To be Argued by:
JOHN V. ELMORE
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

DIONA PATTERSON, individually and as Administrator of the Estate of HEYWARD PATTERSON, J.P., a minor, BARBARA MAPPS, Individually and a Executrix of the Estate of KATHERINE MASSEY, SHAWANDA ROGERS, Individually and as Administrator of the Estate of ANDRE MACKNEIL, A.M., a minor and LATISHA ROGERS,

Plaintiffs-Respondents,

– against –

META PLATFORMS, INC., formerly known as FACEBOOK, INC., SNAP, INC., ALPHABET, INC., GOOGLE, LLC, YOUTUBE, LLC, DISCORD, INC., REDDIT, INC., AMAZON.COM, INC. and 4CHAN COMMUNITY SUPPORT, LLC,

Defendants-Appellants,

(For Continuation of Caption See Inside Cover)

Docket Nos.:
CA 24-00513
CA 24-00515
CA 24-00524
CA 24-00527
CA 24-01447
CA 24-01448

BRIEF FOR PLAINTIFFS-RESPONDENTS DIONA PATTERSON, J.P. A MINOR, BARBARA MAPPS, SHAWANDA ROGERS, A.M., A MINOR AND LATISHA ROGERS IN RESPONSE TO DEFENDANT-APPELLANT AMAZON.COM, INC. AND TWITCH INTERACTIVE, INC.

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Erie County Clerk's Index Nos. 805896/23 and 808604/23

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– and –

4CHAN, LLC, GOOD SMILE COMPANY INC., GOOD SMILE COMPANY US, INC., GOOD SMILE CONNECT, LLC, RMA ARMAMENT, VINTAGE FIREARMS, MEAN LLC, PAUL GENDRON and PAMELA GENDRON,

Defendants-Respondents.

(CA 24-00513)

KIMBERLY J. SALTER, individually and as Executrix of the Estate of AARON W. SALTER, JR., MARGUS D. MORRISON, JR., Individually and as Administrator of the Estate of MARGUS MORRISON, SR., PAMELA O. PRICHETT, Individually and as Executrix of PEARL LUCILLE YOUNG, MARK L. TALLEY, JR., Individually and as Administrator of the Estate of GERALDINE C. TALLEY, GARNELL W. WHITFIELD, JR., Individually and as Administrator of RUTH E. WHITFIELD, JENNIFER FLANNERY, as Public Administrator of the Estate of ROBERTA DRURY, TIRZA PATTERSON, Individually and as parent and natural guardian of J.P., a minor, ZAIRE GOODMAN, ZENETA EVERHART, as parent and caregiver of Zaire Goodman, BROOKLYN HOUGH, JO-ANN DANIELS, CHRISTOPHER BRADEN, ROBIA GARY, individually and as parent and natural guardian of A.S., a minor, and KISHA DOUGLAS,

Plaintiffs-Respondents,

– against –

META PLATFORMS, INC. f/k/a Facebook, Inc., INSTAGRAM LLC, REDDIT, INC., AMAZON.COM, INC., TWITCHINTERACTIVE, INC., ALPHABET, INC., GOOGLE, LLC, YOUTUBE, LLC, DISCORD, INC., SNAP, INC. and 4CHAN COMMUNITY SUPPORT, LLC,

Defendants-Appellants,

– and –

4CHAN, LLC, GOOD SMILE COMPANY, INC., GOOD SMILE COMPANY U.S., INC., GOOD SMILE CONNECT, LLC, RMA ARMAMENT, INC. d/b/a RMA, BLAKE WALDROP, CORY CLARK, VINTAGE FIREARMS, LLC, JIMAY'S FLEA MARKET, INC., JIMAYS LLC, MEAN ARMS LLC d/b/a Mean Arms, PAUL GENDRON and PAMELA GENDRON,

Defendants-Respondents.

(CA 24-00524)

WAYNE JONES, Individually and as Administrator of the Estate of CELESTINE CHANEY,

Plaintiff-Respondent,

– against –

MEAN LLC, VINTAGE FIREARMS, LLC, RMA ARMAMENT, INC., PAUL GENDRON and PAMELA GENDRON,

Defendants-Respondents,

– and –

ALPHABET INC., GOOGLE, LLC, YOUTUBE, LLC and REDDIT, INC.,

Defendants-Appellants.

(CA 24-00515 and CA 24-01447)

FRAGRANCE HARRIS STANFIELD, YAHNIA BROWN-McREYNOLDS, TIARA JOHNSON, SHONNELL HARRIS-TEAGUE, ROSE MARIE WYSOCKI, CURT BAKER, DENNISJANEE BROWN, DANA MOORE, SCHACANA GETER, SHAMIKA McCOY, RAZZ'ANI MILES, PATRICK PATTERSON, MERCEDES WRIGHT, QUANDRELL PATTERSON, VON HARMON, NASIR ZINNERMAN, JULIE HARWELL, individually and as parent and natural guardian of L.T., a minor, LAMONT THOMAS, individually and as parent and natural guardian of L.T., a minor, LAROSE PALMER, JEROME BRIDGES, MORRIS VINSON ROBINSON-McCULLEY, KIM BULLS, CARLTON STEVERSON and QUINNAE THOMPSON,

Plaintiffs-Respondents,

– against –

MEAN LLC, VINTAGE FIREARMS, LLC, RMA ARMAMENT, INC., PAUL GENDRON and PAMELA GENDRON,

Defendants-Respondents,

– and –

ALPHABET INC., GOOGLE LLC, YOUTUBE, LLC and REDDIT, INC.,

Defendants-Appellants.

(CA 24-00527 and CA 24-01448)

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INTRODUCTION

Contrary to Defendants-Appellants Amazon and Twitch (hereinafter collectively "Amazon")'s arguments, Plaintiffs do not "seek to impose liability on Twitch for operating a livestreaming service," nor do they wish to "foreclose [this] entire medium." Amazon Br. at 1, 4. Rather, Plaintiffs seek to hold Amazon accountable for breaching its duty to design a safe product: the Twitch platform itself, which, by its very design, encourages, inspires, and motivates users like Peyton Gendron to commit horrific acts of mass violence. In their brief, Amazon attempts to poetically espouse the benefits of livestreaming as an "expression … as diverse as the country itself," even citing the report by Attorney General Letitia James while sidestepping her clear conclusion that livestreaming played a "centrally motivating factor" in Peyton Gendron's massacre.

It cannot be said, on the pre-answer motion to dismiss, that the utility of Appellants' livestreaming platform completely outweighs its risks as a matter of law. Plaintiffs have sufficiently alleged facts, which must be accepted as true, making out product liability claims under New York law, and those claims do not run afoul of either federal law or the First Amendment. A weighing of the benefits of the Twitch platform's design against the inherent danger of motivating and inspiring mass murder cannot be decided without the benefit of comprehensive discovery as to precisely how Amazon's product functions and is designed, and what Amazon knew

or could have foreseen about the dangers. As such, Supreme Court properly rejected Appellants' request to dismiss this case pre-answer. This Court should affirm.

FACTUAL BACKGROUND

A. Unfettered Livestreaming Directly Motivates White Supremacists, and other Hate Groups, to Commit Horrific Acts of Mass Violence

Over the past decade, livestreaming has become a central component in racist mass shooting incidents. For instance, as alleged, on March 15, 2019, 28-year-old Brenton Tarrant carried out consecutive mass shootings on two mosques in Christchurch, New Zealand. R.160 (¶ 119). Tarrant murdered 44 people at the Al Noor Mosque and 7 at the Linwood Islamic Centre; his victims ranged from 3 to 77 years old. R.160-61 (¶ 120). Minutes before his attack, Tarrant emailed a 74-page writing entitled The Great Replacement, a reference to the replacement and "white genocide" conspiracy theories. R.161 (¶ 121). In addition to posting his racist ideology on the internet, on March 15, 2019, Brenton Tarrant live-streamed his massacre for 17 minutes on Facebook Live. Livestreamed video of the attack showed him firing at worshippers in the prayer hall from close range, shooting many multiple times. R.163 (¶ 134).

On August 26, 2018, 22-year-old David Katz entered the Good Luck, Have Fun Game Bar with two pistols and began shooting indiscriminately into the crowd of 150. Katz fired 12 shots, killing two people and wounding ten others. The shooting

was livestreamed on Twitch and later uploaded to YouTube. R.164-65 (¶ 142).

On October 9, 2019, 27-year-old Stephan Balliet killed two people while attempting to attack a synagogue in Halle, Germany on Yom Kipper. German investigators determined that Balliet had been motivated by the Christchurch killings. Like Tarrant, Balliet livestreamed the attack from the action camera on his helmet. R.165 (¶ 143). Twitch livestreamed Balliet's attack for 35 minutes. R.165 (¶ 145).

On August 19, 2021, a 15-year-old student, Hugo Jackson, armed with four knives and two fake pistols entered a school in Eslöv, Sweden and stabbed a teacher to death. R.165-66 (¶ 146). Jackson livestreamed his attack on Twitch and, according to police, had an interest in white supremacy, Nazism, school shootings, and instances of right-wing terrorism. Id.

The very design elements of Appellants' livestreaming service is what drove its users to commit the aforementioned acts—all of which occurred before Gendron did so, and all of which Appellants' had actual knowledge of long before Gendron's heinous acts at issue.

In her report on the role of online platforms in the Tops massacre, Attorney General Letitia James concluded as follows:

> Livestreaming requires a special mention for its repeated use by hate-fueled mass shooters to broadcast their massacres. Livestreaming undoubtedly has many legitimate use cases, at the same time, the future of livestreaming needs to grapple with how this service has been used

> to broadcast these acts of terror, becoming an extension of the criminal act, further terrorizing the targeted community and serving to promote the shooter's ideology. . . [T]he Buffalo shooter considered the instantaneous transmission of video available through livestreaming to be a centrally motivating factor in his shooting, both because of the intangible support he felt he would receive through it and because he hoped it would inspire other, just as he had been inspired by a video of the Christchurch shooter. . . . Even a short video of a mass shooting can be used to incite others to engage in copycat crimes and serve the criminal goals of the perpetrator.

R.175-76 (¶ 183).

Yet at least five years before Attorney General James found that livestreaming promotes acts of racist mass violence, social media companies recognized this product hazard and chose not to address it. For example, in September 2017, Facebook Director of Content Policy acknoweldged that "not only did we anticipate murders and suicides on Live, we anticipated far worse (all of one of our top 5 predictions have played out). But it still took over a year to post-launch (after these horrible incidents happened)." R.190-91 (¶ 257). Similarly, in 2014, Amazon "documented or otherwise recorded the incidents where Twitch has been used to livestream acts of violence or self-harm and engaged in internal discussions at senior company levels regarding implementation of product design changes that would mitigate this risk." R.190-91 (¶ 357).

B. Amazon's Product Induced Gendron to Commit his Heinous Crime

As observed by Attorney General James, Gendron's ability to livestream his racist murder provided the motivation to carry out his evil plan. R.176 (¶ 179). In

his Discord writing, Gendron described the impact that the Christchurch livestream had on his radicalization:

> Is there a particular person that radicalized you the most?
>
> Yes and his name is Brenton Harrison Tarrant. Brenton's livestream started everything you see here.

R.175 (¶ 180). With haunting insight, Gendron explained that Tarrant's livestreaming of his Christchurch massacre increased the power of his racist message exponentially over the written statement released by Charleston shooter Dylann Roof:

> Dylann Roof's manifesto is not that bad
>
> Livestreaming this attack makes a 1000x greater impact
>
> I most likely wouldn't even know about the real problems in the world if Brenton Tarrant didn't livestream his attack.

R.175 (¶ 181).

Gendron also wrote that livestreaming the attack would help him overcome his fear and any lingering sympathy for human life that could dampen his murderous intent:

> It is very difficult for a normal person even with all the information to carry out an attack that will kill another human being, or the fact that you may die that day. I don't think there really is a way to train for this, but confidence in your goals and equipment may ease them. *I think that live steaming this attack gives me some motivation in the way that I know that some people will be cheering for me.*

R.175 (¶ 182) (emphasis added).

C. Amazon Promoted and Profited from Gendron's Murder Video, Which Was a Fundamental Function of its Product

On May 14, 2022, at 2:08 p.m., Gendron began livestreaming on Twitch using a GoPro video camera attached to his helmet. R.141 (¶ 45). The livestream showed him driving to Tops with his bolt action rifle, visible in the passenger seat, and his ballistic helmet, visible in the rearview mirror. Id. As he arrived in the Tops parking lot, Gendron told his streaming audience, "I just gotta go for it right? It's the end, right here, I'm going in." Id.

Twenty-two minutes into the Twitch livestream—empowered by the knowledge that other users were watching him in real time—Gendron exited his vehicle wearing a helmet, body armor, and fatigues and armed with a Bushmaster XM15-E2S that he had purchased with a MEAN Arms MA Lock installed but that he easily removed so that his gun could accept detachable magazines. He then began shooting. R.141 (¶ 46).

Over a period of two minutes Twitch livestreamed Gendron's murder of ten Black Erie County citizens and wounding of three more. The brutal banality with which Gendron murdered ten Black shoppers at Tops Friendly Markets bore striking similarity to the methodology Brenton Tarrant had used to murder 57 Muslim worshippers in Christchurch. After being radicalized by compulsion, it is readily apparent that Gendron had viewed the Christchurch murder video multiple occasions. Gendron copied the slogans Tarrant painted on the murder weapon, with

the body armor he wore and the efficacy with which he selected his Black victims and repeatedly shot them to death. Gendron was clearly correct when he wrote "Brenton's livestream started everything you see here." R.175 (¶ 180).

Twitch broadcasted Gendron's livestream for 24 minutes, and it was viewed by two dozen other Twitch users during that time. R.150 (¶ 70). Twitch eventually stopped the livestream, but only after Gendron's massacre was complete. Id. While only a small number of people viewed the livestream in real time, Gendron's murder video was posted and amplified online via numerous social media platforms, starting with 4chan. R.150-51 (¶ 71). Shortly thereafter, the link began appearing on mainstream social products, including on Twitter within 17 minutes and on Reddit within an hour. In the following days, the murder video was posted and reposted on these and other social media platforms thousands of times. Id.

The recording of the livestream, which was a design element of Twitch, were thereafter utilized by the other Social Media Defendants at issue, which designed, programmed, and utilized their products in a manner that amplified Gendron's murder video, ensuring that it reached far more users than it otherwise would have. This included users who did not search for, request, or want to see this horrific, violent, and racially motivated massacre—in the same manner that Gendron himself was force-fed similar information by these products. R.151 (¶ 72). The video depicting the murder of Heyward Patterson, Kat Massey, and Andre MacKniel

continues to circulate on social media and has been viewed by hundreds of thousands of individuals, which continues to cause Plaintiffs severe emotional distress. R.255 (¶ 623).

ARGUMENT

I. AMAZON IGNORES THE HIGH STANDARD FOR DISMISSAL UNDER C.P.L.R. 3211(a)

Amazon asks this Court to find that Supreme Court committed reversible error in denying its motion to dismiss without a *single* word discussing the appropriate legal standard under which its motion was considered.

It is long-established that on a motion to dismiss the court must construe the Complaint liberally, accept the pleaded facts as true, and determine simply whether the facts as alleged fit into *any* cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). The court must accept not only the material allegations of the complaint but also whatever can be reasonably inferred therefrom in favor of the pleader. See McGill v. Parker, 179 A.D.2d 98 (1st Dep't 1992); Foley v. D'Agostino, 21 A.D.2d 60, 64 (1st Dep't 1964) ("Upon a 3211 (subd. [a], par. 7) motion to dismiss a cause of action, however, we look to the substance rather than to the form."). The movant bears the burden of demonstrating that the plaintiff's Complaint states *no legally cognizable cause of action*, and this test is so liberal that the court need only find that the plaintiff has *a* cause of action, not even whether one has been stated. Wiener v. Lazard Freres &

Co., 241 A.D.2d 114, 120 (1st Dep't 1998). Moreover, in adjudicating a motion under C.P.L.R. 3211(a)(7), a court may freely consider affidavits and other evidence submitted by the plaintiff to remedy any defects in the complaint. See AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 N.Y.3d 582, 591 (2005); Leon, 84 N.Y.2d at 88; Cadet–Duval v. Gursim Holding, Inc., 147 A.D.3d 718, 719 (2d Dep't 2017).

Amazon quotes selectively from Plaintiffs' 140-page Complaint, mischaracterizing their claims as an attack on constitutionally-protected speech and the exercise of traditional publishing functions. Yet a comprehensive reading of Plaintiffs' Complaint, together with the affidavits and evidence submitted in response to Defendants motion to dismiss, establish legally cognizable products liability claims separate and independent from traditional editorial functions protected by Section 230 and the First Amendment. Plaintiffs make detailed and extensive allegations on how Twitch's unreasonably dangerous design promotes racist radicalization and facilitates horrific acts of mass violence. These allegations are sufficient to withstand a motion to dismiss under C.P.L.R. 3211(a).

Even assuming there was some merit to Amazon's factual arguments, Appellants' substantive assertions should be rejected pursuant to C.P.L.R. 3211(d), which provides that if "facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the

objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just." Here, many of the facts relevant to Plaintiffs' product defect claims against Twitch are in the exclusive possession of Amazon. Moreover, prior to the filing of Defendants' Motion to Dismiss, Plaintiffs served Amazon with targeted discovery seeking the following information:

- Documents sent or received by Amazon personnel referencing the broadcast of racist, antisemitic, homophobic, anti-immigrant, anti-Muslim and white supremacist videos on Twitch, including but not limited to videos on the Great Replacement Theory.

- Documents sent or received by Amazon personnel referencing the relationship, if any, between the design features of Twitch and Twitch Chat and increased radicalization, racism, antisemitism, misogyny, homophobia, anti-immigrant, or anti-Muslim prejudice.

- Documents sent or received by Amazon personnel referencing
    - July 22, 2011, mass-murder by Anders Breivik in, Norway;
    - June 17, 2015, church shooting by Dylann Roof in Charleston, South Carolina;
    - October 27, 2018, synagogue shooting by Robert Bowers in Pittsburgh, Pennsylvania;
    - March 15, 2019, mosque shootings by Brenton Tarrant in Christchurch, New Zealand;
    - April 27, 2019, synagogue shooting by John Earnest in Poway, California;
    - August 3, 2019, Wallmart shooting by Patrick Crusius in El Paso, Texas;
    - May 6, 2023, Allen Premium Outlets shooting by Mauricio Garcia at in Allen, Texas
    - August 26, 2023 Dollar Store shooting by Ryan Palmeter in Jacksonville, Florida

R.1397.

All these discovery topics are central to the factual and legal issues raised in Amazon's appeal, and Plaintiffs should be permitted to conduct discovery before dismissal as a matter of law is even considered. See Meyers v. Becker & Poliakoff, LLP, 202 A.D.3d 627 (1st Dep't 2022) (holding that motion court "providently exercised its discretion in denying defendant's motion to dismiss the complaint on the ground that it was premature, and correctly concluded that discovery was needed to resolve the issues presented"); Wensing v. Paris Indus.—New York, 158 A.D.2d 164, 167 (3d Dep't 1990) ("[W]here successor liability was challenged related to a bankrupt entity, discovery was deemed warranted and "Supreme Court properly noted that Leander retains the opportunity to move for summary judgment if such action is warranted. Accordingly, dismissal on this ground was properly denied."). While Amazon raises important issues regarding whether the First Amendment and Section 230 vitiate Plaintiffs' New York State claims, those issues cannot be adjudicated without first determining whether Twitch constitutes a product under New York law; what Amazon knew, or should have known, regarding Twitch's involvement in prior mass shooting incidents; and the Twitch design features that facilitate livestreaming of violent criminal acts by disturbed users.

II. PLAINTIFFS ALLEGE LEGALLY COGNIZABLE NEW YORK STATE PRODUCT LIABILITY CLAIMS

A. Plaintiffs Sufficiently Allege that Twitch is a Product

Upon the facts of the Complaint, Supreme Court did not err in concluding that the Twitch platform is a product under New York law. Under the Restatement (Third) of Torts: Product Liability, §19, "it is for the court to determine as a matter of law whether something is, or is not, a product." (Comment 1)." In their complaint, Plaintiffs have alleged sufficient facts to satisfy all the factors New York courts consider in determining whether product liability law applies.

In Matter of the Eighth Judicial District Asbestos Litigation [Terwilliger], 33 N.Y.3d 488, 494 (2019), this Court held that in determining whether something is a product, courts should consider the factors set forth in the Third Restatement of Torts:

> Initially, we note that when considering whether strict products liability attaches, the question of whether something is a product is often assumed; none of our strict products liability case law provides a clear definition of a "product." However, "[a]part from statutes that define 'product' for purposes of determining products liability, in every instance it is for the court to determine as a matter of law whether something is, or is not, a product."

These facts considerations include:

> (1) the public interest in life and health;
> (2) the invitations and solicitations of the manufacturer to purchase the product;
> (3) the justice of imposing the loss on the manufacturer who created the risk and reaped the profit;

(4) the superior ability of the commercial enterprise to distribute the risk of injury as a cost of doing business;
(5) the disparity in position and bargaining power that forces the consumer to depend entirely on the manufacturer;
(6) the difficulty in requiring the injured party to trace back along the channel of trade to the source of the defect in order to prove negligence; and
(7) whether the product is in the stream of commerce.

Id. (quoting Restatement [Third] of Torts: Products Liability § 19, Comment [a]).

Here, Plaintiffs allege that "Amazon designed, coded, engineered, manufactured, produced, assembled, and placed Twitch into the stream of commerce" R.205 (¶¶ 333); that "Twitch is uniform and generally available to consumers "R.205 (¶¶ 334); and "mass marketed [and] advertised in a variety of media in a way that is designed to appeal to the general public and in particular teenagers." R.205 (¶¶ 334). Plaintiffs further allege that Twitch is "akin to tangible products" because "[w]hen installed on a consumer's device, they have a definite appearance and location … are operated by a series of physical swipes and gestures [and] are personal and moveable." R.205 (¶ 336). Moreover, in "represent[ations] to the public, jobseekers, and investors," R.205 (¶ 337), "Amazon had repeatedly and consistently acknowledged that Twitch is a 'product,'" R.205 (¶ 338). Taking Amazon's admission at face value and accepting Plaintiffs' allegations as true under C.P.L.R. 3211(a), Plaintiffs have adequately alleged that the Twitch platform to be a product under New York law. See, e.g., Kurtaj v. Borax Paper Prods., Inc., 231 A.D.3d 939, 940 (2d Dep't 2024) (holding that "defendants' admission …

raised triable issues of fact" sufficient to defeat a motion to dismiss under C.P.L.R. 3211(a)).

Remarkably, Amazon makes no effort to analyze Twitch under the Terwilliger factors. Amazon Br. at 28–29. This alone should confirm that Supreme Court acted appropriately. Yet even if this Court wished to examine the factors, Plaintiffs' allegations specific to the Twitch platform, which must be accepted as true, weigh heavily in favor of treating it as a product and applying New York products liability in this case. See, e.g., Brookes v. Lyft Inc., 2022 WL 19799628 (Fla. Cir. Ct. Sept. 30. 2022), at *4 (holding that products liability under Section 19 applies to claims "aris[ing] from the defect in Lyft's application, not from the ideas or expressions in the Lyft application"); Doe v. Lyft, No. 23-2548-JWB-TJJ [Kan. Dt. Ct., Nov. 1, 2024] (finding that the Lyft app is a "software or algorithmic product with sufficient similarities to a tangible product to subject it to product liability law").

First, the public has a particularly high interest in protecting the life and health of New York citizens. See Matter of Delio v. Westchester County Med. Ctr., 129 A.D.2d 1, 26 [1987] (recognizing "societal interest in the preservation of life").

Second, Amazon and Twitch regard teens as an important (if not primary) target demographic and market to them aggressively. See R.206 ¶ 146 ("Twitch actively promotes its platforms to teenagers and young adults.")

Third, insofar as "Twitch earned Twitch earned $2.8 billion revenue in 2022 on 22.4 billion hours of content consumed on its platform," R.206 ¶ 332, it, is fair and just for Amazon, who created the risk and reaped the profit from Twitch, to bear the costs of its inherently dangerous platforms. See Terwilliger, 33 N.Y.3d at 497 (holding coke oven was a "product" where the defendant was "responsible for placing the ovens into the stream of commerce and ... derived financial benefit from its role in the production process").

Fourth, becasue Twitch has 140 million active users and 2.6 million concurrent users," R.206 ¶ 330, Amazon has a superior ability to distribute the risk as the "least cost avoider."

Fasolas v. Bobcat of New York, Inc., 33 N.Y.3d 421, 429 (2019) ("[I]mposing strict liability on the manufacturers for defects in the products they manufactured should encourage safety in design and production, and the diffusion of this cost in the purchase price of individual units should be acceptable to the user if it results in added assurance of protection.").

Fifth, insofar as Amazon is the world's largest online retailer and marketplace, there is a vast disparity in bargaining power between Amazon and the users of Twitch. R.249 (¶ 573).

Sixth, the "complexity" and "secretiveness" of Twitch's design materially hinders consumers' ability to know all of Amazon's tortious conduct. See, Voss v.

Black & Decker Mfg. Co., 59 N.Y.2d 102, 107 [1983] (manufacturer is "in the superior position to discover any design defects and alter the design before making the product available to the public.").

Finally, Amazon placed their standardized Twitch platform into the stream of commerce. See Terwilliger, 33 N.Y.3d at 494 (wares placed in stream of commerce who serve standardized purpose deemed products). See also Gridiron.com, Inc. v. National Football League Player's Ass'n, Inc., 106 F. Supp.2d 1309, 1314 (S.D. Fla. 2000) (holding that websites alleged to have infringed on copyrights "in and of themselves, are products.").

Application of products liability law to the Twitch platform is buttressed by the fact that many courts "may draw an analogy between the treatment of software under the Uniform Commercial Code and under products liability law." Rest. 3d Torts: Prods. Liab. § 19 cmt. d. New York courts recognize that "software that is mass-marketed is considered a good," not a service. Commc'ns Grps., Inc. v. Warner Commc'ns, Inc., 527 N.Y.S.2d 341, 344 (N.Y. Civ. Ct. 1988) ("[I]t seems clear that computer software ... is considered by the courts to be a tangible, and movable item, not merely an intangible idea or thought and therefore qualifies as a 'good' under Article 2 of the UCC."); People v. Aleynikov, 31 N.Y.3d 383, 390 (2018) (rejecting defendant's argument that source code was not "related to a product" under the Economic Espionage Act); see also Neilson Bus. Equip. Ctr., Inc. v. Monteleone,

524 A.2d 1172, 1174 (Del. 1987) (holding that software was a good, not a service, and rejecting argument that "intangibles" are categorically excluded as goods under the UCC). New York courts have echoed this principle in analogous circumstances. See Triangle Underwriters, Inc. v. Honeywell, Inc., 457 F.Supp. 765, 769 (E.D.N.Y. 1978), aff'd in part, rev'd in part on irrelevant grounds, 604 F.2d 737 (2d Cir. 1979) (district court applying New York law determined that the defendant's custom designed computer software system was properly characterized as a "good" within the meaning of UCC § 2-106, and not a "service").

B. Plaintiffs Sufficiently Allege that Twitch is Inherently Dangerous

Amazon argues that "Plaintiffs' claims against Twitch and Amazon … target livestreaming as a medium of expression." Amazon Br. at 4. This is incorrect. Plaintiffs simply allege that "Twitch is inherently dangerous because there is no way the product, *as currently designed*, can prevent the livestream broadcast of mass shootings which have been proven to motivate future acts of mass terror." R.209 (¶ 353) (emphasis supplied).

The seminal case concerning unreasonably dangerous products is Judge Cardozo's decision in MacPherson v. Buick Motor Co., 217 N.Y. 382, (1916), which held that "[i]f the nature of a [product] is such that it is reasonably certain to place life and limb in peril when negligently made, [then] it is then a thing of danger." Id. at 389. New York courts have adhered to this general principle in

addressing product hazards. See, e.g., Field v. Empire Case Goods Co., 179 A.D. 253, 256 (2d Dep't 1917) (considering, among other things, whether "defects could have been discovered by reasonable inspection, and that inspection was omitted"); Quackenbush v. Ford Motor Co., 167 A.D. 433, 436 (3d Dep't 1915) (noting that a "manufacturer's duty depends not upon the results of the accident but upon the fact that his failure to properly construct the car resulted in the accident"); McCarthy v. Olin Corp., 119 F.3d 148, 155 (2d Cir. 1997) (noting that an "unreasonably dangerous" product is one that is "defectively designed" and which, "at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer"). "The issue of whether a product is defectively designed such that its utility does not outweigh its inherent danger is generally one for the jury to decide in light of all the evidence presented by both the plaintiff and defendant." DeCaro v. Somerset Indus., Inc., 228 A.D.3d 1107, 1109 (3d Dep't 2024) (quoting Yun Tung Chow v. Reckitt & Colman, Inc., 17 N.Y.3d 113, 33, 926 N.Y.S.2d 377, 950 N.E.2d 113).

In La Barre v. Mitchell, the court concluded that an alarm system was "defectively designed." 256 A.D.2d 850, 852 (3d Dep't 1998). The court explained that "the failure of a fire alarm system to perform its intended function carefully and competently can have catastrophic consequences, and a design creating an unreasonable risk of failure in such a system would render it dangerous and

defective." Id. Similarly, in Village of Groton v. Tokheim Corp., 202 A.D.2d 728 (App. Div. 1994), the court reasoned that a fuel dispensing system failed "creat[ing] a hazardous condition" that "was almost inevitable" and, accordingly, the defendant "failed to act reasonably to provide an appropriate warning." Id. at 729-31.

As alleged, so too is the Twitch product's "design[s] creat[e] an unreasonable risk of [harm]." 256 A.D.2d at 852. The "normal operation" of Defendants' livestreaming products "are implements of destruction." Cleary v. John M. Maris Co., 173 Misc. 954, 958 (Kings Cnty. Sup. Ct. 1940) (cleaned up and emphasis added). Such purposeful design of Appellants' livestreaming products fits neatly within the meaning of Justice Cardozo's seminal words, where the nature of the product "is such that it is reasonably certain to place life and limb in peril." MacPherson, 217 N.Y. at 389 (Cardozo, J.) (emphasis added). Considering the numerous examples of Twitch being used to effectuate evil before Gendron's acts, Appellants had actual knowledge of the unreasonably dangerous nature of its products, yet took no action to satisfy its products liability obligation under New York law.

Instead, Amazon argues that "a product cannot be 'unreasonably dangerous' when the alleged danger arises from 'an intentional and functional element of the design of the 'product.'" Amazon Br. at 30. However, neither case cited by Amazon is instructive. In McCarthy v. Olin Corp., the court rejected a claim that hollow

point bullets were defective because the "product's sole utility is to kill and maim." 119 F.3d 148, 155 (2d Cir. 1997). Here, Amazon does not claim that the Twitch platform's "sole utility" is to inspire and provoke mass murders. Similarly, Appellants point to no authority to suggest that the Twitch platform is one of those products that, "however well-built or well-designed may cause injury or death." Forni v. Ferguson, 232 A.D.2d 176, 648 N.Y.S.2d 73 (1996) (quoting DeRosa v Remington Arms Co., 509 F. Supp. 762, 769 (E.D.N.Y. 1981)). On the contrary, Plaintiffs have expressly alleged that the Twitch platform *can* be designed in such a way as to reduce or remove such unreasonable risks of harm.

Amazon argues that Plaintiffs do not propose a reasonable alternative design that would render the product safer yet still functional. Amazon Br. at 32. But Plaintiffs' allegations do just that, indicating that "[if] Twitch designed and implemented a time lapse between a user's filming an action or event and the dissemination of the content to Twitch viewers, content moderators, aided by artificial intelligence, would be able to identify acts of livestreamed violence, notify law enforcement, and prevent public viewing of criminal violence." R.210 (¶ 355). Moreover, Plaintiffs allege that "[t]his public safety benefit resulting from this risk reduction would far outweigh any reduction product utility arising from a short delay." R.210 ¶ 356. It is for the jury, not the court, to determine whether a time lapse would impair the "function" of the Twitch platform, particularly where the

content and details of all expressive communications would remain entirely unchanged. SUEZ Water New York Inc. v. E.I. du Pont de Nemours & Co., 578 F. Supp. 3d 511, 560 (S.D.N.Y. 2022) ("Generally, 'it will be for the jury to decide whether a product was not reasonably safe in light of all of the evidence presented by both the plaintiff and defendant.'").

Moreover, Plaintiffs alleged that if "Amazon conducted a reasonable background investigation of persons seeking the ability to livestream content on Twitch harnessing artificial intelligence with the individual user data to which Amazon already has access, it would be possible to identify individuals who exhibit a propensity to commit violent acts and restrict their access to livestream." R.210 (¶ 357). This simple change alone would have no impact on the "live" streaming functionality whatsoever, but would make the product safer. As Defendants' own cited authority makes clear, "[i]t is not necessary in every product liability case that the plaintiff show the safer product is as acceptable to consumers as the one the defendant sold." Adamo v. Brown & Williamson Tobacco Corp., 11 N.Y.3d 545, 551 (2008). A Twitch platform that includes basic screening mechanisms and safety features would preserve the product's core function—streaming videos to users—while reducing the proven, demonstrable risks of mass violence inspired by an instantaneous audience.

III. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE FIRST AMENDMENT

Contrary to Amazon's contentions, Plaintiffs do not seek to "foreclose livestreaming as a means of expression," nor do their claims assert liability "for offering livestreaming as a means of communication." Amazon Br. at 13, 15. Rather, Plaintiffs' basic contention is that it would be "feasible to design the products [at issue] in a safer manner." R.242 (¶ 537). These same claims would arise if Amazon manufactured books bound in barbed wire or an online message board that installs malware. The mere fact that a product serves as a medium of expression does not exempt it from bedrock principles of product liability. Moreover, aside from two distinguishable or otherwise inapplicable Supreme Court cases, Amazon's First Amendment cases are not binding on this Court.

A. The First Amendment Does Not Sanction Inherently Dangerous Product Design

Amazon argues that Twitch, and by extension all livestreaming products, is inherently "entitled to First Amendment protection because it *enables* 'expressive conduct.'" Amazon Br. at 13-14 (emphasis supplied). To be sure, the right to listen is constitutionally protected. See, e.g., Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring); First Nat'l Bank v. Bellotti, 435 U.S. 765, 806 (1978) (White, J., dissenting) (noting that "The self-expression of the communicator is not the only value encompassed by the First Amendment")). Protecting listeners

furthers the core values of the First Amendment's free speech clause because "without both a listener and a speaker, freedom of expression is as empty as the sound of one hand clapping." Rodney A. Smolla, Freedom of Speech for Libraries and Librarians, 85 L. Libr. J. 71, 77 (1993). But it does not follow that a *product* that enables livestreaming can be designed in an unreasonably unsafe manner simply because expressive conduct is involved in some fashion. See TikTok Inc. v. Garland, No. 24-656, 2025 WL 222571, 604 U.S. ___, at *4 (U.S. Jan. 17, 2025) ("Laws that directly regulate expressive conduct can, but do not necessarily, trigger [First Amendment] review.").

Citing Fox Television Stations, Inc. v. F.C.C., Amazon suggests that live broadcasters cannot be liable for airing objectionable live content on the basis that they might be able to "implement a more effective screening system." 613 F.3d 317, 329, 334 (2d Cir. 2010), vacated, 657 U.S. 39 (2012) (vacating on Due Process grounds and specifically noting that the Court "need not address the First Amendment implications of the [FCC's] indecency policy"). Not only did Amazon misleading suggest that Fox had been "vacated on other grounds," Amazon Br. at 17, but even if the Second Circuit's decision was still good law, it would not be binding on this Court. See People v. Kin Kan, 78 N.Y.2d 54, 59-60 (1991) (holding that interpretations by the lower federal courts, including the Second Circuit, concerning federal questions are not binding). Other cases cited by Amazon are both

nonbinding and distinguishable, as they involved claims where the duty at issue concerned speech or content. See, e.g., Project Veritas v. Schmidt, 72 F. 4th 1043, 1050 (9th Cir. 2023) (concluding that state statute prohibiting recording of conversations "is a content-based restriction that violates the First Amendment right to free speech and is therefore invalid on its face"); Am. Broad. Cos. v. Cuomo, 570 F.2d 1080, 1082 (2d Cir. 1977) (concerning enforcement of a criminal statute which as applied would interfere with First Amendment rights of the press); Rodriguez v. Fox News Network, L.L.C., 238 Ariz. 36, 41 (Ct. App. 2015) (rejecting notion that "a broadcaster covering a matter of public concern to cut away whenever a violent or disturbing sight may be caught on camera"). Plaintiffs' claims here, by contrast, concern Amazon and other Social Media Defendants' products.

Other cases cited by Defendants are similarly unavailing. Both Knight v. Montgomery Cnty., Tennessee and Whitting v. City of Athens involved claims brought under 42 U.S.C.A. § 1983, not claims of products liability. In Knight, a resident challenged a county's resolution that prohibited livestreaming city council meetings. 470 F. Supp. 3d 760, 763(M.D. Tenn. 2020). Reviewing a motion to dismiss, the district court assumed *without deciding* that livestreaming "qualifies as expressive conduct" simply because the plaintiff's allegations "at least plausibly" permitted that conclusion. Id. 767–78. In Whitting, a plaintiff brought suit against city officials for interfering with his attempt to livestream an event at a public park

where children were present. 2024 WL 3015735, at *2 (E.D. Tenn. June 14, 2024). Taking all facts in the light most favorable to the non-moving party—the plaintiff—the district court likewise assumed without deciding that livestreaming qualified as "expressive conduct." Id. at *8. Where a conclusion is merely assumed, and thus unnecessary to the ultimate determination, such assumption can hardly be deemed conclusive as to that legal issue.

Similarly, courts have not "long recognized the First Amendment right of speakers and viewers to participate in *live* speech," nor have courts "reject[ed] the very 'time delay' arguments Plaintiffs make here." Amazon Br. at 17 (citing Am. Broad. Companies, Inc. v. Cuomo, 570 F.2d 1080, 1082 (2d Cir. 1977)) (emphasis in original). In Cuomo, the Second Circuit considered whether enforcement of a criminal trespass statute interfered with First Amendment rights in the context of a news organization (ABC) being denied access to a campaign headquarters. 570 F.2d at 1082. At no point did the court suggest that live broadcasts, as opposed to time-delayed broadcasts, enjoyed special First Amendment protections. Rather, the court simply held that "the First Amendment rights of ABC and of its viewing public would be impaired by their *exclusion from the campaign activities* … ." Id. at 1083 (emphasis supplied). Curiously, Amazon's brief cites no binding New York State precedent to support its First Amendment contentions. Amazon Br. at 13-22.

Instead, Appellants rely heavily on the Southern District's decision in Volokh v. James, but that case is inapposite. In Volokh, several social media companies challenged a New York law passed after the Buffalo massacre, the Hateful Conduct Law, that required social media networks to create "(1) a mechanism for social media users to file complaints about instances of 'hateful conduct' and (2) disclosure of the social media network's policy for how it will responds to such complaints." 656 F. Supp. 3d 431, 438 (S.D.N.Y. 2023). Of course, the Volokh court was not adjudicating products liability claims or suggestions that Defendants' platform is an unreasonably dangerous product. Rather, the district court concluded that the law "both compels social media networks to speak about the contours of hate speech and chills the constitutionally protected speech of social media users, without articulating a compelling government interest or ensuring that the law is narrowly tailored to that goal." Id. at 436. In the present case, nothing in Plaintiffs' complaint would "compel[] [Defendants] to speak on an issue on which they would otherwise remain silent," and no statute is implicated, as products liability is rooted in the common law. Id. at 440. Defendants are welcome to host any content they deem fit; they simply need to design a safe product through which to distribute that content.

Finally, Amazon disingenuously suggests that a different product design would "infringe on Twitch's First Amendment right to make editorial 'choices about what third-party speech to display and how to display it.'" Amazon Br. at 18 (quoting

Moody v. NetChoice, 144 S. Ct. 2383, 2393 (2024)). However, Plaintiffs allege that Amazon's Twitch product is defective because "there is no way the product, *as currently designed*, can prevent the livestream broadcast of mass shootings which have been proven to motivate future acts of mass terror. No content moderation technology [exists] that can detect violence in time for Twitch to shut down the broadcast before it is seen by anyone." R.209 (¶ 353) (emphasis supplied). Amazon essentially mischaracterizes Plaintiffs' basic contention that "it was feasible to design the products [at issue] in a safer manner." R.242 (¶ 537). This issue cannot be decided pre-answer, and Supreme Court properly held so.

B. To the Extent that Twitch's Content Moderation Policies are Constitutionally Protected, the First Amendment Does Not Sanction Defective Product Design

Amazon contends that it has "a constitutional right to make editorial judgments . . . about whether, to what extent, and in what manner [it] will disseminate speech." Amazon MTD at 13 (cleaned up). To be sure, "the creation and dissemination of information are speech for First Amendment purposes." Sorrell v. IMS Health Inc., 564 U.S. 552, 553 (2011); see also NetChoice, LLC v. Att'y Gen., Fla., 34 F. 4th 1196, 1210 (11th Cir. 2022) (collecting cases). But, as discussed above, the gravamen of Plaintiffs claims here concern Social Media Defendants'—including Amazon and Twitch—*conduct* and product design, and Plaintiffs allege that Amazon "could manifestly fulfill [its] legal duty to design a reasonably safe

social media products and furnish adequate warnings of foreseeable dangers arising out of the use of [its] products *without altering, deleting, or modifying the content of a single third-party post or communication.*" R.241-42 (¶ 533) (emphasis supplied).

Appellants attempts to address this conduct-content distinction by suggesting that any "restraint on 'conduct' runs afoul of the First Amendment if it burdens activities or mediums that 'enable speech.'" Amazon Br. at 20 (quoting ACLU of Illinois v. Alvarez, 679 F.3d 584, 596 (7th Cir. 2012). Yet Defendants read far too much into the Seventh Circuit's analysis. In Alvarez, the court considered a First Amendment challenge to an Illinois eavesdropping statute that would have criminalized "people who openly record police officers performing their official duties in public." 679 F.3d at 586. The statute defined an "eavesdropping device" broadly as "any device capable of being used to hear or record oral conversation." Id. at 587. The court held that the First Amendment analysis applied because the statute "operates at the front end of the speech process by restricting the use of a common, indeed ubiquitous, instrument of communication." Id. at 596. The court did not, as Defendants suggest, conclude that any restraint on conduct involving a medium of speech necessarily implicates the First Amendment. See also Garland, 604 U.S. at *3 ("Laws that directly regulate expressive conduct can, but do not necessarily, trigger [First Amendment[] review."). On the contrary, the Seventh Circuit pointed out that "a generally applicable law will not violate the First

Amendment simply because its application has an incidental effect on speech or the press." 679 F.3d at 601. While the Twitch platform certainly distributes expressive content, the duty Plaintiffs seek to impose—bedrock principles of products liability—is one of general application for all unreasonably dangerous products. If Defendants were to scrawl a message on a brick and throw it through Plaintiffs' window, the Court would not countenance any suggestion that the brick was a "medium of expression" deserving of heightened First Amendment protections even as it flew through the air.

IV. SECTION 230 DOES NOT BAR PLAINTIFFS' CLAIMS AGAINST AMAZON AND TWITCH

A. Plaintiffs' Claims Do Not Require Treating Twitch as a Publisher

Like the other Social Media Defendants, Amazon and Twitch argue that Section 230 of the Communications Decency Act fully immunizes them from all claims simply because third-party content is found within the causal chain. As explained more fully in Plaintiffs' Response to the Joint Brief of Meta, Alphabet, and Reddit, Plaintiffs' Complaint "expressly disclaim[ed] any and all claims seeking to hold [Amazon] liable as the publisher or speaker of any content provided, posted, or created by third parties." R.241 (¶ 530). Rather, the predicate for Plaintiffs' claims is Defendants' "underlying design, programming, and engineering of their platforms." R.241 (¶ 532). Thus, "Plaintiffs' claims seek to hold the Social Media Defendants accountable for their own, operations, conduct, and products – not for

the speech or content of others or for Defendants' content moderation decisions." Id. Indeed, Plaintiffs allege that Amazon could have fulfilled its duty to design a reasonably safe social media product "without altering, deleting, or modifying the content of a single third-party post or communication." R.241-42 (¶ 533).

Amazon insists that the Court of Appeals in Shiamili v. Real Estate Group of N.Y., Inc., 17 N.Y.3d 281, 287 (2011) "rejected a near-identical argument that defendants 'implicitly encouraged' illegal conduct by providing a website for third parties to post content." Amazon Br. at 24 (citing Shiamili 17 N.Y.3d at 287). Yet as the Shiamili court observed, Section 230 applies only when "liability *depends* on characterizing the provider as a 'publisher or speaker' of objectionable material."17 N.Y. 3d at 280 (reposting libelous content created and by a third party falls within "a publisher's traditional editorial functions") (quotations omitted, emphasis supplied). Other courts applying Section 230 have reached the same conclusion: claims are precluded only where the duty at issue *necessarily requires* the defendants to act as a publisher. See, e.g., Calise v. Meta Platforms, Inc., 103 F.4th 732, 741 (9th Cir. 2024) (Section 230 analysis requires asking "whether the duty would 'necessarily require an internet company to monitor third-party content.'"); Doe v. Internet Brands, Inc., 824 F.3d 846, 853 (9th Cir. 2016) (Section 230 did not preempt plaintiff's California failure to warn claims where defendant obtained independent knowledge of the danger); HomeAway.com, Inc. v. City of Santa Monica, 918 F.3d

676, 682 (9th Cir. 2019) (rejecting view that section 230 immunity "follows whenever a legal duty 'affects' how an internet company 'monitors' a website"); Lemmon v. Snap, Inc., 995 F.3d 1085, 1092 (9th Cir. 2021) (holding that section 230 preemption did not apply because "the duty that Snap alleged violated 'springs from' its distinct capacity as a product designer"). Put differently, if the defendant can comply with its duty without monitoring, editing, or removing third-party content, Section 230 is inapplicable.

In this case, Amazon could comply with its duty under New York law by designing a safe product. The Twitch platform, in its current design, is inherently dangerous because it was designed without any method of preventing the livestream broadcast of mass shootings, which has been proven to motivate future acts of mass terror. R.209 (¶ 353). The analysis would be entirely different if Plaintiffs claimed that the Twitch platform *had* such controls, yet Defendants simply chose not to use them. Supreme Court correctly concluded that whether the inherent danger of the Twitch platform's design outweighs its utility cannot be determined pre-answer.

B. Twitch's Exclusive Possession of Gendron's Murder Video at the Time it was Livestreamed Renders Amazon a Content Creator

Amazon correctly notes that a website is "*generally* not a content 'content provider' with respect to [content] posted by third-party users." Amazon Br. at 36 (quoting Shiamili, 17 N.Y.3d at 289) (emphasis supplied). On the other hand, "[s]ince a content provider is any party 'responsible ... in part' for the 'creation or

development of information,' any piece of content can have multiple providers." Shiamili, 17 N.Y.3d at 289 (quoting 47 U.S.C. § 230(f)(3)). This case presents a critical exception to this general rule.

When Gendron broadcast his livestream, Twitch had an exclusive ownership of the content for a 24-hour period. This feature is unique to Twitch, as the product's user agreement provides in pertinent part:

> Solely for any live audio-visual work you choose to provide to us as User Content (your "**Live Twitch Content**"), starting from beginning of the Initial Broadcast of any such Live Twitch Content, and continuing for a period of twenty-four (24) hours following the end of the Initial Broadcast of such Live Twitch Content (the "**Exclusivity Period**"), such Live Twitch Content is exclusive to Twitch (even as to you). During the Exclusivity Period of any Live Twitch Content, you will not, nor permit or authorize any third party to, broadcast, stream, distribute, exhibit and otherwise make available such Live Twitch Content in any manner. . . . The "**Initial Broadcast**" means the initial broadcasting, streaming, distribution, or other exhibition of Live Twitch Content via the internet, whether such Live Twitch Content is broadcast on a real-time, live basis as the subject event is occurring or such Live Twitch Content has been prerecorded and is being initially broadcast for the first time via any manner or method of streaming.

R.1510 (emphasis in original).

This restrictive license prevents users from distributing content that they created outside of the Twitch platform for 24 hours. This type of exclusive use license in essence is a right for Twitch to possess and a right to prevent others from using. The right to exclusive possession is the most important stick in the bundle of property rights. See, e.g., Matter of Smith v. Town of Mendon, 4 N.Y.3d 1, 12 (2004)

("the most important 'stick' in the proverbial bundle of property rights, the right to exclude others."). During the crucial 24-hour period when Gendron's murder video was uploaded onto Twitch and proliferated onto other platforms, Twitch was the co-owner of its content and as such was itself an "information content provider" under Section 230. See Shiamili v. Real Estate Group of N.Y., Inc., 17 N.Y.3d 281, 289 (2011).

V. PLAINTIFFS' FACTUAL ALLEGATIONS ARE SUFFICIENT TO ESTABLISH AMAZON'S DERIVATIVE LIABILITY FOR TWITCH'S UNREASONABLY DANGEROUS PRODUCT

Finally, Amazon argues that it should be dismissed from this case because Plaintiffs failed to allege sufficient facts to hold it liable for the actions of its wholly-owned subsidiary, Twitch. This is incorrect.

Under New York law, "a party seeking to pierce the corporate veil must establish that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury." Americore Drilling & Cutting, Inc. v. EMB Contr. Corp., 198 A.D.3d 941, 946 (2d Dep't 2021). (quotations omitted). Here, Plaintiffs Complaint contains extensive and specific allegations regarding Amazon's control of the operation of Twitch. See R.208-209 ¶ 333 ("Amazon designed, coded, engineered, manufactured, produced, assembled, and placed Twitch into the stream of commerce."); R.208-209 ¶ 334

("Twitch is made and distributed with the intent to be used or consumed by the public as part of the regular business of Amazon."); R.208-209 ¶ 342 ("At the time audio video content is livestreamed on Twitch, Amazon is the sole owner of such content."); R.208-209 ¶ 331 ("Amazon earns money by selling advertising on Twitch."). These allegations are not, as Amazon argues, reflective of "a typical parent-subsidiary relationship." Amazon Br. at 34. This is a far cry from an "absence of … particularized factual allegations." Amazon Br. at 35 (citing Dragons 516 Ltd. v. Knights Genesis Inv. Ltd., 180 N.Y.S.3d 524 (New York Cnty. Sup. Ct. 2023)).

Moreover, Plaintiffs alleged that their injuries arose out of Amazon's domination of Twitch. See R.208-209 ¶ 345 ("At the time it acquired Twitch in 2014, Amazon knew that the product was used by criminals to livestream criminal activity and that the ability to livestream acts of violence and self-harm on Twitch motivates both criminals and suicide victims to follow through with their plans."); R.208-209 ¶ 346 ("Amazon has documented ... the incidents where Twitch has been used to livestream acts of violence or self-harm and engaged in internal discussions at senior company levels regarding implementation of product design changes that would mitigate this risk."); R.208-209 ¶ 357 ("If Amazon conducted a reasonable background investigation of persons seeking the ability to livestream content on Twitch harnessing artificial intelligence with the individual user data to which Amazon already has access, it would be possible to identify individuals who exhibit

a propensity to commit violent acts and restrict their access to livestream."). Under New York liberal notice pleading standard, these allegations are sufficient to pierce the corporate veil between Amazon and Twitch. See Americore, 198 A.D.3d at 946.

Supreme Court properly deferred ruling on these fact-intensive corporate relationships until discovery has been completed. See Wensing, 158 A.D.2d at 167 (court properly deferred ruling on corporate successorship issue before discovery was completed).

CONCLUSION

For the foregoing reasons, this Court should affirm the Order as to Amazon.com, Inc. and Twitch Interactive, Inc., and award costs to Respondents.

Dated: January 21, 2025

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Dated: January 21, 2025

To be Argued by:
JOHN V. ELMORE
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

DIONA PATTERSON, individually and as Administrator of the Estate of HEYWARD PATTERSON, J.P., a minor, BARBARA MAPPS, Individually and a Executrix of the Estate of KATHERINE MASSEY, SHAWANDA ROGERS, Individually and as Administrator of the Estate of ANDRE MACKNEIL, A.M., a minor and LATISHA ROGERS,

Plaintiffs-Respondents,

– against –

META PLATFORMS, INC., formerly known as FACEBOOK, INC., SNAP, INC., ALPHABET, INC., GOOGLE, LLC, YOUTUBE, LLC, DISCORD, INC., REDDIT, INC., AMAZON.COM, INC. and 4CHAN COMMUNITY SUPPORT, LLC,

Defendants-Appellants,

(For Continuation of Caption See Inside Cover)

Docket Nos.:
CA 24-00513
CA 24-00515
CA 24-00524
CA 24-00527
CA 24-01447
CA 24-01448

BRIEF FOR PLAINTIFFS-RESPONDENTS DIONA PATTERSON, J.P. A MINOR, BARBARA MAPPS, SHAWANDA ROGERS, A.M., A MINOR AND LATISHA ROGERS IN RESPONSE TO DEFENDANT-APPELLANT META PLATFORMS, INC. FORMALLY KNOWN AS FACEBOOK INC.

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– and –

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Defendants-Respondents.

(CA 24-00513)

KIMBERLY J. SALTER, individually and as Executrix of the Estate of AARON W. SALTER, JR., MARGUS D. MORRISON, JR., Individually and as Administrator of the Estate of MARGUS MORRISON, SR., PAMELA O. PRICHETT, Individually and as Executrix of PEARL LUCILLE YOUNG, MARK L. TALLEY, JR., Individually and as Administrator of the Estate of GERALDINE C. TALLEY, GARNELL W. WHITFIELD, JR., Individually and as Administrator of RUTH E. WHITFIELD, JENNIFER FLANNERY, as Public Administrator of the Estate of ROBERTA DRURY, TIRZA PATTERSON, Individually and as parent and natural guardian of J.P., a minor, ZAIRE GOODMAN, ZENETA EVERHART, as parent and caregiver of Zaire Goodman, BROOKLYN HOUGH, JO-ANN DANIELS, CHRISTOPHER BRADEN, ROBIA GARY, individually and as parent and natural guardian of A.S., a minor, and KISHA DOUGLAS,

Plaintiffs-Respondents,

– against –

META PLATFORMS, INC. f/k/a Facebook, Inc., INSTAGRAM LLC, REDDIT, INC., AMAZON.COM, INC., TWITCHINTERACTIVE, INC., ALPHABET, INC., GOOGLE, LLC, YOUTUBE, LLC, DISCORD, INC., SNAP, INC. and 4CHAN COMMUNITY SUPPORT, LLC,

Defendants-Appellants,

– and –

4CHAN, LLC, GOOD SMILE COMPANY, INC., GOOD SMILE COMPANY U.S., INC., GOOD SMILE CONNECT, LLC, RMA ARMAMENT, INC. d/b/a RMA, BLAKE WALDROP, CORY CLARK, VINTAGE FIREARMS, LLC, JIMAY'S FLEA MARKET, INC., JIMAYS LLC, MEAN ARMS LLC d/b/a Mean Arms, PAUL GENDRON and PAMELA GENDRON,

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(CA 24-00524)

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Plaintiff-Respondent,

– against –

MEAN LLC, VINTAGE FIREARMS, LLC, RMA ARMAMENT, INC., PAUL GENDRON and PAMELA GENDRON,

Defendants-Respondents,

– and –

ALPHABET INC., GOOGLE, LLC, YOUTUBE, LLC and REDDIT, INC.,

Defendants-Appellants.

(CA 24-00515 and CA 24-01447)

FRAGRANCE HARRIS STANFIELD, YAHNIA BROWN-McREYNOLDS, TIARA JOHNSON, SHONNELL HARRIS-TEAGUE, ROSE MARIE WYSOCKI, CURT BAKER, DENNISJANEE BROWN, DANA MOORE, SCHACANA GETER, SHAMIKA McCOY, RAZZ'ANI MILES, PATRICK PATTERSON, MERCEDES WRIGHT, QUANDRELL PATTERSON, VON HARMON, NASIR ZINNERMAN, JULIE HARWELL, individually and as parent and natural guardian of L.T., a minor, LAMONT THOMAS, individually and as parent and natural guardian of L.T., a minor, LAROSE PALMER, JEROME BRIDGES, MORRIS VINSON ROBINSON-McCULLEY, KIM BULLS, CARLTON STEVERSON and QUINNAE THOMPSON,

Plaintiffs-Respondents,

– against –

MEAN LLC, VINTAGE FIREARMS, LLC, RMA ARMAMENT, INC., PAUL GENDRON and PAMELA GENDRON,

Defendants-Respondents,

– and –

ALPHABET INC., GOOGLE LLC, YOUTUBE, LLC and REDDIT, INC.,

Defendants-Appellants.

(CA 24-00527 and CA 24-01448)

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INTRODUCTION

> Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.
>
> MacPherson v. Buick Motor Co., 217 N.Y. 382, 391 (1916) (Cardozo, J.).

In 1916, Justice Cardozo struggled to adapt legal principles developed in the horse and buggy era to the social and economic exigencies of the automotive age. A century later, this Court is tasked with applying 20th Century product liability and negligence principals to emergent technologies created by our postindustrial digital economy.

The digital revolution has transformed everyday life, spawning technologies that were inconceivable two decades ago, reshuffling economic relationships, and producing unparalleled levels wealth. Yet transformative social media technologies have also stoked long simmering embers of racist division and created highly effective means for white supremacists to spread hatred, promote violence, and inspire followers to commit horrifying acts of mass slaughter.

Unconstrained by legal obligation, social media technologies will continue to erode our social fabric, sow the seeds of racial hatred, and facilitate replicating

scenes of mass carnage in our communities. Courts today must therefore follow Justice Cardozo's example by using traditional legal principles to meet the requirements of our developing civilization and hold social media companies accountable for the foreseeable and egregious consequences of their intentional design decisions. This appeal provides the Court with such an opportunity.

SUMMARY OF ARGUMENT

On May 14, 2022, Tops Friendly Markets supermarket on the East Side of Buffalo was invaded by a militant, racist 18-year-old whose mission was to kill as many Black people as possible. The shooter, Payton Gendron, sought out a historically Black neighborhood and drove hundreds of miles from his home to cause terror. Gendron murdered ten Black people and injured three more, inflicting untold suffering that rippled outward, impacting an entire community.

Gendron's attorney later acknowledged to the court that "[t]he racist hate that motivated this crime was spread through on-line platforms ... ." Gendron wrote that the audience of racist extremists he acquired through social media gave him "motivation in the way that I know some people will be cheering for me." Yet Gendron's radicalization did not occur in a vacuum or even through his own volition; it was the foreseeable result of Appellants' unreasonably dangerous social media products which force fed Gendron violent extremist material whether he wanted to see it or not.

In appealing from the denial of their pre-answer motion to dismiss, Defendants-Appellants Meta Platforms, Inc., Alphabet, Inc., and Reddit, Inc. (hereinafter collectively "Social Media Defendants" or "Appellants")[1] distort—or simply ignore—the factual allegations in Plaintiffs' complaint and basic New York products liability law. Appellants absolve themselves from any responsibility for the May 14th massacre, mischaracterizing their involvement as simply "disseminating" or "making available" violent white supremacist content to willing users. These arguments flatly disregard entire portions of Plaintiffs' 140-page Complaint alleging, inter alia, that Social Media Defendants designed their online products to addict minor users by deluging them psychologically discordant material—including unsolicited content—and that Gendron's radicalization and violent rampage was the foreseeable consequences of Appellant's design decisions. Erie County Justice Paula L. Feroleto properly accepted these allegations as true in holding that Plaintiffs had stated a cognizable claim for relief under New York law that was not preempted by Section 230. This Court should do this same.

Social Media Defendants' argument rest upon the false premise that because Plaintiffs' harms arise from content Gendron saw on their platforms, Section 230 of the Communications Decency Act preempts their New York state law claims as a

[1] Defendant-Appellants Meta Platforms, Inc.; Alphabet, Inc.; Reddit, Inc.; and Snap, Inc. Plaintiffs have filed separate response to the briefs submitted by Amazon.com, Inc.; Twitch Interactive, Inc.; and Discord Inc.

matter of law. Yet appellants disregard the appropriate standard of review for a pre-answer motion to dismiss, ignore the preemption test New York courts apply to determine when state laws are displaced by federal statues, and rely on the laws of other jurisdictions in addressing Section 230's preemptive effect on New York products liability law.

New York products liability law is rooted in common law rather than statute and often differs drastically compared to other states. See In re New York City Asbestos Litig. [Dummitt], 27 N.Y.3d 765 (2016) (distinguishing New York products liability law from other jurisdictions) . The contours of what constitutes a "product" under New York law has yet to be defined and is necessarily an "intensely fact-specific" inquiry that precludes bright line pronouncements. See Liriano v Hobart Corp., 92 N.Y.2d 232, 242-43 (1998); Matter of the Eighth Judicial District Asbestos Litigation [Terwilliger], 33 N.Y.3d 488, 494 (2019) (New York law has no clear definition of a "product"). Appellants' argument that a product must be physically tangible disregards the Court of Appeals' holding in Terwilliger and New York products liability jurisprudence as a whole. Plaintiffs' allegation that Social Media Defendants' platforms are designed and function as products must therefore be accepted as true for purpose of this appeal. Supreme Court therefore correctly concluded that it cannot be determined as a matter of law, on this pre-answer motion

to dismiss with a bare-bones factual record, whether and to what extent the social media apps at issue are deemed "products" under New York law.

Under Shiamili v. Real Estate Group of N.Y., Inc., 17 N.Y.3d 281 (2011), Section 230 preemption applies only where a plaintiff "seek[s] to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." Id. at 289. Here, Plaintiffs' claims do not fault Appellants for the exercise of a publisher's traditional editorial functions but rather for the defective design features that addicted Gendron to their platforms, connected him to white supremacist groups he never initially sought out, deluged him with unsolicited racist material he never asked for, and radicalized him with livestream videos of racist shootings promoting and normalizing mass killings. Force-feeding an addicted user unsolicited and psychologically discordant material falls well outside "traditional" editorial functions, and Gendron's murderous rampage at Tops Friendly Markets was the foreseeable consequence of Defendants' deliberate design decisions. Holding Appellants liable under New York products liability law is fully consistent with Section 230's statutory purpose to immunize the online practice of traditional editorial functions.

Social Media Defendants' argument that Plaintiffs' claims are barred by the First Amendment because white supremacist speech is constitutionally shielded

ignores the crucial distinction between protected speech and tortious conduct. Defendants' sweeping interpretation of the First Amendment would bar common tort claims such as defamation, medical malpractice, sexual harassment, and creating hostile work environments for no other reason than the defendant's conduct involved speech. Plaintiffs' product liability and negligence claims charge defendants with designing unreasonably dangerous social media platforms that addict vulnerable teens by treating them as a captive audience, bombarding them with progressively extreme and violent material expressly intended to trigger dopaminergic responses in their adolescent brains. The fact that Social Media Defendants' artificial intelligence determined that white supremacist material would trigger Gendron's addictive response cycle does not preempt their unreasonably dangerous design decisions from legal scrutiny.

Appellants' remaining arguments also seek to distort or ignore well-settled New York law. As to duty, it is well-established that a duty is owed to "any person" injured as a result of a defective product. Contrary to Appellants' conclusory contention, such a duty is not limited to product users or direct bystanders. See Codling v. Paglia, 32 N.Y.2d 330, 342 (1973). And whether an act constitutes a superseding, intervening cause that breaks a causal connection is inherently an issue for the trier of fact. See Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 314-15 (1980). The Court of Appeals has addressed this defense numerous times, and in

every instance has concluded that the issue was one for the jury to resolve. See, e.g., Hain v. Jamison, 28 N.Y.3d 524, 529 (2016).

Supreme Court's denial of Social Media Defendants' motion to dismiss should therefore be affirmed in its entirety.

COUNTER-STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Complaint contains extensive allegations addressed to the design and function of the Social Medial Defendants' products, all of which is ignored by Appellants.

A. Social Media Defendants' Products Are Addictive by Design and Force Extreme and Unsolicited Content on Underage Users

Social Media Defendants earn their revenue from advertising, and their profits are directly tied to the quantity of time their users spend online. R.246 (¶ 551). Appellants deliberately designed their social media products to be addictive to users to maximize the amount of advertising they see. Id. Because Social Media Defendants' primary goal is maximizing user engagement, their artificial intelligence driven algorithms select content most likely to trigger intense reactions in users, regardless of whether the content is helpful or hurtful to the user's well-being. R.188 (¶¶ 249, 250).

Social Media Defendants' products are particularly addictive to teenage users. R.244 (¶ 546). The frontal lobes of the brain, particularly the prefrontal cortex, play

an essential part in higher-order cognitive functions, impulse control, and executive decision making. R.166 (¶ 149). During adolescence, the frontal cortex experiences a level of neurologic development second only to infancy. R.166 (¶ 148). Plaintiffs' Complaint contains excerpts from internal company documents demonstrating that Social Media Defendants are not only aware of young users' neurologic vulnerabilities; their business models are expressly predicated on exploiting them. R.162 (¶ 152, 167-68). Appellants' products were therefore designed to addict teenage users by exploiting their neurological and emotional immaturity. See, e.g., R.187-189 (¶¶ 244-253).

Social Media Defendants know that psychologically discordant content triggers a greater dopamine response in young users than soothing or affirming content. They have therefore designed their recommendation algorithms to favor extreme content over benign content. R.136-37 (¶ 25). Meta CEO Mark Zuckerberg publicly recognized this in a disturbing chart set forth in the Complaint. R.188-89 (¶ 250). Appellants also know that recommendation algorithms "are prone to recommending harmful content." R.189 (¶ 251). In one experiment from 2019, Facebook found that in just three weeks by following only its *recommended* content, the test user's News Feed had become a near constant barrage of polarizing nationalist content, misinformation, and violence. Id. Nevertheless, Social Media Defendants designed artificial intelligence driven algorithms to maximize the

engagement of young users—not by sending them content they request or want to see but by showing violent and disturbing content from which they cannot look away. R.173 (¶ 172).

B. Radicalization and Violence Are Foreseeable Consequences of Appellants' Product Design Decisions

Teenagers' incomplete neurological development not only makes them ideal targets for Appellants' addictive algorithms; it makes them particularly susceptible to racist conspiracy theories and radicalization. R.169 (¶ 156). Social Media Defendants' engagement-maximizing algorithms actively encourage, assist, and facilitate the spread of racist, antisemitic and terrorist propaganda notwithstanding the foreseeable and catastrophic harms occurring as a result. R.158 (¶ 103). White supremacist groups capitalize on the unreasonably dangerous design of Social Media Defendants' products to recruit teenagers to their cause, inculcate them in racist ideology, and motivate them to commit unspeakable acts of racist and antisemitic violence. R.131 (¶ 10).

White supremacists explicitly seek to weaponize internet culture so that younger generations can be radicalized more effectively. R.162 (¶ 126). Although white supremacists frequently use less well-known social media, mainstream social media platforms such as YouTube, Snapchat, Instagram and Facebook remain important avenues for promoting racist hatred as they provide the opportunity to reach and radicalize new audiences. R.162 (¶ 126).

Social Media Defendants not only could have foreseen the significant radicalization risk posted by their platforms—they *saw* the risk. For example, Google recognized, anticipated, and even "rebuked internal attempts to mitigate ... harms to [their] young users." R.201 (¶ 309). Facebook's Director of Content Policy explained that "not only did [Facebook] *anticipate* murders and suicides on [its livestreaming product], [Facebook] *anticipated far worse* ... [and the] top 5 predictions have played out." R.190-91 (¶ 257) (emphasis supplied). When it acquired Twitch, "Amazon *knew* that the product was used by criminals to livestream criminal activity and that *the ability to livestream acts of violence* [using Twitch's product] *motivates* [] *criminals ... to follow through with their plans*." R.209 (¶ 350) (emphasis added).

C. Social Media Defendants' Unreasonably Dangerous Products Radicalized Payton Gendron to Commit Heinous Acts of Racist Violence

Payton Gendron's radicalization was neither an accident nor a coincidence; it was the foreseeable consequence of Social Media Defendants' knowing decision to maximize user engagement over public safety. Gendron began using Instagram, YouTube, and Snapchat in his early teens and Reddit, Discord, and 4chan in his late teens. R.172 (¶ 162). Gendron quickly became a problematic user of Social Media Defendants' products due to their dangerously defective and unreasonably dangerous algorithms. R.172 (¶ 163). He accessed his social media accounts multiple times per hour and at all hours of the night. Id.

Gendron did not grow up in a prejudiced household and did not hold racist beliefs until he began using and became dependent on Appellants' products. R.172 (¶¶ 169, 170). Gendron wrote that "when I was like 12, that was when I didn't dislike American blacks and liked listening to black music." Id. He did not initially seek out racist material, but because Appellants' algorithms were expressly designed to maximize Gendron's engagement over his psychological and ethical well-being, they directed him to material promoting racist hate and violence. R.173 (¶ 173). Gendron was radicalized through the unique design features of Social Media Defendants' products which actively promote racist conspiracy theories and facilitate violence-promoting activities. Id. After being coerced into viewing this material, Gendron found a community of racists urging him to move forward with his murderous plan, writing that:

> Knowing that so many other attackers like myself are out there rooting for me gives me quite a bit of confidence. Every single White man has everything to lose by doing nothing, and everything to gain by taking action. Yes I do find inspiration from other attackers.

R.174 (¶ 176).

In order to maintain Gendron's level of engagement—and the resulting advertising revenue—Appellants selected progressively more violent, racist, and graphic material to continue triggering dopamine responses in his adolescent brain. Id. Social Media Defendants' selections progressed from white supremacist screeds to livestream videos of mass shootings and other extreme depictions of racist

violence. Id. The neurological satiation process that Appellants' product design triggered in Gendron's brain paralleled the growing depravity of his soul as he became progressively desensitized to the murderous carnage he was viewing. Id. This erosion of Gendron's moral conscience and growing amenability to racist violance was the foreseeable consequence of the design and operation of Social Media Defendants' products. Id.

During his sentencing on March 13, 2023, Gendron confirmed the radicalizing role social media played in transforming him from a kid who liked Black people and enjoyed listening to Black music into one of the most depraved racist murderers in American history:

> I cannot express how much I regret all the decisions I made leading up to my actions on May 14th. I did a terrible thing that day. I shot and killed people because they were Black. Looking back now, I can't believe I actually did it. I believed what I read on-line and acted out of hate.

R.174 (¶ 178).

II. PROCEDURAL BACKGROUND

On May 14, 2023, one year after the Tops Massacre, Plaintiffs filed their 140-page Complaint against the Social Media Defendants and several firearm product sellers. Plaintiffs subsequently propounded targeted discovery seeking, inter alia, racist videos and message that Gendron viewed on Social Media Defendants' platforms; internal reports discussing social media addiction, adverse mental health

effects and radicalization of young users; and advertising by white supremacist organizations on Appellants' platforms. See R.1239-1459 (Exs. 1-8). In lieu of filing an Answer to Plaintiffs' extensive factual allegations or responding to their discovery, the Social Media Defendants sought dismissal pursuant to C.P.L.R. 3211(a).

Supreme Court Justice Paula L. Feroleto heard extensive arguments on November 17 and 18, 2023, R.2475-2653, ultimately concluding that Defendants' request was improper at this early stage of the litigation. In her written order, Justice Feroleto properly described the gravamen of Plaintiffs' complaint: that the social media platforms at issue "are sophisticated products designed to be addictive to young users and they specifically directed Gendron to further platforms or postings that indoctrinated him with 'white replacement theory.'" R.33. Under this framework, Justice Feroleto concluded that "the factual allegations as a whole in the 715 paragraphs of the complaint are sufficient to allege viable causes of action against each of the social media/internet defendants." R.35.

Justice Feroleto rejected Social Media Defendants' arguments that Plaintiffs' claims were preempted by Section 230 as a matter of law, reasoning that adjudication of their legal defenses could only occur upon the development of a full factual record.

> Many of the social media/internet defendants have attempted to establish that their platforms are mere message boards and/or do not

> contain algorithms subjecting them to the protections of the CDA and/or First Amendment. This may ultimately prove true. In addition, some defendants may yet establish that their platforms are not products or that the negligent design features plaintiffs have alleged are not part of their platforms. However, at this stage of the litigation the Court must base its ruling on the allegations of the complaint and not "facts" asserted by the defendants in their briefs or during oral argument and those allegations allege viable causes of action under a products liability theory.

R.35-36.

ARGUMENT

I. APPELLANTS IGNORE THE HIGH BAR REQUIRED FOR DISMISSAL AS A MATTER OF LAW

The Social Media Defendants flatly ignore the pleadings and ask this Court to improperly draw all inferences in their favor. It is long-established that on a motion to dismiss the court must construe the Complaint liberally, accept the pleaded facts as true, and determine simply whether the facts as alleged fit into *any* cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). The court must not only accept the material allegations of the complaint as true but draw all reasonable inferences in favor of the plaintiff. See McGill v. Parker, 179 A.D.2d 98 (1st Dep't 1992); Foley v. D'Agostino, 21 A.D.2d 60, 64 (1st Dep't 1964) ("Upon a 3211 (on a motion to dismiss " we look to the substance rather than to the form."). The movant bears the burden of demonstrating that the plaintiff's Complaint states no legally cognizable cause of action, and this test is so liberal that the court need only find that the plaintiff

has *a* cause of action, not even whether one has been stated. Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 120 (1st Dep't 1998). Moreover, in adjudicating a motion under C.P.L.R. 3211(a)(7), a court may freely consider affidavits and other evidence submitted by the plaintiff to remedy any defects in the complaint. See AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 N.Y.3d 582, 591 (2005); Leon, 84 N.Y.2d at 88; Cadet–Duval v. Gursim Holding, Inc., 147 A.D.3d 718, 719 (2d Dep't 2017).

Social Media Defendants' 76-page joint brief is bereft of any analysis regarding the appropriate standard of dismissal under C.P.L.R. 3211(a).[2] Instead, Appellants quote selectively from Plaintiffs' 140-page Complaint, couch their conduct as merely "disseminating" or "making available" content, and mischaracterize Plaintiffs' claims as attempts to impose liability for Social Media Defendants' exercise of traditional publishing functions and dissemination of constitutionally-protected speech. Yet a comprehensive reading of Plaintiffs' Complaint, together with the affidavits and evidence submitted in response to Defendants motion to dismiss, establish legally cognizable products liability claims separate and independent from traditional editorial functions protected by Section

[2] Social Media Defendants rely on Univ. Hill Realty v. Akl, 214 A.D.3d 1467 (4th Dep't 2023), where this Court *reversed* the Supreme Court's dismissal on the ground that "the complaint alleges a cognizable claim for breach of implied contract." Id. at 1468.

230 and the First Amendment. Plaintiffs make detailed and extensive allegations on how the design of Defendants' social media products interact with the neurology of their adolescent users to produce addictive use; promote racist, antisemitic and misogynist ideologies; and foster acts of mass violence. Plaintiffs allege that Gendron's racist radicalization resulted from Defendants' decisions to promote user engagement over public safety and that his murderous rampage on May 16, 2022, was the foreseeable consequence of their failure to design and market reasonably safe social media products. These allegations are more than sufficient to withstand a motion to dismiss under C.P.L.R. 3211(a).

II. PLAINTIFFS SUFFICIENTLY ALLEGE THAT SOCIAL MEDIA APPS AND PLATFORMS ARE PRODUCTS

Before any meaningful analysis of Appellants' Section 230 immunity defenses can occur, the Court must first determine whether Plaintiffs' allegations sufficiently establish at this early stage that the social media platforms at issue in this case are products. New York courts have followed a pragmatic, public safety approach to product liability. See, e.g., Matter of the Eighth Judicial District Asbestos Litigation [Terwilliger], 33 N.Y.3d 488, 494 (2019) ("our case law has not focused on creating an exhaustive list of the product's physical characteristics but has instead focused on [its] potential dangers," and ultimately on "principles of reasonableness and public policy" (citations omitted). New York courts have therefore consistently declined to make bright-line pronouncements in the context

of our negligence-based products liability law, since doing so would inexorably lead to harsh results. See Liriano v. Hobart Corp., 92 N.Y.2d 232, 242 (1998). ("[t]he fact-specific nature of the inquiry into whether a particular risk is obvious renders bright-line pronouncements difficult"); Cover v. Cohen, 61 N.Y.2d 261, 270 (1984) ("[w]e decline the single standard invitation [regarding the admission of subsequent remedial measures] because of the different inquiries involved in the different types of cases"); Micallef v. Miehle Co., Div. of Miehle-Goss Dexter, 39 N.Y.2d 376, 385 (1976) (abrogating a bright-line patent-danger rule because "[i]ts unwavering view produces harsh results").

In Terwilliger, the Court of Appeals held that because "none of our strict products liability case law provides a clear definition of a 'product,'" courts should consider the following factors set forth in the Third Restatement of Torts in determining whether something is a product:

(1) the public interest in life and health;

(2) the invitations and solicitations of the manufacturer to purchase the product;

(3) the justice of imposing the loss on the manufacturer who created the risk and reaped the profit;

(4) the superior ability of the commercial enterprise to distribute the risk of injury as a cost of doing business;

(5) the disparity in position and bargaining power that forces the consumer to depend entirely on the manufacturer;

(6) the difficulty in requiring the injured party to trace back along the channel of trade to the source of the defect in order to prove negligence; and

(7) whether the product is in the stream of commerce.

33 N.Y.3d at 494, (quoting Restatement [Third] of Torts: Products Liability § 19, Comment [a])).

Application of these factors to Plaintiffs' factual allegations, which this Court must accept as true, weigh heavily in favor of treating Social Media Defendants' apps as products and applying products liability in this case.[3]

First, the public has a particularly high interest in protecting the life and health of New York citizens. See Matter of Delio v. Westchester County Med. Ctr., 129 A.D.2d 1, 26 [1987] (recognizing "societal interest in the preservation of life").

Second, Social Media Defendants regard teens as an important—if not their primary— target demographic and market to them aggressively. See R.167 (¶ 152). Moreover, even the Social Media Defendants refer to their apps and platforms as

[3] See, e.g., Brookes v. Lyft Inc., 2022 WL 19799628 (Fla. Cir. Ct. Sept. 30. 2022), at *4 (holding that products liability under Section 19 applies to claims "aris[ing] from the defect in Lyft's application, not from the ideas or expressions in the Lyft application"); Doe v. Lyft, No. 23-2548-JWB-TJJ [Kan. Dt. Ct., Nov. 1, 2024] (finding that the Lyft app is a "software or algorithmic product with sufficient similarities to a tangible product to subject it to product liability law").

products, and this Court should take such admission at face value. R.184-85, 195-96, 205-207, 211-12 (¶¶ 233-38, 276-81, 333-39, 362-67).

Third, it is fair and just to expect Defendants, who created the risk and reaped the profit, to bear the costs of their defectively designed apps and platforms. See Terwilliger, 33 N.Y.3d at 497 (holding coke oven was a "product" where the defendant was "responsible for placing the ovens into the stream of commerce and ... derived financial benefit from its role in the production process"). Social Media Defendants have earned billions of dollars from the addiction-causing features of their apps. R.249 (¶ 573). In fact, Defendants have deliberately exacerbated their products' addictive features in pursuit of higher profits. R.245 (¶ 551). Justice requires they face the consequences of this decision before a New York jury.

Fourth, Defendants have a superior ability to distribute the risk, i.e., are the "least cost avoider." This weighs in favor of applying products liability law. See Fasolas v. Bobcat of New York, Inc., 33 N.Y.3d 421, 429 (2019) ("[I]mposing strict liability on the manufacturers for defects in the products they manufactured should encourage safety in design and production, and the diffusion of this cost in the purchase price of individual units should be acceptable to the user if it results in added assurance of protection.").

Fifth, there is a vast disparity in bargaining power between Defendants and the users of their apps. Defendants are some of the world's largest and most powerful

companies. R.249 (¶ 573). Users, conversely, are often hapless adolescents, unaware of the dangers of being force-fed unsolicited information.

Sixth, the "complexity" and "secretiveness" of Defendants' products and their designs materially hinder the Plaintiffs' or any users' ability to know all of Defendants' tortious conduct. See Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 107 [1983] (manufacturer is "in the superior position to discover any design defects and alter the design before making the product available to the public."). Discovery is needed before the parties can make comprehensive arguments as to the nature and function of the social media apps at issue.

Finally, Social Media Defendants have placed their standardized apps into the stream of commerce. See Terwilliger, 33 N.Y.3d at 494 (wares placed in stream of commerce that serve standardized purpose deemed products); see also Gridiron.com, Inc. v. National Football League Player's Ass'n, Inc., 106 F. Supp.2d 1309, 1314 (S.D. Fla. 2000) (holding that websites alleged to have infringed on copyrights "in and of themselves, are products").

Application of the product liability law to social media apps and platforms is buttressed by the fact that courts "may draw an analogy between the treatment of software under the Uniform Commercial Code and under products liability law." Rest. 3d Torts: Prods. Liab. § 19 cmt. d. New York courts recognize that "software that is mass-marketed is considered a good," not a service. Commc'ns Grps., Inc. v.

Warner Commc'ns, Inc., 527 N.Y.S.2d 341, 344 (N.Y.C. Civ. Ct. 1988) ("[I]t seems clear that computer software ... is considered by the courts to be a tangible, and movable item, not merely an intangible idea or thought and therefore qualifies as a 'good' under Article 2 of the UCC."); People v. Aleynikov, 31 N.Y.3d 383, 390 (2018) (rejecting defendant's argument that source code was not "related to a product" under the Economic Espionage Act); see also Neilson Bus. Equip. Ctr., Inc. v. Monteleone, 524 A.2d 1172, 1174 (Del. 1987) (holding that software was a good, not a service, and rejecting argument that "intangibles" are categorically excluded as goods under the UCC). New York courts have echoed this principle in analogous circumstances. See Triangle Underwriters, Inc. v. Honeywell, Inc., 457 F.Supp. 765, 769 (E.D.N.Y. 1978), aff'd in part, rev'd in part on irrelevant grounds, 604 F.2d 737 (2d Cir. 1979) (district court applying New York law determined that the defendant's custom designed computer software system was properly characterized as a "good" within the meaning of UCC § 2-106, and not a "service").

Remarkably, Social Media Defendants do not even engage in the Terwilliger factor analysis, writing instead that the Court should examine only a "critical predicate" of "whether the defendant is alleged to be 'a manufacturer whose wares serve a standardized purpose such that the product's latent dangers, if any, are known, or should be known, from the time it leaves the manufacturer's hands.'" Meta Br. at 61 (quoting Terwilliger, 33 N.Y.3d at 494). This argument is easily

rejected because this is precisely what Plaintiffs alleged, writing that the platforms "are uniform and generally available to consumers." R.184 (¶ 233) (Facebook & Instagram); R.195 (¶ 276) (YouTube); R.206 (¶¶ 333-34) (Twitch); R.211 (¶ 362) (Snapchat); R.214 (¶ 377) (Discord); R.219 (¶ 406) (Reddit).

Otherwise, Appellants do not even touch upon New York products liability law and instead belabor the laws of other jurisdictions. But New York products liability law differs drastically from other jurisdictions. See Dummitt, 27 N.Y.3d at 798 (distinguishing New York products liability law specifically from California and other jurisdictions). Some jurisdictions have codified their products liability laws, and in so doing, have explicitly defined what constitutes a product. See, e.g., Ohio Rev. Code. Section 2307.7(A)(12)(a). Others, like ours, are rooted in the common law and have not defined what constitutes a product. It is no surprise, then, that Appellants rely almost exclusively on inapposite laws. They cite, for instance, Winter v. G.P. Putnam's Sons, 938 F.2d 1033 (9th Cir. 1991) to assert that "[p]roducts liability is geared to the tangible world." Meta Br. at 53. In addition to California's drastically distinct laws, the Ninth Circuit expressly pointed to "[c]omputer software" as an example of a "highly technical tool" that, if defective, would support a claim of products liability. 938 F.2d at 1036. Defendants' other cited cases all address claims against ideas, not products. James v. Meow Media, 90 F. Supp. 2d 798, 809 (W.D. Ky. 2000), aff'd, 300 F.3d 683 (6th Cir. 2002); Sanders

v. Acclaim Entertainment, 188 F. Supp. 2d 1264, 1277 (D. Colo. 2002); Davidson v. Time Warner, No. CIV. A. V-94-006, 1997 WL 405907, at *14 (S.D. Tex. Mar. 31, 1997).

III. SECTION 230 DOES NOT, AS A MATTER OF LAW, PREEMPT PLAINTIFFS' CLAIMS AGAINST SOCIAL MEDIA DEFENDANTS' VIOLATIONS OF NEW YORK PRODUCT LIABILITY LAW

A. Preemption Requires an Irreconcilable Conflict Between Section 230 and Plaintiffs' New York State Law Claims, Which Cannot Be Established as a Matter of Law on This Pre-Answer Record

Section 230 of the Communications Decency Act mandates that "[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), and requires that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section. " 47 U.S.C. § 230(e)(3). At the same time, Section 230 explicitly provides that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C. § 230(e)(3). Therefore, to determine whether Plaintiffs' common law products liability claims are, as a matter of law, inconsistent with Section 230, the Court must start with New York preemption principles.

The New York Court of Appeals has "cautioned [against] reading conflict preemption principles too broadly[.]" Garcia v. N.Y.C. Dep't of Health & Mental

Hygiene, 31 N.Y.3d 601, 617 (2018). Courts therefore "take heed of the rule of interpretation that preemption clauses in a statute are to be *narrowly construed* and that matters beyond their scope are not preempted." Wallace v. Parks Corp., 212 A.D.2d 132, 138-9 (4th Dep't 1995) (emphasis supplied).[4] When faced with potential conflicts between state and federal law, New York courts seek a harmonious interpretation construing state law to align with federal law rather than setting up a direct conflict. Sutton 58 Assocs. LLC v. Pilevsky, 336 N.Y.3d 297, 309 (2020). Only where a harmonious interpretation is impossible because "the conflict between state law and federal policy [is] a sharp one," and the "conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together," will federal law have preemptive force. Id.

The Social Media Defendants baldly assert that Plaintiffs' New York state law claims are *completely* preempted by federal law without *any* acknowledgment of New York's narrow construction rule or effort to show that Plaintiffs state law products liability claim are irreconcilable with Section 230's mandates. Instead,

[4] See, e.g., Balbuena v. IDR Realty LLC, 6 N.Y.3d 338, 357 (2006) (noting that federal statute at issue "d[id] not contain an express statement by Congress" evincing intent to "preempt state laws regarding the permissible scope of recovery in personal injury actions predicated on state labor laws"); Comm'r of the Dep't of Soc. Servs. v. Spellman, 173 Misc.2d 979, 986 (Sup. Ct. 1997) (concluding that the Medicaid Act does not expressly preempt New York law), cert. denied 519 U.S. 965 (1996); Tip Top Farms v. Dairylea Coop., 114 A.D.2d 12, 28 (2d Dep't 1985) (noting that "Congress has not preempted the field of antitrust law by passage of the Federal antitrust statutes [and a State] remains free to regulate in the area of antitrust despite the existence of the Federal antitrust provisions").

Appellants' argument can only be made by advancing an improperly expansive interpretation of Section 230, and restrictive application of New York products liability law focused almost entirely on the laws of other jurisdictions rather than the well-established jurisprudence of this State. In contrast, the legal claims alleged in Plaintiffs' Complaint and illustrated herein provide the Court with a harmonious path to reconcile the protection of online publishers in Section 230 with New York product liability law. To the extent this Court agrees that Plaintiffs' state law claims may "consistently stand together" with Section 230, Defendants' preemption defense must be rejected. Sutton, 36 N.Y.3d at 309. Moreover, at this pre-answer stage, even the possibility that Plaintiffs claims are harmonious with Section 230's proscriptions is sufficient to reject dismissal.

B. Section 230 Preemption Focuses on the Duty the Defendant Allegedly Breached Rejecting a "But-For" or "Only Link" Test Advanced by Appellants

In Shiamili v. Real Estate Group of N.Y., Inc., 17 N.Y.3d 281 (2011), the Court of Appeals enunciated the following three part test for determining whether Section 230 preempts New York State law: First, the defendant must be a "provider or user of an interactive computer service;" second, the plaintiff's "complaint [must] seek[] to hold the defendant liable as a 'publisher or speaker'" under New York state law; and third, the plaintiff's action must be based on "information provided by another information content provider." Id. at 287 (quoting 47 U.S.C. § 230).

Social Media Defendants argue that Plaintiffs' claims are preempted by Section 230 because their alleged harms are "invariably tie[d] … to the third-party with which Gendron allegedly engaged." Meta Br. at 29. Appellants content that because Plaintiffs would not have been harmed if Gendron had "engaged with user-provided content on a benign topic like 'cooking-based videos,'" it is impossible for Plaintiffs to articulate any theory of liability that does not depend upon third party content. Id. at 30. While superficially beguiling, Defendants' "but-for" or "only link" argument erroneously expands the scope of preemption by ignoring Section 230's crucial distinction between the legal duty that Plaintiffs alleged Defendants violated and the nature of the harms they sustained.

Section 230's central focus on legal duty was first articulated by the Ninth Circuit in Barnes v. Yahoo, 570 F.3d 1096 (9th Cir. 2012), where an online platform expressly promised to remove naked photos of the plaintiff from its web site but failed to do so. The Ninth Circuit held that while the plaintiffs' negligent undertaking claim, which sought to hold Yahoo liable for failing to remove the offending material, was preempted by Section 230, her promissory estoppel claim was not. Id. at 1109. Although plaintiff's estoppel claim involved the same harm as the negligent undertaking claim—failing to remove embarrassing content from the site—because the underlying duty did not arise from Yahoo's role as a publisher, Section 230 did not apply:

> [S]ubsection 230(c)(1) precludes liability when the duty the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker. In a promissory estoppel case, as in any other contract case, the duty the defendant allegedly violated springs from a contract—an enforceable promise—not from any non-contractual conduct or capacity of the defendant.

Id. at 1107.

State and federal appellate courts throughout the country have followed Barnes in holding that Section 230 requires courts to "distinguish claims that treat an interactive computer service provider as a publisher from claims that do not, despite being associated with third party content." Lee v. Amazon.com, 76 Cal. App. 5th 200, 257 (2022). Most recently, the Fifth Circuit "rejected a mechanical, but-for reading of section 230," holding that "a but-for test that asks whether third-party speech lies anywhere in the chain of causation leading to the alleged harm would expand section-230 immunity beyond the statute's text." A.B. v. Salesforce, Inc., No. 23-20604, 2024 WL 5163222, at *4 (5th Cir. Dec. 19, 2024). Similarly, in Webber v. Armslist LLC, 70 F.4th 945 (7th Cir. 2023), the Seventh Circuit explained that "§ 230(c)(1) is not a comprehensive grant of immunity for third-party content," but rather "precludes liability only where the success of the underlying claims *requires* the defendant to be considered a publisher or speaker of that content." Id. at 955–957 (emphasis supplied). Similarly, the California Supreme Court explained in in Hassell v. Bird, 5 Cal. 5th 522 (2018), that "not all legal duties owed by Internet intermediaries necessarily treat them as the publishers of third-party content, even

when these obligations are in some way associated with their publication of this material." Id. at 542–43.

Courts uniformly reject Appellant's proffered test invoking Section 230 preemption simply because a state law cause of action would not have accrued in the absence of third-party communication. See, e.g., Erie Ins. v. Amazon.com, Inc., 925 F.3d 135, 139-40 (4th Cir. 2019) (online seller was not protected by § 230 in a product-liability suit even though publishing advertisement on website for defective product was a but-for cause of plaintiff's harm); Lee, 76 Cal. App. 5th at 256 (same); Doe v. Internet Brands, Inc., 824 F.3d 846, 853 (9th Cir. 2016) (Section 230 did not preempt plaintiff's California failure to warn claims where defendant obtained independent knowledge of the danger); HomeAway.com, Inc. v. City of Santa Monica, 918 F.3d 676, 682 (9th Cir. 2019) (rejecting view that section 230 immunity "follows whenever a legal duty 'affects' how an internet company 'monitors' a website"). Rather than focus on the harm the plaintiff sustained, courts engage in a two-part analysis. First, the court "must ask whether *the duty that the plaintiff alleges the defendant violated* derives from the defendant's status or conduct as a publisher or speaker." Bolger v. Amazon.com, 53 Cal. App. 5th 431, 464 (2020) (emphasis supplied.); see Shiamili, 17 N.Y.3d at 286 (noting that Section 230 protects website owners "from liability derived from the exercise of a publisher's traditional editorial functions"); Cross v. Facebook, 4 Cal. App. 5th 190, 207 (2017)

(courts "look instead to what the duty at issue actually requires."). Next, the court must ask "whether the duty would 'necessarily require an internet company to monitor third-party content.'" Calise v. Meta Platforms, Inc., 103 F.4th 732, 741 (9th Cir. 2024).

The Fifth Circuit's recent opinion in A.B. v. Salesforce, Inc. further demonstrates that Social Media Defendants' expansive reading of Section 230 is unfounded. Like the Social Media Defendants here, the defendant in Salesforce argued that the plaintiffs' "necessarily seek to treat Salesforce as the publisher or speaker" of advertisements because "the only link between Salesforce and Plaintiffs' … harms" was the publishing of third-party content. 2024 WL 5163222, at *5. The court soundly rejected this "only-link" theory, reasoning that, "like the but-for analysis, the only-link theory would expand the grant of immunity beyond section 230's text." Id.

Here, Social Media Defendants advance the same "only-link theory" rejected by the Fifth Circuit in Salesforce insisting that the "gravamen" of Plaintiffs' claims relate to "claims that the Internet-Defendants failed to remove or limit the dissemination of third-party content." Meta Br. at 32–33. Yet this "meandering analytical framework," which would tie every conceivable design claim to publisher activity, is nothing more than a "novel theory" that "cannot stand on its own two feet." Salesforce, 2024 WL 5163222, at *6, *8. Were an internet-defendant held to

be publisher in *all* instances involving any third-party content, then the plain language of Section 230 would be rendered meaningless. See McKinney's Statutes § 94 (plain language of the statute evinces the Legislative intent); Majewski v. Broadalbin-Perth Cent. School. Dist., 91 N.Y.2d 577, 583 (1998) ("[a]s the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.").

C. Plaintiffs' Claims Treat Defendants as Manufacturers, Not Publishers

Social Media Defendants castigate Plaintiffs for using "artful pleading" to circumvent Section 230 immunity by challenging product design features that "are simply ways in which the Internet Defendants publish user content." Meta Br. at 29. In so arguing, Defendants misconstrue controlling New York law and ignore the substantive factual and legal claims in Plaintiffs' Complaint.

While Section 230 "protects interactive computer service providers from liability as a publisher of speech, it does not protect them from liability as the seller of a defective product." Erie, 925 F.3d at 140. On this point, the Ninth Circuit's holding in Lemmon v. Snap, Inc., 995 F.3d 1085 (2021), is particularly instructive. There, three boys were killed in a high-speed auto accident after posting their speed using a Snapchat filter. Id. at 1088. As in this case, Snap argued that because the incident arose from third-party content—the decedent posting his speed on

Snapchat—plaintiffs sought to hold it liable as a publisher. However, expanding on its holding in Barnes, the Ninth Circuit held that the appropriate focus of Section 230 preemption is the legal duty allegedly breached rather than the harm the plaintiff sustained:

> Snap "acted as the 'publisher or speaker' of user content by transmitting Landen's snap, and that action could be described as a 'but-for' cause of [the boys'] injuries." This is unsurprising: Snap is an internet publishing business. Without publishing user content, it would not exist. But though publishing content is a but-for cause of just about everything Snap is involved in, that does not mean that the Parents' claim, specifically, seeks to hold Snap responsible in its capacity as a "publisher or speaker." The duty to design a reasonably safe product is fully independent of Snap's role in monitoring or publishing third-party content.

Id. at 1092–93 (quotations omitted); see also A.M. v. Omegle.com, LLC, 614 F.Supp.3d 814, 821 (D. Or. 2022) (Section 230 does not preempt product liability claim that social media app "randomly pair[ed]" an 11-year-old child with a predatory user); Maynard v. Snapchat, Inc., 313 Ga. 533, 534 (2022) (product liability claim arising from social media app's negligent design not preempted by Section 230); Bolger, 53 Cal. App. 5th at 464 (California courts "have declined to apply Section 230 to strict products liability claims.").

Like the defendant in Lemmon, Appellants argue that Plaintiffs' claims treat them as publishers while ignoring expressly contrary language in their Complaint:

> Plaintiffs expressly disclaim any and all claims seeking to hold the Social Media Defendants liable as the publisher or speaker of any

> content provided, posted, or created by third parties. Rather, ... Plaintiffs' claims arise from the Social Media Defendants' status as designers and marketers of a social media products that were not reasonably safe, as well as their own statements and actions, and are not based on their status as the speaker or publisher of third-party content.

R.241 (¶ 530). As in *Lemmon*, the predicate for Plaintiffs' claims Appellants' "underlying design, programming, and engineering of their platforms." R.241 (¶ 532). Thus, "Plaintiffs' claims seek to hold the Social Media Defendants accountable for their own, operations, conduct, and products – not for the speech or content of others or for Defendants' content moderation decisions." Id.

The Court of Appeals has explained that Section 230 only immunizes Internet service providers from liability "where[] such liability *depends on* characterizing the provider as a 'publisher or speaker' of objectionable material." Shiamili, 17 N.Y. 3d at 280 (quotations omitted, emphasis supplied). Here, Plaintiffs explicitly characterize Defendants as manufacturers, not publishers. R.242 (¶ 530). This is not mere semantics. Under Shiamili, Section 230 preemption applies where a plaintiff "seek[s] to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." In this case, Plaintiffs allege that "Social Media Defendants could manifestly fulfill their legal duty to design a reasonably safe social media products ... without altering, deleting, or modifying the content of a single third-party post or communication." R.241-42 (¶ 533). Coerced viewing when the audience cannot

look away—which is *by design*—has nothing at all to do with "traditional" publishing functions.[5] Thus, under Shiamili, Plaintiffs' liability claims against the Social Media Defendants are not based on their exercise of "a publisher's traditional editorial functions." 17 N.Y.3d at 280.

Social Media Defendants rely on the Second Circuit's split decision in Force v. Facebook, 934 F.3d 53 (2d Cir. 2019), as a "classic example of what Section 230 prohibits." Meta Br. at 21. However, because Force involved allegations brought under the Anti-Terrorism Act, not product liability claims, the Second Circuit's holding is readily distinguishable. Moreover, although New York courts are "bound by the United States Supreme Court's interpretations of Federal statutes" interpretations by the lower federal courts, including the Second Circuit, are not binding. People v. Kin Kan, 78 N.Y.2d 54, 59-60 (1991) (citing New York R. T. Corp. v. City of New York, 275 N.Y. 258, 265 (1937), aff'd, 303 U.S. 573 (1938).[6] To the extent this Court looks to Force for guidance, the partial dissent of the late Chief Judge Katzmann represents both a more persuasive analysis of Section 230

[5] Indeed, it would hardly be a traditional editorial function if, for instance, a newspaper tied its reader to a chair and forced him to read only the business section of the newspaper.

[6] See also Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp., 24 N.Y.3d 538, 551 (2014) (New York courts are "at liberty to answer [such questions] in a manner that may conflict with the determinations of courts in [the Second Circuit]"); People v. Konstantinides, 14 N.Y.3d 1, 13 (2009) (noting that "decisions from the United States Court of Appeals for the Second Circuit" are "not controlling"); Delidakis Constr. Co., Inc. v. City of N.Y., 29 A.D.3d 403, 403 (App. Div. 2006) (explaining that a plaintiff's reliance on Second Circuit case law "[was] unavailing, inasmuch as the decision *is not binding on a New York State court*" (emphasis supplied)).

and a better indicator of the current trend among federal courts.[7] Force, 934 F.3d at 64 (Katzmann, J. dissenting in part) (it "strains the English language to say that in targeting and recommending these writings to users ... Facebook is acting as 'the *publisher* of ... information provided by another information content provider").

Social Media Defendants also rely on Gonzalez v. Google, where a split Ninth Circuit panel held that Section 230 barred claims alleging content ISIS posted on YouTube inspired terrorist attacks. Unlike this case, Gonzalez did not involve minor users being compelled to view unsolicited material; it involved a claim of aiding and abetting terrorists, to wit, users that actively sought out the material. It is thus factually inapposite. Moreover, two of the three Ninth Circuit judges on the panel disagreed that Section 230 preempted plaintiffs' claims. After granting certiorari, the Supreme Court expressly declined to address Section 230 and *vacated* the Ninth Circuit's holding rending it a precedential nullity. Gonzalez v Google LLC, 598 U.S. 617, 622, 143 S. Ct. 1191, 1192 (2023); See United States v. Joelson, 7 F.3d 174, 178 n.1 (9th Cir. 1993) (vacated authority "has no precedential effect"). It is

[7]See, e.g., Gonzalez v. Google LLC, 2 F.4th 871, 913 (9th Cir. 2021) (subsequent history omitted) (Berzon, J. concurring) ("I join the growing chorus of voices calling for a more limited reading of the scope of section 230 immunity ... for the reasons compellingly given by Judge Katzmann in his partial dissent in Force v. Facebook"); Id. at 920 (Gould, J. dissenting) ("I do not believe that Section 230 was ever intended to immunize such claims for the reasons stated in Chief Judge Katzmann's cogent and well-reasoned opinion"). See also Salesforce, 2024 WL 5163222, at *5 (quoting Judge Katzmann's partial dissent with approval).); Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 17 (2020) (Statement of Justice Thomas Respecting the Denial of Certiorari).

therefore highly misleading for Appellants to argue that Gonzalez was "vacated on other grounds" and retains persuasive authority on the application of Section 230.

Social Media Defendants' other Section 230 cases are similarly distinguishable. In Herrick v. Grindr LLC, the Second Circuit held that the plaintiff's "failure to warn claim [was] inextricably linked to Grindr's alleged failure to edit, monitor, or remove the offensive content [at issue]; accordingly, it [was] barred by § 230." 765 F. App'x 586, 588, 591 (2d Cir. 2019). Similarly, in M.P. by & through Pinckney v. Meta Platforms, Inc., the district court rejected the Charleston Church shooting victims' attempt to "plead around Section 230 immunity by asserting product liability claims based on the theory that the algorithms and internal architecture of social media sites *direct hate speech to persons inclined to violence.*" 692 F. Supp. 3d 534, 538 (D.S.C. 2023) (emphasis supplied). Here, by contrast, Plaintiffs allege that Gendron "did not hold racist beliefs" prior to using and becoming addicted to Appellants' products. R.172, 242-43 (¶¶ 170, 533).

D. Section 230 Cannot Apply Where it is Alleged that the Social Media Defendants Co-Created the White Supremacist Material Posted on their Platforms

Even if Justice Feroleto erred in finding that Plaintiffs' claims do not require that Appellants be treated as publishers (she did not), evidence submitted in response to Appellants' motion to dismiss that they materially contributed to the malign content on their platforms provides a separate and independent basis for this Court

to conclude that Section 230 preemption is inapplicable.

In Shiamili, the Court of Appeals held that "if a defendant service provider is itself the "content provider," it is not shielded from liability." 17 N.Y.3d at 289. Section 230 defines an "information content provider" as "any person or entity that is responsible, in whole *or in part,* for the creation *or development* of information provided through the Internet ... ." 47 U.S.C. § 230(f)(3) (emphasis supplied.). Therefore, "[s]ince a content provider is any party 'responsible ... in part' for the 'creation or development of information,' any piece of content can have multiple providers." Shiamili, 17 N.Y.3d at 289 (quoting 47 U.S.C. § 230(f)(3)).

In Shiamili, the defendant web site added headings and illustrations to defamatory third-party content posted on its platform. Id. at 292. The Court of Appeals held that by virtue of this additional material, "the Defendants appear to have been 'content providers' with respect to the heading, subheading, and illustration that accompanied the reposting." Id.[8] Here, the Social Media Defendants have done far more that simply repost white supremacist content on their platforms. Rather, as in Shiamili, they routinely augment third party content with headings, memes, music, and videos and are therefore co-publishers of the content at issue in this case.

[8] However, because the Court of Appeals determined that defendants' web site headings "were not defamatory as a matter of law" they did not contribute to the illegality of the third-party content under Section 230. Shiamili, 17 N.Y.3d at 292.

a. Meta is a Content Creator

Meta's Instagram product has features within that allow users to alter and "enhance" their photos within the app. R.1492 (¶ 7). For posts, Instagram allows users to edit a photo with different filters and effects. It also allows a user to overlay music (provided by Instagram) on top of an image. A user also has the ability to add a seemingly unlimited number of "stickers." These stickers include the photo's location, the ability to tag friends in the photo, the ability to ask questions, select music, add hashtags, a clock, a donation button, as well as many other options. Finally, Instagram gives the user the option to select a gif (image file). A user is first prompted to select a gif that is "Trending." A user can also choose to search for a particular gif.R.1504.

As the Court of Appeals noted in Shiamili, adding headings and illustrations is considered content provision. 17 N.Y. 3d at 292. Instagram populates similar content for its users via songs, stickers, and gifs, with the Instagram product selecting which items are available for platform users and which are not.

Facebook also allows for similar user interface options for postings as Instagram does. This includes the option to superimpose text and music onto Stories and Posts. R.1493 (¶ 18). But Facebook's content creation goes far beyond suggestions for Stories and Posts. Indeed, Facebook auto-generates *entire Facebook pages* for groups relating to an organization, a job interest, or location when there is

no existing Facebook page. Id. This has led to Facebook auto generating pages for white supremacist groups including the Proud Boys, Oath Keepers and Texas Three Percent. R.1499-1502. Meta is a content provider as described in Shiamili because the Facebook product itself creates both pages and groups for white supremacist organizations. By auto-generating this content, Facebook is actively creating content for extremist organizations that are involved in real-world violence and spreading principles like those referenced in Payton Gendron's writings. The pages increase the harmful groups' visibility—and legitimacy—on the world's largest social network. These pages are not generated by Facebook users, but by created Facebook itself. R.1493 (¶ 10).

b. Snap is a Content Creator

As the Court of Appeals noted in Shiamili, adding headings and illustrations is considered content provision. 17 N.Y.3d at 292. Snapchat populates similar content for its users via songs, stickers, filters and gifs, with the Snapchat product selecting which items are available for platform users and which are not. Snapchat offers users of its product endless options for modifying and altering photos and videos. R.1493 (¶ 15). Snapchat provides users with a multitude of filters that use artificial intelligence to alter the user's face by beauty enhancements and comedic filters. R.1509. These are filters that alter the user's image while also promoting a product or service. Snapchat also offers users the ability to add music to their photos

and videos. Much like the Instagram product, Snapchat will also recommend the user select a certain part of a song to add to their photo or video. These songs are put into the following categories: "Featured," "My Favorites," and "Trending." A user can add text to their image by typing it out or drawing it. Further, Snapchat also provides an endless number of gifs that a user could add to their photo or video. See R.1493, 1507-1509.

c. Reddit is a Content Creator

Reddit is a provider of content in that it provides files as templates and other specifications for content—in the form of downloadable files—for the use of its own logo assets, fonts, layouts, and content templates. Those downloadable templates are offered to third party sites, while also being implemented on its own site, for use in the display of Reddit's content. In that aspect, Reddit is a provider of its own content. R.1677. Reddit designed the mechanism of granting Gold, and all logos and emojis associated with the use of Reddit Gold on its platform. Therefore, Reddit is a content creator wherever a post receives "Gold" status. Reddit and Karma are used in tandem, with Reddit stating in its own Gold instructions that, "sending gold carries the same karma value as a regular upvote, but with added design treatment." R.1724.

As noted in Shiamili, adding headings and illustrations is considered content provision. 17 N.Y.3d at 292 (finding that the defendant internet service provider was a "content provider" with respect to the "heading, subheading, and illustration that

accompanied the reposting"). Reddit populates similar content for its users with its Karma and Reddit Gold features with Reddit selecting which items are available for platform users and which are not.

IV. PLAINTIFFS HAVE ALLEGED COGNIZABLE PRODUCT LIABILITY CLAIMS UNDER NEW YORK STATE LAW

A. Plaintiffs Sufficiently Allege That Defendants' Social Media Products Were Not Reasonably Safe

Under New York Law, a manufacturer may be liable for a design defect if its product is not reasonably safe and the defective design was a substantial factor in causing plaintiff's injury. See Hoover v. New Holland North America, Inc., 23 N.Y.3d 41, 53-54 (2014). Defective design is a 'negligence-inspired' concept. Denny v. Ford Motor Co., 87 N.Y.2d 248, 258, 662 (1995), rearg. denied 87 N.Y.2d 969. Liability arises when, "if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner." Id.

New York courts apply the following factors in a risk/utility analysis: (1) the product's utility to the public as a whole; (2) its utility to the individual user; (3) the likelihood that the product will cause injury; (4) the availability of a safer design; (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (6) the degree of awareness of the

product's potential danger that can reasonably be attributed to the injured user; and (7) the manufacturer's ability to spread the cost of any safety-related design changes. Id. Importantly, "[t]he issue of whether a product is defectively designed such that its utility does not outweigh its inherent danger is generally one 'for the jury to decide in light of all the evidence presented by both the plaintiff and defendant.'" Yun Tung Chow v. Reckitt & Colman, Inc., 17 N.Y.3d 29, 33 [2011] (quoting Voss v. Black & Decker Mfg Co., 59 N.Y.2d 102, 108 [1983]).

Plaintiffs' product liability claims are premised on the allegation that Defendants' products are unreasonably dangerous because they contain numerous design characteristics not necessary for the platform's utility, which compelled Gendron to view content as a captive audience and were "implemented solely to increase the profits they derive from each additional user and the length of time they can keep each user dependent on their product." Id. The risk, therefore, outweighed the utility. R.242 (¶(¶ 536- 537). Finally, Plaintiffs allege that, "[a]s a proximate result of these dangerous and defective design attributes of Social Media Defendants' products, Payton Gendron was radicalized and motivated to commit the horrific act of May 14, 2022." R.247 (¶ 558). These allegations clearly allege design defect claims that are cognizable under New York's liberal standard. See C.P.L.R. § 3026; Leon v. Martinez, 84 N.Y.2d 83, 87-88 [1994] (complaint states a cause of

action when the allegations, accepted as true, "fit within any cognizable legal theory.").

B. The Social Media Defendants Owed a Duty of Care to the Tops Shooting Victims

Social Media Defendants assert that Plaintiffs' negligence claims fail as a matter of law because they did not owe plaintiffs "any duty of care" under New York law. Meta Br. at 63. Appellants argue that because Plaintiffs cannot assert claims on behalf of Gendron for his own radicalization no duty can be derived to "the public at large.". This overly restrictive concept of duty is contrary to New York law, and disregards the facts as alleged.[9]

Duty is "a legal term by which we express our conclusion that there can be liability." DeAngelis v. Lutheran Med. Center, 58 N.Y.2d 1053, 1055 (1983). It is a "policy-laden" analysis Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 139 (2002), requiring the balancing of interests, including the wrongfulness of the defendant's actions and the reasonable expectation of care owed. Palka v. Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579 (1994); Turcotte v. Fell, 68 N.Y.2d 432, 437 (1986). Duty is "not something derived or discerned from an algebraic formula, [but is] coalesce[d] from vectored forces including logic, science, [and]

[9] Social Media Defendants challenge only whether a duty was owed, not whether any such duty was breached. Inasmuch as this argument was not raised, it is properly waived. Stauffer v. Stubbs, 13 Misc.3d 635, 639 (Fam. Ct. 2006).

weighty competing socioeconomic policies … .” Palka, 83 N.Y.2d at 585. As such, rigid formalisms have little, if any, place in a duty analysis. Instead, multiple considerations must be weighed in a duty inquiry.

Defendants baselessly assert that the Tops shooting victims here were too far removed from Defendants’ conduct to impose a duty of care. New York Courts have uniformly held that privity is not required to establish a duty under products liability. Sprung v. MTR Ravensburg, Inc., 99 N.Y.2d 468, 472 (2003); Heller v. U.S. Suzuki Motor Corp., 64 N.Y.2d 407, 411 (1985); Codling v. Paglia, 32 N.Y.2d 330, 342 (1973) (the citadel of privity has been eroded). “In strict products liability, a manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from the use of the product ‘regardless of privity, foreseeability or the exercise of due care.’” Godoy v. Abamaster of Miami, Inc., 302 A.D.2d 57, 60 (2d Dep’t 2003) (quoting Gebo v. Black Clawson Co., 92 N.Y.2d 387, 392 (1998)). As Supreme Court properly observed, New York products liability jurisprudence has long held that a manufacturer of a defective product owes a duty of care to protect “any person” injured from the product. See McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, 68 (1962); Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622 (1973) (“the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages.”). This fundamental precept of products liability has

led every appellate division to hold that a manufacturer is liable even where its defective product injures an innocent bystander not using or working with the product. See, e.g., Ciampichini v. Ring Bros., Inc., 40 A.D.2d 289 (4th Dep't 1973); Singer v. Walker, 39 A.D.2d 90 (1st Dep't 1972); Codling v. Paglia, 38 A.D.2d 154 (3d Dep't 1972), aff'd 32 N.Y.2d 330; cf. Tucci v. Bossert, 53 A.D.2d 291, 293 (2d Dep't 1976); see also Cawley v. Gen. Motors Corp., 67 Misc.2d 768 (Sup Ct, Broome Cty 1971). In so holding, this Court averred that "it is both reasonable and just to extend to bystanders the protection against a defective manufactured article." Ciampichini, 40 A.D.2d at 293; see also Bah v. Nordson Corp., 2005 WL 1813023, at *15 (S.D.N.Y. Aug. 1, 2005) (holding that defendant owed a duty to warn because the plaintiff, a bystander, was "in the vicinity" in which the machine was being used).

Against this, Social Media Defendants argue that "it was Gendron … who directly caused Plaintiffs' injuries." Meta Br. at 69. Yet Plaintiffs allege facts showing that it was Defendants' defective and negligently designed products and failure to warn that directly caused Gendron to act as he did, and that it was foreseeable that innocent bystanders like Plaintiffs would be harmed. Put differently, Plaintiffs alleged facts showing that Gendron's actions were a direct and natural consequence of the defects in Appellants' products. Appellants' assertion that a "special relationship" is required to impose a products liability duty to an injured victim finds no support in New York law at all, and the cases they cite

involve either the negligent *distribution* of a product rather than products liability itself (Hamilton v. Beretta U.S.A., 96 N.Y.2d 222, 233 (2001)), or a physician's duty (Pingtella v. Jones, 305 A.D.2d 38, 42-44 (4th Dep't 2003)), or a contractor's duty. None of these are applicable or instructive here. See Einhorn v. Seeley, 136 A.D.2d 122 (1st Dep't 1988).

Nevertheless, as a general proposition, a critical consideration in determining whether a duty exists to a third party is whether "the defendant's relationship with *either the tortfeasor* or the plaintiff places the defendant in the best position to protect against the risk of harm." Hamilton, 96 N.Y.2d at 233 (emphasis added). Here, the Social Media Defendants had a direct and profound relationship with Gendron. They were in a unique position to addict Gendron to their social media products, to force-feed him materials he did not seek out and from which he could not turn away, and to radicalize him in service of increasing screentime engagement. Given the toxic and destructive relationship between Gendron and the Social Media Defendants, the Defendants were undoubtedly in the best position to protect Plaintiffs against the risk of harm arising from their own tortious conduct. See MacPherson, 217 N.Y. at 391. Thus, a duty exists.

To this end, the pleadings clearly allege that the Plaintiffs are foreseeable victims, which is addressed to the scope of the duty. As the trial court correctly observed, a product manufacturer's duty of care extends to "third persons exposed

to a foreseeable and unreasonable risk of harm" caused by the defective product. McLaughlin, 11 N.Y.2d at 68; Ciampichini, 40 A.D.2d at 293. Here, Plaintiffs alleged that Gendron's radicalization on social media—and the subsequent violence as a result—"was neither a coincident nor an accident." R.130 (¶ 5). Rather, "it was the foreseeable consequence of the defendant social media companies' conscious decision to design, program, and operate platforms and tools that maximize user engagement (and corresponding advertising revenue) at the expense of public safety." Id. The Social media Defendants therefore "knew or should have known about the risks of radicalization and violence associated with their products . . . " R.252 (¶ 593). The trial court faithfully applied McLaughlin and Ciampichini under these facts to fix the scope of duty.

Defendants suggest that the trial court's analysis is contrary to Hamilton v. Beretta U.S.A., However, in Hamilton, negligent distribution, rather than products liability, was at issue; no defect in the gun was alleged. The Court observed that a duty "should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs." Id. at 234. Here, by contrast, there is a direct link between the Social Media Defendants' negligent product designs, Gendron's social media addiction, his radicalization, and the shocking violence that occurred on May 14, 2022. Moreover, the Social Media

Defendants were plainly in the best position to prevent the wrongs by designing a safer product. The Supreme Court's holding here is fully consistent with Hamilton.

VI. PLAINTIFFS SUFFICIENTLY ALLEGE PROXIMATE CAUSE, AND A SUPERSEDING, INTERVENING CAUSE AFFIRMATIVE DEFENSE CANNOT BE DETERMINED PRE-ANSWER

Social Media Defendants argue that "Gendron's crimes severed any causal link between [Defendants'] actions and Plaintiffs' injuries." Meta Br. at 71. The concept of proximate or legal cause "stems from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct" and therefore "a variety of factors may be relevant in assessing legal cause." Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 314 (1980). For that reason, the court in Derdiarian held that legal cause is quintessentially a factual determination:

> Given the unique nature of the inquiry in each case, it is for the finder of fact to determine legal cause, once the court has been satisfied that a prima facie case has been established ... To carry the burden of proving a prima facie case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury ... Plaintiff need not demonstrate, however, that the precise manner in which the accident happened, or the extent of injuries, was foreseeable.

Id. at 315 (citations omitted). Indeed, the Court of Appeals had addressed a superseding, intervening cause defense at least seven times, and in *every* instance has found that issues of fact exist. See, e.g., Hain v. Jamison, 28 N.Y.3d 524, 529 (2016); Mazella v. Beals, 27 N.Y.3d 694, 705-06 (2016); Cohen v. St. Regis Paper Co., 65 N.Y.2d 752, 754 (1985); Kush v. City of Buffalo, 59 N.Y.2d 26, 33 (1983);

Derdiarian, 51 N.Y.2d at 314; McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, 70 (1962); Rosebrock v. Gen. Elec. Co., 236 N.Y. 227 (1923).

Under New York law, intervening acts of third parties do not break the chain of legal causation flowing from the defendants' negligence. Rather,

> [w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. ... If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus . . . Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve.

Id.

Criminal acts of third parties do not necessarily break the chain of legal causation flowing from the defendants' negligence. In New York, as in many jurisdictions, the general rule is that one is not liable for the criminal acts of third parties. See, e.g., Kush v. Buffalo, 59 N.Y.2d 26, 33 (1983). But that rule "has no application when the intentional or criminal intervention of a third party or parties is reasonably foreseeable." Id. at 33. "Third-party criminal conduct is considered foreseeable as a matter of law where it is 'reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location.'" Id. (quoting Novikova v. Greenbriar Owners

Corp., 258 A.D.2d 149, 153 (1999)). Where a defendant's negligence creates or exacerbates a foreseeable risk of harm from third-party criminal conduct, the defendant may be held liable for its role in bringing about that conduct. Id.; see, e.g., Green v. Tanyi, 238 A.D.2d 954 (4th Dep't 1997) (risk that a defendant intervenor would intentionally injure other patrons through acts of violence was the risk created by the defendant tavern's failure to control him); see also McCarville v. Burke, 255 A.D.2d 892 (4th Dep't 1998) (the risk that intervenor would injure plaintiff or others on defendants' property through an act of violence was a risk created by defendants' earlier actions with respect to the teenagers).

Appellants argument that "it defies plausibility that Gendron's premeditated murder of ten strangers … was the 'foreseeable risk associated with'" its defective product is, at best, disingenuous. Meta Br. at 73. Plaintiffs' allegations, which must be accepted as true, speak to the direct relationship between what Social Media Defendants could have and did foresee, and the very kind of harm alleged. Plaintiffs' allegations go far beyond suggesting that the harm caused by Social Media Defendants' conduct was merely "possible." Perry v. Rochester Lime Co., 219 N.Y. 60, 63-64 (1916); see, e.g., Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268 (1992) (requiring "some direct relation between the injury asserted and the injurious conduct alleged").

Here, as in Derdiarian, Plaintiffs alleged that Gendron's murderous rampage "was the foreseeable consequence of the Social Media Defendants' conscious decision to design, program, and operate platforms and tools that maximize user engagement (and corresponding advertising revenue) at the expense of public safety." R.130 (¶ 5). Plaintiffs further allege that:

> The Social Media Defendants acted with reckless and extreme conduct, disregarding the substantial probability that harm would result from their conduct. The Social Media Defendants' actions are morally blameworthy, given their knowledge of how their products are designed and operated and that they are directing inherently violent, dangerous, and otherwise harmful content to American youth who do not actually request or even want the content and connections the Social Media Defendants have chosen for them, and their failure to make social media platforms safer to avoid the harm to Plaintiffs that they knew was foreseeable.

R.254 (¶ 605). These allegations, which must be taken as true, are sufficient to establish that Social Media Defendants' defective products were a proximate cause of plaintiffs' injuries. See Billsborrow v. Dow Chemical, 177 A.D.2d 7, 17 (2d Dep't 1992) ("The questions of whether an act is foreseeable and in the course of normal events are indispensable in a determination of legal causation and are generally subject to varying inferences best left to the finder of fact to resolve"); Burke v. Dow Chem. Co., 797 F. Supp. 1128, 1134 (E.D.N.Y. 1992) ("[t]hese issues will likely be capable of resolution only after further discovery and a trial"). A jury should ultimately determine whether Gendron's murder of ten Black supermarket patrons was the natural foreseeable consequences of the Social Media defendant's product

designs.

The cases relied upon by Appellants all involve claims other than products liability (see, e.g., Tennant v. Lascelle, 161 A.D.3d 1565 (4th Dep't 2018) (negligent supervision)); issues of governmental immunity, which is not remotely at issue here (see, e.g., Turturro v. City of New York, 28 N.Y.3d 469 (2016)); and/or criminal acts committed by random third parties, rather than a criminal act of a person who had a relationship with the defendant, which was directly spurred on by the defendant's defective products. See, e.g., Dyer v. Norstar Bank, N.A., 186 A.D.2d 1083 (4th Dep't 1992). Therefore, the Supreme Court correctly concluded that dismissal based on a superseding, intervening cause affirmative defense was not warranted at his pre-answer juncture.

VII. THE FIRST AMENDMENT DOES NOT BAR PLAINTIFFS' CLAIMS

Finally, the Social Media Defendants argue that because "[t]he racist speech of online users … is constitutionally protected," Plaintiffs' claims violate the first amendment by seeking "to impose liability … for allegedly making protected speech available to Gendron." Meta Br. at 3, 40. This is analytical sleight of hand. Plaintiffs do not seek to hold the Social Media Defendants liable for hosting racist content on their platforms but for designing dangerously defective social media products that addict neurologically vulnerable adolescents by targeting them with

physiologically discordant content they don't want and maintain kids' addiction with algorithms that feed them progressively more extreme and violent content.

A. The First Amendment Does Not Protect Tortious Conduct

Social Media Defendants suggest that "their only role was in disseminating third-party speech." Meta Br. at 42. Yet conduct is not automatically shielded by the First Amendment just because it involves speech. Rumsfeld v. F.A.I.R., 547 U.S. 47, 62 (2006). It is well established that "the First Amendment does not prohibit restrictions directed at commerce or conduct from imposing incidental burdens on speech." Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011). See, e.g., Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) ("generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on [speech]"); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573-578 (1977) (permitting right of publicity tort claim despite there being "no doubt" that the broadcast at issue was protected speech).[10]

Against this, Social Media Defendants rely heavily on the Supreme Court's recent decision in Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024). Such reliance

[10] See also Clift v. Narragansett Television L.P., 688 A.2d 805, 811 (R.I. 1996) (television station found liable for interviewing a suicidal man in a manner that disrupted police efforts to talk down); Weirum v. RKO General, Inc., 15 Cal. 3d 40, 48 (1975) (explaining that the First Amendment "does not sanction the infliction of physical injury merely because achieved by word, rather than act"); *cf.* Kenneth R. v. Roman Catholic Diocese, 229 A.D.2d 159, 165 (App. Div. 1997) (explaining that while the First Amendment "prohibits regulation of religious beliefs, *conduct* by a religious entity remains subject to regulation for the protection of society" (cleaned up and emphasis added)).

is misplaced because, again, Plaintiffs do not seek to "limit the platforms' capacity to engage in content moderation—to filter, prioritize, and label the varied messages, videos, and other content their users wish to post." Id. at 2393. Rather, the duty Social Media Defendants are alleged to have violated is simply to design a reasonably safe product, to provide appropriate warnings, and to exercise ordinary care in targeting adolescents with a dangerously addictive platform. Plaintiffs' claims to not seek to "ban" speech "on the ground that it expresses ideas that offend," Meta Br. at 39, because nothing within Plaintiffs' complaint would *require* Social Media Defendants to moderate or censor content in any way. Compare Moody, 144 S. Ct. at 2399 ("At bottom, Texas's law requires the platforms to carry and promote user speech that they would rather discard or downplay.").

Appellants' expansive interpretation of the First Amendment would afford immunity for claims such as fraud, failure to warn, negligent misrepresentation, or medical malpractice.[11] Garden variety tort claims—a golfer's failure to warn those

[11] See, e.g., Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2373 (2018) (noting that "[l]ongstanding torts for professional malpractice, for example, 'fall within the traditional purview of state regulation of professional conduct.'" (quoting NAACP v. Button, 371 U. S. 415, 438 (1963))); Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 883, 884 (1992) (requiring physicians to obtain informed consent), *overruled on other grounds by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Schloendorff v. Soc'y of N.Y. Hospital, 211 N.Y. 125, 129-130 (1914) (Cardozo, J.) (explaining that "a surgeon who performs an operation without his patient's consent commits an assault"); Matter of Eighth Judicial Dist. Asbestos Litig., 33 N.Y.3d 488, 495 (2019) (explaining that "a manufacturer can be held liable for failing to warn of latent dangers resulting from foreseeable uses of its product of which it knew or should have known" (cleaned up)); Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 122 (1995) (explaining that "[a] cause of action for fraud may arise when one misrepresents a material

nearby of an errant shot,[12] or a golf club failing to give adequate warning to patrons about the presence of dangerous conditions on the fairway[13]—would be barred under the Social Media Defendants' absolutist reading of the rule.

B. Artificial Intelligence Driven Algorithms are Not Entitled to First Amendment Protection

The Social Media Defendants suggest that the conduct at issue amounts to "editorial choices about what speech to publish and how to publish it," Meta Br. at 46. Defendants assume—without acknowledging the issue—that the Court should treat their artificial intelligence driven algorithms as the equivalent of human speech. The First Amendment protects the freedom to think and speak as an inalienable *human* right. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). Indeed, leading scholars have explained the deeply concerning consequences of assuming machine speech is legally equivalent to, and deserving of, the same constitutional rights as human speech. See Tim Wu, Machine Speech, 161 U. Pa. L. Rev. 1495, 1496 (2013); Helen Norton, Manipulation and the First Amendment, 30

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fact, knowing it is false, which another relies on to its injury [and that a] false statement of intention is sufficient to support an action for fraud" (internal citations omitted)).

[12] Restatement (Third) of Torts: Phys. & Emot. Harm § 18, cmt. a (2010); see, e.g., Jackson v. Livingston Country Club, Inc., 55 A.D.2d 1045, 1045, 391 N.Y.S.2d 234, 235 (App. Div. 1977) (explaining that "[a] golfer is under a general duty of reasonable care to avoid injury to others which may include warning others in his line of play by the traditional call of 'fore' before hitting the ball").

[13] Staats v. Vintner's Golf Club, LLC, 25 Cal. App. 5th 826, 830 (2018) (concluding that golf club had a duty to warn patrons because, among other things, "it was reasonably foreseeable that yellow jackets in an underground nest on the premises would form a swarm and attack a nearby golfer").

Wm. & Mary Bill Rts. J. 221, 223 (2021).

Here, the "editorial decisions" for which Social Media Defendants seek constitutional protection consist of electronic impulses of artificial intelligence-driven algorithms designed to exploit the neurological immaturity of minor users like Payton Gendron and maximize their engagement by deluging them with psychologically discordant material that they are not seeking but from which they cannot look away. See R.166-69, 244 (¶¶ 148, 149, 152, 153, 156, 546; Moody, 144 S. Ct. at 2393 (providing First Amendment protection to social media platforms only "[t]o the extent that [they] create expressive products"). These artificial-intelligence driven algorithms are software, lines of code designed and written by software engineers to respond to specific variables without any underlying cognitive process or communicative intent. See United States Telecom Ass'n v. Fed. Commc'ns Comm'n, 825 F.3d 674, 742 (D.C. Cir. 2016) (holding that the First Amendment requires examination of the "communicative intent of the individual speakers"). In sum, the Social Media Defendants' artificial intelligence in this instance cannot be fairly characterized as constitutionally protected "editorial judgments;" they serve no communicative purpose, are not "speech," and are not entitled to First Amendment protection. See Universal City Studios, Inc. v. Corley, 273 F.3d 429, 451 (2d Cir. 2001) (using computer code to communicate with a computer is "never protected").

C. Appellants' Reliance on Snyder and Similar Cases is Misplaced

In their First Amendment argument, Social Media Defendants place heavy reliance on the Supreme Court's holding in Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207 (2011) at 461, arguing that "the First Amendment bars tort claims that arise from exposure to hate speech," "no matter whether the claims are asserted under theories of product liability, failure-to-warn, negligence, nuisance, or anything else … ." Meta Br. at 39. Defendants' reliance is misplaced.

In Snyder, "[i]t was what Westboro *said* that exposed it to tort damages." 562 U.S. at 457 (emphasis added). In New York Times v. Sullivan, the plaintiff alleged to have been harmed by "statements in a full-page advertisement." 376 U.S. 254, 256 (1964). Similarly, in Sanders v. Acclaim Entertainment, Inc., the court held that the defendants could avoid liability only "by ceasing production and distribution of their creative works." 188 F. Supp. 2d 1264, 1281 (D. Colo. 2002). Here, Social Media Defendants' offer no explanation for how speech in a traditional public forum is comparable in any way to computer-based algorithms inundating minor and teenage users with unsolicited content on their private, personal devices. See, e.g., R.188, 201, 213 (¶¶ 249, 307, 372) (discussing how algorithmically generated user feeds are designed to maximize user engagement).[14] See also Reno v. Am. C.L.

[14] Defendants also cite James v. Meow Media, Inc., but the court there expressly *declined* to resolve the case on First Amendment grounds. 300 F.l3d 683, 699 (6th Cir. 2002).

Union, 521 U.S. 844, 868 (1997) (invalidating "content-based blanket restriction on speech"); Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 181 (D. Conn. 2002) (extending First Amendment protections to videogames only where the claims target "the expressive elements of the game").

CONCLUSION

For the foregoing reasons, this Court should affirm the Order and award costs to Plaintiffs-Respondents.

Dated: January 21, 2025

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