comment, *Tackling the Intangible: Why the Supreme Court Needs to Define Intellectual Property and What Facebook Stands to Lose (or Win)*, 37 Notre Dame J.L. Ethics & Pub. Pol’y 323, 330 (2023). Since the court decided *Atlantic* fourteen years ago, however, it has heard only two cases that feature both state intellectual property law and § 230 immunity considerations. *Id.* This lends empirical support to the Third Circuit’s conclusion that exempting state intellectual property claims from § 230 immunity will not create widespread “disarray” in the internet’s free market. *See Hepp*, 14 F.4th at 211.

If the Court strays beyond the unambiguous meaning of § 230(e)(2)’s text and examines the statute’s purpose, it should define that purpose as promoting the growth of the internet while protecting both state and federal intellectual property rights. These two interests are compatible and recognizing both will not create the online catastrophe that worries the Ninth Circuit and FakeBlock.

B. The common-law right of publicity is a law “pertaining to intellectual property.”

Austero’s common-law right-of-publicity claim qualifies as a claim based on a law pertaining to intellectual property, and therefore FakeBlock may not invoke § 230 immunity to dismiss it. This case asks the Court to interpret a second aspect of the scope of § 230(e)(2): whether the term “laws pertaining intellectual property”

includes a state tort action arising from the common-law right of publicity. Newport Beach’s common-law right of publicity dictates that “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.” R. at 59a; Restatement (Second) of Torts § 652C (Am. L. Inst. 1977).

Congress did not define “law pertaining to intellectual property” as it appears in § 230. *See* 47 U.S.C. § 230(f). The term “intellectual property,” however, retains a longstanding common-law meaning that this court and others have found to include the right of publicity. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977). Therefore, the Court should read the statute with the presumption that Congress gave weight to that well-established definition in drafting the statute. Moreover, the phrase “law pertaining to intellectual property” requires the Court to read § 230(e)(2) broadly to include intellectual property rights beyond its core of patent, copyright, and trademark. *Id.* at 573.

1. This Court’s precedent recognizes the right of publicity as an intellectual property right.

When Congress passed § 230(e)(2), the term “intellectual property” retained a common-law significance, established through decades of precedent, that included the right of publicity. The Court should rely on this precedent and find that the right of publicity qualifies as a law “pertaining to intellectual property.” 47 U.S.C. § 230(e)(2).

To determine whether the right of publicity is an intellectual property right, the Court need not engage in an extensive, whole-code analysis or a dictionary survey.

See R. at 53a. Instead, it can rely on its own precedent and that of other Courts that have already classified the right of publicity as an intellectual property right. When it interprets a statute, the Court often looks to the common-law understanding of the statute’s terms. *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 487 (2005). For example, in *Stewart*, the Court relied on common law and its own precedent to determine the meaning of the term “seaman,” noting “Congress took the term ‘seaman’ as the general maritime law found it.” *Id.*

Almost twenty years before Congress passed § 230, this Court decided a right-of-publicity case for the first and only time in *Zacchini*. 433 U.S. at 578. In that case, a news station taped Zacchini’s “human cannonball” act and played the tape in its entirety on its program. *Id.* at 563. Zacchini claimed that the news station violated his right of publicity under Ohio state law. *Id.* at 564.

The Court recognized that the purpose of the right of publicity is “closely analogous to the goals of patent and copyright law”—the two concepts that lie at the core of intellectual property protection. *Id.* at 573. It reiterated the comparison when it characterized the justification for the right of publicity as the “same consideration underlying the patent and copyright laws long enforced by this Court.” *Id.* at 576. The Court firmly classified the right of publicity as an intellectual property right. *See* Jennifer E. Rothman, *The Right to Publicity’s Intellectual Property Turn*, 42 Colum. J. L. & Arts 277, 305 (2019) (“The Court turned the right of publicity into a form of intellectual property, under a distinct moniker.”).

Lower courts followed *Zacchini's* lead in recognizing the right of publicity as an “intellectual property right” that protects a “cognizable property interest.” *Cardtoons, L.C. v. Major League Baseball Players Ass’n.*, 95 F.3d 959, 967 (10th Cir. 1996); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323 (11th Cir. 2006) (“[T]here appears to be no dispute that the right of publicity is an intellectual property right.”); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 928 (6th Cir. 2003) (“The right of publicity is an intellectual property right of recent origin.”).

The right of publicity was already within the definitional scope of intellectual property when Congress drafted § 230(e)(2) using the broad language “law pertaining to intellectual property.” *Zacchini*, 433 U.S. at 573. And courts deciding whether the right of publicity fit within the intellectual property framework relied on *Zacchini* in finding that it did. *See Cardtoons, L.C.*, 95 F.3d at 967.

Even if the Court limits the definition of “intellectual property” to the core categories of patent and copyright law, the right of publicity would still fit within the phrase “pertaining to intellectual property law” according to the Court’s reasoning in *Zacchini*. 433 U.S. at 573; 47 U.S.C. § 230(e)(2). Congress’s broad wording indicates an intent to include even peripheral intellectual property rights beyond the core concepts of patent, trademark, and copyright.

In *Hepp*, the Third Circuit cited *Morales v. Trans. World Airlines, Inc.* to determine whether the phrase “law pertaining to intellectual property” includes the right of publicity. 504 U.S. 374, 383 (1992). In *Morales*, the Court analyzed the phrase “relating to rates, routes or services” in the Airline Deregulation Act (ADA). *Id.* at

380. It found the phrase “relating to” meant “having a connection with or reference to,” and required a broad reading of the statute. *Id.* at 384. The Third Circuit emphasized Congress’s choice to use the phrase “laws pertaining to intellectual property” instead of simply “intellectual property laws” when drafting § 230(e)(2). This context suggests § 230(e)(2) refers to laws on the “periphery” of the concept of intellectual property as well as those at its core. *Id.* at 214.

The same textual analysis applies to Austero’s right-of-publicity claim. Like “relate to,” the phrase “pertain to” indicates the Court should read “intellectual property” broadly to include the right of publicity, which this Court found “closely analogous” to the concepts at the core of intellectual property law. *Zacchini*, 433 U.S. at 573. This Court should adhere to precedent and the plain meaning of the statute’s text to find that Austero’s right-of-publicity claim arises from a law pertaining to intellectual property.

2. The common-law right of publicity and trademark law protect similar interests, so both should be recognized as laws pertaining to intellectual property.

The common-law right of publicity is a “law pertaining to intellectual property” because it protects interests that trademark law labels as intellectual property interests. The right may be justified under several theories, but in the case at bar, it functions similarly to trademark law. *See Zacchini*, 433 U.S. at 573; *Hepp*, 14 F.4th at 214. Trademark law undoubtedly qualifies as a body of “law pertaining to intellectual property,” and it functions by identifying the source of a product and distinguishing that source from others. R. at 53a (Walt, J., dissenting) (finding a

definition of intellectual property incomplete because it omitted trademark law); *see Jack Daniel's Properties, Inc. v. VIP Products LLC*, 599 U.S. 140, 146 (2023). In doing so, it helps consumers by assuring the quality and consistency of a brand. *Id.* It benefits producers by ensuring that only they profit from the brand's reputation and it incentivizes them to create a reliable product. *Id.* Like the right of publicity, trademark law protects a profitable reputation, not a single creative work. *Id.*

In this case, Austero's right of publicity vests her with a property interest similar to the interest protected by a trademark. The right of publicity protects an individual's right to profit from and selectively use of their identity. *See* Restatement (Second) of Torts § 652C. A plaintiff's right to publicity is violated only when another person appropriates, to his own use or benefit, the "reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness." *Id.* § 652C cmt. c.

The Third Circuit's analysis of the right of publicity in *Hepp* stressed the similarity between the interests protected by trademark law and those protected by the right of publicity. *Hepp*, 14 F.4th at 214. Hepp alleged a violation of her right of publicity because her image was used to advertise a dating service, she spent time and money to build a reputation that would be valuable to advertisers, and the dating service misappropriated that reputation in a way that could confuse consumers into thinking Hepp endorsed the site. *Id.* This is the same concern involved in trademark infringement, which the court found to be a "close analogue[]" to the right of publicity. *Id.* at 213.

Other circuits’ analyses of the right of publicity engage in the same trademark-adjacent discussion, emphasizing that the right of publicity protects the individual’s right to endorse selectively and profitably. In *White v. Samsung Elecs Am., Inc.*, the Ninth Circuit found an advertiser violated game show presenter Vanna White’s right of publicity when it featured a robot wearing her signature outfit and performing her signature act from the show *Wheel of Fortune*. 971 F.2d 1395, 1402 (9th Cir. 1992). The court noted that celebrities like White expend “[c]onsiderable energy and ingenuity” in building a reputation valuable for endorsements, and that the law protected White’s ability to selectively endorse brands and be the sole recipient of compensation for those endorsements. *Id.* at 1399.

It is the right to profit and use one’s identity, not the identity itself, that the right of publicity protects. *Zacchini*, 433 U.S. at 573. This is similar to the reputational interest protected by trademark law, which indicates that the right of publicity protects an identifiable intellectual property interest. *Jack Daniel’s Properties, Inc.*, 599 U.S. at 146.

Here, FakeBlock used Austero’s likeness to promote its website without her consent, thus invading her right to be the sole beneficiary of her hard-earned celebrity status. R. at 5a. FakeBlock and Judge Walt’s dissent from the Fifteenth Circuit’s majority opinion argue that the right of publicity is not an intellectual property right because an individual’s appearance or identity is not a “product of the human intellect.” R. at 51a (citing *Intellectual Property*, Black’s Law Dict. (11th ed. 2019)). This approach forgets that trademark—an analogous intellectual property right—protects

the right to profit from reputation alone, not a specific creation. *Jack Daniel's Properties, Inc.*, 599 U.S. at 146.

The right of publicity protects Austero's ability to selectively use and profit from her identity. The right does not protect a single creative work, but the identity interest the right protects is still intellectual property, as demonstrated through trademark law.

C. FakeBlock may not claim Section 230 immunity because the company created and developed *Moonie Bares All*.

FakeBlock is not entitled to § 230 immunity, even if the Court finds that § 230(e)(2) is inapplicable to Austero's claim, because a reasonable jury could conclude that the company is responsible, at least in part, for creating *Moonie Bares All*. Unless a statutory exception applies, interactive computer service providers like FakeBlock are not liable for hosting content created and uploaded by another party. 47 U.S.C. § 230(c)(1). But here, there is no third party. FakeBlock's own corporate officer uploaded *Moonie Bares All* to its network. R. at 11a.

A reasonable jury could conclude that FakeBlock itself is at least responsible in part for creating *Moonie Bares All* because its own corporate officer uploaded the video to the website. R. at 11a. An internet service provider remains liable for claims arising from its own content. 47 U.S.C. § 230(c)(1). Therefore, the Court must deny FakeBlock's motion for summary judgment on its § 230 immunity defense.

1. *Interactive computer service providers remain liable for their own actions as information content providers under § 230.*

FakeBlock may not claim § 230 immunity because it is an information content provider as well as an interactive computer service provider for the purpose of Austero's claim. Section 230 immunizes interactive computer service providers from claims arising from the third-party content they host. 47 U.S.C. § 230(c)(1). "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." *Id.* An "information content provider" is "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." *Id.* § 230(f)(2).

An interactive computer service provider like FakeBlock loses § 230 immunity and becomes an information content provider when it is even minimally responsible for the creation or development of content that gives rise to a tort claim. *See id.* § 230(c)(1); *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016). Courts recognize that a company can "be liable for creating and posting, inducing another to post, or otherwise actively participating in the posting of [content] in a forum that that company maintains" as an information content provider, even if that company also qualifies as an internet service provider under § 230. *Huon*, 841 F.3d at 742; *See also Lycos*, 478 F.3d at 419 ("This is a broad definition, covering even those who are responsible for the development of content only "in part."").

When employees play a direct role in editing, writing, or designing content that gives rise to a claim, the company acts as an information content provider. In *Fed.*

Trade Comm'n v. LeadClick Media, LLC., the Second Circuit rejected LeadClick's assertion of § 230 immunity and found that the company acted as an information content provider when its employees helped develop and edit deceptive websites. 838 F.3d 158, 176 (2nd Cir. 2016). In *Huon*, the Seventh Circuit held found that an internet service provider qualified as an information content provider because it employed the individuals who allegedly authored the comments that gave rise to the defamation claim at issue. 841 F.3d at 742.

Huon and *LeadClick* demonstrate that when an internet service provider plays a role in developing the content at issue, it becomes an information content provider and loses its claim to § 230 immunity. *Id.*; *LeadClick Media LLC*, 838 F.3d at 176. FakeBlock may not claim § 230 immunity because it created and developed *Moonie Bares All*.

2. *FakeBlock qualifies as an information content provider because a reasonable jury could conclude that the company created and developed Moonie Bares All.*

This Court should affirm the Fifteenth Circuit's denial of FakeBlock's motion for summary judgment because a dispute of material fact exists as to whether the company is responsible for creating and uploading *Moonie Bares All*. When ruling on a motion for summary judgment, the Court must construe all reasonable inferences in the light most favorable to the nonmoving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Summary judgment is only appropriate when no dispute of material fact exists and the nonmoving party fails to allege a substantive element of their claim. *Id.*

The question of material fact is whether FakeBlock is “responsible,” in whole or in part, for the creation or development of *Moonie Bares All*, and therefore an information content provider under § 230. 47 U.S.C. § 230(c)(1). FakeBlock is responsible for the creation of *Moonie Bares All* if it played a role in “creating and posting, inducing another to post, or otherwise actively participating in the posting” *Moonie Bares All. Huon*, 841 F.3d at 742.

According to the common-law doctrine of *respondeat superior*, FakeBlock is responsible for the actions its employees take within the scope of their employment. Restatement (Third) of Agency § 2.04 (Am. L. Inst. 2006).¹ An employee acts outside the scope of their employment when their actions occur “within an independent course of conduct not intended by the employee to serve any purpose of the employer.” *Id.* § 7.07(2). If Fünke acted within the scope of her employment, then FakeBlock is “responsible” for the creation and development of *Moonie Bares All*. § 230(c)(1). Therefore, whether Fünke acted in furtherance of her own interests or those of her employer is a fact material to determining whether FakeBlock is responsible for the creation and development of *Moonie Bares All*.

Austero’s claim creates a clear issue of material fact regarding whether Fünke acted in support of her own interests or to “serve any purpose of the employer” when

¹ *Respondeat superior* is generally categorized as a state common law doctrine, and is recognized in both Delaware and California, FakeBlock’s state of incorporation and the state that serves as its primary place of business, respectively. *See Verrastro v. Bayhospitalists, LLC*, 208 A.3d 720, 724 (Del. 2019); *Delfino v. Aligent Tech., Inc.*, 52 Cal.Rptr.3d 376, 394-96 (Cal. Ct. App. 2006). However, the Court may also look to the general common law principles of agency when it interprets undefined terms in a federal statute that have common-law significance, such as “responsible” in § 230. *Cmtty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-741 (1989). The Court should evaluate corporate responsibility for the creation and development of content under § 230(c)(1) according to the common law principles of agency because of the statute’s nationwide application. *See id.*

she uploaded *Moonie Bares All* to FakeBlock. Restatement (Third) of Agency § 707(2) (Am. L. Inst. 2006). The parties agree that Fünke was one of FakeBlock’s corporate officers, that she was one of only three people allowed to post on the site, and that she posted her video to FakeBlock and no other website. R. at 5a, 6a. It was her duty, as director of investor relations, to “advertise[] the site and attract[] additional investors.” R. at 42a (Ping, J., concurring). The lower court derived these job titles according to testimony that outlined the responsibility of each corporate officer, and they were not meaningless stand-ins for informal titles. R. at 5a n.3. Fünke promoted FakeBlock and used her influence to convince other celebrities to invest in the site. R. at 57a (Walt, J., dissenting). Although FakeBlock argues that Fünke did not have the authority to post the video, the company refrained from removing it until legal action loomed. R. at 42a.

Though not immediately conclusive, this evidence gives credence to a reasonable inference that, in addition to advancing her monetary interest, Fünke wished to attract additional investors to FakeBlock for the benefit of the business by posting her video on the site. R. at 6a. If Fünke acted to further FakeBlock’s interests and according to her official capacity when she uploaded *Moonie Bares All*, the company itself is responsible for the creation and development of the video. *See Huon*, 841 F.3d at 742.

Viewing the facts of this case in the light most favorable to Austero, FakeBlock’s responsibility is similar to the companies in *Huon* and *LeadClick*, because a reasonable jury could find that its employee directly created the offending

content pursuant to her official duties. *Huon*, 841 F.3d at 742; *LeadClick Media LLC*, 838 F.3d at 176. A genuine issue of material fact exists as to whether FakeBlock is the information content provider that created the actionable content, and therefore the Court should affirm the Fifteenth Circuit's denial of the company's motion for summary judgment on its § 230 immunity claim.

II. FÜNKE'S USE OF AI TO DEPICT AUSTERO IN *MOONIE BARES ALL* INFRINGED ON THE RESPONDENT'S RIGHT OF PUBLICITY AND WAS NOT PROTECTED BY THE FIRST AMENDMENT.

The right of publicity protects every person's inherent privilege to control their name, image, and likeness. *See Haelan Lab's, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). Violations of this property right happen when defendants misappropriate a person's identity, without permission or compensation. *See Zacchini*, 433 U.S. at 569. Courts closely safeguard this right, even though cases often implicate First Amendment concerns. *See id.*

Understanding these principles, the Fifteenth Circuit correctly found that Austero raised an issue of fact that Fünke violated this right when she used artificial intelligence to create a nearly identical version of Austero in her video *Moonie Bares All*. R. at 31a. The court further concluded that petitioners failed to prove their First Amendment defense. R. at 39a. This Court should affirm the Fifteenth Circuit's decision and find that the Petitioners created a video that capitalizes on Austero's identity, and the First Amendment does not protect this misappropriation.

A. Fünke infringed on Austero’s right of publicity by creating a model that copies the celebrity’s likeness and all aspects of her fame.

Most states recognize the right of publicity, either by common law, statute, or both. J. Thomas McCarthy and Roger E. Schechter, *1 Rights of Publicity and Privacy* § 1:2 (2d ed. 2023). Newport Beach joined these states in recognizing this right consistent with Restatement (Second) of Torts § 652C, which says: “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.” R. at 9a.

Aside from causation and damages, essentially two components constitute the prima facie case for the right of publicity. First, the plaintiff has an enforceable right to an aspect of her identity. Second, the defendant infringed on this right by using the plaintiff’s persona or identity. *Doe*, 540 F. Supp. 2d at 304.²

This Court should affirm the Fifteenth Circuit’s decision regarding the right of publicity claim for two reasons. First, Austero has a valid, enforceable right in her identity, as appropriated by the Petitioner. Second, *Moonie Bares All* infringed on Austero’s right of publicity. *See* R. at 21a.

1. The lower court properly described and analyzed the right of publicity.

Before discussing Fünke’s infringement of Austero’s right of publicity, it is important to describe how the lower court properly analyzed this case. Newport Beach courts have not addressed the parameters of the right of publicity beyond the language of § 652C. *See* R. at 19a. Since Austero initiated this suit based on a state

² Like every tort, publicity infringement requires causation and damages. The Petitioners did not contest this issue below. *See* R. at 21a.

tort claim, the lower courts were sitting in diversity. *See* R. at 19a; 28 U.S.C. § 1332. *Erie R.R. Co. v. Tompkins*, requires federal courts sitting in diversity to apply a state’s substantive law. 304 U.S. 64, 78-80 (1938). However, when state law lacks clarity, courts must ascertain how the state’s highest court would apply the law. *See In re Jackson*, 972 F.3d 25, 38 (2d Cir. 2020). In making this determination, courts deduce the “majority rule” of other jurisdictions. *See Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 311 (5th Cir. 2010). The Fifteenth Circuit properly derived the correct standard and breadth for Newport Beach’s right of publicity when it determined that many states characterize the right as encompassing something broader than just mere image or likeness. *See* R. at 20a.

The Fifteenth Circuit obeyed “the general constitutional policy of maintaining uniformity in intellectual property laws . . . [by] giv[ing] attention to the entire available body of case law when deciding right of publicity cases.” *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 622-23 (6th Cir. 2000). It accurately ascertained that courts generally interpret the terms “name and likeness” broadly, encompassing any “aspect of identity or persona.” *Id.* at 624. In doing so, the Fifteenth Circuit utilized *Doe’s* language as a simple way to describe the elements of the right of publicity. R. at 21a; *see Doe*, 540 F. Supp. 2d at 304.

Many states that follow have adopted a right of publicity that encompasses a broad conception of identity. In New Jersey, which also utilizes § 652C, the right of publicity protects not just the formal use of an image but also the incorporation of elements associated with one’s identity into a video game. *See Hart v. Elec. Arts, Inc.*,

717 F.3d 141, 151 (3d Cir. 2013). In California, a defendant infringes on this right when they misappropriate objects associated with the plaintiff or a celebrity's voice. *See White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397-98 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). In Kentucky, "the common-law right of publicity...can be read broadly to protect a wide variety of uses of a person's (or public figure's) identity." *Montgomery v. Montgomery*, 60 S.W.3d 524, 528 (Ky. 2001).

These few examples typify the common interpretation of the right of publicity. Most states seek to protect plaintiffs, like Austero, from misappropriations of their identity or persona, not just their mere likeness. The Fifteenth Circuit recognized this broad principle and obeyed its *Erie* duty by approximating how the highest court in Newport Beach would analyze the right of publicity. *See Amerisure Ins. Co.*, 611 F.3d at 311. Many other states approach the right of publicity with the same broad interpretation, and Newport Beach would have known this fact that when it adopted the common law right of publicity. The Fifteenth Circuit interpreted the state's law with this landscape in mind. Thus, the court properly identified the elements and breadth of Newport Beach's right of publicity.

Furthermore, the court correctly ignored the dissent's suggestion that the question should be certified to Newport Beach's highest court. When there is an issue about the proper application of state law, a federal court may certify the question to the state's highest court. *See Roberts v. Alexandria Transp., Inc.*, 968 F.3d 794, 801 (7th Cir. 2020). However, a state must authorize certification. *See id.* Here, the dissent's suggestion of certification is improper for two reasons. First, nothing in the

record says that Newport Beach has passed a certification statute, rendering it unclear if this process was even an option for the Fifteenth Circuit. Second, accepting the dissent's standard for certification would neuter the sweep of diversity jurisdiction by sending questions back to the state every time the court was mildly unsure about how a state court might specifically handle an issue. Thus, the Fifteenth Circuit maintained the proper procedure in identifying how the state of Newport Beach would apply its right of publicity statute.

2. Austero has a valid, enforceable right in her identity.

The right of publicity protects the cluster of values wrapped up in a person's identity. *See Wendt v. Host Intern., Inc.*, 125 F.3d 806, 811 (9th Cir. 1997). The first element of the prima facie case is whether the person has an enforceable right in their identity. *See id.* To have valid enforceability, the plaintiff must show that they have some legal interest in their identity. *See id.* This prong sometimes raises difficulties for celebrities whose fame comes primarily from acting, because these plaintiffs might not have a property interest in the character or part they play. *See id.* However, “[a]t its heart, the value of the right of publicity is associational” and courts still often find for plaintiff actors. *See McFarland v. Miller*, 14 F.3d 912, 919 (3d Cir. 1994).

The Ninth Circuit held two actors from the television show *Cheers* raised a fact issue as to whether the defendants infringed on their publicity rights by creating look-alike animatronic robots. *Wendt*, 125 F.3d at 811. The defendant claimed that the robots were based on the television show's characters, not the plaintiff actors. *Id.* The court rejected this argument, holding that the robots had physical similarities to the

actors and “an actor or actress does not lose the right to control the commercial exploitation of his or her likeness by portraying a fictional character.” *Id.*

Taking the opposite stance, the Sixth Circuit held in *Landham* that an actor did not have a right of publicity claim against a defendant’s creation of an action figure. 227 F.3d at 621. The plaintiff was a “fringe” actor who appeared in several films in supporting roles, including “Billy, the Native American Tracker” from the movie *Predator*. *Id.* The defendant created a toy similar to the plaintiff’s character. *Id.* However, the court found that the plaintiff could not show how the toy invoked the actor’s persona, as opposed to the character. *Id.* at 626.

Austero’s case is stronger than all of the above cases. In each, the alleged appropriation only focused on one character the actor played. *See, e.g., Wendt*, 125 F.3d at 811. However, Fünke did not just infringe on one role or attribute; she strung together several aspects of Austero’s persona that made her famous. *See R.* at 21a. Austero’s claim is not that Fünke infringed on her character in *Cabaret* or *Tell Me That You Love Me, Junie Moonie*, it is that the petitioner brought together several aspects of Austero’s career to create the image of Austero, not one of her characters. *See R.* at 21a. In that way, this case resembles *Wendt* because Austero is hurt by the associational similarities between her identity and Moonie, not the invocation of characters themselves. *See* 125 F.3d at 811. Unlike *Landham*, Moonie does not just invoke one aspect of Austero’s persona, but strings together many parts of her fame to create an association between Moonie and Austero. *See* 227 F.3d at 621. As such, Austero has an enforceable right in her identity, as misappropriated by Fünke.

3. *Fünke infringed on Austero's right of publicity.*

The right of publicity protects the plaintiff's ability to use their identity to profit, and permissionless misappropriation inhibits this right. The touchstone in a right of publicity analysis is whether the defendant has used the plaintiff's identity or persona to identify the plaintiff in the beholder's mind. *See White*, 971 F.2d at 1398. With identifiability in mind, courts analyzing infringement claims must determine whether the plaintiff is identifiable in the defendant's use. Courts have looked at various factors in making this determination, including the plaintiff's physical characteristics, contexts closely associated with the plaintiff, and the plaintiff's voice. *See id.* All of these considerations counsel in favor of finding an infringement in this case.

a) Moonie's physical appearance resembles Austero.

Courts have frequently found infringements of a celebrity's likeness (or at least a triable issue of fact) even when the appropriation did not exactly match the plaintiff. In *Kirby v. Sega of Am., Inc.*, a California court found a triable issue of fact as to whether a video game character misappropriated the appearance of a musician. 50 Cal. Rptr. 3d 607, 613 (Cal. App. 2d Dist. 2006). Sega's computer-generated character shared physical characteristics with the plaintiff: it was "thin," had similar facial features, and wore similar outfits. *Id.* While some differences existed between the plaintiff and the video game character, the court found the similarities "sufficiently reminiscent enough of Kirby's features and personal style to suggest imitation" and a triable fact issue. *Id.* Moreover, the Third Circuit has opined that the defendant's

depiction does not need to cross the uncanny valley, where images look almost human but have subtle distortions, to sustain a right-of-publicity claim. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 166 (3d Cir. 2013).

Moonie's physical characteristics are almost identical to Austero. Moonie's hair, skin color, height, body style, and outfit all mirror the actress. *See R.* at 25a. These similarities were enough in *Kirby*, and they are enough here. *See* 50 Cal. Rptr. 3d at 613. Further, the fact that Moonie's face is slightly dissimilar is not dispositive. In *Kirby*, the character was not a perfect match, but the depiction was close enough to create a triable issue of fact. *See id.* As the Third Circuit has suggested, the requirement cannot be that the depiction cross the uncanny valley to maintain a right of publicity claim. *See Hart*, 717 F.3d at 166. To hold so would create an unworkable standard in the modern world. As such, the physical similarities shared between Moonie and Austero infringes on the latter's right of publicity.

b) All of Moonie's actions are closely associated with Austero.

Fünke did not stop at creating Moonie to closely resemble Austero; she also made the character imitate the actions that brought Austero fame. Courts safeguard the right of publicity when the defendant's depiction, while not literally copying the plaintiff, uses objects or situations closely associated with the plaintiff that lead to the conclusion that it is the plaintiff. *See White*, 971 F.2d at 1398. In *White*, Vanna White, *Wheel of Fortune* actress, defeated a summary judgment motion regarding Samsung's infringement of her right of publicity. *Id.* Samsung created a commercial that depicted a robot, dressed like White, on the *Wheel of Fortune* set in 2012. *Id.* at

1396. Of course, the robot was not a pixel for pixel copy of White. *See id.* Still, the Ninth Circuit held that there was a triable issue of fact as to whether this depiction infringed on White’s right. *Id.* at 1398. The court’s inquiry focused not on “*how* the defendant has appropriated the plaintiff’s identity, but *whether* the defendant has done so.” *Id.* Because the robot depicting White wore the same clothes and was placed in the context of *Wheel of Fortune*, the defendant improperly exploited the items closely associated with the plaintiff to misappropriate identity. *See id.*

The Third Circuit made a similar suggestion in *Hart*. The court discussed how the defendant’s use of the plaintiff’s height, weight, and jersey number were stand-ins for the “genuine article.” *Hart*, 717 F.3d at 166. Electronic Arts took this proxy and put it in the context with which the plaintiff was associated: playing football. *Id.* While the defendant conceded its infringement (for purposes of its motion), the Third Circuit still took the opportunity to explain how using representations in conjunction with the activity associated with the plaintiff’s fame can lead to infringement. *See id.*

White and *Hart* exemplify a simple principle: context matters. Defendants cannot simply change one or two details about a plaintiff and escape liability for their tort. And this principle is well suited for upholding in this case. Fünke combined the physical appearance of Austero with all aspects of her fame. *See R.* at 25a. Similar to the robot on the television set in *White*, *Moonie Bares All* uses Austero’s singing, dancing, and acting fame, combined with the outfit and appearance of the plaintiff, to violate her right of publicity. *See White*, at 971 F.2d at 1398. *Hart* stands for a similar proposition. Just looking at the height or outfit alone, there likely would not

be an infringement. *See Hart*, 717 F.3d at 166. However, combining these memorable moments into a coherent picture puts the entire work in perspective and evidences an infringement of the plaintiff's rights.

The Petitioners infringed on Austero's valid enforceable right of publicity. This conclusion not only has the support of the law but also the policy that undergirds publicity rights. These rights protect one's ability to control their most sacred property—their identity. Fünke cannot be allowed to use artificial intelligence to create a robust portrait of Austero, without permission or compensation.

B. The First Amendment does not protect Fünke's infringement of Austero's right of publicity.

The First Amendment protects the free speech and expression rights of every citizen. U.S. Const. amend. I. *Moonie Bares All* likely qualifies as expressive speech under First Amendment doctrine. *See Zacchini*, 433 U.S. at 569. However, this fact does not save Fünke; “[n]ot all speech is of equal First Amendment importance, ...and where matters of purely private significance are at issue, First Amendment protections are often less rigorous.” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988)). In the context of the right of publicity, this Court requires a balancing of free speech rights against a person's proprietary interest in the appropriation of their identity. *See Zacchini*, 433 U.S. at 574-75. Heeding this command, the lower courts developed three tests to balance the two rights against each other: the transformative use test, the *Rogers* test, and the predominant use test. *Hart*, 717 F.3d at 153-60. This Court should adopt the transformative use test, as it strikes the correct balance in protecting speech and

property. Further, Fünke qualifies for no First Amendment protection under the public interest defense.

When this Court considered the right of publicity's intersection with the First Amendment, it reasoned that states have an interest "in protecting the proprietary interest of the individual in his act in part to encourage such entertainment," and that much of the value in this interest comes from one's ability to maintain "exclusive control" over their publicity. *Zacchini*, 433 U.S. at 573, 575. Thus, the Court declared: "[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that 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.

Heeding this command, the lower courts have developed three tests to balance First Amendment rights against rights of publicity. The Sixth Circuit has utilized the *Rogers* test from trademark law to analyze these claims. *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 937 (6th Cir. 2003). The test focuses on whether the infringement has artistic relevance, and if so, whether it explicitly misleads the viewer as to the source of the work. *Id.* However, this test is ill-suited for right of publicity claims. It focuses on falsity, which really is not at issue when discussing the proprietary interests connected with the right of publicity. *See* J. Thomas McCarthy and Roger E. Schechter, 1 *Rights of Publicity and Privacy* § 8:71 (2d ed. 2023).

The predominant use test has only found favor in Missouri courts. *See Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (creating this test). The test focuses

on how the defendant predominantly used the identity of the plaintiff. *Id.* If the predominant use was to exploit the commercial value of the plaintiff's identity, then it receives no First Amendment protection. *See Hart*, 717 F.3d at 153. However, predominant uses that comment on the plaintiff receive constitutional protection. *Id.* There is a reason that this test has yet to survive outside its home state. As the Third Circuit pointed out, the predominant use test is "subjective at best, arbitrary at worst." *Id.* at 154. The test fails to produce a meaningful way to test if something is used predominantly for one reason or another.

The majority of courts have adopted the transformative use test, which asks "whether the product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness." *Comedy III Prods, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001). This test achieves the equilibrium that the First Amendment requires. It protects a celebrity's right to control their identity, while respecting the creative efforts of artists by allowing them to capitalize on their transformative uses of the plaintiff. *Id.* The test's five elements provide meaningful standards for factfinders to evaluate the work and analyze the transformative nature of the depiction. Once this Court adopts this test, it can easily find that Austero's rights outweigh the Respondent's speech rights.

1. *Moonie Bares All fails to sufficiently transform Fünke's infringement into protected expression.*

Fundamentally, the transformative use test asks whether the defendant's infringement sufficiently transforms the plaintiff's identity to expression, or merely

co-opts portions of the persona for the defendant's own gain. Courts look to five elements when balancing the two rights. *See Comedy III Prods.*, 21 P.3d at 809. These elements, as formulated by the Fifteenth Circuit, are:

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 manifestly subordinated to the overall goal of creating a conventional portrait of the celebrity.

R. at 33a (quoting *Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1274 (9th Cir. 2013)).

The California Supreme Court created this test in *Comedy III Prods.* 21 P.3d at 809. Since then, courts have used it to find transformations sufficient to maintain a First Amendment defense in a few cases. In *Winter v. D.C. Comics*, the California Supreme Court found that the First Amendment protected the defendant's comic

book. 69 P.3d 473, 479-80 (Cal. 2003). The book featured the Autumn Brothers, two characters loosely based on the plaintiffs' band, the Winter Brothers. *Id.* at 638. However, the work transformed the plaintiffs into half-human supervillains living in a fantasy universe. *Id.* The court found that this book was a clear case for protection, because the extreme transformation by the defendant met all five elements of the transformative use test. *See id.* at 479.

Similarly, a California appellate court protected a video game that included some elements of the musician plaintiff's identity. *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 616 (Cal. App. 2d Dist. 2006). The game appropriated aspects of the plaintiff's style, as well as certain catchphrases. *Id.* at 609. Yet, Sega did not just merely recreate the musician, but transported her into a futuristic universe, where the character performed a number of dances. *Id.* This appropriation survived the transformative use test because the dances were unlike any of the plaintiff's music videos and, despite some physical similarities, the depiction transfigured the plaintiff since the game was animated. *Id.*

Notwithstanding these cases, courts have rejected many First Amendment claims at the early stages of litigation. In *Hilton v. Hallmark Cards*, the Ninth Circuit held that the transformative use test did not protect Hallmark's infringement. 599 F.3d 894, 909 (9th Cir. 2010). Hallmark created a card that featured Paris Hilton's head superimposed on the body of a waitress. *Id.* at 899. The card referenced an episode of Hilton's show, where she attempts to be a waitress. *Id.* The court rejected Hallmark's First Amendment claim as a matter of law because, "[d]espite these

differences [between Hilton and the depiction] . . . the basic setting is the same [as the show]: we see Paris Hilton, born to privilege, working as a waitress.” *Id.*

Similarly, in *No Doubt v. Activision Publ'g., Inc.*, a California appellate court rejected the defendant’s assertion of the transformative use defense during early stages of the litigation. 122 Cal. Rptr. 3d 397, 411 (Cal. App. 2d Dist. 2011). Activision’s video game *Band Hero* featured literal depictions of the band No Doubt, and allowed participants to play songs as the band members, the very act that made the group famous. *Id.* at 410-11. While one could interact with these characters in fanciful settings, the court ultimately held that the right of publicity won at this stage of the litigation. *Id.* The court not only gave weight to the depictions of the band, but also to the commercial incentives, holding that the video game promised fans the opportunity to play alongside their favorite band. *Id.*

Similarly, Electronic Arts has lost transformative use challenges to its video games in both the Third and Ninth Circuits. *See Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013); *Davis v. Elec. Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015). Electronic Arts’s video game series, *NCAA Football*, was never transformative enough to satisfy the summary judgment standard. *Hart*, 717 F.3d at 166. The video game allowed users to play football as college football teams. *Id.* at 145-47. Electronic Arts did not use the actual names of the players, yet it imbued each of the players with biographical statistics (e.g., height, weight, jersey number) of the real-world counterparts. *Id.* Further, the company used actual pictures of the players in a montage at the opening credits of the game. *Id.* The Third Circuit held that the game did not survive the

transformative use test because the avatars closely matched the actual players and copied their clothing. *Id.* Further, these literal depictions were connected with the context that made the football players famous—the avatars played the sport and positions of the real versions. *Id.* While holding that Electronic Arts did not survive the transformative use test, the court did mention that the First Amendment protected the use of pictures in the opening credits of the game. *Id.* at 169-170 (citing *ETW Corp.* for the contention that the collage of photographs “imbues the image with additional meaning beyond simply being a representation of the player”). Analyzing the same video games, the Ninth Circuit has twice come to the same conclusion on similar grounds. *See Davis*, 775 F.3d at 1178; *Keller v. Elec. Arts Inc.*, 724 F.3d 1268, 1284 (9th Cir. 2013).

To properly analyze Fünke’s First Amendment defense, it is important to examine the song Moonie sings separately from the rest of the video. *See R.* at 35a-36a.

- a) The song in *Moonie Bares All* is likely protected speech but must be differentiated from the rest of the video.

While all of the *Comedy III* factors weigh in Austero’s favor, the song that Moonie sings would likely receive First Amendment protection. The song parodies *New York, New York* by Leonard Bernstein by replacing the lyrics with crude references to the citizens of Newport Beach. *See R.* at 35a-36a. The First Amendment likely protects this part of the video. *See Buckley v. Am. Const’l Law Found., Inc.*, 525 U.S. 182, 183 (1999). However, that one portion of the film might receive

protection does not save the entire work. Counter to what the dissent below contended, courts look to multiple parts of a work and choose which ones merit safeguarding. *See* R. at 66a (Walt, J., dissenting). For example, in *Hart*, the Third Circuit said the portion of the game that contained the actual photograph of the plaintiff quarterback was a part of a First Amendment protected montage, pursuant to the same theory in *ETW Corp. See Hart*, 717 F.3d at 170. However, the court did not hesitate to find that the First Amendment did not protect other aspects of the video game. *Id.* Through the same logic, this Court can protect Fünke’s song, without protecting her appropriation of Austero’s identity.

b) The First Amendment does not protect the majority of *Moonie Bares All*s infringement.

Aside from the song, the case law points to one conclusion: the transformative use test favors protection of Austero’s right of publicity. Each of the elements from *Comedy III* supports Austero’s claim. The first and second factors show that Austero is “the very sum and substance of” *Moonie Bares All*, and the work is not primarily the defendant’s own expression, but a simple recreation of Austero’s identity. *See Comedy III*, 21 P.3d at 809. Fünke used artificial intelligence to create a realistic version of Austero and she succeeded. *See* R. at 4a. The entire video features a realistic depiction of Austero, closely copying her physical features, outfit, known dancing skills, singing, and a scene from one of her movies. R. at 25a. In doing this, Fünke violated the principles set forth in *Hart*, *No Doubt*, and *Hilton*. Just like the football player in *Hart* or the band in *No Doubt*, Moonie looks like Austero and

performs the actions that are closely associated with the Respondent's celebrity. *See Hart*, 717 F.3d at 166; *No Doubt*, 122 Cal.Rptr.3d at 410-11. That Moonie is performing one of Austero's dance routines in an outfit that Austero memorably wore in another context does not save the video. R. at 25a. The virtual band in *No Doubt* could perform songs other than those sung by the real-world counterpart, and still the game did not qualify for First Amendment protection. *No Doubt*, 122 Cal.Rptr.3d at 410-11. At base, *Moonie Bares All* uses parts of Austero's celebrity without much alteration, which reflects the fact that Austero is the "very sum and substance" of the video.

To the third and fifth factors, the literal and imitative parts of *Moonie Bares All* predominate the video and subordinate Fünke's expression to create an accurate picture of Austero. The portions of the film that predominate are Austero's nearly identical "twin" Moonie appearing on a stage wearing the actress's exact outfit from *Cabaret*, performing Austero's dance from Radio City Music Hall, and undressing in a manner similar to one of Austero's roles. R. at 25a. According to Fünke, and any reasonable person watching the film, realism was the goal. *See* R. at 4a. *Moonie Bares All* does not morph its subject like the video game in *Kirby* or the comic book in *Winter*. *See Kirby*, 50 Cal. Rptr. 3d at 616; *Winter*, 69 P.3d at 479-80. Whereas the creative elements in those cases engulfed the work, here there is little creating and more mimicking. Even with the song in the background, this case reflects the same aspects of the card in *Hilton* that blocked the work from transformation. Although Paris Hilton's head was superimposed onto the body of a waitress, this was not

creative enough to transform the work into protected expression. *Hilton*, 599 F.3d at 911. Likewise, *Moonie Bares All* fails to transform because, [d]espite the[] differences,” “the basic setting is the same” we see Austero acting, singing, and dancing. *Id.* Thus, Moonie’s minor distinctions and song are drowned out by the conventional portrayal of Austero.

Finally, the fourth *Comedy III* factor weighs in Austero’s favor because the economic value of *Moonie Bares All* comes from the celebrity’s fame. Fünke created this software to profit from the ability to create realistic images. *See R.* at 4a n.2. She wanted *Moonie Bares All* to showcase how accurately her artificial intelligence could produce recreations. *R.* at 4a. The best way to do this was to use the software to depict a famous actress who was currently running for political office, so that potential buyers could see just how well her program works. Thus, the ability to recognize the celebrity is what would generate wealth for Fünke. *Moonie Bares All*’s economic engine is quite similar to the motivations for Electronic Arts in *Hart*. *See* 717 F.3d at 168 (“Appellee seeks to create a realistic depiction of college football for the users. Part of this realism involves generating realistic representations of the various college teams—which includes the realistic representations of the players. Like Activision in *No Doubt*, therefore, Appellee seeks to capitalize on the respective fan bases for the various teams and players.”).

2. *The public interest defense does not protect Moonie Bares All because the video does not publish or report any factual data.*

The common law public interest defense protects the “right of the public to know and the freedom of the press to tell.” *Hilton*, 599 F.3d at 912. However, the defense is cabined to reports or publications of factual data. *Id.* In *Hilton*, Hallmark’s depiction of socialite Paris Hilton did not receive the public interest defense because there was no factual reporting involved in the creation of Hilton’s caricature. *Id.* Likewise, in *Davis*, Electronic Arts’s infringement on a quarterback’s right of publicity did not merit this defense. 775 F.3d at 1179. This Court should affirm the lower court’s holding that the First Amendment does not safeguard Fünke’s infringement of Austero’s right of publicity, since it contains no factual data or reporting, and is merely an attempt to sell software and promote a website.

As a matter of law, the First Amendment does not protect *Moonie Bares All* because the work fails to transform and simply just recreates Austero and the aspects of her life that brought her fame. This conclusion is especially true considering the disposition of this case. Summary judgment requires that there be “no genuine issue of material fact” when construing “all justifiable inferences” in the non-movant’s favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255 (1986). Viewing these facts in a light most favorable to Austero, there is, at the very least, a triable issue of fact. Ultimately, this Court should not let the First Amendment safeguard defendants from reproductions of celebrities because doing so would effectively erase the right of publicity across the country. Unchecked by the right of publicity, artificial

intelligence offers wrongdoers the ability to “create” realistic depictions of celebrities and profit from their use. This Court should affirm that while the First Amendment can provide some protection, it is not *carte blanche* for people to profit from the identity of others.

CONCLUSION

Lucille Austero has the right to protect her identity from exploitation. This Petitioners invaded that right by depicting Austero in *Moonie Bares All* and posting it to their website to generate profits. Neither § 230 nor the First Amendment help the Petitioners escape liability. This Court should affirm the Fifteenth Circuit’s decision and remand for further proceedings.

Respectfully submitted,
/s/ Team #87
Team #87
Counsel for Respondents November 20, 2023

APPENDIX

47 U.S.C. § 230(b)(1)-(4), (c)(1)-(2)(A), (e), (f)(2)-(3)

(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

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

(1) Treatment of publisher or speaker

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

(2) Civil liability

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

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

(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--

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

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

(f) Definitions

As used in this section:

(2) Interactive computer service

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

(3) Information content provider

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