To Be Argued By:
ERIC A. SHUMSKY
(admitted *pro hac vice*)
Time Requested: 15 Minutes

Erie County Supreme Court Index Nos. 805896/23, 808604/23, 810316/23, 810317/23

New York Supreme Court

APPELLATE DIVISION—FOURTH DEPARTMENT

Index No. 805896/23

DOCKET NOS.
CA 24-00513
CA 24-00515
CA 24-00524
CA 24-00527
CA 24-01447
CA 24-01448

DIONA PATTERSON, individually and as Administrator of the ESTATE OF HEYWARD PATTERSON; J.P., a minor; BARBARA MAPPS, Individually and as Executrix of the ESTATE OF KATHERINE MASSEY; SHAWANDA ROGERS, Individually and as Administrator of the ESTATE OF ANDRE MACKNIEL; 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.; 4CHAN COMMUNITY SUPPORT, LLC,

Defendants-Appellants,

(*Caption continued on inside covers*)

BRIEF FOR DEFENDANT-APPELLANTS META PLATFORMS, INC., ALPHABET, INC., AND REDDIT, INC.

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

Defendants.

Index No. 808604/23

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 the 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 the 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.; TWITCH INTERACTIVE, INC.; ALPHABET, INC.; GOOGLE, LLC; YOUTUBE, LLC; DISCORD INC.; SNAP, INC.; 4CHAN COMMUNITY SUPPORT, LLC,

Defendants-Appellants,

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.

Index No. 810316/23

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

Plaintiff-Respondent,

—against—

MEAN LLC; VINTAGE FIREARMS, LLC; RMA ARMAMENT, INC.; 4CHAN, LLC; 4CHAN COMMUNITY SUPPORT, LLC; PAUL GENDRON and PAMELA GENDRON,

Defendants,

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

Defendants-Appellants.

Index No. 810317/23

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.; 4CHAN, LLC; 4CHAN COMMUNITY SUPPORT, LLC; PAUL GENDRON and PAMELA GENDRON,

Defendants,

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

Defendants-Appellants.

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PRELIMINARY STATEMENT

These consolidated cases arise from a horrific crime.[1] In May 2022, a white supremacist named Payton Gendron killed ten people in a racially motivated mass shooting. Plaintiffs here—survivors of the attack and family members of the victims—brought this suit against a host of parties, including Gendron's parents and the companies from which Gendron purchased weapons and armor. But they also sued Meta, Google, Discord, Reddit, Snap, Twitch, and Amazon (the "Internet-Defendants"), operators of online services that host and disseminate content created by their users. Plaintiffs allege that the Internet-Defendants are liable for Gendron's crimes because he allegedly was exposed to, and influenced by, other people's racist speech online.[2]

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[1] By order dated October 17, 2024, the Court consolidated the appeal in this action (CA 24-00513) together with the appeals in CA 24-00515, CA 24-00524, CA 24-00527, CA 24-01447, and CA 24-01448 for purposes of perfection and argument.

[2] More precisely, the Internet-Defendants are Meta Platforms, Inc.; Facebook, Inc.; Instagram LLC; Snap Inc.; Alphabet, Inc.; Google, LLC; YouTube, LLC; Discord Inc.; Reddit, Inc.; Twitch Interactive, Inc.; and Amazon.com, Inc. Not every Internet-Defendant is a Defendant-Appellant in each of the consolidated cases, and this brief should be deemed filed only on behalf of the Defendants-Appellants in each case.

Plaintiffs' theory is precluded by federal statute, the U.S. Constitution, and bedrock principles of tort law, all of which foreclose tort liability for publishing the speech of others, or for the editorial choices the Internet-Defendants make in curating that speech for their users. Courts have uniformly rejected similar claims seeking to hold defendants—from television broadcasters and video-game distributors to online platforms—liable for violent conduct supposedly resulting from speech they present. Here too, Plaintiffs' claims fail as a matter of law and should have been dismissed for multiple reasons.

First, Section 230 of the Communications Decency Act bars all of Plaintiffs' claims. As both the New York Court of Appeals and the Second Circuit have recognized, that statute prohibits holding online services liable for exercising traditional publishing functions—including deciding whether and how to present third-party content. That is precisely what Plaintiffs seek to do here. Their claims would hold the Internet-Defendants liable for publishing objectionable third-party content to Gendron. And they would impose a duty on online services to monitor, restrict, or remove such content, lest it inspire viewers to engage in misconduct. Section 230 forecloses such claims.

Second, the First Amendment independently bars all of Plaintiffs' claims. The racist speech of online users that allegedly influenced Gendron, while abhorrent, is constitutionally protected—so the Internet-Defendants cannot be held liable for allegedly disseminating that speech. Equally protected are the Internet-Defendants' editorial choices in organizing and presenting third-party speech in curated user feeds, as the U.S. Supreme Court recently confirmed.

Plaintiffs cannot avoid those federal protections by framing their claims in the language of product liability or other common-law torts. Regardless of their labels, Plaintiffs' claims depend on the content—indeed, the viewpoint—of the speech on the Internet-Defendants' services: racist and violent views that allegedly inspired Gendron. Had Gendron viewed benign content like chess tutorials or nature documentaries, Plaintiffs would have no claim. Indeed, the very reason Plaintiffs allege that certain digital design features are "defective" (or require warnings, or are a "nuisance," among other theories) is that they purportedly lead to the dissemination of harmful third-party content. These content-based challenges to publication and speech are barred by Section 230 and the First Amendment.

Third, Plaintiffs' product-liability claims fail because New York law does not treat the communication of intangible information as a "product." The Internet-Defendants provide *services*, not products, when they connect users to content and other people. This Court should reject Plaintiffs' attempt to dramatically extend product-liability law to the realm of ideas and information, where it has never applied and does not belong.

Fourth, Plaintiffs' negligence-based claims fail because Plaintiffs do not allege any cognizable duty of care. New York law imposes no duty to protect the public from third parties' violent crimes, much less a duty on publishers to prevent the allegedly harmful influence of the information they disseminate. Recognizing such a duty here would upend foundational tort principles and open the door to liability that would chill all manner of speech and expression.

Finally, Plaintiffs' tort claims fail for lack of proximate causation. Plaintiffs assert that a complex causal chain leads from the Internet-Defendants' services to their harms. But an extraordinary intervening event—Gendron's long-planned, cold-blooded murders—breaks this chain as a matter of law. New York courts have consistently recognized

that such unanticipated criminal conduct defeats causation. And courts around the country have reached the same conclusion in circumstances like those alleged here: when an individual purportedly became "radicalized" online into committing violence.

In denying the Internet-Defendants' motion to dismiss, the trial court suggested—with little analysis or explanation—that these legal arguments turned on disputed facts or must otherwise await resolution. On the contrary, even taking the Complaints' allegations as true, they fail as a matter of law to state any claim. And the legal principles described above—particularly Section 230 and the First Amendment—should be resolved now, lest valuable avenues for online communication be restricted by the chilling effect of litigation. The decisions below should be reversed, and the Complaints dismissed in full as to the Internet-Defendants.

QUESTIONS PRESENTED

1. Does Section 230 of the Communications Decency Act preclude tort claims where the alleged connection between an online service's conduct and the plaintiff's injuries depends on the service's publication, arrangement, and/or display of third-party user content?

The trial court erroneously answered in the negative.

2. Does the First Amendment protect online services from liability for their choices about how to arrange and present constitutionally protected third-party speech that allegedly inspired violence?

The trial court erroneously answered in the negative.

3. Can online services that host and disseminate third-party ideas constitute "products" under New York product-liability law?

The trial court erroneously answered in the affirmative.

4. Do online services owe a duty to protect the general public from criminal conduct allegedly inspired by third-party content that those services publish?

The trial court erroneously answered in the affirmative.

5. Do intentional criminal acts of an unaffiliated person, like Gendron's crimes here, preclude proximate causation as a matter of law?

The trial court erroneously answered in the negative.

BACKGROUND

I. Factual Background

A. Gendron commits a horrific hate crime.

On May 14, 2022, 18-year-old Payton Gendron engaged in a racially motivated attack at Tops Friendly Market in Buffalo, where he killed ten people and wounded numerous others. R.129(¶¶1-2); R.2664(¶1); R.5027(¶1); R.6115(¶¶1-2).[3] Gendron spent "months" planning his attack. R.140(¶40); *see* R.2702(¶166); R.5038(¶55); R.6152(¶164). He painstakingly researched which firearms, ammunition, and body armor to use. R.140(¶41); R.217(¶¶391-92); R.2724-25(¶¶243, 249); R.5045-51(¶¶81-103); R.6153-58(¶¶165-87). And he drove twice from his home to Tops—over 200 miles away—to canvas the store. R.129(¶2); R.140(¶40); R.2664(¶1); R.2702-03(¶167). On the day of the shooting, Gendron livestreamed his attack. R.141(¶45); R.2690-91(¶¶126-28). He posted online a public link to that livestream, and to his 700-page diary and "manifesto" detailing his plans and attempting "to justify his violence." R.217(¶¶390-93); *see* R.2690(¶126);

[3] As this Background reflects, the factual allegations in all four cases are substantially similar. Subsequent sections of this brief therefore cite only illustrative allegations.

R.5043(¶77.n.4); R.6151(¶161.n.12). In the following days, the livestream was reposted online by various online users who are not parties here. R.132(¶14); R.222(¶¶416-17); R.2805(¶598). The Internet-Defendants removed many of those posts pursuant to their content-moderation policies, and they continue to remove such posts as they identify them. R.1554-59 (New York Attorney General report).

Gendron's writings explained his motive: He was an adherent of white replacement theory, a fringe "conspiracy theory that posits … a deliberate effort by 'elites' to replace the white population of Europe and North America with non-white immigrants." R.2695-96(¶145); *see* R.155(¶91); R.5043-44(¶¶76-77); R.6151(¶¶160-61). Thus, Gendron wrote, he "decide[d] to carry out the attack … [t]o show to the replacers that as long as the White man lives our land will never be theirs and they will never be safe from us." R.154(¶85); *see* R.130(¶4); R.2664-65(¶¶3-4).

Gendron allegedly spent years absorbing "racist, antisemitic, and white supremacist propaganda" posted by third parties online. R.129-31(¶¶3-4, 10); R.171-74(¶¶171-78); *see* R.2664-65(¶3); R.2720(¶¶221-25); R.2763(¶¶409-10); R.5043-45(¶¶76-77, 80); R.6151-52(¶¶160-61,

164). According to Plaintiffs, racists spread their "white supremacist and white nationalist group imagery, content, and memes … to recruit teenagers like Gendron to their evil cause, inculcate them in racist ideology, and motivate them to commit unspeakable acts of racist and antisemitic violence." R.131(¶10); R.157(¶100); *see* R.2713-14(¶¶204-06). Gendron allegedly embraced these invidious theories. Among other things, Gendron was inspired by materials from other mass shooters, including "videos of racist massacres." R.131(¶11); R.175(¶180); *see* R.2723-24(¶241); R.5092(¶244); R.6197(¶328).

B. Plaintiffs allege the Internet-Defendants made racist third-party content available to Gendron.

Plaintiffs do not allege the Internet-Defendants created or posted the extremist content that allegedly inspired Gendron's views; to the contrary, they acknowledge that "white supremacists" and other bigoted individuals did. R.131(¶10); R.157(¶100); *see* R.2713-14(¶¶204-06); R.5043-45(¶¶76-77, 80); R.6151-52(¶¶160-61, 164). The basis for their claims is that the Internet-Defendants allegedly made this third-party content available to Gendron.

The Internet-Defendants own and operate online services. *Supra* 1 n.1. Although different in their particulars, they all host and

disseminate user-created content such as text, photos, and video. *E.g.*, R.183(¶¶228-29). These services allow users "to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Packingham v. North Carolina*, 582 U.S. 98, 104-05 (2017).

Plaintiffs allege that some Internet-Defendants use algorithms to facilitate the publication and arrangement of that user-created content. Some algorithms allegedly display content based primarily on a user's detected "preference[s]." R.199-200(¶¶295, 301); *see* R.2716-17(¶214); R.5086(¶220); R.6191-92(¶304). When a user "demonstrates an interest" in content, those algorithms prioritize "more of the same" when selecting further content to display to that user. R.2716-17(¶214); *see* R.193(¶267); R.194(¶274); R.5086(¶220); R.6191-92(¶304). "So, for example, a person who watches cooking shows on YouTube is more likely to see cooking-based videos and advertisements for cookbooks." *Twitter v. Taamneh*, 598 U.S. 471, 481 (2023). Other algorithms arrange content based on the content's recency and how many users have expressed approval of that content. R.218-19(¶¶397-404); R.5087(¶222); R.6192(¶306).

According to Plaintiffs, these algorithms increase users' engagement with content, allegedly to the point of "addiction." R.244(¶546); R.2796(¶558); R.5042-43(¶¶73-75); R.6150-51(¶¶157-59). Plaintiffs assert that Gendron became "obsessed" with specific kinds of third-party content on various Internet-Defendants' services. R.131(¶¶10-11); R.172(¶¶162-68); R.2720-21(¶¶225-31); R.5043(¶75); R.6150-52(¶¶157-59, 164). Algorithms allegedly directed Gendron to "progressively more extreme" content, where third parties "promoted racism, antisemitism, and gun violence." R.172-74(¶¶171-76); *see* R.2721-23(¶¶229-39); R.5086-87, 5091(¶¶220-23, 238); R.5102-04(¶¶283-86); R.6191-92(¶¶304-07); R.6207-08(¶¶367-69). Gendron allegedly viewed the most extreme versions of this content on a website called 4chan (not one of the Internet-Defendants), where he interacted with "hate groups and racist[] conspiracy mongers." R.173-74(¶175); *see* R.2722(¶238); R.5104(¶287); R.6212(¶386). According to Plaintiffs, excessive exposure to this material radicalized Gendron into committing

murder. R.129-30(¶¶3-4); R.2664-65(¶¶2-3); R.2723-24(¶241); R.5028(¶7); R.6115-16(¶5).[4]

II. Procedural History

Four groups of Plaintiffs sued in Erie County Supreme Court. They named a host of individuals and companies including Gendron's parents, the companies from which Gendron purchased weapons and gear, employees of those companies, and online services including the Internet-Defendants. They did not sue Gendron.

As relevant to the Internet-Defendants, Plaintiffs pleaded various tort theories. Those claims focused on the Internet-Defendants' presentation of third-party content that, according to Plaintiffs, radicalized Gendron and led him to commit crimes. In particular, Plaintiffs alleged that the Internet-Defendants' services are defectively and negligently designed because they "direct[]" minors to "racist,

[4] Plaintiffs also allege that various Internet-Defendants' services contain other purportedly addictive features, such as the ability to "like" content, make content private, "upvote" or "downvote" content based on the user's reaction, receive a "karma" score for the helpfulness of the user's participation, receive notifications when new content is posted, and post content that disappears after a period of time. *E.g.*, R.183-84(¶¶229-32); R.187(¶245); R.197(¶¶286-87); R.212(¶368); R.213(¶372); R.215(¶¶382-83); R.218(¶397); R.219(¶404); R.2717(¶215); R.2747(¶370); R.2771(¶439); R.2773-75(¶¶450-55); R.2779-80(¶471); R.5087(¶222); R.6192(¶306). Plaintiffs do not allege, however, that Gendron used those features, much less that they contributed to Gendron's purported addiction, radicalization, and decision to commit a mass shooting.

antisemitic, and violence provoking content" without providing safeguards or controls. *E.g.*, R.242-47(¶¶534-60); R.249-50(¶¶573-82); R.2795-99(¶¶552-69); R.2806-08(¶¶605-20); R.5133-37(¶¶434-53); R.5140-42 (¶¶473-89); R.6239-44(¶¶547-66); R.6246-49(¶¶586-602). Plaintiffs also asserted a failure-to-warn theory, alleging that the Internet-Defendants "failed to warn minor users or their parents that their children would be inundated with" such material. R.247-49(¶¶562-71); *see also, e.g.*, R.250-52(¶¶584-94); R.2802-04(¶¶583-93); R.2808-10(¶¶622-34); R.5137-40 (¶¶454-72); R.5142-44(¶¶490-502); R.6244-46(¶¶567-85); R.6249-51(¶¶603-15).

Certain Plaintiffs also brought claims related to Gendron's attack video. They alleged that some Internet-Defendants, by not preventing the video from being posted (or not removing it quickly enough), invaded victims' privacy rights and negligently inflicted emotional distress. R.254(¶¶607-14); R.256(¶¶625-28); R.2804-05(¶¶594-603); R.2812-13(¶¶647-55).

Plaintiffs also brought unjust-enrichment claims, alleging that certain Internet-Defendants financially "benefited from the time Payton Gendron spent on their services viewing racist, antisemitic, and

violence promoting material," and from the attack video's circulation. R.252(¶598); R.255(¶¶616-20); *see* R.2810-11(¶¶635-46); R.5147(¶¶516-22); R.6255-56(¶¶643-49).

Finally, the *Salter*, *Jones*, and *Stanfield* Plaintiffs claimed that certain Internet-Defendants created a public nuisance by exposing Gendron to "extremist and racist content," allegedly "creat[ing] a condition that permanently injured Plaintiffs, causing lasting interference with their health, safety, [and] welfare." R.2799(¶572); R.2800(¶575); R.5144-46(¶¶503-15); R.6253-55(¶¶630-42).

The Internet-Defendants moved to dismiss each action. As relevant here, the trial court rejected the defenses that would have mandated dismissing all or most of Plaintiffs' claims, namely, that: (1) Section 230 barred Plaintiffs' claims; (2) the First Amendment barred Plaintiffs' claims; (3) the Internet-Defendants' services were not products under New York law; (4) the Internet-Defendants owed no duty of care to Plaintiffs; and (5) Plaintiffs failed to plausibly allege proximate causation. R.30-39; R.65-74; R.80-88; R.95-97; R.106-15; R.122-24.

Plaintiffs in *Jones* and *Stanfield* subsequently filed amended complaints. The trial court denied motions to dismiss those complaints, relying on its earlier opinions. R.95-97, 122-24. All of the motion-to-dismiss orders involving the Internet-Defendants are included in these consolidated appeals. R.30-39; R.65-74; R.80-88; R.95-97; R.106-15; R.122-24.

STANDARD OF REVIEW

Dismissing a complaint is appropriate when the allegations fail to "fit within any cognizable legal theory" under which plaintiffs could prevail. *Univ. Hill Realty v. Akl*, 214 A.D.3d 1467, 1468 (4th Dep't 2023). This Court reviews de novo the denial of a motion to dismiss. *Consol. Rest. Operations v. Westport Ins.*, 205 A.D.3d 76, 81 (1st Dep't 2022).

ARGUMENT

I. Plaintiffs' Claims Are Barred By Section 230 Of The Communications Decency Act.

Section 230 forbids suing an online service on any claim that treats it as the publisher of other people's content. That federal prohibition forecloses all of Plaintiffs' claims, which seek to hold the

Internet-Defendants liable for third-party content they allegedly published and the methods by which they published it.

Congress enacted Section 230 to combat "the threat that tort-based lawsuits pose to freedom of speech" on the Internet. *Shiamili v. Real Estate Grp. of N.Y.*, 17 N.Y.3d 281, 286-87 (2011) (quoting *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997)). Such protection is essential "to maintain[ing] the robust nature of Internet communication." *Id.* To that end, "Section 230 establishes 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][1]), and it preempts any state law—including imposition of tort liability—inconsistent with its protections (*see* 47 U.S.C. § 230[e][3])." *Id.* at 286.

Embracing a "national consensus," the Court of Appeals has "interpreted Section 230 immunity broadly, so as to effectuate Congress's policy choice not to deter harmful online speech through the route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Id.* at 288 (cleaned up). In short, Section 230 bars all "lawsuits seeking 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.

Consistent with that broad prohibition, the Second Circuit and other courts have consistently applied Section 230 to reject claims like Plaintiffs'. *See Force v. Facebook*, 934 F.3d 53 (2d Cir. 2019) (dismissing claims seeking to hold Facebook liable for terrorist attacks allegedly inspired by material posted by Hamas). For over "a quarter of a century," courts "address[ing] highly analogous claims by victims of terrorist violence … inflicted by actors who accessed and consumed hate material on social media sites … have been in general agreement that the text of Section 230 should be construed broadly in favor of immunity." *M.P. ex rel. Pinckney v. Meta Platforms*, 692 F. Supp. 3d 534, 538 (D.S.C. 2023) (dismissing product-liability claims that racist user-speech inspired a mass shooting), *appeal docketed*, No. 23-1880 (4th Cir. Aug. 24, 2023); *e.g.*, *Gonzalez v. Google*, 2 F.4th 871 (9th Cir. 2021) (claims involving YouTube videos alleged to have inspired ISIS terrorist attack), *vacated on other grounds*, 598 U.S. 617 (2023). Imposing liability under these circumstances would require online

services to drastically curtail online expression, which is exactly what Section 230 sought to prevent.

Under these established principles, Section 230 bars Plaintiffs' claims because they would hold the Internet-Defendants liable as publishers of speech created and posted by others. *Infra* § I.A. The trial court failed to engage with these principles, instead declining to apply Section 230 simply because Plaintiffs' claims are couched in terms of product liability. That was error. There is no product-liability exception to Section 230, and courts repeatedly have applied Section 230 to dismiss those and the other claims that Plaintiffs assert here. *Infra* § I.B.1. Plaintiffs say they are challenging only design features of the Internet-Defendants' services, but those features are simply means by which the Internet-Defendants published the third-party content at issue. *Infra* § I.B.2. Plaintiffs' effort to plead around Section 230 should be rejected and their claims dismissed in full.

A. Because Plaintiffs' claims arise from the alleged publication of third-party speech, they are foreclosed by Section 230.

A defendant is "immune from state-law liability" under Section 230 when three elements are met: (1) the defendant is a "provider … of

an interactive computer service"; (2) the plaintiff's claims treat the defendant as the "publisher" of the relevant content; and (3) the content was "provided by another information content provider." *Shiamili*, 17 N.Y.3d at 286; 47 U.S.C. § 230(c)(1). All three elements are satisfied here.

1. The Internet-Defendants provide interactive computer services and they did not provide the content at issue.

The first and third elements of Section 230 plainly are met.

Plaintiffs concede that each Internet-Defendant is a "provider" of an "interactive computer service"—i.e., they "provide[] or enable[] computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2); *see* R.183(¶227); R.193(¶265); R.204 (¶327); R.213(¶375); R.218(¶397). Courts have uniformly so held. *E.g.*, *Force*, 934 F.3d at 64; *Does 1-6 v. Reddit*, 51 F.4th 1137, 1139 (9th Cir. 2022).

There also is no real dispute that the content was "provided by another information content provider" who was "responsible, in whole or part, for [its] creation or development." 47 U.S.C. § 230(c)(1), (f)(3). Specifically, Plaintiffs allege that third-party users, not the Internet-Defendants, provided the content that allegedly radicalized Gendron.

And Gendron himself provided the livestream video of the attack. *Supra* 7. Those allegations are dispositive: "A Web site is generally not a 'content provider' with respect to [content] posted by third-party users." *Shiamili*, 17 N.Y.3d at 290.

2. Plaintiffs' claims treat the Internet-Defendants as publishers of the content.

Plaintiffs' claims also fall squarely within the second element of Section 230 because they treat the Internet-Defendants as the publishers of the third-party content that Gendron allegedly encountered on their services. Plaintiffs' theory is that Gendron committed his crime because of that content, and that the Internet-Defendants should be held liable because they published that material to him instead of preventing him from seeing it. Those claims thus seek to hold the Internet-Defendants liable for exercising a publisher's traditional functions, "such as deciding whether to publish, withdraw, postpone or alter" that content. *Shiamili*, 17 N.Y.3d at 289; *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) ("[T]he very essence of publishing is making the decision whether to print or retract a given piece of content.").

In choosing whether to publish or exclude content, publishers necessarily choose *how* to do so—for instance, how to select, arrange, display, and promote content, or conversely, how to screen or remove it. Section 230 protects such "editorial choices regarding the display of third-party content," including "where … content should reside and to whom it should be shown." *Force*, 934 F.3d at 66-67; *see also Jane Doe No. 1 v. Backpage.com*, 817 F.3d 12, 20-21 (1st Cir. 2016) (the "structure and operation" of a website, which "reflect[s] choices about what content can appear on the website and in what form, are editorial choices that fall within the purview of traditional publisher functions").

Under these principles, Section 230 bars Plaintiffs' claims, which challenge the Internet-Defendants' alleged dissemination of two types of third-party content.

Claims Based On Content That Gendron Allegedly Viewed. Plaintiffs primarily seek to hold the Internet-Defendants liable for publishing third-party material that allegedly helped radicalize Gendron or helped him prepare for his attack. *Supra* 9-12. Such claims, which are premised on the harms allegedly flowing from third-party content, are classic examples of what Section 230 prohibits. *See Force*,

934 F.3d at 65; *Dyroff v. Ultimate Software Grp.*, 934 F.3d 1093, 1097-98 (9th Cir. 2019); *Shiamili*, 17 N.Y.3d at 288.

To avoid Section 230, Plaintiffs say they do not seek to hold the Internet-Defendants liable for *publishing* this content, but for *how* they did so. R.241(¶¶530-533). In fact, Plaintiffs repeatedly allege the Internet-Defendants should have prevented Gendron from accessing objectionable third-party content altogether. *E.g.*, R.188(Patt.Compl.¶249) (asserting failure to "protect te[e]ns from disturbing content"); R.2796(Salt.Compl.¶561) (asserting failure to "limit[] [young users'] overexposure to extremist, racist, antisemitic, violent, and hate oriented views"); R.201(Patt.Compl.¶308); R.243(Patt.Compl.¶539). By their terms, Plaintiffs' claims seek to hold the Internet-Defendants liable for the content they allegedly displayed to Gendron, not just the means by which they did so.

Regardless, Plaintiffs' supposed distinction between *what* was published and *how* it was published makes no difference under Section 230. Decisions about how to publish content "fall[] within the heartland of what it means to be the 'publisher' of information under Section 230(c)(1)." *Force*, 934 F.3d at 65. After all, "arranging and distributing

third-party information" to form "connections" between content and viewers is "an essential result of publishing." *Id.* at 66. If Section 230 did not apply to "organizing and displaying content," its protections would be "eviscerate[d]." *Id.* Plaintiffs' challenges to various design features boils down to a claim that some Internet-Defendants promoted objectionable content to Gendron. *E.g.*, R.172-73(¶171); R.173(¶173). But Section 230 "does not differentiate between 'neutral' and selective publishers." *Shiamili*, 17 N.Y.3d at 289. Rather, Congress "made a … policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others." *Id. Shiamili* therefore rejected the argument that an online service lost Section 230 immunity when it "promoted" an allegedly defamatory article from a comment thread to a "stand-alone post" with its own heading, accompanying image, and discussion thread. *Id.* at 285.

As explained in greater detail below (in § I.B.2), it is equally well-settled that an online service's use of "recommendations and notifications" to promote third-party content to users are protected publisher functions under Section 230 because they are "tools meant to

facilitate the communication and content of others." *Dyroff*, 934 F.3d at 1098. Section 230 does not turn on "the specific edit[orial] or selection process" that a publisher uses to determine how to present content; it applies equally when online services use automated tools, algorithms, or other features to "make [certain] content more 'visible,' 'available,' and 'usable.'" *Force*, 934 F.3d at 67, 70. After all, "making information more available is … an essential part of traditional *publishing*." *Id.* at 70. Indeed, Section 230 expressly applies to "tools" that "filter," "pick," "choose," "digest," and "organize" content, 47 U.S.C. § 230(f)(4)(A)-(C)—just the sorts of features that Plaintiffs allege should give rise to liability here.

Claims Based On Content That Gendron Created. Plaintiffs also seek to hold the Internet-Defendants liable for the video that Gendron originally posted and other users later reposted. *E.g.*, R.254(¶¶608-613); R.256(¶¶626-28). Plaintiffs say the Internet-Defendants should have prevented Gendron's video from being posted or removed it sooner. *See, e.g.*, R.209(¶354); R.222(¶¶416-17). But Section 230 precludes "allegations based on … refusal to remove offensive content authored by another." *Herrick v. Grindr*, 765 F. App'x

586, 590 (2d Cir. 2019) (cleaned up); *Shiamili*, 17 N.Y.3d at 289 (no liability for "deciding whether to … withdraw" content). That is true of all Plaintiffs' claims based on Gendron's video, regardless of how they are styled. *Herrick*, 765 F. App'x at 590 (affirming dismissal of intentional- and negligent-infliction-of-emotional-distress claims); *Word of God Fellowship v. Vimeo*, 205 A.D.3d 23, 26 (1st Dep't 2022) (unjust enrichment); *Ratermann v. Pierre Fabre USA*, 651 F. Supp. 3d 657, 670 (S.D.N.Y. 2023) (invasion of privacy). In short, "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Fair Hous. Council of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (en banc).

B. The trial court's product-liability rationale contravenes Section 230.

1. Section 230 precludes product-liability claims premised on publishing third-party content.

In denying the motions to dismiss, the trial court did not analyze the elements of Section 230. Instead, it stated only that "plaintiffs have set forth sufficient facts with regard to each defendant to allege viable causes of action under a products liability theory." R.35.

If the court meant that factual development was required, that was error. Because Section 230 "protects websites not only from ultimate liability, but also from having to fight costly and protracted legal battles," it must be applied "at the earliest possible stage of the case." *Nemet Chevrolet v. Consumeraffairs.com*, 591 F.3d 250, 255 (4th Cir. 2009); *see also Shiamili*, 17 N.Y.3d at 286 (applying Section 230 to dismiss complaint before discovery); *Word of God Fellowship*, 205 A.D.3d at 29 (same).

The court likewise erred as a matter of law in adopting Plaintiffs' argument that Section 230 is "irrelevant" to product-liability claims. R.34. "[T]he name of the cause of action" does not "matter" to Section 230's applicability, and "a plaintiff cannot sue someone for publishing third-party content simply by changing the name of the theory." *Barnes v. Yahoo!*, 570 F.3d 1096, 1101-02 (9th Cir. 2009).

That conclusion follows from the statute's text, which protects online services from any claim that "trea[ts]" them as the "publisher or speaker" of third-party content. 47 U.S.C. § 230(c)(1); *see Zeran*, 129 F.3d at 330 (Section 230 applies to "*any* cause of action") (emphasis added). When Congress wished to exclude particular claims from

Section 230's broad sweep, it knew how to do so: Section 230 carves out federal criminal statutes and intellectual property laws. 47 U.S.C. § 230(e)(1), (e)(2). Congress chose not to similarly exclude product-liability claims. *See Andrus v. Glover Constr.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied….").

Thus, in determining whether Section 230 applies, courts must "look beyond the claim's formal elements" and ask whether "holding th[e] defendant liable requires treating them as a publisher." *Henderson v. Source for Pub. Data*, 53 F.4th 110, 124 (4th Cir. 2022). "This rule prevents plaintiffs from using 'artful pleading' to state their claims only in terms of the interactive computer service provider's own actions, when the underlying basis for liability is unlawful third-party content published by the defendant." *Daniel v. Armslist*, 926 N.W.2d 710, 724 (Wis. 2019) (barring negligence, emotional distress, and public nuisance claims arising from mass shooting).

There is nothing unique about product-liability claims for these purposes. Even if the Internet-Defendants' services qualified as products (which they do not, *infra* Part III), when a plaintiff's claim is

"inextricably linked" to an "alleged failure to edit, monitor, or remove … offensive content," Section 230 applies. *Herrick*, 765 F. App'x at 591. Indeed, the "unanimous view" of courts addressing this issue is that Section 230 bars "claims alleging that defectively designed internet products allowed for transmission of harmful third-party communications." *In re Facebook*, 625 S.W.3d 80, 94 (Tex. 2021).[5] Simply put, Plaintiffs cannot "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." *M.P.*, 692 F. Supp. 3d at 538.

[5] *See also, e.g.*, *Estate of Bride v. Yolo Techs.*, 112 F.4th 1168, 1179-80 (9th Cir. 2024) (product-liability claims that online service's design "made it uniquely dangerous to minors" barred by Section 230 because they are "attempt[s] to hold [the online service] responsible for users' speech or [its] decision to publish it"); *Herrick*, 765 F. App'x at 590 (rejecting "manufacturing and design defect claims" that would impose liability for "failure to combat or remove offensive third-party content"); *Lama v. Meta Platforms*, 2024 WL 2021896, at *6 (N.D.N.Y. May 6, 2024) (product-defect claims "treat Defendants as the publishers" of third-party information where the alleged design flaws were "allow[ing] users to post content that can be harmful to others" and "not hav[ing] a mechanism to require Defendants to remove such content when reported"); *L.W. v. Snap*, 675 F. Supp. 3d 1087, 1096-98 (S.D. Cal. 2023) (dismissing product-liability claims); *Wozniak v. YouTube*, 100 Cal. App. 5th 893, 912-15 (2024), *as modified on denial of reh'g* (Apr. 2, 2024) (negligent design and failure-to-warn claims "predicated" on third-party videos treated YouTube as a publisher).

2. Plaintiffs' allegations targeting certain features of the Internet-Defendants' services do not render Section 230 inapplicable.

The substance of Plaintiffs' allegations confirms the trial court's error. Plaintiffs argued below that Section 230 does not apply because their claims do not concern publishing activity but rather the "underlying design, programming, and engineering of [Defendants'] platforms." R.241-42(¶¶530-33). Specifically, Plaintiffs take aim at (1) certain Internet-Defendants' use of algorithms to deliver content; (2) the Internet-Defendants' alleged lack of effective control mechanisms and warnings; and (3) the allegedly addictive features of certain Internet-Defendants' services. *E.g.*, R.243(¶539); R.246(¶552); R.247-48(¶562).

Far from avoiding Section 230, these allegations confirm its applicability. The challenged features are simply ways in which the Internet-Defendants publish user content. That is clear from the Complaints themselves. When Plaintiffs describe the harm these features allegedly caused, they invariably tie it to the third-party content with which Gendron allegedly engaged. R.129-30(¶3); R.156-57(¶97); R.173-74(¶¶172-77); R.200(¶305); R.248(¶564). That is no

accident, as there could be no harm to Plaintiffs if Gendron had engaged with user-provided content on a benign topic like "cooking-based videos." *Taamneh*, 598 U.S. at 481. Plaintiffs' theories all depend on the Internet-Defendants having allegedly published particular harmful content, and their claims seek to hold Defendants liable for having done so. That is true for each of the features that Plaintiffs put at issue:

Recommendation Algorithms and Content Delivery. Plaintiffs allege that certain Internet-Defendants used algorithms that recommended to Gendron "racist, antisemitic, and violence-promoting" content created by other users. R.221-22(¶¶414-15); *see supra* 11.

As alleged, though, the very function of recommendation algorithms is to determine when and how to publish third-party content. *Supra* 10. Algorithms facilitate online services' ability to "select[] and rank[]" content for users to view, "most often based on a user's expressed interests and past activities," but also "based on other factors." *Moody v. NetChoice*, 144 S. Ct. 2383, 2403 (2024). In doing so, online services are acting as "editors" exercising "protected editorial control." *Id.* at 2403, 2405-06. That is why courts have repeatedly held that using algorithms to arrange and display third-party content is

protected by Section 230. *See, e.g.*, *Gonzalez*, 2 F.4th at 896; *Dyroff*, 934 F.3d at 1098; *V.V. v. Meta Platforms*, 2024 WL 678248, at *10 (Conn. Super. Ct. Feb. 16, 2024).

The Second Circuit's decision in *Force*, a case brought by victims of terrorist attacks, is instructive. The court held that Section 230 barred claims targeting Facebook's use of algorithms that "suggest content to users," including content allegedly encouraging terrorist attacks. 934 F.3d at 65. Such algorithms are simply a means of "arranging and distributing third-party information." *Id.* at 66. This is true regardless of whether the algorithms are agnostic to users' interests, or if they select, recommend, or display third-party content that is matched to users' preferences. *Id.* at 67; *see Shiamili*, 17 N.Y.3d at 289 (Section 230 "does not differentiate between 'neutral' and selective publishers"). It may be true that, "as compared to … other editorial decisions," algorithms can "present users with targeted content of even more interest to them." *Force*, 934 F.3d at 67. But "it would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing

the functions of publishers, they are no longer immunized from civil liability." *Id*.

Here, Plaintiffs' allegations about algorithms simply accuse the Internet-Defendants of publishing certain content too effectively. For instance, the Complaints allege that algorithms are "successful in getting users to view recommended content" (R.199(¶297)); "direct[]" users to certain content (R.174(¶177)); "send large volumes of carefully targeted video content to each user" (R.193(¶267)); and "identify additional [content] to play" (R.194(¶274)). Because these claims seek to impose liability for the core publishing function of presenting third-party content to users, they are barred.

Lack of Effective Control Mechanisms and Failure To Warn. Next, Plaintiffs allege that the Internet-Defendants' services failed to provide mechanisms to prevent Gendron from consuming harmful user-provided content (or posting such content himself). *E.g.*, R.256(¶627) (alleging failure "to implement feasible technology to prevent Gendron's murder video from being uploaded"); R.244(¶544) ("lack of parental controls"). They further claim the Internet-Defendants failed to warn "minor users or parents" about objectionable

third-party content on their services. R.248(¶564); *see also* R.247-49(¶¶561-71); R.250-52(¶¶583-94).

But the gravamen of both theories is that "such features would [have] ma[d]e it more difficult" for Gendron to view allegedly harmful content or would have made it "easier" for the Internet-Defendants "to remove" content. *Herrick*, 765 F. App'x at 590. These are claims that the Internet-Defendants failed to remove or limit the dissemination of third-party content and, as such, they fall squarely within Section 230. Alleging a "failure to implement basic safety measures" is "merely another way of claiming that [the defendant] was liable for publishing the communications" between users. *Doe v. MySpace,* 528 F.3d 413, 419-20 (5th Cir. 2008); *see also Herrick v. Grinder*, 306 F. Supp. 3d 579, 590-91 (S.D.N.Y. 2018).[6]

So too with failure-to-warn claims. "A warning about third-party content is a form of editing, just as much as a disclaimer printed at the

[6] *Accord In re Facebook*, 625 S.W.3d at 94 (allegations about a "lack of safety features" seek to hold the defendant "liable for its failure to combat" third-party content); *Doe II v. MySpace*, 175 Cal. App. 4th 561, 573 (2009) ("That appellants characterize their complaint as one for failure to adopt reasonable safety measures does not avoid the immunity granted by section 230."); *Wozniak*, 100 Cal. App. 5th at 912-13 (claims regarding "security protocols" are "predicated on [] third-party content").

top of a page of classified ads in a newspaper would be." *In re Facebook*, 625 S.W.3d at 94. Plaintiffs' theory is that the *content* is the danger and that the Internet-Defendants have failed to nullify that danger by removing the content: "The warnings Plaintiffs seek would only be necessary because of [Defendants'] allegedly inadequate policing of third-party content transmitted via its platforms." *Id.*[7]

In short, Section 230 bars claims "alleging that defectively designed internet products allowed for transmission of harmful third-party communications"; a contrary rule would improperly hold online services "liable for failing to protect Plaintiffs from third-party users on the site." *In re Facebook*, 625 S.W.3d at 94 (collecting cases); *accord Wozniak*, 100 Cal. App. 5th at 914-15. That is what Plaintiffs seek to do here.

Features Allegedly Causing Addiction. Finally, Plaintiffs have suggested that the Internet-Defendants' alleged conduct falls

[7] *Accord Bride*, 112 F.4th at 1180 (a "failure to warn claim faults [the online service] for not mitigating, in some way, the harmful effects of … content" and therefore "is essentially faulting [the online service] for not moderating content"); *Herrick*, 765 F. App'x at 591 (failure-to-warn claim was "inextricably linked to … alleged failure to edit, monitor, or remove" content); *Doe v. Kik Interactive*, 482 F. Supp. 3d 1242, 1252 (S.D. Fla. 2020); *McDonald v. LG Elecs. USA*, 219 F. Supp. 3d 533, 538-40 (D. Md. 2016); *Wozniak*, 100 Cal. App. 5th at 914-15.

outside of Section 230 because their services use features that supposedly "addict" minors. R.244(¶546); R.2798(¶566). That argument likewise fails.

This is not a traditional addiction case: Plaintiffs do not claim that they were addicted to the Internet-Defendants' services. Instead, Plaintiffs' theory is that certain Internet-Defendants' services have allegedly addictive features, which caused Gendron *to view particular kinds of third-party content*, which allegedly radicalized him into committing a violent attack. *E.g.*, R.200(¶305); R.204(¶326) (asserting that some Internet-Defendants' algorithms created "addict[ion] *to extreme content*," and posed undisclosed risks of "addiction and radicalizing exposure *to racist[], antisemitic, and violent content*") (emphases added). Section 230 precludes these claims, which turn on allegedly "dangerous" content. R.200-01(¶306).

Plaintiffs' addiction-related allegations are just another way of challenging the publication of third-party content, which is the only purported link between Gendron's supposed addiction and his attack. *See, e.g.*, R.129-30(¶3); R.131(¶11). Because those allegations—like the rest of Plaintiffs' claims—seek to hold the Internet-Defendants liable for

publishing material created and posted by others, they are barred by Section 230.

II. The First Amendment Precludes Plaintiffs' Claims.

The First Amendment offers independent protections complementary to those provided by Section 230. Although the speech that Gendron allegedly saw on the Internet-Defendants' services was undoubtedly repugnant, it was protected by the Constitution. *Infra* § II.A.1. The First Amendment therefore forbids what Plaintiffs seek: tort liability for disseminating lawful speech based on its content and viewpoint. *Infra* § II.A.2-3. That the Internet-Defendants allegedly used technology to help curate and present such speech to users provides no basis for withdrawing the First Amendment's protections. To the contrary, the First Amendment "does not go on leave when social media [platforms] are involved," and their curatorial choices are protected expressive activities. *Moody*, 144 S. Ct. at 2394; *infra* § II.B.

A. The First Amendment prohibits holding the Internet-Defendants liable for disseminating and curating third-party speech.

1. The First Amendment precludes tort liability for distributing protected speech.

The First Amendment forecloses civil tort claims premised on constitutionally protected speech. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). Indeed, because the "fear of damage awards" can "be markedly more inhibiting" to expression "than the fear of prosecution," *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964), courts are "particularly wary" of speech-based tort liability, *Sanders v. Acclaim Ent.*, 188 F. Supp. 2d 1264, 1281 (D. Colo. 2002); *accord McCollum v. CBS*, 202 Cal. App. 3d 989, 1003 (1988) (imposing "postpublication civil damages … would be just as violative of the First Amendment as a prior restraint"). There is "particular value in resolving [such First Amendment] claims at the pleading stage, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms." *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 457 (S.D.N.Y. 2012) (cleaned up). The trial court failed to heed these principles when it brushed aside the Internet-Defendants' First Amendment arguments—

without explanation—as "without merit at this stage of the litigation." R.39.

This case involves the dissemination of third-party speech that, offensive as it is, is constitutionally protected. While there are "well-defined and narrowly limited classes of speech" not protected by the First Amendment, *United States v. Stevens*, 559 U.S. 460, 468-69 (2010)—for instance, incitement "directed [at] producing imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)—Plaintiffs have never argued that the speech Gendron allegedly encountered on Internet-Defendants' services falls into any of those narrow categories. Nor could they: "Even hateful, racist, and offensive speech … is entitled to First Amendment protection." *Million Youth March v. Safir*, 63 F. Supp. 2d 381, 391 (S.D.N.Y. 1999); *accord Brandenburg*, 395 U.S. at 446 (First Amendment protects racist speech); *Volokh v. James*, 656 F. Supp. 3d 431, 445 (S.D.N.Y. 2023) (a law, enacted in response to the Buffalo shooting, targeting "speech that 'vilifies' or 'humiliates' a group or individual … clearly implicates [] protected speech").

Simply put, it is a "bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend." *Matal v. Tam*, 582 U.S. 218, 223 (2017). That is why the U.S. Supreme Court held in *Snyder* that the First Amendment bars tort claims that arise from exposure to hate speech, even when it inflicts "great pain." 562 U.S. at 448, 461 (emotional distress claims against protestors who picketed military funeral carrying signs reading "God Hates Fags" and "Thank God for 9/11").

That Gendron engaged in real-world violence does not alter the analysis. No matter whether the claims are asserted under theories of product liability, failure-to-warn, negligence, nuisance, or anything else, courts have consistently held that the First Amendment forecloses tort liability arising from protected speech that allegedly inspired violent acts:

- *Wilson v. Midway Games*, 198 F. Supp. 2d 167, 182 (D. Conn. 2002) (First Amendment a "complete bar" to product-liability claims alleging that a violent video game addicted a child and caused him to commit fatal stabbing);
- *Sanders*, 188 F. Supp. 2d at 1268-69 (product-liability and negligence claims against movie and game distributors and websites alleging that the content they disseminated inspired Columbine school shooting, including by making "violence pleasurable and attractive");

- *Davidson v. Time Warner*, 1997 WL 405907 (S.D. Tex. Mar. 31, 1997) (negligence and product-liability claims alleging that violent music provoked listener to kill policeman);
- *McCollum*, 202 Cal. App. 3d at 1003 (claims based on Ozzy Osbourne song that allegedly caused minor's suicide);
- *Herceg v. Hustler Mag.*, 814 F.2d 1017, 1019 (5th Cir. 1987) (claims based on publication of an article that inspired 14-year-old to commit a fatal act);
- *Olivia N. v. NBC*, 126 Cal. App. 3d 488, 494-97 (1981) (negligence claims alleging that broadcast of movie depicting sexual assault inspired real-life assault);
- *Zamora v. CBS*, 480 F. Supp. 199, 206 (S.D. Fla. 1979) (negligence claims alleging that minor's addiction to violent content on television led him to kill neighbor).

The same principle applies here: The First Amendment bars tort liability against the Internet-Defendants "not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas." *Herceg,* 814 F.2d at 1019.

2. Plaintiffs' claims impermissibly demand content- and viewpoint-based restrictions on protected speech.

Plaintiffs' effort to impose liability on the Internet-Defendants for allegedly making protected speech available to Gendron flouts the "most basic" principle of First Amendment jurisprudence: that the law may

not be used to "restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 790-91 (2011).

Plaintiffs' claims are necessarily content-based because they "target speech based on its communicative content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015). The animating premise of Plaintiffs' tort claims is that "Gendron was motivated to commit his heinous crime by racist, antisemitic, and white supremacist propaganda recommended and fed to him by the social media companies." R.130(¶3); *accord* R.2665(¶3) (Gendron "radicalized by overexposure to fringe, racist ideologies"); R.243(¶539); R.248(¶564); R.252(¶¶596-97); R.2798-99(¶567); R.2800(¶575); R.2803(¶588(c)); R.2808(¶617); R.2811(¶637); *supra* 9-12. These claims, which allege harm arising from "particular speech because of the topic discussed … or message expressed," are the opposite of content neutral. *Reed*, 576 U.S. at 163.

The constitutional violation is exacerbated because Plaintiffs' claims are not just *content*-based, but *viewpoint*-based. They assert that Gendron consumed speech advancing a particular ideological message—"Great Replacement Theory," "white supremacy," and "belief in white

genocide." R.2703(¶170); R.173(¶¶173-174); R.222(¶418). But the First Amendment forbids Plaintiffs from using state law to "discriminate against speech based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 588 U.S. 388, 393-94 (2019). Such viewpoint-based liability is "uniquely harmful to a free and democratic society," *NRA of Am. v. Vullo*, 602 U.S. 175, 187 (2024), and it makes the "violation of the First Amendment … all the more blatant," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

3. The First Amendment protects the dissemination of third-party speech by online service providers.

The Internet-Defendants are all the more covered by the First Amendment because their only role was in *disseminating* third-party speech. Both "creation and dissemination of information are speech within the meaning of the First Amendment," *Sorrell v. IMS Health*, 564 U.S. 552, 570 (2011), so "[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference," *Brown*, 564 U.S. at 792 n.1; *see also Lacoff v. Buena Vista Publ'g*, 183 Misc. 2d 600, 604 (Sup. Ct. N.Y. Cty. 2000) ("the First Amendment strictly limits the imposition of liability on publishers for the contents of books").

Moreover, the "expressive activity" protected by the First Amendment "includes presenting a curated compilation of speech originally created by others." *Moody*, 144 S. Ct. at 2400. That is because "the editorial function itself is an aspect of speech" and so "an entity exercising editorial discretion in the selection and presentation of content is engaged in speech activity." *Id.* at 2401-02 (cleaned up); *accord Rivoli v. Gannett*, 327 F. Supp. 2d 233, 241 (W.D.N.Y. 2004) ("[T]he act of publication and the exercise of editorial discretion concerning what to publish are protected by the First Amendment.").

These established protections apply fully to the dissemination of speech on the Internet. And they apply specifically to online platforms like the Internet-Defendants, which allow "users to gain access to information and communicate with one another about it on any subject that might come to mind." *Packingham*, 582 U.S. at 107 (striking down law barring registered sex offenders from accessing social-media websites); *accord Moody*, 144 S. Ct. at 2402-03 (applying First Amendment to social-media platforms); *Reno v. ACLU*, 521 U.S. 844, 870, 874-79 (1997) (there is "no basis for qualifying the level of First

Amendment scrutiny that should be applied to" online communications).

As the U.S. Supreme Court recently explained, "the major social-media platforms are in the business, when curating their feeds, of combining multifarious voices to create a distinctive expressive offering," which is the "product of a wealth of choices about whether—and, if so, how—to convey posts having a certain content or viewpoint." *Moody*, 144 S. Ct. at 2405 (cleaned up). Those "expressive choices" "receive First Amendment protection." *Id.* at 2406.

Moody addressed a Texas law "regulating the content-moderation policies that the major platforms use for their feeds." *Id.* at 2408. As the Court explained, "Texas does not like the way those platforms are selecting and moderating content, and wants them to create a different expressive product, communicating different values and priorities. But under the First Amendment, that is a preference Texas may not impose." *Id.* The same is true here: The First Amendment forbids Plaintiffs from using New York law to assert claims premised on disagreement with how the Internet-Defendants "selected and moderated content"—claims aimed at "changing the balance of speech

on the major platforms." *Id.*; *accord Volokh*, 656 F. Supp. 3d at 446-47 (striking down New York law requiring websites to develop and post policies regarding hate speech on their websites).

That is especially so because Plaintiffs advance strict-liability and negligence claims with no scienter requirement. Recognizing that "[p]rohibitions on speech have the potential to chill, or deter, speech outside their boundaries," the First Amendment will often "condition liability on the State's showing of a culpable mental state"—even in cases involving unprotected speech like incitement. *Counterman v. Colorado*, 600 U.S. 66, 75 (2023). That rule applies with equal, if not greater, force to those who *distribute* speech. In *Video Software Dealers Association v. Webster*, for example, the court struck down a statute that "unconstitutionally impose[d]" strict liability on video dealers for disseminating violent videos to minors, holding that "any statute that chills the exercise of First Amendment rights must contain a knowledge element." 968 F.2d 684, 690 (8th Cir. 1992).

Here, Plaintiffs seek to hold the Internet-Defendants liable for disseminating protected speech, based on claims—including strict liability and negligence—that do not require *any* showing of culpable

intent. Such claims do not afford the "precision of regulation" the First Amendment demands. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 916-17 (1982); *cf. Herceg*, 814 F.2d at 1024 ("[m]ere negligence" "cannot form the basis of liability" because if "the shield of the First Amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury … all free speech becomes threatened").

B. Plaintiffs cannot overcome the First Amendment by alleging that the Internet-Defendants used technology and "addictive" features to disseminate speech.

In the trial court, Plaintiffs sought to avoid dismissal by arguing that the Internet-Defendants' dissemination of speech to Gendron constituted unprotected "conduct." But what Plaintiffs characterize as "conduct" are editorial choices about what speech to publish and how to publish it, which is precisely "the kind of 'speech' that the First Amendment protects." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). *Moody* thus squarely rejected the argument that "the content choices the major platforms make for their main feeds are 'not speech' at all," but instead unprotected conduct—an argument that betrayed a "serious misunderstanding of First Amendment precedent and principle." 144 S.

Ct. at 2399. To the contrary, "presenting a curated and edited compilation of third-party speech is itself protected speech." *Id.* at 2409 (cleaned up).

Similar to Plaintiffs' mistaken argument, the trial court here suggested that the First Amendment could be defeated by simply alleging that the Internet-Defendants' services are not "mere message boards" but instead "contain algorithms." R.35-36, 71. But as *Moody* holds, the fact that these services actively curate speech—including by delivering "a personalized collection" of content or an "individualized list of video recommendations"—only reinforces their First Amendment protection. 144 S. Ct. at 2403. For example, when Facebook and YouTube "decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices." *Id.* at 2406.

Nor does the fact that algorithms are involved mean that the First Amendment is not. *Moody* confirmed that the "prioritization of content" on online speech platforms is protected by the First Amendment, even though it is "achieved through the use of algorithms." *Id.* at 2402-03. Invoking the word "algorithm" thus does not transform constitutionally

protected publishing into unprotected tortious activity. Rather, algorithms are means for those services to implement their "expressive choices" about what content "to present and promote." *Id.* at 2405-06. Efforts to use law to curtail such "editorial choices must meet the First Amendment's requirements," and that "principle does not change because the curated compilation has gone from the physical to the virtual world." *Id.* at 2393; *accord Force*, 934 F.3d at 64-67 (Facebook's "conduct" in arranging speech, including via recommendation algorithms, is a core publishing activity).

Plaintiffs also cannot avoid dismissal by alleging that the ways some Internet-Defendants disseminate third-party speech were designed to "addict" users and "maximize engagement" with such speech, R.130(¶7); R.173(¶172); R.2664(¶2)—or that they allegedly failed to warn users of the risks associated with certain kinds of speech. As discussed above (at 35), Plaintiffs do not claim to have been injured because of Gendron's alleged addiction to Internet-Defendants' services in general, but instead because Gendron viewed particular kinds of third-party content that allegedly caused him to develop "extremist views." R.2721(¶233); *accord* R.2664-65(¶3); R.131(¶9); R.173-74(¶175).

Plaintiffs cannot plead around the objectionable speech that is the very basis for their claims. *E.g.*, *Bill v. Super. Ct.*, 137 Cal. App. 3d 1002, 1007 (1982) (rejecting argument that failure-to-warn claim did "not seek to impose liability on the basis of the content of the motion picture" because if showing the movie "attract[ed] violence-prone persons to the vicinity of the theater, it is precisely because of the film's content"); *Estate of B.H. v. Netflix*, 2022 WL 551701, at *2 & n.3, *3 (N.D. Cal. Jan. 12, 2022) (allegations that Netflix's algorithms manipulated viewers "into watching content that was deeply harmful to them" targeted speech; "[w]ithout the content, there would be no claim").

Moreover, as the Ninth Circuit recently explained, the First Amendment's prohibitions on compelled speech bar efforts to use state law to force internet platforms to "opine on and mitigate the risk that children may be exposed to harmful or potentially harmful materials." *NetChoice v. Bonta*, 113 F.4th 1101, 1108 (9th Cir. 2024) (enjoining law requiring online services to prepare reports addressing whether the design of their services could harm children).

Finally, even if Plaintiffs' claims could be understood as merely challenging the Internet-Defendants' *means* of disseminating speech,

the First Amendment still would bar those claims. As discussed, "[d]eciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own." *Moody*, 144 S. Ct. at 2402. Holding the Internet-Defendants liable for "defectively" publishing harmful speech, or for making such speech too engaging, is thus to *describe* a First Amendment violation—not to escape it.

Both in the digital and brick-and-mortar worlds, publishers seek to attract and hold the attention of consumers. The First Amendment does not exclude attention-grabbing headlines, cliffhanger endings, or other techniques for keeping viewers engaged. Courts thus have consistently rejected the idea that constitutional protection diminishes if a given medium is "addictive" or amplifies the impact of speech. *See Brown*, 564 U.S. at 798 (rejecting argument that video games "present special problems because they are 'interactive'"); *accord Wilson*, 198 F. Supp. 2d at 170, 181; *Sanders*, 188 F. Supp. 2d at 1268-69. As the Seventh Circuit explained in striking down an ordinance limiting distribution of speech that could "affect[] [the] thoughts," "socialization," and "unconscious responses" of its recipients, "[i]f the fact that speech

plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech." *Am. Booksellers Ass'n. v. Hudnut*, 771 F.2d 323, 328-30 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

Simply put, the "force of speech" is not a permissible basis for "attempts to stifle it." *Sorrell*, 564 U.S. at 577-78. Plaintiffs seek to do just that, but the First Amendment bars their effort to "prevent[] a platform from compiling the third-party speech it wants in the way it wants." *Moody*, 144 S. Ct. at 2394.

III. Plaintiffs Do Not Plead Viable Product-Liability Claims.

The trial court's sole basis for denying the Internet-Defendants' motion to dismiss was its unexplained conclusion that Plaintiffs may eventually prove that the Internet-Defendants' services qualify as defective "products"—triggering the law of strict products liability. R.34-36. That reasoning was incorrect as a matter of law. And this Court can correct that mistake on the pleadings without further factual development. *Walter v. Bauer*, 109 Misc. 2d 189 (Sup. Ct. Erie Cty. 1981), *aff'd in part and rev'd in part on other grounds*, 88 A.D.2d 787 (4th Dep't 1982); *see also* Restatement (Third) of Torts: Prod. Liab. § 19,

cmt. a ("[I]t is for the court to determine as a matter of law whether something is, or is not, a product."). New York law is clear that intangible ideas and expressions are not products. *Infra* § III.A. Neither are pure services like those offered by the Internet-Defendants. *Infra* § III.B.

Plaintiffs' product-liability theory is unprecedented in this State. The law of products liability, in New York as elsewhere, is designed to equitably allocate the risks to consumers from *standardized, tangible products* sold in commerce. But Plaintiffs' claims seek something radically different, which no New York appellate court has ever embraced: to apply product-liability law to publication services that, far from being uniform, present a different mix of intangible speech to every user. Plaintiffs allege that the Internet-Defendants failed to mitigate the "danger" of their services, but that alleged "danger" is the transmission of third parties' ideas among billions of users based on their individual interests and preferences—nothing standardized or uniform. This Court should reject Plaintiffs' attempt to dramatically expand product-liability law.

A. Neither ideas nor the publication of ideas are "products."

Courts in this State and across the country have long held that a product-liability claim does not exist when the alleged defect arises from the substance of *ideas* in media the defendant published or distributed. As the Ninth Circuit explained in *Winter v. G.P. Putnam's Sons*:

> A book containing Shakespeare's sonnets consists of two parts, the material and print therein, and the ideas and expression thereof. The first may be a product, but the second is not.… Products liability law is geared to the tangible world.

938 F.2d 1033, 1034 (9th Cir. 1991). In other words, a book can be a product only to the extent its *tangible* properties cause harm—for example, if a book jacket had unreasonably sharp edges. But when the plaintiff's harm arises from the ideas communicated by a book, a product-liability claim does not lie. *See Gorran v. Atkins Nutritionals*, 464 F. Supp. 2d 315, 324-25 (S.D.N.Y. 2006) (diet book); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1216-17 (D. Md. 1988) (nursing textbook); *Beasock v. Dioguardi Enters.*, 130 Misc. 2d 25, 29 (Sup. Ct. Monroe Cty. 1985) (published tire specifications); *accord Lacoff*, 183

Misc. 2d at 611 (applying *Winter* to reject claims seeking to hold book publisher liable for book's contents).

That is why courts have consistently rejected claims based on legal theories like Plaintiffs': that publishers of media containing allegedly harmful or dangerous ideas consumed by violent criminals can be liable for distributing defective products. In *James v. Meow Media*, for example, school-shooting survivors alleged that the shooter had "regularly played video games, watched movies, and viewed internet sites" that "desensitized [him] to violence and caused him to kill" his classmates. 300 F.3d 683, 687 (6th Cir. 2002) (cleaned up). The Sixth Circuit affirmed dismissal of product-liability claims because the "words and pictures" that allegedly caused the harm "are not sufficiently 'tangible' to constitute products in the sense of their communicative content." *Id.* at 701.

The product-liability claims brought by victims of the Columbine high-school shooting in *Sanders v. Acclaim Entertainment* were likewise dismissed on the ground that "intangible thoughts, ideas, and expressive content are not 'products.'" 188 F. Supp. 2d at 1279. In *Wilson v. Midway Games*, parents of a boy stabbed by his friend argued

that a video game was defective because its violent imagery had inspired the killing. 198 F. Supp. 2d at 169. But the court held that a "pictoral representation that evokes the viewer's response" is not a product. *Id.* at 174. And in *Davidson v. Time Warner*, the survivors of a police officer killed during a traffic stop were not permitted to sue Tupac Shakur's record label for allegedly violent anti-police imagery on Tupac's album. That was because product-liability law applies only to harm from the "physical properties of the audio tape," not to "the *ideas* contained in the recording." 1997 WL 405907, at *1, *14.

New York law is the same. This Court has held that a plaintiff who "sustained an injury in school while conducting a science experiment described in a textbook" could not maintain a product-liability claim against the book's publisher. *Walter*, 88 A.D.2d at 788. Just as a plaintiff cannot sue a publisher for distributing a book with supposedly defective or dangerous ideas, *id.*, a plaintiff cannot sue a bookstore or library on the theory that its choice of whether or how to make that same book available was defective. Product-liability law has never extended to claims that a defendant facilitated the dissemination of dangerous ideas or expressions, including by making such ideas more

prominent through its publication choices. *See Gorran*, 464 F. Supp. 2d at 324.

Plaintiffs attempt to avoid that clear law by insisting that their product-liability claims do not seek to hold the Internet-Defendants liable "for the speech or content of others or for Defendants' content moderation decisions." R.241(¶532). But that bare legal assertion cannot save Plaintiffs' product-liability claims because it is irreconcilable with the factual allegations in the Complaints. *Browne v. Lyft*, 219 A.D.3d 445, 446 (2d Dep't 2023). The Complaints allege that the Internet-Defendants' platforms are defective because they exposed or directed Gendron to harmful third-party speech, including "extreme and violent content" that "promoted racism, antisemitism, and gun violence." R.173(¶173).

Likewise, as discussed above (at 29-34), the supposedly "defective" features that Plaintiffs target all relate to Gendron's exposure to allegedly harmful ideas. The claimed defects include algorithms that allegedly "direct minor users to" harmful content; recommend "harmful or violent videos" and "content that is violent, sexual, or encourages self-harm" to teenagers; and "attract[] extremist organizations" and

"prioritize[] extremist content," such as by "elevat[ing] racist[], antisemitic, and violence-promoting postings." R.188(¶249); R.200(¶¶303-04); R.204(¶323); R.221(¶¶412-13).[8]

Each of those alleged defects arises from the "communicative element" of the Internet-Defendants' platforms and the "ideas and images" that Plaintiffs claim radicalized Gendron, not any "tangible container" analogous to a sharp book jacket. *See James*, 300 F.3d at 701; *see also Walter*, 109 Misc. 2d at 191 (no product-liability claim where plaintiff "was not injured" by the physical act of reading a book, but rather by acts allegedly inspired by the ideas contained therein). The Internet-Defendants' features that Plaintiffs object to here are alleged to be dangerous *only because* of the ideas they help convey.

The purpose of product-liability law is to protect consumers from "the dangers inherent in [a] product's reasonably foreseeable uses or misuses." *Matter of Eighth Jud. Dist. Asbestos Litig. ("Terwilliger")*, 33 N.Y.3d 488, 496 (2019). New York law excludes ideas and expression

[8] As noted above (at 12 n.3), Plaintiffs also challenge communicative features that they do not allege Gendron even used, such as "likes," commenting, upvotes, notifications, and ephemeral messaging. R.196-97(¶285-86); R.213(¶372); R.218(¶399).

from the category of potentially defective products because including them would require courts to identify the "dangers inherent in" speech—to sift "harmful" ideas and information from more benign expression. That perilous endeavor risks a "chilling effect" on "freedoms of speech and press." *Walter*, 109 Misc. 2d at 191; *see also Jones*, 694 F. Supp. at 1217. That principle, by itself, rules out Plaintiffs' product-liability claims.

B. Product-liability law does not apply to the services offered by the Internet-Defendants.

Plaintiffs cannot pursue product-liability claims for the independent reason that Internet-Defendants' websites are services, not products. Contrary to the trial court's suggestion that products can be intangible, R.34-36, the law is clear that "[a] product is tangible personal property distributed commercially for use or consumption." Restatement (Third) of Torts: Prod. Liab. § 19. "Services, even when provided commercially, are not products." *Id.*; *see also Terwilliger*, 33 N.Y.3d at 501 (when "the transaction [is] clearly one for services … strict products liability does not apply") (cleaned up).

Before the trial court's ruling, no New York court had held that online speech platforms, whether accessed via website or digital

application, are products. To the contrary, the Supreme Court in New York County has held that a website that provides a "forum for third-party expression" offers a "service" and is not a product. *Intellect Art Multimedia v. Milewski*, 2009 N.Y. Slip Op. 51912(U), at *7 (Sup. Ct. N.Y. Cty. Sept. 11, 2009). Internet-Defendants' services are similarly, by Plaintiffs' own allegations, a "forum for third-party expression." *See id.* They allow users to create and share content with other users, and to view and interact with other users' content. That the Internet-Defendants distribute mobile software-based applications to facilitate the use of their services does not change this analysis. *E.g.*, R.184-85(¶235); R.195(¶278). The function of Internet-Defendants' applications is to provide a portal to the *services* they offer—connecting users to other users, and allowing them to create, disseminate, and access speech. And it is those services, not the applications, with which Plaintiffs take issue.

State and federal courts recently have rejected allegations similar to Plaintiffs' here—that certain online platforms are defective products because they are addictive to minor users—precisely because the Internet-Defendants provide services rather than products. *Social*

Media Cases, 2023 WL 6847378, at *15-19 (Cal. Super. Ct. Oct. 13, 2023); *In re Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 844-45, 849 (N.D. Cal. 2023) (holding that plaintiffs "have not established as a global matter that defendants' platforms are akin to tangible personal property such that they are products"; considering whether specific "content-agnostic" functionalities may be products). That is because "manufacturing processes place[] into general circulation products that ha[ve] predictable, uniform characteristics," but the Internet-Defendants' platforms are not alleged to be a "product that all consumers *experience* in a uniform manner." *Social Media Cases*, 2023 WL 6847378, at *15-16. Instead, as alleged, they "are intended to and do tailor the user's experience to the individual consumer." *Id.* at *16; *see also id.* at *20 (describing the "multiplicity of consumer expectations" by different users of online platforms). Other courts have held similarly. *Ziencik v. Snap, Inc.*, 2023 WL 2638314, at *4 (C.D. Cal. Feb. 3, 2023); *Jacobs v. Meta Platforms*, 2023 WL 2655586, at *4 (Cal. Super. Ct. Mar. 10, 2023); *Grossman v. Rockaway Twp.*, 2019 WL 2649153, at *4 (N.J. Super. Ct. Law Div. June 10, 2019).

The trial court further erred when it concluded—without analyzing or balancing the relevant factors—that "the most reasonable allocation of risks, burdens and costs among the parties and within society" supports judicially regulating the Internet-Defendants' services as products. R.34-35 (citing *Terwilliger*, 33 N.Y.3d at 495-96). The court ignored *Terwilliger*'s critical predicate for conducting that analysis: 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." 33 N.Y.3d at 494.

There is nothing standardized about the "latent dangers" alleged by Plaintiffs—i.e., that the Internet-Defendants' services allow users to share a wide array of ideas with one another, including in some instances ideas that are objectionable (although constitutionally protected). *See Social Media Cases*, 2023 WL 6847378, at *16. Indeed, Plaintiffs' theory is that the defendants' websites are problematic *precisely because* they allegedly offer a tailored mix of content designed to incorporate each user's preferences. *E.g.*, R.174(¶176); R.187-88(¶¶244-48). Such personalization prevents the identification and

mitigation of any standardized, reasonably foreseeable harms. Content that is anodyne to most people might be harmful to particular users—a news article about a global conflict might affect a college professor differently than a veteran suffering from PTSD. The law of strict products liability is thus a poor fit here because both the Internet-Defendants' services and the potential harms that could arise from their use are highly individualized. *See Social Media Cases*, 2023 WL 6847378, at *16 ("The interactions between Defendants and Plaintiffs by way of the Defendants' platforms are not analogous to the distribution and use of tangible personal property. They do not present challenges that the common law overcame by creating product liability doctrine.").

Plaintiffs' extreme theory would open the door to lawsuits against not just the Internet-Defendants, but many other industries, like streaming services, fitness apps, and educational publishers, anytime one of their users commits an unlawful or tortious act. Yet product-liability law has never been a vehicle for making platforms responsible for violent crimes committed by third parties—and certainly not on the logic that third parties used those platforms to receive information and

communicate with others. Allowing Plaintiffs' claims to proceed would open a floodgate of individualized, fact-specific litigation where liability turns on a third party's particular conduct and circumstances—contravening the purpose that streamlined product-liability law is intended to serve.

IV. Plaintiffs' Negligence Claims Fail Because The Internet-Defendants Do Not Owe a Duty of Care to Plaintiffs.

Plaintiffs' negligence-based claims fail as a matter of law for the further reason that Plaintiffs cannot allege or establish a core element of any negligence claim: a legal duty owed by the defendant that was breached.

New York law does not impose any duty of care on the Internet-Defendants to protect members of the general public, like Plaintiffs, from harm committed by a criminal like Gendron. To the contrary, a defendant "generally has no duty to control the conduct of third persons so as to prevent them from harming others." *Hamilton v. Beretta U.S.A.*, 96 N.Y.2d 222, 233 (2001); *see also Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016); *Morgan v. Whitestown Am. Legion Post No. 1113*, 309 A.D.2d 1222, 1222 (4th Dep't 2003) (reversing denial

of motion to dismiss negligence claim because plaintiff failed to plead a cognizable legal duty). *Infra* § IV.A.

The trial court did not engage with that established principle, which defeats the claims here. Instead, the court reasoned that a duty existed because "a manufacturer of a defective product is liable to 'any person' injured from the product." R.37-38. That conclusion is deeply flawed. Even if the Internet-Defendants' services were products (*but see supra* Part III), the duty imposed on a manufacturer is limited to protecting against injury to "*users* of its product" or bystanders directly injured by the product itself. *See, e.g.*, *In re New York City Asbestos Litig.*, 27 N.Y.3d 765, 790 (2016) (emphasis added). Plaintiffs are neither. *Infra* § IV.B.

A. The Internet-Defendants have no relationship with Plaintiffs giving rise to a duty of care.

Plaintiffs allege that the Internet-Defendants owed a duty "to [non-plaintiff] minor and young adult users" to "prevent [them] from becoming radicalized," R.249(¶¶574-75), and—broader still—that the Internet-Defendants have a duty to protect "the public at large" from harm. R.253(¶602). The Internet-Defendants owed neither such duty.

Plaintiffs cannot establish that any duty to prevent users "from becoming radicalized" runs to Plaintiffs themselves, because they have not alleged that they are users of the Internet-Defendants' services, nor can they assert claims on Gendron's behalf. Moreover, a duty to protect against independent criminal harm arises only where the plaintiff can establish a "special relationship"—that is, "where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others." *Hamilton*, 96 N.Y.2d at 233; *see also Pingtella v. Jones*, 305 A.D.2d 38, 42-44 (4th Dep't 2003). Special relationships of this nature are rare and limited to, for example, "employers-employees, owners and occupiers of premises, [and] common carriers and their patrons," *Einhorn v. Seeley*, 136 A.D.2d 122, 126 (1st Dep't 1988)—circumstances not present here.

Indeed, Plaintiffs do not allege that they had any relationship with the Internet-Defendants at all. And in the absence of such a relationship, Internet-Defendants do not owe "a duty running directly to" Plaintiffs as "the injured person." *Lauer v. City of New York*, 95

N.Y.2d 95, 100 (2000). It is well settled that, as a matter of law, a special duty to prevent harm "does not extend to members of the general public." *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 289 (2001); *see also Davis v. S. Nassau Comms. Hosp.*, 26 N.Y.3d 563, 573 (2015) (no duty owed to "an indeterminate, faceless, and ultimately prohibitively large class of plaintiffs"). Because the Internet-Defendants had no special relationship with Plaintiffs, they owed no duty to protect them against Gendron's criminal conduct. *Hamilton*, 96 N.Y.2d at 233.

Plaintiffs also cannot establish that the Internet-Defendants had any special relationship with *Gendron*. Courts consistently hold that online services do not owe any duty to protect their users, much less members of the general public, from harm. *See Bibicheff v. PayPal*, 844 F. App'x 394, 395-96 (2d Cir. 2021) (PayPal); *Klayman*, 753 F.3d at 1359-60 (Facebook). That is not surprising: "No website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content." *Dyroff*, 934 F.3d at 1101; *accord Social Media Cases*, 2024 WL 2980618, at *13 (Cal. Super. Ct. June 7, 2024) (online services do not owe a legal duty to school

districts based on alleged harm resulting from students' excessive use of social media).

These principles apply with special force to entities that disseminate speech and information. A chorus of authority has rejected claims that publishers have a duty to protect third parties from acts of violence committed by people who consumed media they disseminated. *E.g.*, *James*, 300 F.3d at 687 (rejecting argument that defendants owed a duty to victims of school shooting where the shooter was allegedly "desensitized" to violence by defendants' video games, movies, and websites); *Zamora*, 480 F. Supp. at 202 (rejecting argument that television networks owed a duty to shooting victim where the shooter allegedly became addicted and desensitized to violence by watching defendants' television shows); *see also Herrick*, 306 F. Supp. 3d at 585-87, 599 (social networking application did not have a duty to prevent publication of allegedly dangerous and harassing content).

These cases are consistent with established New York law declining to extend tort duties to publishers of other types of media. *E.g.*, *Abraham v. Entrepreneur Media*, 2009 WL 4016515, at *1 (E.D.N.Y. Nov. 17, 2009) ("under New York law, a magazine publisher

owes no duty of care to subscribers or readers"); *McMillan v. Togus Reg'l Off., Dep't of Veterans Affs.*, 120 F. App'x 849, 852 (2d Cir. 2005) (same); *Lacoff*, 183 Misc. 2d at 611 ("defendants have no duty to investigate the accuracy of the contents of the book they published").

Under these principles, Plaintiffs cannot establish any legal duty to prevent Gendron from viewing objectionable content. And they cannot be held responsible under negligence law for the harms his independent criminal behavior inflicted.

B. The trial court's bystander theory of duty was erroneous.

Ignoring this established body of law, the trial court concluded that the Internet-Defendants owed a duty to protect Plaintiffs from Gendron's crimes on the logic that "a manufacturer of a defective product is liable to 'any person' injured from the product." *See, e.g.*, R.37-38.

That was clear legal error. The trial court cited *McLaughlin v. Mine Safety Appliances Co.* and *Ciampichini v. Ring Brothers*. Those decisions stand for the proposition that a product manufacturer's duty might extend to "third persons exposed to a foreseeable and unreasonable risk of harm" caused directly by the defective product.

McLaughlin, 11 N.Y.2d 62, 68 (1962); *see Ciampichini*, 40 A.D.2d 289, 290, 293 (4th Dep't 1973) (duty to protect the "perfectly foreseeable" victim of a defective trailer hitch). That principle has no application here. For one, in this case, it was Gendron—not the Internet-Defendants' services—who directly caused Plaintiffs' injuries. Moreover, the bystander-liability doctrine is just an unremarkable application of the general negligence duty to avoid "subject[ing] another to an unreasonable risk of harm arising from … foreseeable hazards." *Di Ponzio v. Riordan*, 89 N.Y.2d 578, 584 (1997). Nowhere do these decisions suggest that this statement of a product manufacturer's ordinary negligence duties is an exception to the rule that a defendant "generally has no duty to control the conduct of third persons so as to prevent them from harming others" or to "protect plaintiff from the conduct of others." *Hamilton*, 96 N.Y.2d at 232-33.

In fact, the Court of Appeals rejected a similar suggestion. In *Hamilton*, plaintiffs argued that handgun manufacturers owed a duty to those injured by people who illegally obtained handguns. They attempted to "predicate the existence of this protective duty … on foreseeability of harm," arguing that manufacturers should be deemed

to have "a protective relationship with those foreseeably and potentially put in harm's way by their products." *Id.* at 234-35. On the contrary, the court explained, "a duty and the corresponding liability it imposes do *not* rise from mere foreseeability of the harm." *Id.* Otherwise, defendants would be subject to "limitless liability to an indeterminate class of persons conceivably injured by any negligence in that act." *Id.* at 232. Consistent with that principle, the product-liability cases that have imposed a duty to protect a non-user of a product have not imposed a requirement to control another person's *intentionally harmful* conduct.[9]

Thus, even if product-liability principles applied here, they would provide no basis for imposing a duty on the Internet-Defendants to prevent harm to Plaintiffs—non-users of Defendants' platforms who were not harmed directly by those platforms, but by the independent, intentional criminal choices of a third party.

[9] *See*, *e.g.*, *Rivera v. Berkeley Super Wash*, 44 A.D.2d 316, 318 (2d Dep't 1974); *Codling v. Paglia*, 38 A.D.2d 154, 156 (3d Dep't 1972), *aff'd in part, rev'd in part*, 32 N.Y.2d 330, 335 (1973).

V. Gendron's Crimes Defeat Proximate Causation.

Finally, Plaintiffs' product-liability and negligence-based claims (and certain Plaintiffs' public-nuisance and unjust-enrichment claims) fail for a final reason: Gendron's crimes severed any causal link between the Internet-Defendants' actions and Plaintiffs' injuries.

Causation "may be decided as a matter of law" when "only one conclusion may be drawn from the established facts." *Derdiarian v. Felix Contracting*, 51 N.Y.2d 308, 315-16 (1980). Accordingly, "dismissal for failure to allege proximate cause is appropriate on a motion to dismiss for failure to state a cause of action, if the allegations warrant such a determination." *Cannonball Fund v. Marcum & Kliegman*, 110 A.D.3d 417, 417 (1st Dep't 2013); *see, e.g.*, *Alden v. People's Law.*, 91 A.D.3d 1311, 1311 (4th Dep't 2012) (affirming dismissal; "proximate cause of plaintiff's damages" was "intervening and superseding" act by plaintiff); *Kraut v. City of New York*, 85 A.D.3d 979, 980 (2d Dep't 2011) (reversing denial of motion to dismiss; "allegations of the complaint itself negated the essential element of proximate cause" because they

established "an independent ground for the plaintiff's arrest, completely unrelated to any purported negligence").

Relevant here, causation is lacking "as a matter of law" when a plaintiff's injury was caused by "independent intervening acts" that were "not the foreseeable risk associated with the original negligence." *Derdiarian*, 51 N.Y.2d at 315-16; *accord Hain v. Jamison*, 28 N.Y.3d 524, 529 (2016) (proximate cause is lacking when an intervening event "is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct") (cleaned up). As this and other courts have concluded, a third party's "criminal act" is the paradigmatic example of such an unforeseeable intervening act. *Turturro v. City of New York*, 28 N.Y.3d 469, 484 (2016); *see, e.g.*, *Taylor v. Bedford Check Cashing*, 8 A.D.3d 657, 657 (2d Dep't 2004); *Tennant v. Lascelle*, 161 A.D.3d 1565, 1566 (4th Dep't 2018) ("intentional murder" of child was not foreseeable consequence of leaving child in murderer's care); *Dyer v. Norstar Bank*, 186 A.D.2d 1083, 1083 (4th Dep't 1992) (robbery at ATM was not foreseeable consequence of alleged negligence in securing premises).

Under these principles, Gendron's extraordinary crimes break any causal chain as a matter of law. Plaintiffs attempt to trace a line from the publication of third-party content on the Internet-Defendants' services, to Gendron's engagement with that content, to Gendron's travel to engage in a mass shooting, to Plaintiffs' injuries. But it defies plausibility that Gendron's premeditated murder of ten strangers—a calculated decision he made after months of research, purchasing weapons and gear, and documenting his hateful beliefs—was "the foreseeable risk associated with" Internet-Defendants facilitating communication among billions of people worldwide. *Derdiarian*, 51 N.Y.2d at 315-16; *see Dyer*, 186 A.D.2d at 1083 (just because conduct is conceivable does not make it foreseeable). Plaintiffs' own allegations admit much the same. The duty Plaintiffs claim the Internet-Defendants owed is to prevent "injury to minor users"—namely, the risk of "addiction." *E.g.*, R.242-47(¶¶534-57); R.2796-98(¶¶558-66). But those purported harms, and Plaintiffs' injuries at Gendron's hands, are vastly "different in kind." *Derdiarian*, 51 N.Y.2d at 315-16.

Plaintiffs make conclusory assertions that the "cascade of harms" allegedly flowing from the Internet-Defendants' conduct extended all

the way to Gendron's "radicalization" and murder spree. *E.g.*, R.2798(¶566). But courts have consistently rejected this radicalization theory of causation. Online service providers who offer access to massive amounts of content "do not proximately cause everything that an individual may do after viewing this endless content." *Crosby v. Twitter*, 921 F.3d 617, 625 & n.4 (6th Cir. 2019) (collecting cases). "This is especially true where," as here, "independent criminal acts … are involved." *Id.*

Courts have thus found proximate cause lacking when a mass shooter allegedly "became 'self-radicalized'" from "view[ing] online content," *id.* at 624-26, when a terrorist organization used an online service to communicate in advance of a terrorist attack, *Fields v. Twitter*, 881 F.3d 739, 749-50 (9th Cir. 2018), and when a school shooter was allegedly inspired by violent videogames, *Sanders*, 188 F. Supp. 2d at 1276. Were it otherwise, service providers "would become liable for seemingly endless acts of modern violence simply because the individual viewed relevant social media content before deciding to commit the violence." *Crosby*, 921 F.3d at 625. That result would vitiate the doctrine of proximate cause, which is designed to "place manageable

limits upon … liability." *Hain*, 28 N.Y.3d at 528 (quotation marks omitted).

The trial court nevertheless concluded, relying on a single inapposite decision, that Gendron's massacre did not necessarily defeat causation. R.37 (citing *Oishei v. Gebura,* 221 A.D.3d 1529 (4th Dep't 2023)). That was error. In *Oishei*, the defendant left a key in his unlocked car, in violation of a statute. *Id.* at 1530 (citing Veh. & Traf. Law § 1210(a)). The plaintiff police officer sustained injuries the next day when attempting to stop a thief driving the car. *Id.* at 1529-30. The only proximate-cause question this Court considered was whether "the passage of time between the theft of [the] vehicle and the accident vitiated any proximate cause as a matter of law." *Id.* at 1530-31. It did not discuss whether the theft of the car necessarily broke the causal chain—the legislature had already determined that it did not by enacting the key-in-the-car statute. *See, e.g.*, *Delfino v. Ranieri*, 131 Misc. 2d 600, 604 (Sup. Ct. Kings Cty. 1986) ("Section 1210 … changed case law so that the intervention of an unauthorized person no longer operates to break the chain of causation.").

Indeed, in car-theft cases *not* involving violations of that statute, New York law is clear that "the use of the car by the thief intervene[s] between the occurrence of the owner's negligence and the thief's unskillful driving" and any subsequent collision. *Howard v. Kiskiel*, 152 A.D.2d 950, 950 (4th Dep't 1989); *accord Lotito v. Kyriacus*, 272 A.D. 635, 637 (4th Dep't 1947) (proximate cause of accident was thief's driving, not leaving car unguarded). Gendron's decision to murder innocent strangers based on material he allegedly viewed online is far more extraordinary—and unforeseeable—than the theft and reckless driving of an unlocked car with the keys exposed to public view. The trial court erred in failing to recognize Gendron's acts for what they were: inexplicable crimes that the Internet-Defendants could not reasonably have foreseen, and that break any causal link between their publication of information and Plaintiffs' tragic injuries.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the Complaints dismissed in full as to the Internet-Defendants.

October 21, 2024

Respectfully submitted,

By 

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STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FOURTH DEPARTMENT

Erie County Clerk's Index No. 810316/23

Appellate Division Case Nos. CA 24-00513 CA 24-00515 CA 24-00524 CA 24-00527 CA 24-01447 CA 24-01448

Index No. 805896/23

DIONA PATTERSON, individually and as Administrator of the ESTATE OF HEYWARD PATTERSON; J.P., a minor; BARBARA MAPPS, Individually and as EXECUTRIX OF THE ESTATE OF KATHERINE MASSEY; SHAWANDA ROGERS, Individually and as Administrator of the ESTATE OF ANDRE MACKNIEL; 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.; 4CHAN COMMUNITY SUPPORT, LLC,

Defendants-Appellants,

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

Defendants.

Index No. 808604/23

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 the 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 the 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.; TWITCH INTERACTIVE, INC.; ALPHABET, INC.; GOOGLE, LLC; YOUTUBE, LLC; DISCORD, INC.; SNAP, INC.; 4CHAN COMMUNITY SUPPORT, LLC,

Defendants-Appellants,

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.

Index No. 810316/23

WAYNE JONES, Individually and as Administrator of the ESTATE OF CELESTINE CHANEY,

Plaintiff-Respondent,

—against—

MEAN LLC; VINTAGE FIREARMS, LLC; RMA ARMAMENT, INC.; 4CHAN, LLC; 4CHAN COMMUNITY SUPPORT, LLC; PAUL GENDRON and PAMELA GENDRON,

Defendants,

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

Defendants-Appellants.

Index No. 810317/23

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.; 4CHAN, LLC; 4CHAN COMMUNITY SUPPORT, LLC; PAUL GENDRON and PAMELA GENDRON,

Defendants,

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

Defendants-Appellants.

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1. The index numbers of the cases are 805896/23, 808604/23, 810316/23, and 810317/23.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The actions were commenced in Supreme Court, Erie County.

4. The action in 805896/23 was commenced on May 12, 2023 by service of summons and complaint; Defendants' answers and motions to dismiss were served thereafter. The action in 808604/23 was commenced on July 12, 2023 by service of summons and complaint; Defendants' answers and motions to dismiss were served thereafter. The action in 810316/23 was commenced on August 15, 2023 by service of summons and complaint; Defendants' answers and motions to dismiss were served thereafter. The action in 810317/23 was commenced on August 15, 2023 by service of summons and complaint; Defendants' answers and motions to dismiss were served thereafter.

5. The nature and object of the action is to recover damages for personal injuries sustained on theories of negligence and products liability.

6. This appeal is from decisions and orders of the Honorable Paula L. Feroleto, entered in favor of Plaintiffs, against Defendants-Appellants, on March 18, 2024, and August 29, 2024, which denied Defendant's motions to dismiss in their entirety.

7. The appeal is on a full reproduced record.