

No. 22-9908

IN THE SUPREME COURT OF THE UNITED STATES

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 PETITIONERS

Team 96

Attorneys for Petitioner

QUESTIONS PRESENTED

- I. Whether, under Section 230(c) of the Communications Decency Act, a social media company is immune from a state law right-of-publicity claim when it did not assist in the creation or development of content posted by a third party, and alternatively, whether Section 230(e)(2)'s immunity exclusion applies to state law right-of-publicity claims?
- II. Whether a short film, created using artificial intelligence, violates a celebrity's right-of-publicity when the short film merely references the celebrity's past performances and physical appearance, and alternatively, whether the short film is protected by the First Amendment?

PARTIES TO THE PROCEEDING

Petitioners FakeBlock, Inc. and Maebly Fünke were the appellees in the court below. Respondent Lucille Austero was the appellant in the court below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifteenth Circuit has not yet been published but is reported at No. 20-9804.

JURISDICTION

The United States District Court for the District of Newport Beach exercised diversity jurisdiction over this case pursuant to 28 U.S.C. § 1332. The United States Court of Appeals for the Fifteenth District had jurisdiction over the case under 28 U.S.C. § 1291. The judgment of the court of appeals was entered on October 17, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), as a writ of certiorari was timely filed and granted on October 9, 2023.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS

This case involves the First Amendment to the United States Constitution and what is commonly known as the Intellectual Property Clause, which state: “Congress shall make no law...abridging the freedom of speech[]” and “Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. amend. I., U.S. Const. art. I, § 8, cl. 8. This case also involves the Communications Decency Act of 1996, which is codified at 47 U.S.C. § 230. Additionally, it involves Federal Rule of Civil Procedure Rule 56 (“Summary Judgment”). The relevant portion of each of the listed provisions is contained in the appendix to this brief.

STATEMENT OF THE CASE

I. Factual Background

This case arises out of Petitioner Maeby Fünke's (Fünke) use of Petitioner FakeBlock, Inc.'s (FakeBlock) social media platform to inform the citizens of the state of Newport Beach about 2018 Congressional candidate and Respondent Lucille Austero (Austero). *Austero v. FakeBlock, Inc.*, No. 20-9804, op. at 1a (15th Cir. Oct. 17, 2022). Fünke is a digital artist and computer software programmer who expresses her ideas through artificial intelligence (AI). *Id.* at 3a. Fünke launched her career as a digital artist with the creation of computer software that enabled users to morph photographs of two individuals together to predict their child's appearance. *Id.* at 3a, n. 2. After interest in this type of software declined, Fünke reconstructed the program to generate realistic AI models capable of talking, singing, and dancing. *Id.* at 3a, n. 2, 4a. Sometime around 2018, Fünke made a personal investment in FakeBlock. *Id.* at 5a.

A Social Media Startup. FakeBlock is a social media company incorporated in Delaware with its principal place of business is in Irvine, California. *Id.* At the time of the events giving rise to this lawsuit, FakeBlock did not have a sophisticated corporate structure. *Id.* at 56a. Instead, it was a small company conceived by college students who were finding their footing in the tech world. *Id.* These students, including George Maharis and Paul Huan, operated under colloquial titles like "Mr.

Manager” and “P Hound,” respectively. *Id.* at 5a, n.3. ¹ In 2018, FakeBlock’s software was “in beta,” meaning it was pre-released to a large group of users before the final version was completed.² At that time, there were three individuals with the ability to upload content to the site: Maharis, Huan, and Fünke. *Id.* In addition to her small investment in FakeBlock, Fünke lent her skills as a programmer to assist in the final stages of software error testing and troubleshooting. *Id.* at 57a. During this process, Fünke was necessarily authorized to publish content on the site, and she uploaded several videos to FakeBlock, including a short film titled *Moonie Bears All* on May 29, 2018. *Id.* at 2a. While Fünke used her influence as a digital creator to encourage others to invest in FakeBlock, she did not receive any compensation for her work on the software. *Id.* at 6a.

A New Type of Political Parody is Born. *Moonie Bears All* is a five-minute-long AI generated political commentary video created to inform the public about Austero, who ran against Fünke’s mother, Lindsay Bluth, in the 2018 Congressional election. *Id.* at 3a-4a. Specifically, Fünke created *Moonie Bears All* to raise awareness of Austero’s “darker side,” which Fünke believed was critical information for Newport Beach voters. *Id.* at 4a.

In *Moonie Bears All*, the main character, Moonie, begins by tap dancing in a burlesque outfit. *Id.* at 5a. After dancing for almost one minute, Moonie stumbles

¹ The Fifteenth Circuit’s majority opinion elected to attach corporate titles to these individuals, such as CEO, CFO, and director of investor relations. Fünke was referred to as the director of investor relations, but there is no evidence that indicates what her involvement was with the company or what responsibilities, if any, she was officially given *Austero*, No. 20-9804 at 5a, n. 3.

² Tim Fisher, *What is Beta Software?*, Livewire (Dec. 2, 2020), <https://www.lifewire.com/what-is-beta-software-2625812> (last visited Nov. 15, 2023).

and falls to the edge of the stage. *Id.* Moonie then strips off her clothing and begins to recite a slurred parody of Leonard Bernstein’s “New York, New York” from the musical *On the Town*.³ *Id.* The modified lyrics discuss Moonie’s wealth and substance abuse problems while also implying that Moonie is not fond of the Newport Beach Public. *Id.* Fünke posted a caption along with the video that read “VOTE 4 LINDSAY BLUTH” with a link to Bluth’s campaign website. *Id.* at 6a.

Fünke testified that she had two reasons for creating *Mooney Bares All*. First, she wanted to make a political statement, and second, she wanted to advertise the capabilities of her newest computer software. *Id.* at 4. The goal of the video was to ensure that the public was well informed about Austero and, presumably, why she should not be elected to public office. *Id.* Like most artists, Fünke also hoped her short film might display her creative capabilities and garner interest from potential purchasers of her product. *Id.* Fünke even described her software in the post accompanying the video. *Id.* at 58a. Additionally, she testified that she hoped the video would increase user traffic to FakeBlock itself, not because she had an obligation to solicit future investors for the company, but because FakeBlock’s success would ultimately increase the value of her own investment. *Id.*

Fünke used Austero’s image and voice as a starting point when creating the main character of *Moonie Bares All*. *Id.* at 4a. However, after Fünke’s software analyzed Austero’s image and voice, Fünke purposefully altered the production to create the unique, artificial figure that she named Moonie. *Id.* at 27a. Moonie is

³ Any depictions of nudity were blurred per FakeBlock’s obscenity filters. *Austero*, No. 20-9804 at 5a.

approximately 5'4 with short, black hair. *Id.* at 5a. While Moonie has the same general body type and proportions as Austero, the similarities in Moonie and Austero's appearances end there. *Id.* at 4a. Moonie's hair lays flat across her as opposed to Austero's famous spiky hairstyle. *Id.* at 23a. Moonie does not have Austero's famous beauty mark on her left cheek. *Id.* Moonie's nose tips downward, which is distinct from Austero's nose. *Id.* Moonie has a mouth that is disproportionately large for her head. *Id.* Moonie does not smile with her teeth, while Austero is known for smiling with her teeth. *Id.* Moonie also has wideset, asymmetric eyes that differ from Austero's. *Id.*

There is no doubt that some elements of *Moonie Bears All* allude to characters Austero played throughout her career. For example, the name "Moonie" is similar to Austero's character in the 1970 movie *Tell Me That You Love Me, Junie Moon*. *Id.* at 64. Moreover, the outfit that Moonie dances in is similar to the outfit Austero wore in the movie *Cabaret*. *Id.* The tap dance Moonie performs also resembles Austero's performance in *Cabaret*. *Id.* at 25a. Finally, while Austero has no connection to the song that Moonie sang in the video, Austero famously sang a different song by the same name. *Id.* at 64.

Outrage Ensues Over Public Criticism. After being published on FakeBlock's platform, *Moonie Bears All* attracted significant attention on internet message boards where viewers commented on different aspects of the video. *Id.* at 6a. Presumably offended by the commentary and criticism, Austero filed suit against FakeBlock in the United States District Court for the District of Newport Beach on

August 24, 2018. *Id.* A few days later, FakeBlock’s leadership removed the video from its site and cut ties with Fünke, effectively ending her involvement—or more accurately stated, her collaboration—with the company. *Id.*

II. Proceedings Below

Austero originally sued only FakeBlock seeking an injunction, for the removal of *Moonie Bears All* from the internet. *Austero*, No. 20-9804 at 6a. However, after she lost the 2018 election, Austero amended her complaint, adding Fünke as a defendant and alleging that both FakeBlock and Fünke violated Austero’s right-of-publicity. *Id.* Austero alleged that the video appropriated her identity and infringed on her right to profit from her identity. *Id.*

Both Fünke and FakeBlock moved for summary judgment on two grounds: (1) that Austero did not have a valid claim for the infringement of her right-of-publicity and (2) that even if there was valid claim, it was precluded by the First Amendment because *Moonie Bears All* is protected speech. *Id.* at 7a. Additionally, FakeBlock argued that summary judgment was proper because it was entitled to immunity under Section 230 of the Communications Decency Act as an internet service provider. *Id.*; see 47 U.S.C. § 230.

The district court granted summary judgment to both Fünke and FakeBlock, finding that there was no genuine dispute of material fact regarding Austero’s right-of-publicity claim. *Id.* The district court did, however, reject FakeBlock’s immunity defense. *Id.* Austero appealed the grant of summary judgment to the United States Court of Appeals for the Fifteenth Circuit. *Id.* While FakeBlock did not cross-appeal

the district court's rejection of its immunity claim, the Fifteenth Circuit nevertheless considered the claim in its decision. *Id.*

On appeal, the Fifteenth Circuit reversed the district court's grant of summary judgment, ruling that summary judgment was improper because Austero raised an issue of fact regarding her right-of-publicity claim. *Id.* at 2a. The court also affirmed the district court's rejection of Fünke and FakeBlock's affirmative defenses under the First Amendment and FakeBlock's immunity defense under the Communications Decency Act. *Id.* at 18a, 39a. With respect to the latter, the court concluded that Austero's state-law right-of-publicity claim qualified for an exception to immunity. *Id.* at 18a. FakeBlock and Fünke then filed a timely petition for writ of certiorari, which this Court granted one year after the Fifteenth Circuit's ruling. *Id.* at 7a.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fifteenth Circuit’s ruling and hold that summary judgment should have been granted under Fed. R. Civ. P. 56(a) because FakeBlock is entitled to immunity under Section 230 and because Fünke’s video, *Moonie Bears All*, did not deprive Austero of the right to profit from her own publicity.

With respect to the first issue, FakeBlock established each element of its affirmative defense of immunity under Section 230(c)(1) of the Communications Decency Act because it is an interactive computer service provider that Austero attempts to treat as the publisher of content created and developed by Fünke, a third-party content provider. 47 U.S.C. § 230 (1996). However, the Fifteenth Circuit prematurely concluded that FakeBlock was not entitled to immunity based on the “intellectual property” exception in Section 230(e)(2) without considering Congress’s findings and policy codified in the first part of the statute. Congress took the unusual step of detailing its factual findings and policy considerations, which the Fifteenth Circuit failed to take into consideration when it focused myopically on a single word—“any”—to the exclusion of the statute as a whole. Proper statutory analysis dictates that the phrase “any law pertaining to intellectual property” in Section 230(e)(2) should be read and applied as “any law pertaining to *federal* intellectual property.”

Even assuming that the Fifteenth Circuit’s flawed construction is plausible, Austero’s claim for the infringement of her identity, as pleaded, does not constitute

an intellectual property claim. Austero did not create her persona or identity in the way an author writes a copyrightable novel nor are her physical characteristics distinctive in the way a trademark indicates origin. Any interest Austero may have in her likeness and identity is simply not a product of her own intellect, and to accept her claim and others like it as “intellectual property” would undermine Section 230’s broad immunity. Accordingly, Austero’s right-of-publicity claim against FakeBlock is barred by under Section 230(c)(1), and the court below erred in holding otherwise.

With respect to the second issue, the Fifteenth Circuit erred in concluding that a genuine issue of material fact remained as to Austero’s right-of-publicity claim. First, the elements the Fifteenth Circuit adopted were far too broad and were inconsistent with Newport Beach’s common law right-of-publicity. But even under the broadened right-of-publicity, *Moonie Bears All* is inconsistent with precedent supporting a claim for appropriation of identity because the short film does not deprive Austero of any ability to profit off her own image. *See White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1403-04 (9th Cir. 1992) (Alcoron, J., concurring in part, dissenting in part). Additionally, Austero cannot claim a right-of-publicity for references to characters and performances in which she has no proprietary interest. *See Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 625 (6th Cir. 2000).

But even if Austero’s claim for right-of-publicity survives, it is barred by the First Amendment because *Moonie Bears All* is a transformative, expressive work. The court must carefully balance the right-of-publicity with the competing interest

of creators to express their ideas. Under the transformative use test, courts ask whether a piece of work is transformed to the point that it is the “primarily the defendant’s own expression rather than the celebrity’s own likeness.” *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th. 387 (2001). Fünke took the “raw elements” of Austero’s physical appearances and voice and created “Moonie,” a unique avatar that dances and sings a song expressing Moonie’s viewpoint regarding the Newport Beach Public. *Austero*, No. 10-9804 at 27a. The primary function of *Moonie Bears All* is that of a political parody expressing Fünke’s viewpoint about a political candidate. As such, *Moonie Bears All* warrants full protection under the First Amendment.

ARGUMENT

I. FAKEBLOCK IS ENTITLED TO IMMUNITY UNDER SECTION 230(C)(1) BECAUSE AUSTERO’S RIGHT-OF-PUBLICITY CLAIM DOES NOT FALL WITHIN THE PURVIEW OF THE INTELLECTUAL PROPERTY EXCLUSION IN SECTION 230(E)(2).

Arguably the most important safeguard of free expression on the Internet, Section 230 of the Communications Decency Act of 1996 (CDA) bars suits against websites and other internet providers for tortious content provided by third parties.⁴ *See* 47 U.S.C. § 230. Under Section 230, “interactive computer service” providers (ICS)—including social media companies like FakeBlock—can publish content without being “treated as the publisher or speaker of any information provided by another information content provider” and cannot be held liable for restricting access to certain material. *Id.* at §§ 230(c)(1), (2). By providing immunity to internet service providers under these provisions, Section 230 aims to achieve two goals: first, “to encourage the unfettered and unregulated development of free speech on the internet[,]” and second, to encourage online providers to “self-police” for potentially harmful or offensive content. *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003); *see also* 47 U.S.C. §§ 230(b)(2), (c)(2).

Section 230 protection, however, is not absolute. The immunity provided in (c)(1) and (c)(2) is subject to a number of exceptions, including a carveout for “intellectual property” claims. *See* 47 U.S.C. § 230. That provision states that Section 230 immunity shall not “limit or expand any law pertaining to intellectual property.” *Id.*

⁴ Kathleen Ann Ruane, *How Broad a Shield? A Brief Overview of Section 230 of the Communications Decency Act*, Congressional Research Service (Feb. 21, 2018), <https://crsreports.congress.gov/product/pdf/LSB/LSB10082>.

§ 230(e)(2). However, when construed in light of the statute as a whole, including Congress’s codified findings and policy, it becomes clear that Section 230(e)(2) was intended to apply to *federal* intellectual property claims only. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118-19 (9th Cir. 2007).

The Fifteenth Circuit erred in holding (1) that FakeBlock was not entitled to immunity under Section 230(c)(1) because Section 230(e)(2) applies to state and common law claims and (2) that Austero’s claim for appropriation of her identity was an intellectual property claim within the purview of Section 230(e)(2).

A. FakeBlock did not create or assist in the development of Moonie Bears All.

The Fifteenth Circuit declined to consider whether Fünke acted on her own or on behalf of FakeBlock when she uploaded *Moonie Bears All* because it prematurely concluded that FakeBlock was not entitled to immunity under the statutory exception in Section 230(e)(2). *Austero v. FakeBlock, Inc.*, No. 20-9804, op. at 11a (15th Cir. Oct. 17, 2022). For reasons discussed in Section B, the court erred in reaching that conclusion because Austero’s claim sounds in privacy law and does not qualify as an “intellectual property” claim. In any case, there is insufficient evidence from which a jury could conclude that Fünke acted on FakeBlock’s behalf when she uploaded the video or that FakeBlock was responsible for the video’s creation or development. FakeBlock is entitled to immunity under Section 230(c)(1), and the court below erred in affirming the denial of FakeBlock’s motion for summary judgment. *See generally In re La. Crawfish Providers*, 852 F.3d 456 (5th Cir. 2017); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

Circuit courts conduct a three-part test when deciding Section 230 immunity to determine whether: (1) the party seeking immunity qualifies as a provider of an interactive computer service; (2) the claim seeks to treat the ICS as a publisher or speaker; and (3) the claim is based on information provided by a third-party content provider. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009). This test turns on “the specific content that was the source of the alleged liability” and considers who created and developed that content. *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1198-99 (10th Cir. 2009); *accord Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 409 (6th Cir. 2014) (“immunity under the CDA depends on the pedigree of the content at issue”). The parties do not contest the first and second elements of the test, so this case turns on whether FakeBlock is responsible for the information uploaded by Fünke, the video titled *Moonie Bears All*.

Section 230(f)(3) classifies an internet content provider (“ICP”) as any “person or entity that is responsible, in whole or in part, for the creation or development of information” provided through an ICS. While it might be possible for an ICS to be both an “information content provider” and an “interactive computer service provider” simultaneously, that is only true if the ICS “assisted in the development of what made the content unlawful.” *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1263 n.6 (N.D. Cal. 2006); *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016). The Sixth and Ninth Circuits have interpreted “development” to mean “materially contribut[ing] to [the content’s] alleged unlawfulness.” *Jones*, 755 F.3d at 410 (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.Com*,

LLC, 521 F.3d 1157, 1167-68 (9th Cir. 2008)). For example, a website operator who edits user-created content for things like spelling, length, and the removal of obscenities has not made any material contribution and will retain his immunity because such edits are unrelated to any illegality. *Roommates*, 521 F.3d at 1169. Thus, assisting in the “development” of unlawful content means more than merely displaying or allowing access to content created by a third-party. *Jones*, 755 F.3d at 410.

Here, there is no evidence that FakeBlock created or materially contributed to *Moonie Bears All* because Fünke uploaded the video on her own behalf as a third-party user, not in her capacity as a representative of FakeBlock. It is true that a corporation can act only through its agents and employees. *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 225 (3d Cir. 2007). However, there is little evidence to suggest that Fünke was a FakeBlock employee much less a corporate officer with the type of responsibility and authority that could implicate FakeBlock as a content provider. Fünke was not paid by FakeBlock, which in 2018, was a “ragtag, unsophisticated” start-up run by college students. *Austero*, No. 20-9804 at 56a. Additionally, Fünke was never given the official title of “director of investor relations,” and there is no evidence that Fünke was responsible for or performed any duties related to FakeBlock’s investment fund or the procurement of new investors. *Id.* at 6a, 56a-57a. Instead, Fünke simply used her influence as a digital creator to try to convince others to invest in the company, a move likely motivated by self-interest due to Fünke’s personal investment in FakeBlock. *Id.* at 56a.

Similarly, there is no evidence that uploading specific content akin to *Moonie Bears All* was part of Fünke's collaboration with FakeBlock. Because the site's software was not yet complete and because Fünke was a computer programmer, it is more likely that she was necessarily authorized to upload content on the platform so she could assist with error testing and troubleshooting before the platform fully opened to the public. *Id.* at 57a. Austero points to the fact that Fünke was one of three people with the ability to post on the site in support of the argument that Fünke was somehow instructed to upload *Moonie Bears All*. But Fünke made several posts, including other videos supporting her mother's campaign, none of which promoted FakeBlock or were aimed at attracting potential investors. *Id.*

Fünke's stated motivations for creating and uploading *Moonie Bears All* further support the conclusion that she acted in her own capacity as a third-party content provider. Fünke created the Moonie character to advertise the newest version of her software and to help her mother's Congressional campaign. *Id.* at 4a. Austero would argue that by merely uploading the video to FakeBlock alone, Fünke sought to attract new investors as part of her corporate duties. However, this argument discounts entirely Fünke's testimony that she posted to FakeBlock instead of other social media platforms because she hoped to draw users to the site and increase the value of her own investment. *Id.* at 6a. It also ignores the fact that the post accompanying the video did not mention or reference FakeBlock in any way but was instead drew attention to the campaign. *Id.*

Austero cannot show that FakeBlock materially contributed to *Moonie Bears All* to make it a content provider under the third prong of the test. Austero provided no evidence that FakeBlock required Fünke to post any videos, nor can she show that FakeBlock knew about *Moonie Bears All* or Fünke’s intent to upload it to the site. Austero cannot show that FakeBlock made suggestions or edits to Fünke’s content or that the company contributed to Fünke’s posts in any way aside from authorizing her to post as part of the general error testing process. *See Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1099 (9th Cir. 2019) (operator of social networking site did not create content on website even though operator used features and functions to analyze user posts and recommend other user groups).

Because FakeBlock has established that Fünke is a third-party content provider, as required to establish its affirmative defense under Section 230(c)(1), and because Austero failed to “designate facts showing a genuine issue for trial,” summary judgment was proper at the district court level, and the court of appeals erred in holding otherwise. *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021) (citing *McCarty v. Hillstone Rest. Grp., Inc.*, 864 F.3d 354, 357 (5th Cir. 2017)).

B. The codified Congressional findings and policy makes clear that Section 230(e) pertains primarily to federal law and includes state laws only where they are coextensive with federal law.

Although courts begin the analysis by determining the plain meaning of statutory text, statutory interpretation is “a holistic endeavor” where the analysis is guided by established principles and canons of construction. *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988); *Talley*

v. Wetzel, 15 F.4th 275, 280 (3d Cir. 2021). However, this Court has made clear that where “reliance on [the statute’s] language would defeat the plain purpose of the statute,” courts should go beyond the language and “construe laws in harmony with the legislative intent and... purpose.” *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). Courts should not be “guided by a single sentence or member of a sentence,” but should instead strive to give effect to the statute’s every word and provision without passing judgment on the course of action chosen by the legislature. *Asadi v. G.E. Energy, LLC*, 720 F.3d 620, 622 (5th Cir. 2013); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978); *see also Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 126 (1989) (“Our task is to apply the text, not to improve upon it.”).

The Fifteenth Circuit erred in interpreting Section 230(e)(2) in isolation without considering legislative intent or purpose. When enacting Section 230, Congress took the unusual step of codifying the factual findings and policy considerations behind the legislation. Because those findings and policies are included *in the statute itself*, the Fifteenth Circuit violated established canons of statutory interpretation by construing Section 230(e)(2) to apply to state-law claims. Taking all of this into consideration, the only plausible conclusion is that Congress intended “intellectual property” in Section 230(e)(2) to mean “*federal* intellectual property.” Thus, this Court should correct the erroneous interpretation concocted by the Fifteenth Circuit and analyze the text of Section 230(e)(2) in light of subsections (a) and (b).

1. Congress’s Codified Findings and Policy Confirm that “Any Law” Should be Construed as “Any Federal Law.”

When Congress enacted the CDA in 1996, its initial goal was to protect children from being exposed to sexually explicit content on the internet. *See LeadClick*, 838 F.3d at 173.. In 1998, an amendment to the Act created Section 230, which, in addition to protecting the development of interactive computer services, was created to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State Regulation.” 47 U.S.C. § 230(b)(2). To align Congress’s somewhat opposing goals within this Act, Section 230(c) provides protection for ICSs from being held liable for content published by another provider. *Id.* §§ 230(c)(1), (2).

In Section 230(a)(1), Congress emphasized the importance of the internet and the “extraordinary advance[ment]” it has made in the lives of many Americans. Its findings expressed the rationale behind protecting ICSs due to their contribution to the accessibility of educational resources, opportunities for developments in areas like diversity and inclusion, and various political, cultural, and entertainment related services. *Id.* §§ 230(a)(1)-(5). Section 230(b) explains, among other things, Congress desire:

- (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*; [and]
- (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[.]

When construed in light of these subsections, Section 230 has only one meaning: Having found that “interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation,” *id.* § 230(a)(4), Congress acted “to preserve the vibrant and competitive free market” for those services, “unfettered by Federal or State regulation,” *id.* § 230(b)(2), by granting internet service providers immunity from tort claims seeking to treat them as publishers or speakers of content provided by third parties. *Id.* § 230(c)(1). Any other interpretation would frustrate Congress’s purpose and lead to a chaotic new reality where, as the dissenting opinion from the Fifteenth Circuit noted, “Companies like FakeBlock will have no choice but to censor every photograph, painting, drawing, sound recording, and video, lest somebody claim a violation of state law *somewhere.*” *Austero*, No. 20-9804 45a (Walt, J. dissenting) (emphasis in original). This contradicts Congress’s intent in granting immunity for these companies. *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542 (1940) (“In the interpretation of statutes, the function of the courts is... to construe the language so as to give effect to the intent of Congress.”).

2. The Language and Structure of Section 230(e) Support the Conclusion that “Any Law” means “Any Federal Law.”

Section 230(e) provides that the statute shall have no effect on criminal law, intellectual property law, communications privacy law, or sex trafficking law. 47 U.S.C. §§ 230(e)(1)-(2), (4)-(5). The headings for each of these parts are stated generally. *See, e.g., id.* at § 230(e)(1) (“No effect on criminal law.”). However, the text of parts (1), (4), and (5) refer primarily to federal law and bar immunity from

only state laws that confer the same rights or cover the same conduct as their federal counterparts. *See, e.g., id.* at § 230(e)(4) (“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.”). In part (3), Congress addressed state law more broadly and reserved certain rights to the states in so long as there is no conflict with federal laws. *See id.* at § 230(e)(3) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section”).

Given Congress’s stated purposes and legislative findings, the provisions including similar state laws combined with the absence of any mention of state intellectual property laws point to one conclusion: Section (e)’s exclusions are directed at certain *federal* laws and only include *state* laws where they confer the same rights and reach the same conduct.

3. The Ninth Circuit’s interpretation of Section 230(e)(2) complies with Congressional intent and purpose.

The Fifteenth Circuit’s holding reflects the need for this Court to settle a circuit split as to whether Section 230(e)(2) excludes immunity from claims arising under state law as well as federal law. The court followed the Third Circuit’s approach in *Hepp v. Facebook*, which held that, according to the statute’s plain language, Section 230(e)(2) applies to both federal and state intellectual property claims. 14 F.4th 204, 212 (3d Cir. 2021). Alternatively, the Ninth Circuit held in *Perfect 10, Inc. v. CCBill, LLC* that Section 230(e)(2) of the CDA only applies to federal claims because state intellectual property laws vary so greatly that

including them in the exemption “would be contrary to Congress’s expressed goal of insulating the development of the internet from the various state-law regimes.” 488 F.3d at 1118. To promote consistency within the law, this Court should adopt the Ninth Circuit’s reasoning and hold that Section 230(e)(2) applies only to *federal* intellectual property claims.

In *Perfect 10*, the court’s opinion was rightfully guided by Congress’s intent in providing immunity to ICS companies like FakeBlock. *Id.* The court discussed the lack of uniformity in state law intellectual property laws and discussed the implications that would arise if those claims were included in Section 230(e)(2). *Id.* Because the CDA does not define ‘intellectual property’ and because the consequences which would arise if state law intellectual property claims were exempted from immunity would directly contradict the goal Congress sought to achieve, the court correctly held that only federal intellectual property claims were included under Section 230(e)(2). *Id.* Thus, absent further direction from Congress, this Court should follow *Perfect 10* and hold that Section 230(e)(2) only applies to intellectual property claims arising out of federal laws.

In its analysis, the Fifteenth Circuit relied on *Hepp* as support for the interpretation that Section 230(e)(2) excludes immunity from federal and state law intellectual property claims. *Hepp*, however, is distinguishable from the present case because the right-of-publicity claim in that case arose under a codified statutory provision in Pennsylvania’s code that the court itself recognized as “limited.” 14 F.4th at 214. The court explicitly declined to consider whether a claim

under Pennsylvania’s common law would be included in Section 230(e)(2) and pointed out that it was not determining whether every state’s right-of-publicity laws would “qualify as intellectual property as a matter of law.” *Id.* In addition to *Hepp*, the Fifteenth Circuit discussed two district court opinions from New York and New Hampshire in support of its holding, but those opinions carry no greater weight than other district court rulings that have relied on *Perfect 10’s* analysis. *See Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008); *Atl. Rec. Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009); see also *Curran v. Amazon.com, Inc.*, No. 2:07-0354, 2008 WL 472433 (S.D. W. Va. 2008) (holding CDA immunity extends to right-of-publicity claims). Thus, the majority’s reliance on the cherry picked caselaw from the Third Circuit, the District Court of New Hampshire and the Southern District of New York was misplaced and does not provide enough persuasive authority for this Court to ignore the sound reasoning applied by other courts. *See Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019).

The Fifteenth Circuit relied on the First Circuit’s opinion in *Universal Communication Systems, Inc. v. Lycos, Inc.* as additional support for its ruling. 478 F.3d 413 (1st Cir. 2007). However, as Justice Walt noted in his dissenting opinion, the First Circuit has since changed its position on the immunity issue, thus casting significant doubt as to where the First Circuit presently stands. *See Austero*, No. 20-9804 at 47a (Walt, J. dissenting). In *Jane Doe No. 1 v. Backpage.com, LLC*, the First Circuit discussed its own reservations with respect to whether state

intellectual property claims were included in section 230(e)(2)'s exception. 817 F.3d 12, 26 (1st Cir. 2016). The court cited the Ninth Circuit's decision in *Perfect 10* as an example of how other circuits have come to the opposite conclusion than it did almost a decade earlier in *Lycos*. *Id.* at 26 n. 9 ("The application of the exemption to the appellants' state law claims for the unauthorized use of pictures is not free from doubt"). The First Circuit also described its holding in *Lycos* as being "without detailed analysis." *Id.* Therefore, as the dissenting opinion suggested below, the split is really between the Third and Ninth Circuits. *Austero*, No. 20-9804 at 47a (Walt, J. dissenting).

For these reasons, this Court should follow the Ninth Circuit's analysis in *Perfect 10* and hold that state law intellectual property claims are not included within Section 230(e)(2)'s exemption from CDA immunity.

C. Austero's claim for appropriation of her identity is a tort-based claim outside the purview of Section 230(e)(2).

Even if this Court determines that Section 230(e)(2) applies to state law claims, FakeBlock is still entitled to immunity because Austero's right-of-publicity claim sounds in privacy law, not intellectual property law. A right-of-publicity claim is not an "intellectual property claim" as that phrase is used in Section 230(e)(2) because "intellectual property" is a "category of intangible rights protecting commercially valuable products of the *human intellect*." *Intellectual Property*, Black's Law Dict. (11th ed. 2019) (emphasis added). In contrast, the right-of-publicity is a distinct

legal category recognizing the “inherent right of every human being to control the use of his or her identity.”⁵

Applying Section 230(e)(2) to tort-based suits is wholly inconsistent with the core objectives of Section 230 as Congress “recognized the threat that [such] lawsuits pose to freedom of speech in the new and burgeoning Internet medium.” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Even where right-of-publicity claims arguably involve products of the human intellect, allowing those claims under Section 230(e)(2) would open ICSs to liability under state statutes and common law definitions that vary greatly between jurisdictions and conflict with federal intellectual property laws. Nothing in Section 230 indicates this is what Congress intended, and because Austero’s is not seeking remedies for any injury to her intellectual property, this Court should reverse the Fifteenth Circuit’s ruling.

1. Congress did not define intellectual property” in Section 230.

Although Congress did not define intellectual property in Section 230(e)(2)⁶, every court that has examined Section 230 has recognized the breadth of its immunity. *See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006)

⁵ J. Thomas McCarthy & Roger E. Schechter, *The Rights of Publicity and Privacy*, § 1:4 (2d ed. 2019); *see also* J. Thomas McCarthy & Roger E. Schechter *The Rights of Publicity and Privacy*, § 1:3 (2d ed. 2023).

⁶ A review of other statutory definitions of “intellectual property” provides some guidance with respect to Section 230(e)(2) even though the term is not used anywhere in the statute. *See generally Leiba v. Holder*, 699 F.3d 346, 354–55 (4th Cir. 2012) (holding that where Congress includes a word or phrase in one section of a statute but omits it elsewhere, it is generally presumed that Congress acted intentionally and purposefully in the disparate inclusion or exclusion). For example, the Bankruptcy Code’s definition is incomplete as it excludes trademarks. *See Sunbeam Prods., Inc. v. Chicago Am. Mfg., LLC*, 686 F.3d 372, 375 (7th Cir. 2012). Yet, in another section, Congress uses a more inclusive definition to encompass “patents, process patents, registered trademarks, copyrights, trade secrets, and mask works.” 19 U.S.C. § 2242(d)(2). In neither of these inclusive and exclusive definitions does Congress use the term “intellectual property” to mean right-of-publicity. *Austero*, No. 20-9804 at 53a (Walt, J. dissenting).

“federal circuits have interpreted [Section 230] to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user” (internal citations and quotations omitted). Austero would have this Court view the term “intellectual property” in isolation, determine it unambiguous, and end the analysis there. However, that approach effectively ignores Congress’s “policy choice... not to deter harmful online speech through the... route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” *Lycos*, 478 F.3d at 419 (quoting *Zeran*, 129 F.3d at 330-31. Instead, this Court should interpret “intellectual property” in a way that best promotes Congress’s intent and purpose.

The Ninth Circuit recently considered whether Section 230(e)(2) excluded from immunity a false advertising claim brought under the federal trademark statute. *Enigma*, 946 F.3d at 1053. Relying on Congress’s stated policies in Section 230, the court held that the intellectual property exception pertains only to “established intellectual property rights under federal law,” and unless a false advertising claim involves intellectual property itself, the exception does not apply. *Id.* Therefore, *Enigma*’s claim was not one “pertaining to intellectual property law” even though it was brought under the Lanham Act. *Id.* The court recognized the dangers of applying the immunity ban to claims that do not directly involve intellectual property rights, warning that any potential for new liability “would upset, rather than ‘preserve’ the vibrant culture of innovation... that Congress envisioned.” *Id.* (quoting 47 U.S.C. § 230(b)(2)).

Upholding the Fifteenth Circuit’s expansive interpretation of Section 230(e)(2) would expose ICSs to liability for *all* state law intellectual property claims, not just right-of-publicity claims. If false advertising under the Lanham Act is not a federal intellectual property right, it is even more far-fetched to assume that state right-of-publicity claims fit within the definition. Congress could, if it saw fit, create a federal right-of-publicity regime akin to other intellectual property rights, but it has not. As a result, this Court is confined to the present state of federal intellectual property law, which does not include a right-of-publicity. *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (“The wisdom of Congress’ [in]action, however, is not within our province to second-guess”). Thus, this Court should hold that “intellectual property” in Section 230(e)(2) applies only to federal intellectual property laws—an interpretation that “effectuates rather than frustrates the major purpose of the legislative draftsmen.” *D.B. v. Cardall*, 826 F.3d 721, 739 (4th Cir. 2016) (quoting *Shapiro v. U.S.*, 335 U.S. 1, 31 (1948)).

2. Austero’s claim, as pleaded, does not allege injury to any property right.

As the dissent below properly observed, the right-of-publicity inquiry should focus on whether the plaintiff’s claim involves an infringement of some product of the human intellect. *Austero*, No. 20-9804 at 54a (Walt, J. dissenting). Austero’s claim for the infringement of her identity is not an intellectual property claim because any interest she may have in her likeness and identity is simply not a product of her own intellect. Austero did not create her persona or identity in the way an author creates a copyrightable novel. The latter involves a creative process that results in a product borne of the author’s intellect, and that product has an

unequivocal monetary value. In other words, Austero’s persona or likeness is not a “work of authorship” and does not become so simply because a hair style, body type, and vague musical references may resemble aspects of her physical image in an otherwise copyrightable work, in this case *Moonie Bears All*. Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.01(B)(1)(c) (3d ed. 2017).

2017). The same is true of trademarks and patents. Austero’s likeness is not *consistently* represented through certain physical characteristics, so it is not “distinctive” in the way a trademark is used to indicate origin. *See Pirone v. MacMillan, Inc.*, 894 F.2d 579, 581, 582 (2d Cir. 1990). Austero’s persona is clearly not “novel” or useful in a patent sense and obviously does not qualify as a “process, machine, manufacture, or composition of matter, or ... improvement thereof.” *See* 35 U.S.C. § 101. Thus, as the dissent below observed, even if Austero’s claim had alleged a plausible property interest, “not all property claims are *intellectual* property claims...” *Austero*, No. 20-9804 at 52a (Walt, J. dissenting) (internal citations omitted); *see generally Benoit v. Saint-Gobain Performance Plastics Corp.*, 959 F.3d 491, 497 (2d Cir. 2020) (differentiating between “property claims” for injury to real property).

Many courts, including the Fifteenth Circuit below, rely on this Court’s ruling in *Zacchini v. Scripps-Howard Broad. Co.* for the proposition that rights of publicity are *ipso facto* intellectual property identical to patent and copyright. 433 U.S. 562, 573 (1977) (“The State’s interest in permitting a ‘right-of-publicity’ is in protecting the proprietary interest of the individual... [and] is closely analogous to the goals of

patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors...”); *Austero*, No. 20-9804 at 52a (Walt, J. dissenting). While it is true that states have an interest in protecting the right of individuals like Austero to profit from their own publicity, there is no “reward” to be “reaped” from having a certain hair style or body type. The court below briefly and erroneously concluded that Austero stated an intellectual property claim because she sought “damages... for dilution of her right to profit from her own publicity.” *Austero*, No. 20-9804 at 18a. However, Austero’s claim, as pleaded, appears to arise from some injury to her dignity as she failed to provide any evidence of any “commercial damage to the business value of [her] identity.” *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1447 (11th Cir. 1998).

Unlike copyright and patent protections, rights-of-publicity do not require the same exclusive rights or statutory protections necessary “[t]o promote the [p]rogress of [s]cience and useful [a]rts.” U.S. Const. art. I, § 8, cl. 8. Rights of publicity do not promote “the creation and spread of knowledge and learning” nor do they encourage technological “innovation, advancement, or social benefit.” *Golan v. Holder*, 565 U.S. 302, 324 (2012); *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 5 n.1 (1966). Allowing state and common law right-of-publicity claims to qualify under Section 230(e)(2) would mean that no litigant will know if he is entitled to immunity for that claim until a court decides whether the particular law in question can be “classified as ‘intellectual property.’” *Perfect 10*, 488 F.3d at 1119.

3. State right-of-publicity laws are wholly inconsistent and vary from jurisdiction to jurisdiction.

Because there is no federal law recognizing the right-of-publicity, claims for infringement arise under a patchwork of conflicting state laws categorized in some states as a privacy right, a property right, or sometimes both as states struggle to articulate a “consistent theory of why the right exists and what it should be designed to protect.”⁷ Despite the Fifteenth Circuit’s reliance on the adoption of Restatement § 652C in some jurisdictions, the exact contours of the right-of-publicity differ significantly from jurisdiction to jurisdiction. *Perfect 10*, 488 F.3d 1102, 1118. For example, the scope of protection is inconsistent among states. *Compare* Ky. Rev. Stat § 391.170 (“[A] person has property rights in his name and likeness...”) *with* Ind. Code § 32-36-1-6 (defining a protectable interest in a “personality’s name, voice, signature, photograph, image, likeness, distinctive appearance, gesture, or mannerisms”). State statutes also differ in what constitutes infringement of the right, whether protection extends beyond celebrities, whether the right is transferrable or descendible, and what exceptions narrow its scope.⁸

This web of inconsistent state laws is exactly what Congress sought to avoid in enacting Section 230. *See* 47 U.S.C. § 230(b). Subjecting ICSs like FakeBlock to conflicting right-of-publicity statutes would force them to censor content to avoid liability. The Fourth Circuit recognized that this type of censorship would have “an

⁷ Joshua L. Simmons & Miranda D. Means, *Split Personality: Constructing a Coherent Right of Publicity Statute*, A.B.A. (May/June 2018), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/may-june/split-personality/ (last visited Nov. 1, 2023).

⁸ *Id.*

obvious chilling effect” on speech because it would be unfeasible for ICSs, which have millions of users, to screen each and every post for offensive content. *Zeran*, 129 F.3d at 331. In the nearly three decades since the Fourth Circuit’s observation, the number of internet users has increased from about 70 million users in 1997 to over 5.5 billion users today.⁹ Thus, exposing ICSs to liability under state right-of-publicity laws would eviscerate the protections Congress found necessary to preserve a “vibrant and competitive free market.” 47 U.S.C. § 230(b)(2).

In sum, the most logical interpretation of Section 230 is that Congress intended to limit the immunity exceptions in subsection (e) to certain *federal* statutes and included state laws *only where they are coextensive with federal law*. The accuracy of this interpretation is even more apparent in the context of right-of-publicity claims because exposing ICSs to liability, under fifty-one inconsistent statutory schemes, for content created by third-party users negates the entire purpose of Section 230. As such, this Court should reverse the ruling of the Fifteenth Circuit and hold that Section 230(e)(2) bars immunity from federal intellectual property claims only.

II. SUMMARY JUDGMENT WAS PROPER BECAUSE AUSTERO HAS NOT CREATED A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER FÜNKE AND FAKEBLOCK APPROPRIATED AUSTERO’S LIKENESS.

As an issue of first impression, this Court is tasked with determining whether the right-of-publicity extends to an AI generated political parody. This

⁹ Tiffanie Drake, *The 1990s: When Technology Upended Our World*, A&T Television Networks (Oct. 3, 2023), <https://www.history.com/news/90s-technology-changed-culture-internet-cellphones> (last visited Nov. 16, 2023).

Court should hold that it does not. The right-of-publicity gives celebrities an avenue to prevent individuals from using their image or likeness without consent. *See Halean Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). Newport Beach has adopted the common law right-of-publicity as defined in Section 625(c) of the Restatement of Torts, which gives celebrities a cause of action when someone infringes on their “name or likeness.” Restatement (Second) of Torts § 652C (Am. L. Inst. 1977). Because the Supreme Court of Newport Beach has not yet clarified the elements of the state’s right-of-publicity claim, the Fifteenth Circuit found guidance in a New Hampshire case that extends the right-of-publicity to include appropriations of a person’s “identity or persona.” *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008). By relying upon *Doe*, the Fifteenth Circuit extended Newport Beach’s common law right-of-publicity beyond its proper scope. As such, this Court should limit the right of publicity to the Restatements definition alone.

But regardless of whether this Court applies a limited or broad right-of-publicity, Austero’s claim fails because Fünke did not appropriate Austero’s identity. Even caselaw advocating for a broad right-of-publicity limits the right to appropriations that would create the false impression of the celebrity’s endorsement or approval of the product or medium. *See White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1403-04 (9th Cir. 1992). Moreover, Austero cannot sustain a claim for elements of *Moonie Bears All* that merely refer to Austero’s characters and

performances. *See Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 625 (6th Cir. 2000).

Finally, even if the Court holds that Austero's has raised a genuine issue of material fact as to her right-of-publicity claim, Austero's claim is barred by the First Amendment to the United States Constitution. The First Amendment prohibits the government from infringing on artistic expression. *See, e.g., 303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023). This right does not take a back seat to the right-of-publicity. Rather, courts balance First Amendment interests with the right-of-publicity to determine whether a particular work is representative enough of the creator's viewpoint to warrant First Amendment protection. *Comedy III Productions, Inc. v. Gary Saderup*, 25 Cal. 4th. 387, 404 (2001). *Moonie Bears All* is precisely the type of transformative, expressive work that the First Amendment was designed to protect.

In sum, this Court should reverse the Fifteenth Circuit and hold that Fünke and FakeBlock are entitled to summary judgment because they did not appropriate Austero's right-of-publicity. In the alternative, even if the Court holds that Austero's claim survives, the Court should afford *Moonie Bears All* under the First Amendment.

A. Fünke did not violate Austero's right-of-publicity.

The right-of-publicity is notoriously inconsistent across jurisdictions. While some states do not recognize a right-of-publicity whatsoever, others give celebrities a sweeping right to control content that merely references their identity or persona. *White*, 971 F.2d at 1395. On its face, Section 652C of the Restatement provides a

limited right-of-publicity, allowing recovery only for the appropriation of a person's "name or likeness." Restatement (Second) of Torts § 652C. Under a properly limited right-of-publicity, Austero's claim does not survive summary judgment because any reference to Austero in *Moonie Bears All* does not reach the level of appropriation necessary for a viable claim.

But even under an extended right-of-publicity, Austero's claim does not contain a genuine issue of material fact because Fünke's political parody did not appropriate Austero's identity. Courts that have extended the right-of-publicity have done so to prevent celebrities from losing the right to profit from their personas, not to prevent them from being merely referenced in a political parody. Thus, Austero's right-of-publicity claim does not pass summary judgment.

1. The Fifteenth Circuit adopted an overly broad right-of-publicity that is inconsistent with Newport Beach's common law.

At its core, the right-of-publicity is intended to protect an individual's ability to profit from their name and likeness. *See Hales Laboratories*, 202 F.2d at 868. Newport Beach, like many states, recognizes the common-law right-of-publicity as defined in Section 652C of the Restatement. *Austero*, No. 20-9804 at 19a; Restatement (Second) of Torts § 625C. Under the Restatement, a person is subject to liability if they "appropriate[] to his own use or benefit the name or likeness of another." *Id.*

The Restatement does not include a cause of action for appropriation of identity, but some courts have expanded the Restatement's definition of right-of-publicity to include the appropriation of any "aspect of identity or persona." *See White*, 971 F.3d

at 1398. Newport Beach has not adopted this expanded right-of-publicity.

Nonetheless, the Fifteenth Circuit adopted expansive right-of-publicity elements that are unduly broad and inconsistent with the traditional enforcement of the right-of-publicity.

When evaluating state law issues, federal courts should do their best to “predict state law, not to create or modify it.” *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 199 (5th Cir. 2020). With issues of first impression, looking to the “majority rule” from other jurisdictions. *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 311 (5th Cir. 2010). The Fifteenth Circuit failed to make such an inquiry, relying instead on the elements from *Doe v. Friendfinder*. 540 F. Supp. 2d 288. Under *Friendfinder*, a plaintiff can establish a claim for violation of their right-of-publicity if they allege (1) they own an enforceable right in the identity of a human being, (2) the defendant used “some aspect of identity or persona in a way that plaintiff is identifiable,” and (3) the defendant’s use is likely to cause damage to the commercial value of that persona. 971 F.2d at 304. The Fifteenth Circuit had no indication that Newport Beach would adopt these elements. *Id.*

Additionally, the right-of-publicity as stated in *Friendfinder* is hardly the majority rule. In fact, among the states that recognize the right of privacy, several states strictly construe that right to include only appropriation of image or likeness.¹⁰ Because of the chaotic buffet of state laws, there has even been a call for

¹⁰ Fourteen states have not recognized a common law or statutory right-of-publicity. Among the states that have, twenty-two have not extended the right-of-publicity past the concrete physical characteristics of an individual, such as name, likeness, voice, and photograph. *See* Right of Publicity

a federal statute to address the “dramatic lack of uniformity concerning the scope and substance of the right-of-publicity.” Kevin L. Vick and Jean-Paul Jassy, *Why a Federal Right of Publicity Statute is Necessary*, *Communications Lawyer*, Vol. 28, No. 2, 15 (Aug. 2011). Thus, the state of the law in New Hampshire is hardly the state of the law across the country – and this Court should not treat it as such.

Not only do the *Friendfinder* elements fail to represent the majority of state laws, they also grant a celebrity the right to recover when an individual merely invokes their “persona,” which extends the right-of-publicity beyond its intended scope. *See Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 811, 838 (6th Cir 1983). There are three main policy considerations behind the right-of-publicity: protecting a celebrity’s economic interest in their fame, fostering creativity by incentivizing individuals to spend the funds and time necessary to produce creative works, and preventing unjust enrichment. *Id.* A broad right-of-publicity configuration does not promote these policies in a meaningful way.

The Ninth Circuit first adopted a broad right-of-publicity in *White v. Samsung* in 1992. 971 F.2d at 1395. There, the Ninth Circuit allowed a celebrity to assert a violation of their right-of-publicity for an advertisement that did not replicate the celebrity’s likeness, but merely invoked the celebrity’s persona. *Id.* The advertisement at issue in *White* depicted a futuristic version of the *Wheel of Fortune* game show with a blonde robot standing next to the game board. No image

Committee, *Right of Publicity State of the Law Survey*, International Trademark Survey (2019); *See State of the Law Survey*, International Trademark Survey (2019); *see also Rothman’s Roadmap to the Right of Publicity*, Right of Publicity Roadmap <https://rightofpublicityroadmap.com/law/> (last visited Nov. 15, 2023).

of White was ever used and, apart from a blonde wig and a formal gown, the robot did not resemble White whatsoever. *Id.* at 1396. Nonetheless, the Ninth Circuit held that White’s right-of-publicity claim survived summary judgment because the advertisement invoked White’s identity. *Id.* at 1399.

The majority opinion in *White* was met with harsh criticism because it exposed creators and advertisers to liability when their creations merely evoked *thoughts* of a particular celebrity. *See, e.g.*, Stacey L. Dogan, *What the Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1179 (2006). Justice Kozinski expressed such concerns in his dissenting opinion from the Ninth Circuit’s decision to deny an *en banc* rehearing of *White*. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512 (9th Cir. 1993) (denying petition for rehearing) (Kozinski, J., dissenting). Justice Kozinski explained that the *White* holding upset the balance between a celebrity’s interest in protecting their image and the public’s interest in being free to express themselves while. *Id.* at 1515. Justice Kozinski rightly identified the consequences of the ruling, calling attention to the fact that “every famous person now has an exclusive right to anything that reminds the viewer of her.” *Id.*

The Fifteenth Circuit failed to conduct the necessary inquiry before adopting this broad right-of-publicity. This Court should instead undergo the limited inquiry under Section 625C of the Restatement, which merely asks whether Fünke and FakeBlock appropriated Austero’s “name or likeness.”

The Fifth Circuit stated the proper Restatement standard in *Meadows v. Hartford Life Ins. Co.*, 493 F.3d 634, 638 (2007). In that case, the court applied the

Texas right-of-publicity law, which was adopted from the Restatement, to a claim against an insurance company for misappropriating a client's name. *Id.* In determining whether the claim should be dismissed, the court limited their inquiry to the scope of the Restatement by asking whether there was appropriation of name or likeness.¹¹ *Id.* Like the *Meadows* court, this Court should limit its inquiry to the scope of Newport Beach's expressly adopted standard: the Restatement definition.

Here, *Moonie Bears All* did not replicate Austero's name or likeness. Austero conceded that *Moonie Bears All* does not mention Austero by name. *Austero*, No. 20-9804 at 23a. Thus, the only issue is whether Fünke appropriated Austero's likeness. Likeness is a "visual image of the plaintiff other than a photograph." *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1998). Admittedly, Moonie and Austero both have similar body types and short, black hair. *Austero*, No. 20-9804 at 24a. But the similarities end there. Moonie's hair is not "spiky" like Austero's, Moonie does not have Austero's beauty mark or her prominent nose, and unlike Austero, Moonie's mouth is unusually large for her head and her eyes are wideset and slanted. *Id.* These elements create a unique character that is not a visual image of Austero. Even the Fifteenth Circuit conceded that "there is no version of Lucille Austero, ever, that quite matches Moonie." *Id.* at 27a. As such, there is no appropriation of likeness, and this Court should reverse the Fifteenth Circuit.

¹¹ Texas and Newport Beach are not alone in their adoption of a limited Restatement right-of-publicity cause of action. Several states have adopted a more limited right of publicity, allowing recovery for appropriation of name or likeness. *See, e.g., In Re Jackson*, 972 F.3d 25, 34 (2d. Cir. 2020); *Rosa & Raymond Parks Inst. For Self Dev. v. Target Corp.*, 812 F.3d 824, 830 (11th Cir. 2016); *Wagner v. Gallup, Inc.*, 788 F.3d 877, 889 (8th Cir. 2015).

Contrary to the Fifteenth Circuit's contention, Fünke did not appropriate Austero's voice, either. The Fifteenth Circuit relies on *Midler*, where an automobile company hired one of Bette Midler's backup singers to sing in an advertisement after failing to hire Midler herself. 849 F.2d at 460, 461. The agency asked the singer to "sound as much as possible the like Bette Midler record." *Id.* Because the voice was recognizable as Midler, the court held that the plaintiffs had an action for right-of-publicity. *Id.* at 463. But the court was sure to clarify that not "every imitation of a voice to advertise merchandise is actionable." *Id.* Instead, the court held that when "a distinctive voice of a professional singer is widely known and deliberately imitated in order to sell a product," the singer can sustain a right-of-publicity claim. *Id.*

The present case is distinguishable from *Midler* because any use of Austero's voice was modified to the point that it is no longer recognizable. While Fünke used Austero's voice as the "raw building blocks" for Moonie's voice, Fünke purposefully altered the voice so that it was no longer recognizable as Austero's. *Austero*, No. 20-9804 at 27a. Further, the parties do not dispute that Moonie's voice does not match Austero's voice from any period. *Id.* at 66a. Even the plaintiff's expert demonstrated uncertainty when she states that Moonie's voice "*could very well* be Lucille's *current* voice digitally raised by one octave." *Id.* at 26a. This is hardly the type of certainty required to pass as an imitation of Austero's voice. And even if the voice in *Bears All* was Austero's voice, it was raised an entire octave and would not be

distinctive enough to be recognizable as Austero.¹² Thus, Fünke did not violate Austero’s right-of-publicity by appropriating her likeness or voice.

2. Even under a broad right-of-publicity, Fünke did not appropriate Austero’s likeness.

Even under an expanded right-of-publicity, Fünke did not appropriate Austero’s identity. The hallmark cases for the expansion of the right-of-publicity allow claims when a celebrity’s persona is used in advertising. *See White*, 971 F.2d at 1395 (appropriation of identity); *Midler*, 849 F.2d at 463 (appropriation of voice); *Carson* 698 F.2d at 837 (appropriation of catchphrase); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 822 (9th Cir. 1974) (appropriation of symbols associated with the celebrity). The majority relies on both *White* and *Midler* to support its holding that Austero stated a claim for appropriation of likeness. Even if this Court were to find those cases persuasive, Austero’s claim nonetheless fails under those same cases cited by the Fifteenth Circuit.

The caselaw the *White* court relied upon is distinguishable from the case at hand. As mentioned, in *Midler*, an automobile company asked an individual to mimic Bette Midler’s voice for a vehicle advertisement. 849 F.2d at 463. In *Carson*, a toilet company utilized a catchphrase that the public associated with Johnny Carson to garner customers. 698 F.2d at 837. In *Motschenbacher*, a tobacco company used the plaintiff’s racecar in their commercial to allude to the plaintiff’s

¹² Even drawing all reasonable inferences in favor of Austero, the proposition that Moonie’s voice is Austero’s is based upon an uncertain witness. *See Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2011). This is not sufficient to create a reasonable inference as it is based on a mere possibility. *GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1200-01 (10th Cir. 2022) (noting that “an inference is unreasonable if it requires ‘a degree of speculation and conjecture that renders [the factfinder’s] findings a guess or mere possibility’” (internal citations omitted)).

endorsement of their product. 498 F.2d at 822. As the dissent in *White* noted, each of these cases have a common thread—they use aspects of a celebrity’s identity to indicate that celebrity’s support of their product.

Fünke did not use Austero’s identity to create a false representation of Austero’s support for her product. She created a short film that mimicked elements of Austero’s career to criticize Austero and her motivations behind running for political office. *Austero*, No. 10-9804 at 4a. Given the negative light the video casts on the character in the film, it is likely that no viewer would mistakenly perceive Austero supports Fünke’s software or *Moonie Bears All*. Further, the short film cannot be properly characterized as an advertisement. While the film served a limited advertising function by showcasing the capabilities of Fünke’s software, the video is first and foremost a political parody expressing Fünke’s disapproval of a political candidate.

To be sure, the right-of-publicity extends beyond commercial advertisements. For example, the Fifteenth Circuit cites three cases evaluating whether football players had right-of-publicity claims when a football video game creator imitated them as avatars in the games. *Austero*, No. 10-9804 at 29a (citing *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268 (9th Cir. 2013), and *Davis v. Elec. Arts Inc.*, 775 F.3d 1172 (9th Cir. 2015)). In each of those cases, the video game creators used the players’ unique biographical and physical characteristics to identify its individual avatars. *Hart*, 717 F.3d at 145; *Keller*, 724 F.3d at 1272; *Davis*, 775 F.3d at 1176. By using the player’s identity

without consent or compensation, the video game creators “exploit[ed] the value of [the players’] notoriety.” *Hart*, 717 F.3d at 151 (quoting *McFarland v. Miller*, 14 F.3d 912, 923 (3d Cir. 1994)). Like the advertisement cases, these cases hinged on the defendants’ deprivation of the players’ ability to profit from the licensing and use of their fame.

Unlike the plaintiffs in *Hart*, *Keller*, and *Davis*, Austero has not lost any ability to profit from the use of her fame because this is not the type of advertisement that Austero would have otherwise been hired to endorse. At its core, *Moonie Bears All* is a political parody. To hold otherwise would give Austero and other celebrities the power to “keep people from mocking them, or from ‘evo[king]’ their images in the mind of the public.” *White*, 989 F.2d at 1519.

B. Austero had no right to be protected from an individual referencing elements from her past characters and performances.

Austero has no right to prevent creators from referencing elements of her past characters. Understandably, courts have been unwilling to allow a right-of-publicity claims every time a fictional character is invoked in media. *Landham*, 227 F.3d at 625. The right-of-publicity gives a celebrity the right to exploit the use of their own image and likeness. *Carson*, 698 F.2d at 835 (“The right of publicity has developed to protect the commercial interest of celebrities in their identities.”).

However, a celebrity’s identity is distinct from the characters they portray.

Landham, 227 F.3d at 625. With that in mind, courts have taken care to “draw the line between the character’s identity and the actor’s.” *Id.* Thus, a right-of-publicity claim for the invocation of a celebrity’s character is will not be entertained unless

the actor's identity is "inseparable in the public's mind" from the character they portray. *Id.*

Courts have only allowed celebrities to bring right-of-publicity claims for invocations of their characters in rare circumstances. For example, in *McFarland*, the Third Circuit held that George McFarland had a right-of-publicity claim when a company used the name "Spanky McFarland," which was his well-known character from the series *Our Gang*. 14 F.3d at 920. Similarly, the Ninth Circuit held that the actors who portrayed Norm and Cliff in the television show *Cheers* could bring a right-of-publicity claim when a company placed animatronic robots of the characters behind airport bars. *Wendt v. Host Intern., Inc.*, 125 F.3d 806, 811-12 (9th Cir. 1997). The court recognized that the right-of-publicity does not give actors a proprietary interest in the roles they portray but reasoned that the commercial value of the robotic replicas where their physical resemblance to the actors, not the characters they portrayed. *Id.* at 811. Austero's identity, however, is not so intertwined with each of her past characters to allow a right-of-publicity claim.

Instead, Austero has failed to demonstrate that the reference of any of her past characters would invoke her own persona. The Sixth Circuit in *Landham* refused to allow a celebrity to bring a right-of-publicity claim against a toy company that created an action figure modeled after the character he played in the movie *Predator*. 222 F.3d at 621. The court reasoned that the actor did not demonstrate that the character would invoke his own persona distinct from the movie character. *Id.* at 626. To allow a claim without meeting that burden, the court explained,

would overextend the right-of-publicity as it is “impossible to evoke a movie or TV show without evoking the identities of its actors to some extent.” *Id.*

Like the plaintiff Landham, Austero must be closely identified with the characters invoked by *Moonie Bears All* to survive summary judgment for her right-of-publicity claim. *Moonie Bears All* contains potential references to four of Austero’s past roles. *Austero*, No. 20-9804 at 15a-20a. Moonie’s outfit resembles Austero’s outfit from her role in the movie *Cabaret*. There is also speculation that the dance Moonie performs is from Austero’s performance at Radio City Music Hall.¹³ The short film also references the name “Junie Moon” from one of Austero’s past films. Finally, *Moonie Bears All* includes lyrics from “New York, New York,” a song Austero is known for singing with the same title. *Austero*, No. 20-98041986 at 5a. Nonetheless, *Moonie Bears All* does not invoke Austero through her characters but merely references elements Austero’s past characters, none of which are inseparable from Austero’s identity. Allowing a celebrity to sue every time details of their past characters are recalled would essentially “create a common law monopoly” that removes specific outfits, names, or song titles from the public domain. *Carson*, 698 F.2d at 840. As such, this Court should reverse the Fifteenth Circuit and hold that Austero’s identity is inextricably tied to the characters she played during her career.

¹³ It is important to note that Austero has no right to the choreography because she was not responsible for creating it. *See, e.g., Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986) (addressing whether choreography for a ballet was infringed upon).

C. Even if Austero’s right-of-publicity claim stands, the First Amendment bars the claim because *Moonie Bears All* is a transformative work meant to express Fünke’s ideas about a political candidate.

Even if the Court determines that *Moonie Bears All* appropriates Austero’s likeness, it is nonetheless protected by the First Amendment. The First Amendment protects all types of creative expression. *See 303 Creative LLC*, 600 U.S. 570 (graphic design); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995) (parades); *Ward v. Rock Against Racism*, 490 U.S. 781 (1989) (music); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (movies). Political speech is afforded the greatest protection under the First Amendment as “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.” *Citizens United v. Fed. Election Com’n*, 558 U.S. 310, 339 (2010). Freedom of speech does not fall aside merely because a celebrity is involved. Instead, even when there is clear infringement of a right-of-publicity, the court must carefully examine the speech at issue to ensure that it does not chill constitutionally protected speech. *See Comedy III*, 25 Cal.4th at 387.

The right-of-publicity caselaw is at odds with the right to comment on and create parodies about a celebrity. *Id.* at 403. Justice Powell acknowledged that tension in *Zacchini v. Scripps-Howard Broadcasting Co.*, which is the only time this Court has addressed the right-of-publicity. 433 U.S. 562, 580 (1977) (Powell, J., dissenting). Recognizing the importance of the countervailing First Amendment interests, Justice Powell advocated for a presumption of protection for certain film mediums “absent a strong showing by the plaintiff” that the footage was a “subterfuge or cover for private or commercial exploitation.” *Id.* at 581.

Even the Supreme Court of California, which has notoriously expanded the right-of-publicity, has recognized the importance of limiting the right-of-publicity in light of the First Amendment. *Comedy III*, 25 Cal.4th at 397-98. The court explained that this limit is to ensure that the celebrity “possesses not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity’s fame.” *Id.* at 403.

1. The transformative use test shows that Moonie Bears All is protected speech.

Courts have developed several tests to determine whether the right-of-publicity should prevail over the First Amendment in a particular circumstance. Some courts use the transformative use test, which applies five factors to determine whether a work is transformative enough to place it within the realm of First Amendment protection. *See Comedy III*, 25 Cal. 4th at 406. As the majority in the Fifteenth Circuit stated, the transformative use test “fairly accounts for numerous traditional First Amendment defenses, including parody, factual reporting, fictionalized portrayal, lampooning, and subtle social criticism.” *Austero*, No. 20-9804 at 32a.

The critical inquiry under the transformative use test is “whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s own likeness.” *Comedy III*, 25 Cal. 4th at 406. The court in *Comedy III* named five factors for courts to consider in making this determination, including: (1) whether the celebrity’s likeness is a “raw material” from which the original work was synthesized or the ‘sum and substance’ of the work; (2) whether the work is primarily the defendant’s own

expression; (3) whether the elements predominately imitate the celebrity or the creative elements; (4) whether the economic value is primarily from the celebrity's fame; and (5) whether the artist's skill and talent are subordinate to the goal of creating a portrait of the celebrity. *Id.*

Several courts have held that the First Amendment protects transformative works when those works add artistic elements to a portrayal of a celebrity. *See, e.g., ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (holding that a mural of Tiger Woods was transformative when it incorporated other elements of the Masters' grounds). Addressing facts comparable to the case at hand, a California court held that the First Amendment protected a video game creator who invoked the identity a famous singer because the video game was transformative under the First Amendment. *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 61 (Cal. Ct. App. 2006). Although the video game character had similar clothing, hair color, and style as the singer, the video game was sufficiently transformative to sustain a First Amendment defense. *Id.* at 60.

Like the creators in *Kirby*, the transformative use factors weigh in favor of a holding that *Moonie Bears All* is protected by the First Amendment. First, even though Fünke used Austero's image and voice as the "raw elements" of her video, she transformed that information into a unique creation so that Austero's image was not the "sum and substance" of the video. *Austero*, No. 20-9804 at 4a. Moonie is physically distinct from Austero in several aspects such as her distinct hairstyle and unique facial features. *Id.* at 23a-24a. Most importantly, the elements of Moonie's

performance were a product of Fünke’s creativity and skills. *Id.* at 4a. Fünke used her knowledge and skills to create the unique song and dance in *Moonie Bears All*. *Id.* The song that Moonie sings is a parody that Fünke wrote, which was designed to comment on the attitude of Austero. *Id.* at 36a. While Fünke admittedly used Austero’s image as the building blocks for *Moonie Bears All*, Fünke transformed those raw materials into a unique political parody. *Id.* at 27a.

Second, *Moonie Bears All* primarily serves as Fünke’s creative expression. Fünke’s goal was to expose the Newport Beach voters to Austero’s “darker side.” *Id.* at 4a. To express that viewpoint, Fünke created Moonie, who had a substance abuse problem and expressed a disdain for the Newport Beach public. *Id.* at 5a. As such, this short film’s primary function is to express Fünke’s viewpoint of Austero as a political candidate. *Id.* at 36a.

Further, there is no evidence indicating any economic value, much less economic value derived solely from Austero’s likeness. While Fünke admittedly hoped *Moonie Bears All* would garner interest for her software program, the record is void of any evidence showing that Fünke actually received economic benefit from this video. *Id.* at 4a. The transformative use factors undoubtedly weigh in favor of a holding that *Moonie Bears All* is protected by the First Amendment.

2. Moonie Bears All should be protected as a political parody.

This Court has held that satire and parody are protected under the First Amendment. *See Hustler Magazine, Inc. v. Jerry Falwell*, 485 U.S. 46 (1988) (holding that public officials could not recover for intentional infliction of emotional distress because parody was a protected form of speech); *see also Campbell v. Acuff-*

Rose Music, Inc., 510 U.S. 569 (1994) (holding that a parody of a song was protected by the First Amendment despite a claim of copyright infringement). In *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, the Tenth Circuit held that parody baseball cards drawing attention to the wealth and attitudes of famous baseball players were entitled to First Amendment protection because the cards provided social commentary on public figures. 95 F.3d 959, 969 (10th Cir. 1996). Even though the cards were not political speech, commentary on “an important social institution constitutes protected” expression. *Id.* Other courts have also applied the transformative use test to cases involving common entertainment mediums. *See Winter v. D.C. Comics*, 69 P.3d 473 (Cal. 2003) (holding that comic books were sufficiently transformative because they distorted representations of the characters for purposes of parody.); *see also Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (holding that a transformative photograph depicting the plaintiff’s head on a different body was protected commercial speech).

Like the baseball cards at issue in *Cardtoons*, *Moonie Bears All* is a parody commenting on the wealth and status of a social figure. *Austero*, No. 20-9804 at 4a. However, *Moonie Bear All* is a *political* parody discussing a Congressional candidate. *Id.* If the First Amendment protects a producer’s right to sell baseball cards poking fun at famous baseball, it certainly protects Fünke’s ability to post a video revealing what she believed to be critical information about a political candidate. This video is akin to the comedic skits found in *Saturday Night Live*,

where comedians often portray celebrities, sometimes even political candidates, and comment on their actions.

Holding for Austero would place these time-honored entertainment media platforms in jeopardy because there is a clear difference between preserving one's ability to profit from their likeness and silencing negative publicity. *See Zacchini*, 433 U.S. at 572 (contrasting defamation rights grounded in reputation with the right-of-publicity's goal of protecting economic interests). Extending the right-of-publicity to the latter would give individuals unlimited power to control everything that is said about them in the public forum while chilling otherwise protected speech. To avoid serious infringement of artists' right to express their ideas through new, innovative technology, this Court should reverse the Fifteenth Circuit and hold that Fünke and FakeBlock are entitled to summary judgment with regard to Austero's right-of-publicity claim.

CONCLUSION

For the foregoing reasons, the judgment of the Fifteenth Circuit should be reversed.

APPENDIX A

Relevant Statutory Provisions

The Communications Decency Act, 47 U.S.C. § 230, provides in pertinent part:

(a) Findings

The Congress Finds the following:

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

(b) Policy

It is the Policy of the United States --

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

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

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

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

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker 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 or to availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

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

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this 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 Communications Privacy Act of 1996 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

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

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

(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.

Federal Rule of Civil Procedure Rule 56 provides in pertinent part:

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state the reasons for granting or denying the motion.