STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

Diona Patterson, individually and as Administrator of the ESTATE OF HEYWARD PATTERSON; Barbara Mapps, Individually and as Executrix of the ESTATE OF KATHERINE MASSEY; Shawanda Rogers, Individually and as Administrator of the ESTATE OF ANDRE MACKNIEL; LATISHA ROGERS, A.M., a minor; and LATISHA ROGERS,

Plaintiffs,

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, LLC; 4CHAN COMMUNITY SUPPORT, 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.: 805896/2023

Hon. Paula L. Feroleto

Mot. Seq. #012; #013; #014; #015; #016; and #019

PLAINTIFFS' AMENDED MEMORANDUM OF LAW IN CONSOLIDATED OPPOSITION TO SOCIAL MEDIA DEFENDANTS' JOINT AND INDIVIDUAL MOTIONS TO DISMISS

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> Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.

MacPherson v. Buick Motor Co., 217 N.Y. 382, 391 (1916) (Cardozo, J.)

I. INTRODUCTION

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

As Gendron's attorney later admitted to the court, "The racist hate that motivated this crime was spread through on-line platforms . . ." Gendron brought his hateful community with him to Tops, using social media platforms to livestream the attack. Gendron wrote that the community of racist extremists that he developed on social media gave him "motivation in the way that I know some people will be cheering for me."

Social media has played an insidious part of other mass shootings in the United States and across the globe. As detailed in Plaintiffs' Complaint, many shooters, including Gendron, were inspired to commit mass murder after learning about previous mass shooters and their extremist, racist, and misogynous ideologies through online social media platforms. Shooters, including Gendron, have published extensive writings on social media platforms, and live-streamed their attacks.

These shootings are not inevitable. As Plaintiffs made clear, they hope that "this lawsuit will force the change necessary to spare other families the loss, devastation, and despair that Plaintiffs experience every day and will continue to experience for the rest of their lives." But so long as the Social Media Defendants' products are permitted to exist in their current form that enable extremists—over documented concerns of the malign uses of product features raised within the companies themselves—it is not a question of *if* social media will continue to fuel tragedies, but *when* the next one will occur.

Social Media Defendants seek to dismiss this case in its entirety before any discovery has occurred. The Court should deny Social Media Defendants' Motion to Dismiss because the factual allegations in Plaintiffs' Complaint state legally cognizable product liability and negligence claims under New York law which do not conflict with federal law or the First Amendment. The defective design features of Defendants' social media products addicted Payton Gendron to their platforms by linking him to white supremacist groups that he never initially sought out, deluged him with unsolicited racist material he never asked for, and radicalized him with livestream videos of racist shootings which promoted and normalized mass killings and facilitated sales of illegal weapons.

Contrary to Social Media Defendants' contentions, their platforms are in fact "products" under New York law, and thereunder, they owed a duty of care to protect Plaintiffs from foreseeable injuries arising out of the normal and anticipated use of their social media products. Defendants have known for over a decade that their social media platforms (1) addict teenage users using artificial intelligence powered algorithms; (2) maximize youth engagement by exploiting minors' underdeveloped neurology; (3) trigger addictive dopamine cycles in vulnerable youth by bombarding them with progressively more extreme and psychologically discordant material; and (4) radicalize them to commit acts of racist violence. In particular, Defendants' artificial intelligence maximized and compelled Payton Gendron's engagement through a radicalizing progression of misogynist, racist, antisemitic, and violent materials which exploited his underdeveloped neurology and emotional insecurity. Gendron's murderous rampage at Tops Friendly Markets was the foreseeable consequence of Defendants intentional design decisions.

Social Media Defendants argue that Section 230 of the Communications Decency Act preempts Plaintiffs' claims because Payton Gendron would not have committed his heinous acts in the absence of the radicalizing third party content he encountered online. But this simplistic "but for" test of federal preemption has been rejected by state and federal courts throughout the country. The proper focus of Section 230 immunity is not the harm the plaintiff sustained but the legal duty the defendant allegedly breached; claims arising from traditional publishing activity are preempted, but product liability claims, like here, are not. Because Plaintiffs seek to hold Social Media Defendants liable for, inter alia, designing unreasonably dangerous social media products

that actively compelled Gendron to become violently radicalized—not merely for "publishing" third party content—their state law product liability claims are not inconsistent with Section 230 and are thus not preempted. 47 U.S.C. § 230(e)(3) ("Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section."). Indeed, a core policy consideration of Section 230 is "maximiz[ing] user control over what information is received by individuals [and] families…," (Id. at (b)(3)). Defendants' products worked to the contrary. Moreover, the Social Media Defendants' material contribution to the injurious third-party material also makes them co-publishers of the racist, antisemitic and violence promoting content on their platforms.

New York courts narrowly interpret the scope of Congress's intended invalidation of state law whenever possible, and preemption is disfavored. Plaintiffs' New York product liability claims do not seek to hold Social Media Defendants liable as publishers of third-party content but rather for designing unreasonably dangerous social media products. Social Media Defendants could ameliorate their products' dangerously defective design features without removing a single piece of content from their platforms. Because Plaintiffs' state law claims are consistent with Section 230, the Social Media Defendants motion to dismiss should be denied.

Social Media Defendants' argument that Plaintiffs' product liability and negligence claims are barred by the First Amendment because white supremacist speech is constitutionally shielded ignores the crucial distinction between protected speech and tortious conduct. Defendants' sweeping interpretation of the First Amendment would bar common tort claims such as defamation, medical malpractice, sexual harassment, and creating hostile work environments simply because the defendant's conduct involved speech. Plaintiffs' product liability and negligence claims charge defendants with designing unreasonably dangerous social media platforms that addict vulnerable teens by treating them as a captive audience, bombarding them with progressively extreme and violent material expressly intended to trigger dopaminergic responses in their adolescent brains. The fact that Social Media Defendants' artificial intelligence selected white supremacist material to trigger Payton Gendron's addictive response cycle does not immunize their unreasonably dangerous design decisions from legal scrutiny simply because

political speech was incidentally involved.

Because Social Media Defendants fail to show as a matter of law that they cannot be held accountable in tort under New York law for harms caused by their unreasonably dangerous products, their motion to dismiss should be denied and this case permitted to proceed to discovery.

II. STATEMENT OF FACTS

A. Payton Gendron Was Radicalized By Social Media Defendants' Unreasonably Dangerous Products

Payton Gendron's implementation of his murderous crime was inspired and facilitated by the defective and unreasonably dangerous design of the Social Media Defendants' products. See NYSCEF Doc. No. 1, Complaint ¶ 12 ("Complaint"). Gendron did not grow up in a racially prejudiced household or a racially polarized community. Complaint ¶ 169. Before he began using and became dependent on the Social Media Defendants' products, Gendron did not hold racist beliefs. Complaint ¶ 170. He wrote that "when I was like 12, that was when I didn't dislike American blacks and liked listening to black music . . . I remember I listened to Kyle a lot." Id.

Gendron began using Instagram, YouTube, and Snapchat in his early teens and Reddit, Discord, and 4chan in his late teens. Complaint ¶ 162. Because of the dangerously defective and unreasonably dangerous algorithms powering Instagram, YouTube, and Snapchat, Gendron quickly became a problematic user of these Social Media Defendants' products. Complaint ¶ 163. He accessed his social media accounts multiple times per hour and at all hours of the night.

In order to maximize Gendron's engagement with their products, Instagram, YouTube, and Snapchat directed him to progressively more extreme and psychologically discordant material. Complaint ¶ 171. They did this through the dangerously defective and unreasonably dangerous artificial intelligence driven algorithms. Id. The defendant social media companies drew Gendron down a rabbit hole of increasingly racist and antisemitic sites, indoctrinating him in white supremacist replacement theory and violent accelerationism. Complaint ¶ 10.

Exploiting the incomplete development of Gendron's frontal lobe, Instagram, YouTube, and Snapchat maintained his product engagement by targeting him with increasingly extreme and violent content and connections which promoted racism, antisemitism, and gun violence.

Complaint ¶ 173. Because the Instagram, YouTube, and Snapchat algorithms were designed with the singular goal of maximizing Gendron's product engagement over his psychological, emotional, and ethical well-being, they directed him to other platforms and users promoting racist hate and violence. Complaint ¶ 173.

Gendron was directed to 4chan, Reddit and Discord by the racist and violent content and connections Instagram, YouTube, and Snapchat directed to him. Complaint ¶ 174. Gendron was further radicalized through exposure to the hate groups and racist conspiracy theorists who flourish on these platforms due to their unique design that facilitates violence-promoting activities. Id. Gendron found a community of fellow racists urging him to move forward writing that:

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

Complaint ¶ 176.

The racist, antisemitic and violent videos that Social Media Defendants' algorithms selected for Gendron triggered dopamine extrusion from the ventral tegmental area of his brain to his frontal cortex, but steadily lost their physiologic effect due to satiation. Complaint ¶ 176. In order to maintain Gendron's level of engagement--and the resulting advertising revenue--the algorithms driving Defendants' social media products selected progressively more violent, racist, and graphic material to overcome this satiation effect and continue triggering dopamine responses in Gendron's adolescent brain. Id.

The racist and violent material to which Gendron was directed by the artificial intelligence driven algorithms in Defendants' social media products cauterized his empathetic responses and desensitized him to the human suffering they depicted. Complaint ¶ 177. Gendron's progression to livestream videos of mass shootings and other extreme depictions of racist violence occurred because his dopamine response mechanism had become satiated to less violent material. Id. The neurological satiation process occurring in Gendron's brain paralleled the growing depravity of his soul as he became more and more desensitized to the murderous carnage he was viewing. Id. The erosion of Gendron's moral conscience and his desensitization to acts of murderous violence

was the foreseeable consequence of the design and operation of Defendants' social media products. Id.

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

> I'm very sorry for all the pain I caused the victims and their families to suffer through. I'm very sorry for stealing the lives of your loved ones. I cannot express how much I regret all the decisions I made leading up to my actions on May 14th. I did a terrible thing that day. I shot and killed people because they were Black. Looking back now, I can't believe I actually did it. I believed what I read on-line and acted out of hate. I know I can't take it back but I wish I could, and I don't want anyone to be inspired by me and what I did.

Complaint ¶ 178.

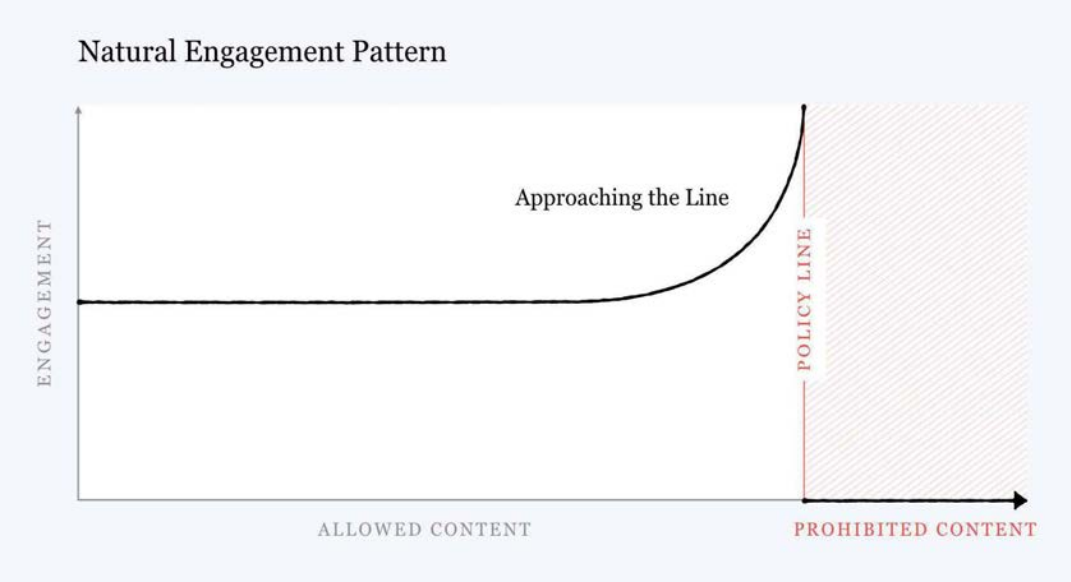
B. Social Media Defendants' Products Are Addictive By Design

Payton Gendron's radicalization was neither an accident nor a coincidence; it was the foreseeable consequence of Social Media Defendants' knowing decision to design products that maximize user engagement over public safety. Social Media Defendants earn their revenue from advertising. The size of Defendants' profits is directly tied to the quantity of time their users spend online and their level of engagement. Complaint ¶ 551. Defendants' therefore designed their products to maximize the amount of time users such as Payton Gendron spent on their platforms by making them addictive to young users. Id.

As demonstrated by the diagram below, recommendation algorithms are computer-generated artificial intelligence that select the content most likely to advance the goals of the social media company. Complaint ¶ 551.

Because Social Media Defendants' primary goal is maximizing user engagement, their artificial

intelligence selects the content most likely to trigger intense reactions in young users, regardless of whether they are searching for such content. Complaint ¶¶ 249, 250. Social Media Defendants know that psychologically discordant content triggers a greater dopamine response in young users than soothing or affirming content and have therefore designed their recommendation algorithms to favor extreme content over benign content. Complaint ¶ 25. Meta CEO Mark Zuckerberg publicly recognized this in a 2018 post, in which he demonstrated the correlation between engagement and sensational content that is so extreme that it impinges upon Meta's own ethical limits, with the following chart.



Complaint ¶ 251.

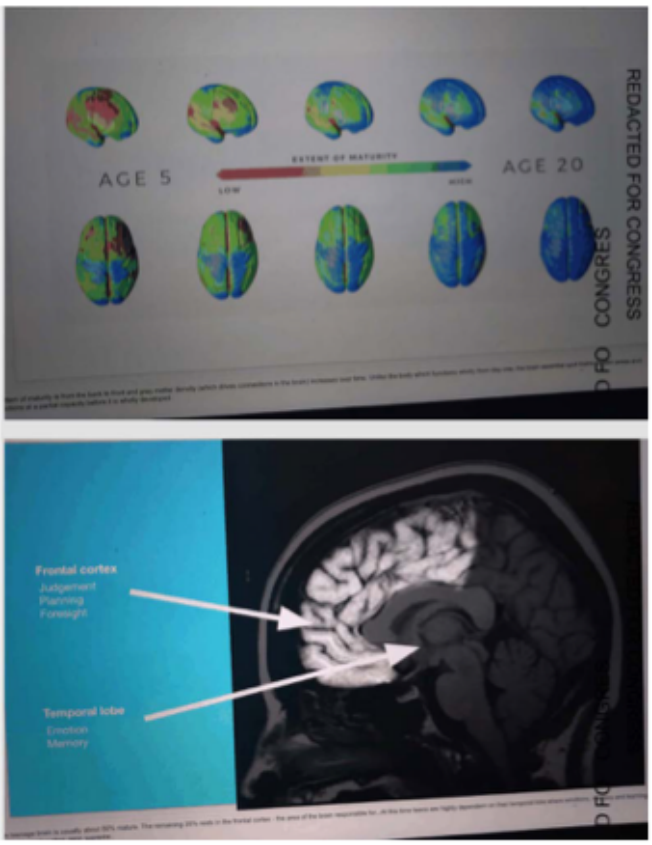
Meta and the other Social Media Defendants know that recommendation algorithms "are prone to recommending harmful content." Complaint ¶ 251. In one experiment from 2019, Facebook tested its recommendation algorithm and created an account for a test user. The experiment found that in just 3 weeks by following just this *recommended* content, the test user's News Feed had become a near constant barrage of polarizing nationalist content, misinformation, and violence. Complaint ¶ 251. Social Media Defendants designed and have chosen to operate artificial intelligence driven algorithms to maximize the engagement of young users such as Payton Gendron--not by sending them content they request or want to see--but by showing content which

they can't look away from. Complaint ¶ 172.

The social media addiction that Payton Gendron experienced has emerged as a problem of global concern, with researchers all over the world conducting studies to evaluate how pervasive the problem is. Complaint ¶ 548. Addictive social media use is manifested when users such as Payton Gendron (1) become preoccupied by social media (salience); (2) use social media in order to reduce negative feelings (mood modification); (3) gradually use social media more and more in order to get the same pleasure from it (tolerance/craving); (4) suffer distress if prohibited from using social media (withdrawal); (5) sacrifice other obligations and/or cause harm to other important life areas because of their social media use (conflict/functional impairment); and (6) seek to curtail their use of social media without success (relapse/loss of control). Complaint ¶ 548.

Social Media Defendants' products are particularly addictive to teenage users such as Payton Gendron. Complaint ¶ 546. The human brain is still developing during adolescence in parallel to adolescents' psychosocial development. Complaint ¶ 148. The frontal lobes of the brain, particularly the prefrontal cortex, play an essential part in higher-order cognitive functions, impulse control, and executive decision making. Complaint ¶ 149. MRI studies have shown that the prefrontal cortex is one of the last regions of the brain to mature. Id.

The Social Media Defendants are not only aware of their young users' neurologic vulnerabilities; they have business models expressly predicated on exploiting them. Complaint ¶ 152. The following illustrations from the internal Meta teen marketing strategy presentation illustrates this process.



Social Media Defendants designed their products to addict minor users by exploiting their neurological and emotional immaturity. See, e.g., Complaint ¶¶ 244-253 (Meta); ¶¶ 244-253; ¶¶ 285-289 (YouTube); ¶¶ 343-346 (Twitch); ¶¶ 370-373 (Snapchat),

It is feasible for the Social Media Defendants to make products that are not addictive to minor users by turning off or even simply slowing recommendation technologies, limiting the frequency and duration of access, and suspending service during sleeping hours. Complaint ¶ 552. Designing software that is not addictive to minor users such as Payton Gendron could be accomplished at negligible cost; whereas the benefit to public safety would be manifold. Id.

C. Social Media Defendants' Addictive Algorithms Radicalize Minor Users

The incomplete neurological development of adolescents, teenagers, and young adults not only makes them ideal targets for the Social Media Defendants' algorithms; it makes them particularly susceptible to conspiracy theories and radicalization. Complaint ¶ 156. The engagement-maximizing algorithms driving Social Media Defendants' products send radical, extremist and violent material to young white males like Payton Gendron whether or not they are

seeking such content. Complaint ¶ 153. Half of young adults are regularly exposed to hateful material while online. Id.

The products Social Media Defendants distributed to Payton Gendron actively encourage, assist, and facilitate the spread of racist, antisemitic and terrorist propaganda, despite the foreseeable and catastrophic harms occurring as a result. Complaint ¶ 103. White supremacist organizations rely on the dangerously defective and unreasonably dangerous design of social media platforms 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. Complaint ¶ 10. Unfortunately, the radicalization tendency of Social Media Defendants' products appears to be working. Over 50 percent of minors with high social media usage agreed with the statements that "Mass migration of people into the western world is a deliberate policy of multiculturalism and part of a scheme to replace white people" and "Jewish people have a disproportionate amount of control over the media, politics and the economy." Complaint ¶ 159.

Although white supremacists use fringe social media platforms to share material, mainstream social media platforms such as YouTube, Snapchat, Instagram and Facebook remain important avenues for promoting such material. Complaint ¶ 126. These mainstream platforms are also beneficial as they provide the opportunity to reach and radicalize new audiences. White supremacist commentators have explicitly referenced the need to weaponize internet culture so that younger generations can be radicalized more effectively. Complaint ¶ 126

The availability of racist online forums, by itself, does not account for the exponential rise in white supremacist communities over the past decade. Complaint ¶ 102. If that had been the case, the rise would have coincided with the advent of the internet in the late 1990s and early 2000s, not the advent of social media products after 2010. Id. Instead, the profusion of misogynist, racist and antisemitic hate groups is the direct result of Social Media Defendants' knowing decision to design and operate their products in a manner that prioritizes user engagement over public safety. Id.

D. Livestreaming Motivates White Supremacists to Commit Mass Violence.

Over the past decade, livestreaming has become a central component in racist mass

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

On August 26, 2018, 22-year-old David Katz entered the Good Luck, Have Fun Game Bar with two pistols and began shooting indiscriminately into the crowd of 150. Katz fired 12 shots, killing two people and wounding ten others. The shooting was livestreamed on Twitch and later uploaded to YouTube. Complaint ¶ 142.

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

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

On April 10, 2023, 25-year-old Connor Sturgeon opened fire on employees of Old National Bank in Louisville, Kentucky murdering five people and injuring nine. Complaint ¶ 147. Sturgeon livestreamed his attack on Instagram,

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

> Livestreaming requires a special mention for its repeated use by hate-fueled mass shooters to broadcast their massacres. Livestreaming undoubtedly has many legitimate use cases, at the same time, the future of livestreaming needs to grapple with how this service has been used to broadcast these acts of terror, becoming an extension of the criminal act, further terrorizing the targeted community and serving to promote the shooter's ideology. . . [T]he Buffalo shooter considered the instantaneous transmission of video available through livestreaming to be a centrally motivating factor in his shooting, both because of the intangible support he felt he would receive through it and because he hoped it would inspire other, just as he had been inspired by a video of the Christchurch shooter. . . . Even a short video of a mass shooting can be used to incite others to engage in copycat crimes and serve the criminal goals of the perpetrator.

Complaint ¶ 183.

Yet at least five years before Attorney General James' found that livestreaming promotes acts of racist mass violence, Social Media Defendants knew of this product hazard and chose not to address it. For example, in September 2017 the following email exchange took place between Facebook Director of Content Policy Kaitlin Sullivan and Craig Mullaney, founder Facebook's Global Executive Program

> Sullivan: I work on the Content Policy team, our job is to think of the worst of the worst ways people will behave and express themselves on our platform, and we're increasingly partnering with new products on their rules and systems pre-launch. But the MOST frustrating thing is not being listened to and then hearing these stories come out. My team consulted for Live, not only did we anticipate murders and suicides on Live, we anticipated far worse (all of one of our top 5 predictions have played out). But it still took over a year to post-launch (after these horrible incidents happened) to get most of the tools we were begging for from the start to incorporate. And all along we kept hearing that no one could have anticipated . . .
>
> Mullaney: Not only did you predict the Live issue, but you backed them up with examples from multiple Live platforms preceding Facebook. I'd rather we were just honest and could say, if only to ourselves, that we took a calculated risk because of the upside was more important to us.

Complaint ¶ 257.

E. Livestreaming Induced Gendron to Commit His Heinous Crime

As observed by Attorney General James--and predicted by Meta--Gendron's ability to live stream his racist murder provided the motivation to carry out his evil plan. Complaint ¶ 179. In his

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

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

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

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

Complaint ¶ 181.

Gendron also wrote that livestreaming the attack would help him overcome his fear and any lingering sympathy for human life that could dampen his murderous intent. Complaint ¶ 182.

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

Complaint ¶ 182.

F. Social Media Defendants Promoted and Profited from Gendron's Murder Video

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

Twenty-two minutes into the Twitch livestream –empowered by the knowledge that other users were watching him in real time--Payton Gendron exited his vehicle wearing a helmet, body armor, and fatigues and armed with a Bushmaster XM15-E2S that he had purchased with a Mean

Arms MA Lock installed, but easily removed so that his gun could accept detachable magazines. He then began shooting. Complaint ¶ 46.

Over a period of two minutes Twitch livestreamed Gendron's murder of ten Black Erie County citizens and wounding of three more. The evil banality with which Gendron murdered ten Black shoppers at Tops Friendly Markets bore striking similarity to the methodology Brenton Tarrant had used to murder 57 Muslim worshippers in Christchurch. After being radicalized by compulsion, it is readily apparent that Gendron had viewed the Christchurch murder video multiple occasions. Gendron copied the slogans Tarrant painted on the murder weapon, with the body armor he wore and the efficacy with which he selected his Black victims and repeatedly shot them to death. Gendron was clearly correct when he wrote "Brenton's livestream started everything you see here." Complaint ¶ 180.

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

Copies of Gendron's murder video were posted to Facebook and displayed next to advertisements, as well as with searches for terms associated with footage of the shooting Complaint ¶ 74. In some cases, Facebook even recommended certain search terms to users relating to the murder video, noting that they were "popular now" on the platform. Id. Gendron's video was viewed more than 3 million times and Social Media Defendants profited from advertising revenue earned from their hosting and amplifying of its gruesome depiction of racist murder. Complaint ¶¶ 76, 77.

Social Media Defendants designed, programmed, and utilized their products in a manner that amplified Gendron's murder video, ensuring that it reached far more users than it otherwise

would have. This included users who did not search for, request, or want to see this horrific, violent, and racially motivated massacre—in the same manner that Gendron himself was force-feed similar information. Complaint ¶ 72. The video depicting the murder of Heyward Patterson, Kat Massey, and Andre MacKniel continues to circulate on social media and has been viewed by hundreds of thousands of individuals, which continues to cause Plaintiffs severe emotional distress. Complaint ¶ 623.

III. ARGUMENT

A. Social Media Defendants' Motion to Dismiss Fails to Satisfy the High Bar Required for Dismissal as a Matter of Law

It is long-established that on a motion to dismiss, the court must construe the complaint liberally, accept the pleaded facts as true, and determine simply whether the facts as alleged fit into any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). The court must accept not only the material allegations of the complaint, but also whatever can be reasonably inferred therefrom in favor of the pleader. See McGill v. Parker, 179 A.D.2d 98 (1st Dep't 1992); Foley v. D'Agostino, 21 A.D.2d 60, 64 (1st Dep't 1964) ("Upon a 3211 (subd. [a], par. 7) motion to dismiss a cause of action, however, we look to the substance rather than to the form."). This test is so liberal that the standard is simply whether the plaintiff *has* a cause of action, not even whether one has been stated. Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 120 (1st Dep't 1998). It is the movant that has the burden to demonstrate that the pleading states no legally cognizable cause of action. Id.

Moreover, in adjudicating a motion under C.P.L.R. 3211(a)(7), a court may freely consider affidavits and other evidence submitted by the plaintiff to remedy any defects in the complaint. See AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 N.Y.3d 582, 591 (2005); Leon, 84 N.Y.2d at 88; Cadet–Duval v. Gursim Holding, Inc., 147 A.D.3d 718, 719 (2d Dep't 2017). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" Guggenheimer, 43

N.Y.2d at 275; Wiener, 241 A.D.2d.

B. Plaintiffs Allege Viable New York State Product Liability Claims

1. New York Product Liability Law is Liberally Construed to Promote Public Safety

Fifty years ago, the New York Court of Appeals articulated the public safety orientation of modern product liability law.

> Today as never before the product in the hands of the consumer is often a most sophisticated and even mysterious article. Not only does it usually emerge as a sealed unit with an alluring exterior rather than as a visible assembly of component parts, but its functional validity and usefulness often depend on the application of electronic, chemical or hydraulic principles far beyond the ken of the average consumer. Advances in the technologies of materials, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture. In today's world, it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose.

Codling v. Paglia, 32 N.Y.2d 330, 340 (1973).

Subsequent New York courts have followed this pragmatic, public safety approach to product liability. See, e.g., Matter of Eighth Judicial District Asbestos Litigation, No. 36, 105 N.Y.S.3d 353, 358 (N.Y. 2019) ("our case law has not focused on creating an exhaustive list of the product's physical characteristics but has instead focused on [its] potential dangers," and ultimately on "principles of reasonableness and public policy" (citations omitted)); Micallef v. Miehle Co., 39 N.Y.2d 376, 387 (1976) ("legal responsibility, if any, for injury caused by machinery which has possible *dangers incident to its use* should be shouldered by the one in the best position to have eliminated those dangers") (emphasis supplied). The New York Court of Appeals has therefore consistently declined to make bright-line pronouncements in the context of our negligence-based products liability law, since doing so would inexorably lead to harsh results. See, e.g., Hoover v. New Holland N. Am., Inc., 23 N.Y.3d 41, 59 (2014) (permitting manufacturers to "*automatically* avoid liability" in design defect cases where a safety device is removed post-sale but not replaced would create "[s]uch a broad rule" that it "would lessen the manufacturer's duty to design effective safety devices that make products safe for their intended purpose and

'unintended yet reasonably foreseeable use'") (emphasis in original); Liriano v. Hobart Corp., 92 N.Y.2d 232, 242 (1998). ("[t]he fact-specific nature of the inquiry into whether a particular risk is obvious renders bright-line pronouncements difficult"); Cover v. Cohen, 61 N.Y.2d 261, 270 (1984) ("[w]e decline the single standard invitation [regarding the admission of subsequent remedial measures] because of the different inquiries involved in the different types of cases"); Micallef, 39 N.Y.2d at 385 (abrogating a bright-line patent-danger rule because "[i]ts unwavering view produces harsh results…").

2. Defendants Make Products Under New York Law

Social Media Defendants argue that "Plaintiffs seek to expand New York's product-liability law in an unprecedented way by holding providers of intangible, online services liable for harm arising from the ideas and content conveyed on those services." (Joint Motion at 24). Defendants are correct that, to date, no New York court has expressly held social media apps to be products, however, what constitutes a product under New York law is also not defined and is thus not confined to tangible chattel as a matter of law. Here, however, Plaintiffs' alleged facts satisfy all the factors New York courts consider in determining whether product liability law applies.

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

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

These facts considerations include:

(1) the public interest in life and health;
(2) the invitations and solicitations of the manufacturer to purchase the product;
(3) the justice of imposing the loss on the manufacturer who created the risk and reaped the profit;
(4) the superior ability of the commercial enterprise to distribute the risk of injury as a cost of doing business;

(5) the disparity in position and bargaining power that forces the consumer to depend entirely on the manufacturer;
(6) the difficulty in requiring the injured party to trace back along the channel of trade to the source of the defect in order to prove negligence; and
(7) whether the product is in the stream of commerce.

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

Here, Plaintiffs allege that Social Media Defendants "designed, coded, engineered, manufactured, produced, assembled, and placed [their platforms'] into the stream of commerce. . . . with the intent to be used or consumed by the public" and their platforms "are uniform and generally available to consumers." Complaint ¶ 233 (Facebook & Instagram), ¶ 276 (YouTube); ¶¶ 333-34 (Twitch), ¶ 362 (Snapchat), ¶ 377 (Discord); ¶ 406 (Reddit). Social Media Defendants' platforms are also "mass marketed," "designed to be used and is used by hundreds of millions of consumers" and "to appeal to adolescents." Complaint ¶ 235 (Facebook & Instagram); ¶ 277 (YouTube), ¶ 335 (Twitch), ¶ 363 (Snapchat), ¶ 378 (Discord), ¶ 407 (Reddit). These platforms are "akin to tangible products" because "[w]hen installed on a consumer's device, they have a definite appearance and location. . . are operated by a series of physical swipes and gestures [and] are personal and moveable." Complaint ¶ 235 (Facebook & Instagram), ¶ 278 (YouTube), ¶ 336 (Twitch), ¶ 364 (Snapchat), ¶ 379 (Discord), ¶ 408 (Reddit). Social Media Defendants "repeatedly and consistently acknowledged that [their] social media platforms are 'products'" in annual reports, investor calls and job postings for "product managers." Complaint ¶¶ 236-237 (Facebook and Instagram), ¶¶ 279-280 (YouTube), ¶¶ 337-339 (Twitch), ¶¶ 336-337 (Snapchat), ¶ 381 (Discord), ¶ 410 (Reddit). Finally, Plaintiffs alleged that "[the public has an interest in the health and safety of widely used and distributed products such as those promoted by [Social Media Defendants]" and "[j]ustice requires that losses related to [these platforms] . . . be borne by . . . the manufacturer and creator of the product." Complaint ¶ 246 (Instagram), ¶ 281, (YouTube), ¶ 365 (Snapchat), ¶ 380 (Discord), ¶ 409 (Reddit). These allegations are amply sufficient to deem the social media apps product under New York law.

Application of the Terwilliger factors to Plaintiffs' factual allegations weigh heavily in favor of treating Social Media Defendants' apps as products and applying strict liability in this

case. See, e.g., Brookes v. Lyft Inc, 2022 WL 19799628 (Fla. Cir. Ct. Sept. 30. 2022), at *4 (discussing Section 19 and holding that products liability applies to claims "aris[ing] from the defect in Lyft's application"].)

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

Second, Social Media Defendants regard teens as an important—if not their primary—target demographic and market to them aggressively. See Complaint ¶ 152.

Third, it is fair and just to expect Defendants, who created the risk and reaped the profit, to bear the costs of their defectively designed apps. See Terwilliger, 33 N.Y.3d 488, 497 (2019) (holding coke oven was a "product" where the defendant was "responsible for placing the ovens into the stream of commerce and . . . derived financial benefit from its role in the production process"). Social Media Defendants have earned billions of dollars from the addiction-causing features of their apps. Complaint ¶ 573. In fact, Defendants have deliberately exacerbated their products' addictive features in pursuit of higher profits. Complaint ¶ 551.

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

Fifth, there is a vast disparity in bargaining power between Defendants and the users of their apps. Defendants are some of the world's largest and most powerful companies. Complaint ¶ 573.

Sixth, the "complexity" and "secretiveness" of Defendants' products and their designs materially hinder the Plaintiffs' ability to know all of Defendants' tortious conduct. See, Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 107 (1983) (manufacturer is "in the superior position to discover any design defects and alter the design before making the product available to the

public.")

Finally, Social Media Defendants have placed their standardized apps into the stream of commerce. Terwilliger, 33 N.Y.3d at 494 (wares placed in stream of commerce who serve standardized purpose deemed products)

Application of the product liability law to social media apps is buttressed by the fact that many courts "may draw an analogy between the treatment of software under the Uniform Commercial Code and under products liability law." Rest. 3d Torts: Prods. Liab. § 19 cmt. d. New York courts recognize that "software that is mass-marketed is considered a good," not a service. Commc'ns Grps., Inc. v. Warner Commc'ns, Inc., 527 N.Y.S.2d 341, 344 (N.Y. Civ. Ct. 1988) ("[I]t seems clear that computer software . . . is considered by the courts to be a tangible, and movable item, not merely an intangible idea or thought and therefore qualifies as a 'good' under Article 2 of the UCC."); People v. Aleynikov, 31 N.Y.3d 383, 390 (2018) (rejecting defendant's argument that source code was not "related to a product" under the Economic Espionage Act). See also Neilson Bus. Equip. Ctr., Inc. v. Monteleone, 524 A.2d 1172, 1174 (Del. 1987) (holding that software was a good, not a service, and rejecting argument that "intangibles" are categorically excluded as goods under the UCC). New York Courts have echoed this principle in analogous circumstances.

Defendants contend that Plaintiffs cannot state a claim under any products liability theory because their social media platforms not a 'tangible product.'" (Joint Motion at 25). Quoting selectively from the Third Restatement, Defendants argue that tangibility is the *sine qua non* of product liability. However, Defendants ignores the portion of the Third Restatement providing that items that are not clearly tangible may be considered products "when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property[.]" (Rest.3d Torts: Prods. Liab., § 19(a)).[1] Moreover, the Court of Appeals has expressly

[1] Significantly, Comment "a" to the Third Restatement avers that "Given that design and warning cases turn on essentially risk-utility evaluations, see § 2, Comment d, the practical importance of whether something is, or is not, a product has diminished somewhat." And the Comment goes on to note that where statutes are enacted to reform products liability, nontraditional conditions and limitations on products liability may enhance the importance of whether something is classified as a product. Id. New York, of course, has no such statute. Since products liability is of the common law, the practical importance of classifying Social Media Defendants platforms as products is diminished.

recognized that "what constitutes a product is not limited to the physical characteristics." Terwilliger, 33 N.Y.3d at 494.

Social Media Defendants also rely on Winter v. G.P. Putnam's Sons 938 F.2d 1033, 1034 (9th Cir. 1991) to assert that "products liability is geared to the tangible world." (Joint Motion at 27). Initially, however, New York products liability law differs drastically from other jurisdictions like California. See In re New York City Asbestos Litig. [Dummitt], 27 N.Y.3d 765 (2016) (distinguishing New York products liability law from other jurisdictions). In any event *Winter* must be read in context: the court was rejecting the plaintiffs' argument that *ideas* can be products. Id. at 1036, fn 4. Additionally, Defendants conveniently ignore language in Winter that injury in a products liability case "does not have to be caused by impact from the physical properties of the item." (*Ibid.*) Winter even pointed to "[c]omputer software" as an example of a "highly technical tool" whose defect supports product liability.[2] Id. at 1036. Defendants also ignores Maynard v. Snapchat, Inc. 313 Ga. 533 (2022), where Georgia Court of Appeals held that that Snap had a duty as a "manufacturer" and that Snapchat was a "product" for purposes of strict liability. Id. at 534.

3. Plaintiffs' Allege Legally Cognizable Product Liability Claims Under New York Law

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

[2] The Third Restatement endorses that approach, recognizing that *Winter* suggested "that computer software might be considered a product for purposes of strict products liability in tort" and further cataloging the "numerous commentators [who] have discussed the issue and urged that software []be treated as a product." Rest. 3d Torts: Prods. Liab. § 19, cmt. d; see Brookes v. Lyft Inc, 2022 WL 19799628, at *4 (Fla. Cir. Ct. Sept. 30. 2022) [discussing Section 19, comment d and holding that products liability applies to claims 7 "aris[ing] from the defect in Lyft's application"].)

New York courts apply the following factors in in a risk/utility analysis: (1) the product's utility to the public as a whole, (2) its utility to the individual user, (3) the likelihood that the product will cause injury, (4) the availability of a safer design, (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced, (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user, and (7) the manufacturer's ability to spread the cost of any safety-related design changes. Id. Importantly, "[t]he issue of whether a product is defectively designed such that its utility does not outweigh its inherent danger is generally one 'for the jury to decide in light of all the evidence presented by both the plaintiff and defendant.'" Yun Tung Chow v. Reckitt & Colman, Inc., 17 N.Y.3d 29, 33 (2011) (quoting Voss v. Black & Decker Mfg Co., 59 N.Y.2d 102, 108 (1983)).

Here, Plaintiffs' product liability claims are premised on the allegation that "[a]s designed, the Social Media Defendants' products addicted Payton Gendron." Complaint ¶ 546. In order to maintain engagement of teen users--and the resulting advertising revenue--the artificial intelligence driving Social Media Defendants' products deluged Gendron with progressively more extreme and psychologically discordant material to overcome the satiation effect and trigger a dopamine response in his adolescent brain. Complaint ¶ 171.

More specifically, Plaintiffs product liability claims allege that as a minor, Payton Gendron lacked "the ability to discern the Social Media Defendants' products' potential for radicalization and the instigation of racist, antisemitic, and violent behavior."[3] Complaint ¶ 536. Defendants' products are unreasonably dangerous because they contain numerous design characteristics not necessary for the platform's utility but compelled Gendron to view content as a captive audience and were "implemented solely to increase the profits they derive from each additional user and the length of time they can keep each user dependent on their product." Id. The risk, therefore, outweighed the utility. Complaint ¶ 536. Plaintiffs alleged that,

[3] See also Complaint ¶ 575. ("The Social Media Defendants owed a heightened duty of care to minor and young adult users of their products because adolescents' brains are not fully developed which results in a diminished capacity to make responsible decisions regarding social media use, eschew violent behaviors.")

> The Social Media Defendants' products are defective and not reasonably safe because there was a substantial likelihood that they would cause harm and it was feasible to design the products in a safer manner. The foreseeable risks of harm posed by the social media products' design could have been reduced or avoided by the adoption of a reasonable alternative design and the omission of the alternative design renders the products not reasonably safe. If the design defects in the Social Media Defendants products were known at the time of manufacture and distribution, a reasonable person would conclude that the utility of their products did not outweigh the risk inherent in designing them in that manner.

Complaint ¶ 537. Finally, Plaintiffs allege that "[a]s a proximate result of these dangerous and defective design attributes of Social Media Defendants' products, Payton Gendron was radicalized and motivated to commit the horrific act of May 14, 2022." Complaint ¶ 558.

These allegations clearly allege design defect claims that are cognizable under New York law's exceedingly liberal standard. See C.P.L.R. § 3026; Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994) (complaint states a cause of action when the allegations, accepted as true, "fit within any cognizable legal theory").

C. Plaintiffs Have Viably Pleaded Each Element of their Negligence Claims Under New York Law

Social Media Defendants assert that Plaintiffs' negligence claims fail as a matter of law because they did not owe them "a cognizable duty of care." Joint Motion at 34. Defendants argue that because Plaintiffs cannot assert claims on behalf of Gendron for his own radicalization they did not owe any duty to "the public at large to control Gendron." Defendants' overly restrictive concept of duty is contrary to New York law.

1. Social Media Defendants Owe A Duty of Care to Plaintiffs under Clear New York Law

Duty is "a legal term by which we express our conclusion that there can be liability." DeAngelis v. Lutheran Med. Center, 58 N.Y.2d 1053, 1055 (1983). It requires a person "to conform to a certain standard of conduct, for the protection of others against unreasonable risks." Prosser and Keeton, Torts §§ 30 & 53, at 164, 356 (5th ed.). It is a "policy-laden" analysis (Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 139 (2002)), requiring the balancing of interests, including the wrongfulness of the defendant's actions and the reasonable expectation of care owed. Palka v. Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579 (1994); Turcotte v. Fell, 68 N.Y.2d 432,

437 (1986).

Duty is "not something derived or discerned from an algebraic formula, [but is] coalesce[d] from vectored forces including logic, science, [and] weighty competing socioeconomic policies…" Palka, 83 N.Y. 2d at 585. As such, rigid formalisms have little, if any, place in a duty analysis. Rather, multiple considerations must be weighed in a duty inquiry involving this genus of failure-to-warn cases – considerations that embody the policy-driven goals of fixing duty. See Prosser and Keeton, Torts § 53, at 358 (5th ed.) (duty is not sacrosanct but is "only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection"); Green v. Tanyi, 238 A.D.2d 954 (4th Dep't 1997) (risk that a defendant intervenor would intentionally injure other patrons through acts of violence was the risk created by the defendant tavern's failure to control him); see also McCarville v. Burke, 255 A.D.2d 892 (4th Dep't1998) (the risk that intervenor would injure plaintiff or others on defendants' property through an act of violence was a risk created by defendants' earlier actions with respect to the teenagers); Leonard v. Con Edison Co. of N.Y. Inc., 279 A.D.2d 296 (1st Dep't 2001) **(**actions did not constitute a supervening act negating the negligence of defendants in permitting gas to escape into the room where the explosion occurred).

There is no merit in Defendants assertion that the Tops shooting victims here are too far removed from Defendants' conduct to impose a duty of care. The Court of Appeals has definitively concluded that privity is not required to establish a duty under strict products liability. Sprung v. MTR Ravensburg, Inc., 99 N.Y.2d 468, 472 (2003); Heller v. U.S. Suzuki Motor Corp., 64 N.Y.2d 407, 411 (1985); Codling v. Paglia, 32 N.Y.2d 330, 342 (1973) (the citadel of privity has been eroded). "In strict products liability, a manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from the use of the product 'regardless of privity, foreseeability or the exercise of due care' " Godoy v. Abamaster of Miami, Inc., 302 A.D.2d 57, 60 (2d Dep't 2003) (quoting Gebo v. Black Clawson Co., 92 N.Y.2d 387, 392 (1998)). It is long-established in New York products liability jurisprudence that a manufacturer of a defective product is liable to "any person" injured from the product. See McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, 68 (1962). Indeed, The

Court of Appeals in Codling avowed that "the manufacturer of a defective product is liable to *any person* injured or damaged if the defect was a substantial factor in bringing about his injury or damages." Id. at 342 (emphasis supplied).

This fundamental precept of products liability has led every Appellate Division to hold that a manufacturer is liable even where its defective product injures an innocent bystander not using or working with the product. See, e.g., Ciampichini v. Ring Bros., Inc., 40 A.D.2d 289 (4th Dep't 1973); Singer v. Walker, 39 A.D.2d 90 (1st Dep't 1972); Codling v. Paglia, 38 A.D.2d 154 (3d Dep't 1972), aff'd 32 N.Y.2d 330; cf. Tucci v. Bossert, 53 A.D.2d 291, 293 (2d Dep't 1976); see also Cawley v. Gen. Motors Corp., 67 Misc.2d 768 (Sup Ct, Broome Cty 1971). In so holding, the Fourth Department averred that "it is both reasonable and just to extend to bystanders the protection against a defective manufactured article." Ciampichini, 40 A.D.2d at 293; see also Bah v. Nordson Corp., 2005 WL 1813023, at *15 (S.D.N.Y. Aug. 1, 2005) (Plaintiff was injured when she was burned by hot glue discharged from a machine which was being used by a coworker. Defendant argued that it did not have a duty to warn plaintiff because she was not an end-user. The court ruled that defendant had a duty to warn plaintiff, even though she was a bystander, since she was "in the vicinity" in which the machine was being used.).

2. Plaintiffs have Pleaded Cognizable Failure to Warn Claims Under New York Law

The duty to warn about unsafe products is a matter of "basic tort-law principles." Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 993 (2019). In Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 297 (1992), the New York Court of Appeals unanimously declared that "[a] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known." Failure-to-warn in New York is a negligence-based claim. See Enright v. Eli Lilly & Co., 77 N.Y.2d 377, 385-87 (1991) (failure to warn claim, "though . . . couched in terms of strict liability, is indistinguishable from a negligence claim," such that "[c]oncepts of reasonable care and foreseeability are not divorced from this theory of liability…").

A duty to warn inquiry is "intensely fact-specific." Liriano v. Hobart Corp., 92 N.Y.2d 232, 243 (1998); Di Ponzio v. Riordan, 89 N.Y.2d 578, 583 (1997) ("[t]he nature of the inquiry depends,

of course, on the particular facts and circumstances in which the duty question arises"). See Espinal, 98 N.Y.2d at 139 ("'policy-laden' nature of the existence and scope of a duty generally precludes any bright-line rules…"). It is therefore axiomatic that the reasonableness of a warning is a question of fact for the jury. See Cover v. Cohen, 61 N.Y.2d 261, 276 (1984) ("[g]enerally, the issue will be one of fact for the jury"); Feiner v. Calvin Klein, Ltd., 157 A.D.2d 501 (1st Dep't 1990) ("[t]he courts have repeatedly held that questions of design defect and a manufacturer's failure to warn are generally inappropriate for resolution on a summary judgment motion").

Here, Plaintiffs allege that "[t]he Social Media Defendants know that these product features cause significant risks to their minor users to be radicalized and violent." Complaint ¶ 540. Their products are therefore "defective and not reasonably safe because they contain no adequate warning to minor users or parents regarding their addictive design and propensity to promote radicalization and violence. Complaint ¶ 563. These factual allegations are sufficient to state a cognizable failure to warn claim under New York law.

D. Plaintiffs Have Properly Pleaded Proximate Causation Under New York Law

Social Media Defendants argue that "Plaintiffs cannot establish the Internet-Defendants' conduct was the legal cause of Plaintiffs' injuries." Joint Motion at 29.

The concept of proximate or legal cause "stems from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct" and therefore "a variety of factors may be relevant in assessing legal cause". Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 314 (1980). For that reason, The New York Court of Appels in Derdiarian held that legal cause is quintessentially factual determination.

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

Id. at 315 (citations omitted). See also Oken v. A.C. & S., Inc., 7 A.D.3d 285 (1st Dep't 2004) ("The plaintiff is not required to show the precise causes of his damages, but only to show facts

and conditions from which defendant's liability may be reasonably inferred.").

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

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

Derdiarian, 51 N.Y.2d at 315.

In Derdiarian, a driver who negligently failed to take his epilepsy medication suffered a seizure and lost consciousness, causing his vehicle to careen into the work site where struck a construction worker who flew in the air and was splattered with hot liquid enamel from a kettle struck by the automobile. Id. at 313. The injured worker sued the contractor for failing to take adequate measures to ensure the safety of workers on the excavation site. The Court of Appeals held that the driver's intervening act was not a superseding cause of the workers' injury and that the jury's finding of negligence was supported by to evidence.

> Serious injury, or even death, was a foreseeable consequence of a vehicle crashing through the work area. The injury could have occurred in numerous ways, ranging from a worker being directly struck by the car to the car hitting an object that injures the worker. Placement of the kettle, or any object in the work area, could affect how the accident occurs and the extent of injuries. That defendant could not anticipate the precise manner of the accident or the exact extent of injuries, however, does not preclude liability as a matter of law where the general risk and character of injuries are foreseeable.

Id. at 316-17.

Nor do criminal acts of third parties necessarily break the chain of legal causation flowing from the defendants' negligence. In New York, as in many jurisdictions, the general rule is that one is not liable for the criminal acts of third parties. See, e.g., Kush v. Buffalo, 59 N.Y.2d 26, 33 (1983). But that rule "has no application when the intentional or criminal intervention of a third party or parties is reasonably foreseeable." Id. at 33. Where, as here, a defendant's negligence

creates or exacerbates a foreseeable risk of harm from third-party criminal conduct, the defendant may be held liable for the criminal acts of third parties. Id.

For example, "landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person." Beato v. Cosmopolitan Assocs., LLC, 69 A.D.3d 774, 776 (2d Dep't 2010) (cleaned up). "Third-party criminal conduct is considered foreseeable as a matter of law where it is 'reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location.'" Id. (quoting Novikova v. Greenbriar Owners Corp., 258 A.D.2d 149, 153 (1999)). Matter of World Trade Ctr. Bombing Litig., 3 Misc. 3d 440, 467 (Sup. Ct. 2004).

Social Media Defendants' contention that the harm Plaintiffs allege was "independent of or far removed from" Social Media Defendants' conduct and "not foreseeable in the normal course of events" is, at best, disingenuous. Joint Motion at 32. Plaintiffs' allegations speck to the direct relationship between what Social Media Defendants could have and did foresee and the very kind of harm alleged. Plaintiffs' allegations go far beyond suggesting that the harm caused by Social Media Defendants' conduct was merely "possible." Perry v. Rochester Lime Co., 219 N.Y. 60, 63-64 (1916); see also, e.g., Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268 (1992) (requiring "some direct relation between the injury asserted and the injurious conduct alleged").

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

Here, the high degree of foreseeability of serious harm and exceedingly low burden to

prevent the same shows that holding Social Media Defendants liable for their failure to prevent such harm. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d. Cir. 1947) (Hand, J.) (duty is a function of three variables: (1) the probability of injury; (2) the gravity of the injury and (3) the burden of adequate precautions). Just like in Kush, where the "danger could be averted with great ease and at little cost," 59 N.Y.2d at 31, implementing design changes to the Social Media Defendants products could easily be implemented at minimal cost. Plaintiffs' Complaint alleges the following:

> The Social Media Defendants' products are defective and not reasonably safe because there was a substantial likelihood that they would cause harm and it was feasible to design the products in a safer manner. The foreseeable risks of harm posed by the social media products' design could have been reduced or avoided by the adoption of a reasonable alternative design and the omission of the alternative design renders the products not reasonably safe. If the design defects in the Social Media Defendants products were known at the time of manufacture and distribution, a reasonable person would conclude that the utility of their products did not outweigh the risk inherent in designing them in that manner.

Complaint ¶¶ 537-8.

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

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

Complaint ¶ 605. These allegations, which must be taken as true, are sufficient to establish that Social Media Defendants' defective products were the legal cause of plaintiffs' injuries. See Billsborrow v. Dow Chemical, 177 A.D.2d 7, 17 (2d Dep't 1992) ("The questions of whether an act is foreseeable and in the course of normal events are indispensable in a determination of legal

causation and are generally subject to varying inferences best left to the finder of fact to resolve"); Burke v. Dow Chem. Co., 797 F. Supp. 1128, 1134 (E.D.N.Y. 1992) ("[t]hese issues will likely be capable of resolution only after further discovery and a trial").

E. Section 230 Does Not Preempt Plaintiffs' Claims Against Social Media Defendants' Violations of New York Product Liability and Negligence Law

Section 230 of the Communications Decency Act provides 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)). Social Media Defendants argue that this provision bars all Plaintiffs' causes of action in their entirety. Defendants' argument contravenes well-established principles of federalism and misconstrues the factual and legal bases of Plaintiffs' state law claims.

1. Preemption Requires an Irreconcilable Conflict Between Section 230 and Plaintiffs' New York State Law Claims

Section 230 preempts state law liability if (1) it is a "provider or user of an interactive computer service"; (2) the complaint seeks to hold the defendant liable as a "publisher or speaker" under the state law cause of action, and (3) the action is based on "information provided by another information content provider" Shiamili v. Real Estate Group of N.Y., Inc., 17 N.Y.3d 281, 287 (2011) (quoting 47 U.S.C. § 230) On the other hand, Section 230 does seek to occupy the field of online communications, but rather explicitly provides that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." (47 U.S.C. § 230(e)(3)).

The Supremacy Clause of the U.S. Constitution has given rise to three distinct preemption doctrines: "(1) 'express preemption,' where Congress explicitly defines the extent to which its enactment preempts state law, (2) 'field preemption,' where Congress regulates a field so pervasively that an intent to occupy the field exclusively may be inferred, and (3) 'conflict preemption,' where the state and federal law actually conflict so that it is impossible for a party to simultaneously comply with both, or the state law stands as an obstacle to the execution of the full purposes and objectives of Congress." Bantum v. AMEX, LLC, 7 A.D.3d 551, 552 (2d Dep't 2004) (citing Barnett Bank v. Nelson, 517 U.S. 25 (1996)). Generally, "[p]reemption is disfavored

absent persuasive reasons to the contrary. Comm'r of the Dep't of Soc. Servs. v. Spellman, 173 Misc. 2d 979, 986 (Sup. Ct. 1997) (citing Cipollone v. Liggett Grp., 505 U.S. 504, 516 (1992)).

Express preemption may be found where a federal statute "explicitly declares that a federal law is intended to supersede state law." Balbuena v. IDR Realty LLC, 6 N.Y.3d 338, 356 (2006). "A conflict exists where compliance with both federal and state regulations is a physical impossibility . . ." Sutton 58 Assocs. LLC v. Pilevsky, 36 N.Y.3d 297, 325 (2020) (cleaned up). However, the Court of Appeals has "cautioned [against] reading conflict preemption principles too broadly[.]" Garcia v. N.Y.C. Dep't of Health & Mental Hygiene, 31 N.Y.3d 601, 617 (2018). Rather, New York courts "take heed of the rule of interpretation that preemption clauses in a statute are to be *narrowly construed* and that matters beyond their scope are not preempted." Wallace v. Parks Corp., 212 A.D.2d 132, 138-9 (App. Div. 1995) (emphasis supplied).[4] When faced with potential conflicts between state and federal law, New York courts seek a harmonious interpretation construing state law to align with federal law rather than setting up a direct conflict. Sutton, 36 N.Y.3d at 309. Only where a harmonious interpretation is impossible because "the conflict between state law and federal policy [is] a sharp one" and the "conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together," will federal law have preemptive force. Id.

Here, Social Media Defendants baldly assert that Plaintiffs' New York state product liability and negligence claims are *completely* preempted by federal law without *any* discussion of the applicable standard under which their preemption claims should be evaluated by this Court. Under well-established New York preemption principles, the Court must "narrowly construe[]" Section 230 and determine whether the federal statute is so inconstant with New York product liability and negligence law that it is impossible to comply with both. Wallace, 212 A.D.2d at 138.

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

Social Media Defendants do not even attempt to make this showing, but rather ask the Court to adopt an expansive interpretation of Section 230 and rigid application of New York tort law that makes a conflict inevitable. This is not sufficient to meet their preemption burden. Sutton, 36 N.Y.3d at 309.

Defendants must show that the conflict between Section 230 and New York tort law is "a sharp one" and that the conflict is "so direct and positive" that the two laws "cannot be reconciled or consistently stand together." Id. This they cannot do. In contrast. as set forth in detail below, Plaintiffs offer the Court an interpretation of Section 230 in which state law claims that seek to hold social media companies liable for wrongful exercise of traditional publishing functions are preempted but product liability and negligence claims directed toward the unreasonably dangerous design of Defendants' social media products are not. Plaintiffs' harmonious interpretation of state and federal law is not only more consistent with Section 230's statutory language and legislative intent but satisfies the preemption analysis that New York courts require when faced with potential conflicts between state and federal law.

2. Section 230 Preemption Analysis Rejects a "But For" Test and Focuses on the Legal Duty the Defendant Allegedly Breached, Not the Harm the Plaintiff Sustained

Social Media Defendants argue that Plaintiffs' claims implicate traditional publishing activity preempted by Section 230 because their alleged harms "are inextricable from the third-party content with which Gendron allegedly engaged." Joint Motion at 10. Because Plaintiffs would not have been harmed if Gendron had been "provided content related to benign topics, like gardening or chess," Defendants contend it is impossible for Plaintiffs to articulate any theory of liability that does not depend upon user generated content. Id. at 11. While superficially beguiling, this "but for" argument ignores Section 230's crucial distinction between the legal claims Plaintiffs allege and the physical harms they sustained.

Courts throughout the country have rejected an expansive "but for" interpretation of Section 230 preemption. In Hassell v. Bird 5 Cal. 5th 522 (2018), the California Supreme Court explained that "not all legal duties owed by Internet intermediaries necessarily treat them as the publishers of third-party content, even when these obligations are in some way associated with

their publication of this material." Id. at 542–43. More recently, in Webber v. Armslist LLC 70 F. 4th 945 (7th Cir. 2023) the Seventh Circuit held that "§ 230(c)(1) is not a comprehensive grant of immunity for third-party content," but rather "precludes liability only where the success of the underlying claims requires the defendant to be considered a publisher or speaker of that content." Id. at 955–957. Courts accordingly reject a "but-for" test that would invoke Section 230 preemption simply because a state law cause of action would not have accrued in the absence of third-party communication. See, e.g., Erie Ins. v. Amazon.com, Inc 925 F.3d 135, 139-40 (4th Cir. 2019) (online seller was not protected by § 230 in a product-liability suit even though publishing advertisement on website for defective product was a but-for cause of plaintiff's harm); Lee v. Amazon.com, 76 Cal. App. 5th 200, 256 (2022) (same).

Rather, than focus on the harm the plaintiff sustained, "courts must ask whether *the duty that the plaintiff alleges the defendant violated* derives from the defendant's status or conduct as a publisher or speaker." Bolger v. Amazon.com, 53 Cal. App. 5th 431, 464 (2020) (emphasis supplied.) See Cross v. Facebook, 4 Cal. App. 5th 190, 207 (2017) (courts "look instead to what the duty at issue actually requires."). Section 230's focus on legal duty was first articulated by the Ninth Circuit in Barnes v. Yahoo, 570 F.3d 1096 (9th Cir. 2012), where an online platform expressly promised to remove naked photos of the plaintiff from its web site but failed to do so. The Ninth Circuit held that while the plaintiffs' negligent undertaking claim was preempted by Section 230 because it sought to hold Yahoo liable for failing to remove the offending material, her promissory estoppel claim was not. Id. at 1109. While the promise underlying the promissory estoppel claim involved the same misconduct as the negligent undertaking claim—failing to remove content from the site—because the corresponding duty did not arise from Yahoo's role as a publisher §230 did not apply.

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

Id. at 1107. See also Doe v. Internet Brands, Inc., 824 F.3d 846, 853 (9th Cir. 2016) (Section 230 did not preempt plaintiff's California failure to warn claims where defendant obtained independent

knowledge of the danger).

In evaluating the scope of Section 230 preemption, courts must "distinguish claims that treat an interactive computer service provider as a publisher from claims that do not, despite being associated with third party content." Lee, 76 Cal. App.5th at p. 257. As the Seventh Circuit explained,

> This "but-for" publication test would say a claim treats an entity as a "publisher" under § 230(c)(1) if liability hinges in any way on the act of publishing. This but-for test bears little relation to publisher liability at common law. To be held liable for information "as the publisher or speaker" means more than that the publication of information was a but-for cause of the harm. . . A claim only treats the defendant "as the publisher or speaker of any information" under § 230(c)(1) if it (1) bases the defendant's liability on the disseminating of information to third parties and (2) imposes liability based on the information's improper content.

Weber, 70 F4th at 123. See also Force v. Facebook, Inc., 934 F3d 53, 82 (2d Cir 2019) (Katzmann C.J., dissenting in part) ("The CDA does not mandate "a 'but-for' test that would provide immunity ... solely because a cause of action would not otherwise have accrued but for the third-party content.").

The Ninth Circuit's holding in Lemmon v. Snap, Inc., 995 F.3d 1085 (2021), is instructive. There, three boys were killed in a high-speed auto accident after posting their speed using a Snapchat filter. Id. at 1088. As in this case, Snap argued that because the incident arose from third-party content — one of the deceased posting his speed on Snapchat — plaintiffs sought to hold it liable as a publisher. However, expanding on its holding in Internet Brands, the Ninth Circuit held that the appropriate focus of the Section 230 analysis is the duty plaintiffs alleged was breached rather than the harm sustained.

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

Id. at 1092–93, (quotations omitted). See also Maynard v. Snapchat, supra, 313 Ga. at 534 (product liability claim arising from social media app's negligent design not preempted by Section 230).

Here, Plaintiffs' Complaint expressly disclaimed any claim seeking to hold Social Media Defendants liable as publishers.

> Plaintiffs expressly disclaim any and all claims seeking to hold the Social Media Defendants liable as the publisher or speaker of any content provided, posted, or created by third parties. Rather, Plaintiffs seek to hold Social Media Defendants accountable for their own acts and omissions. Plaintiffs' claims arise from the Social Media Defendants' status as designers and marketers of a social media products that were not reasonably safe, as well as their own statements and actions, and are not based on their status as the speaker or publisher of third-party content.

Complaint ¶ 530. Rather, the predicate for Plaintiffs' claims is Social Media Defendants' "underlying design, programming, and engineering of their platforms." Complaint ¶ 532. Thus, "Plaintiffs' claims seek to hold the Social Media Defendants accountable for their own, operations, conduct, and products – not for the speech or content of others or for Defendants' content moderation decisions." Id. Indeed, Plaintiffs allege that:

> Social Media Defendants could manifestly fulfill their legal duty to design a reasonably safe social media products and furnish adequate warnings of foreseeable dangers arising out of the use of their products without altering, deleting, or modifying the content of a single third-party post or communication.

Complaint ¶ 533.

As in Weber, Lee, Barnes, Maynard, Internet Brands, and Lemmon, Plaintiffs legal claims do not arise from Social Media Defendants' publishing of third party content on its platform; they arise from the breach of Defendants' duty to design reasonably safe social media products. Section 230 does not preempt these claims.

3. Plaintiffs' Product Liability Claims Do Not Treat Defendants as Publishers

Social Media Defendants castigate Plaintiffs for using "artful pleading" to circumvent Section 230 immunity by "cloak[ing] their claims about harmful third-party content in product liability theories." Joint Brief at p. 9. In so arguing, Defendants misconstrue controlling New York law and ignores the substantive legal claims in Plaintiffs' Complaint.

Section 230 immunizes Internet service providers from liability for third-party content "wherever such liability depends on characterizing the provider as a "publisher or speaker" of objectionable material." Shiamili, 17 N.Y. 3d at 280 (reposting libelous content created and by a third party falls within "a publisher's traditional editorial functions") (quotations omitted). This

occurs where the plaintiffs "seek 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. (quotations omitted). However, claims that Social Media Defendants violated their duties as publishers are distinct from Plaintiffs' allegations in this case that Defendants breached their duty as manufacturers to design reasonably safe products. See Erie, 925 F.3d at 140 (Section 230 "protects interactive computer service providers from liability *as a publisher of speech*, it does not protect them from liability as the seller of a defective product.")' Bolger, 53 Cal. App.5th at 464 (California courts "have declined to apply Section 230 to strict products liability claims."); A.M. v. Omegle.com, LLC 614 F. Supp.3d 814 (D. Or. 2022) (Section 230 does not preempt product liability claim that social media app "randomly paired" an 11-year-old child with a predatory user); Maynard, 870 S.E.2d at 745 (product liability claim that Snapchat speed filter caused fatal car accident not preempted by Section 230)

As in Bolger, Erie, Lemmon, Manyard and Omegle, Plaintiffs' claims here are premised on Social Media Defendants role as the designer, developer, marketer, distributor, and operator of defective and/or inherently dangerous products. Plaintiffs have alleged specific design defects that, if proven, would subject Defendants to strict liability under New York law as well as common law negligence and failure to warn claims. See Complaint ¶¶ 720–98, 799–877. Plaintiffs' claims explicitly characterize Defendants as manufacturers, not publishers. Complaint ¶ 530. See Shaimili, supra (Section 230 generally immunizes Internet service providers from liability for third-party content wherever such liability depends on "characterizing the provider as a 'publisher or speaker' of objectionable material."). Moreover, none of Plaintiffs' allegations seek to hold Defendants liable for their content moderation decisions in failing to review, alter, or remove the content that their users generate. Complaint ¶ 532. The distributor of a product designed to addict minor users by deluging them with unsolicited and psychologically discordant material can hardly be deemed to be engaged in "a publisher's traditional editorial functions." Shiamili, 17 N.Y. 3d at 280.

4. Social Media Defendants Are Responsible in Part For the Creation and Development of White Supremacist Material Posted on their Platforms.

Even if Plaintiffs were seeking to hold Social Media Defendants liable as publishers of

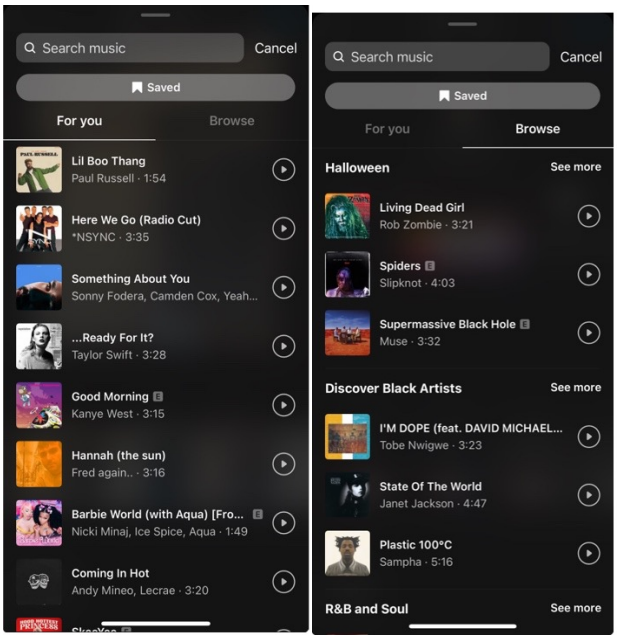
third-party content (they are not) Section 230 would not preempt their claims because Defendants materially contributed to the racist content that Gendron encountered on their platforms.

While Section 230 prohibits an interactive computer service from being treated as the publisher or speaker of any information provided by another information content provider, "if a defendant service provider is itself the "content provider," it is not shielded from liability". Shiamili, 17 N.Y. 3d at 289. Section 230 defines an "information content provider" as "any person or entity that is responsible, in whole *or in part,* for the creation *or development* of information provided through the Internet . . ." (47 U.S.C. § 230(f)(3) (emphasis supplied.) "Since a content provider is any party "responsible . . . in part" for the 'creation or development of any piece of content can have multiple providers." Shiamili, 17 N.Y. 3d at 289 (quoting 47 U.S.C. § 230(f)(3)).

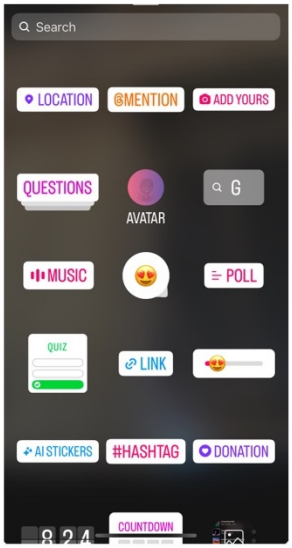
In Shiamili, the defendant web site added headings and illustrations to defamatory third-party content posted on its platform. Id. at 292. The New York Court of Appeals held that by virtue this additional material "the Defendants appear to have been 'content providers' with respect to the heading, subheading,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

a. Instagram is responsible in part for the creation of content on its platform

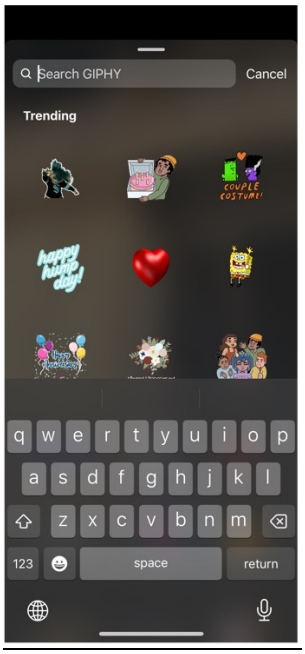
Meta's Instagram product has features within that allow users to alter and "enhance" their photos within the app. Affirmation of Madeline F. Bergman in Opposition to Social Media Defendants' Motion to Dismiss. ¶ 7. For posts, Instagram allows users to edit a photo with different filters and effects. It also allows a user to overlay music (provided by Instagram) on top of an image. On the page to select music, Instagram provides the option to select songs that have been preselected in the "Browse" section based on categories, such as "Halloween" "R&B and Soul" and "Pop." The "Browse" section also gives the user the option to select songs based on "moods."



Id. Exhibits 1 and 2. Once a user selects a song, they are prompted to select certain sections of the song to overlay with their image. These selected pieces of the music are noted as red dots, that allow the user to simply select that portion of the song, as recommended by Instagram.



Id. Exhibit 4. A user also has the ability to add a seemingly unlimited number of "stickers." These stickers include the photo's location, the ability to tag friends in the photo, the ability to ask questions, select music, add hashtags, a clock, a donation button, as well as many other options. Finally, Instagram gives the user the option to select a gif. A user is first prompted to select a gif that is "Trending." A user can also choose to search for a particular gif.



Id. Exhibit 10.

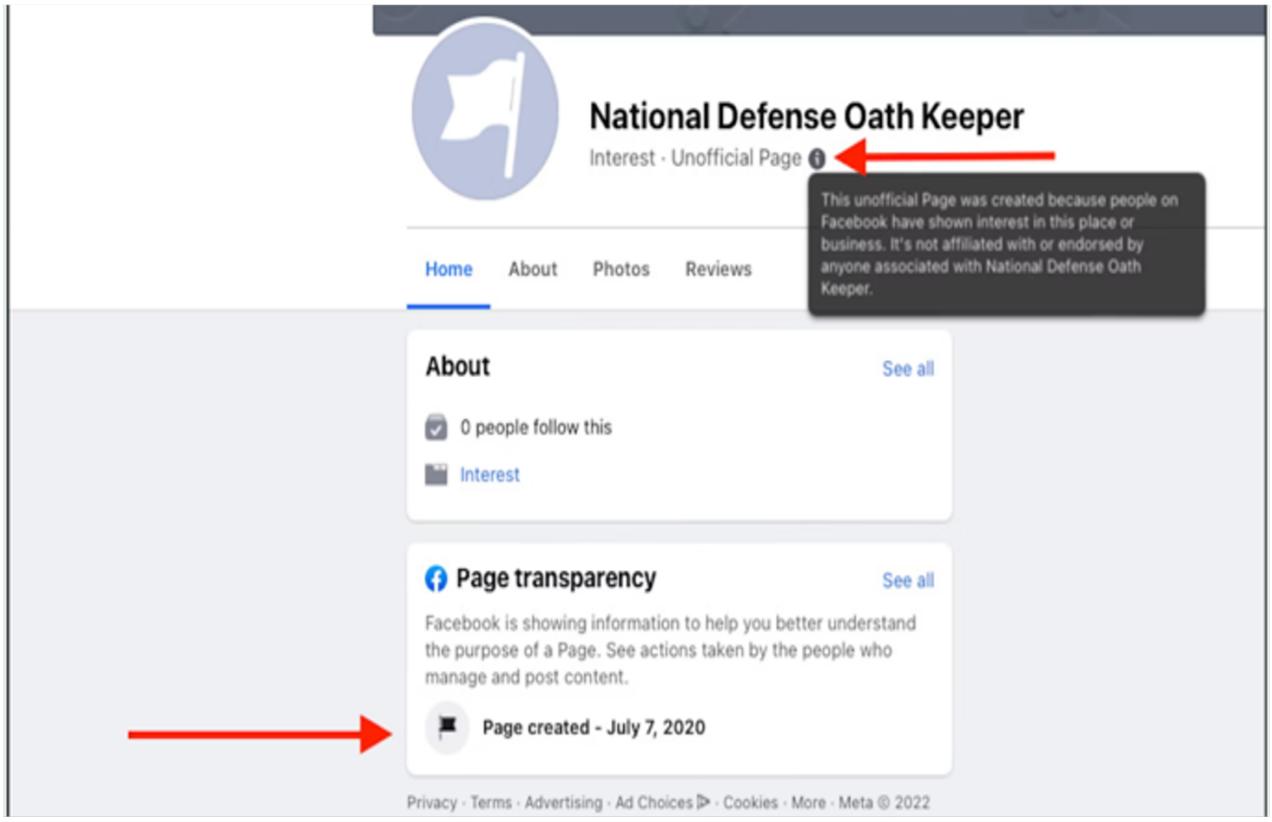
Therefore, Instagram generates content on its platform along with users. As the Court of Appeals noted in Shiamili, adding headings and illustrations is considered content provision. 17 N.Y. 3d at 292. Instagram populates similar content for its users via songs, stickers, and gifs, with the Instagram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

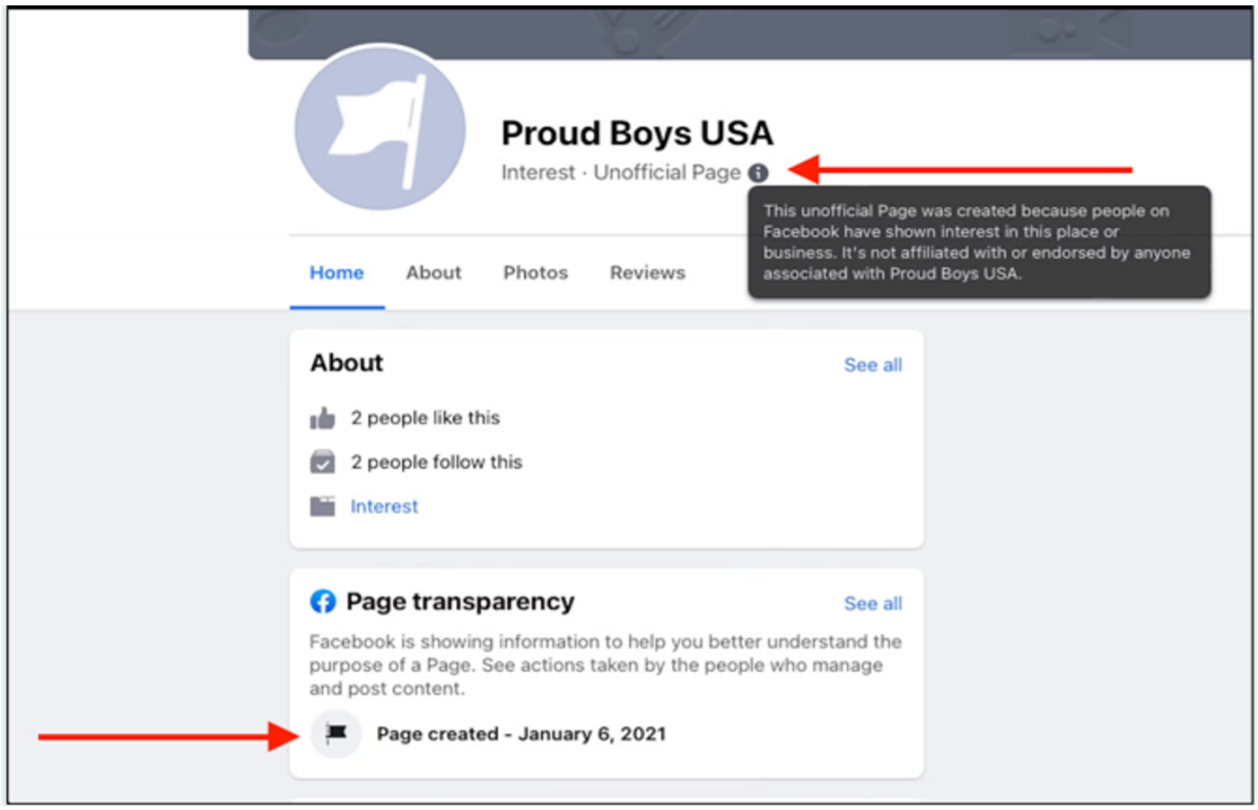
b. Facebook is responsible in part for the creation of content on its platform

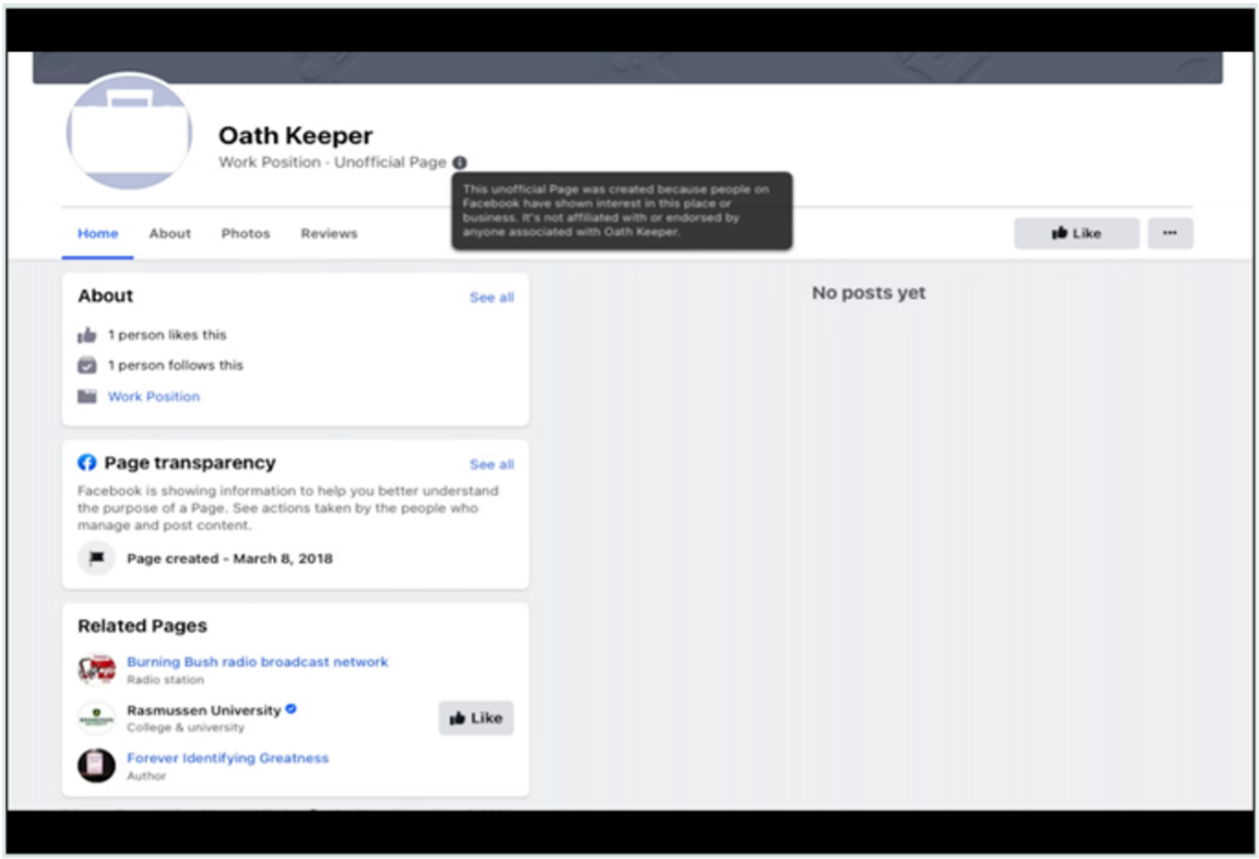
Facebook also allows for similar user interface options for postings as Instagram does. This includes the option to superimpose text and music onto Stories and Posts. Id. ¶ 18. But Facebook's content creation goes far beyond suggestions for Stories and Posts. Indeed, Facebook auto-generates ***entire Facebook pages*** on its platform when a user lists certain information (like a job interest, or location) in their profile that does not have an existing Facebook page. Id.

This has led to Facebook auto generating pages for white supremacist groups. Below are examples of pages of white supremacist groups that were autogenerated by Facebook.


Zone 4 District 2 Texas Three Percent
Interest · Unofficial Page
This unofficial Page was created because people on Facebook have shown interest in this place or business. It's not affiliated with or endorsed by anyone associated with Zone 4 District 2 Texas Three Percent.
Home
About
Photos
Reviews
About
See all
3 people like this
3 people follow this
Interest
Page transparency
See all
Facebook is showing information to help you better understand the purpose of a Page. See actions taken by the people who manage and post content.
Page created - June 16, 2020
Privacy · Terms · Advertising · Ad Choices · Cookies · More · Meta © 2022


National Defense Oath Keeper
Interest · Unofficial Page
This unofficial Page was created because people on Facebook have shown interest in this place or business. It's not affiliated with or endorsed by anyone associated with National Defense Oath Keeper.
Home
About
Photos
Reviews
About
See all
0 people follow this
Interest
Page transparency
See all
Facebook is showing information to help you better understand the purpose of a Page. See actions taken by the people who manage and post content.
Page created - July 7, 2020
Privacy · Terms · Advertising · Ad Choices · Cookies · More · Meta © 2022


Proud Boys USA
Interest · Unofficial Page
This unofficial Page was created because people on Facebook have shown interest in this place or business. It's not affiliated with or endorsed by anyone associated with Proud Boys USA.
Home
About
Photos
Reviews
About
See all
2 people like this
2 people follow this
Interest
Page transparency
See all
Facebook is showing information to help you better understand the purpose of a Page. See actions taken by the people who manage and post content.
Page created - January 6, 2021

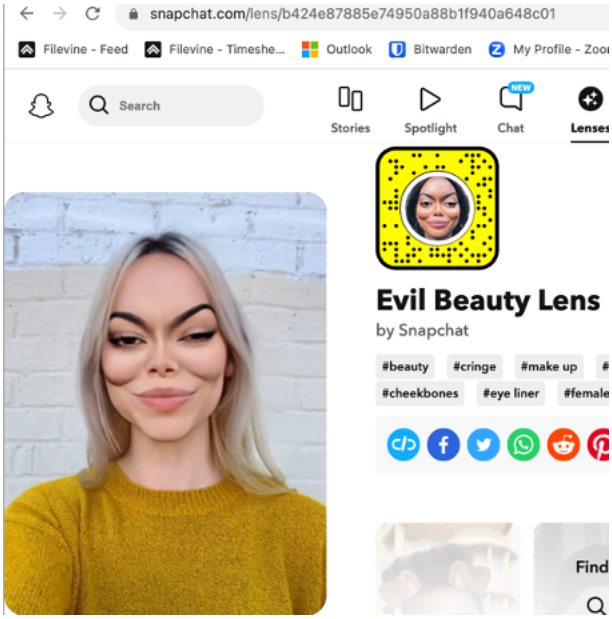

Oath Keeper
Work Position · Unofficial Page
This unofficial Page was created because people on Facebook have shown interest in this place or business. It's not affiliated with or endorsed by anyone associated with Oath Keeper.
Home
About
Photos
Reviews
Like
About
See all
1 person likes this
1 person follows this
Work Position
No posts yet
Page transparency
See all
Facebook is showing information to help you better understand the purpose of a Page. See actions taken by the people who manage and post content.
Page created - March 8, 2018
Related Pages
Burning Bush radio broadcast network
Radio station
Rasmussen University
College & university
Like
Forever Identifying Greatness
Author

Id. Exhibits 5, 6, 7, and 8.

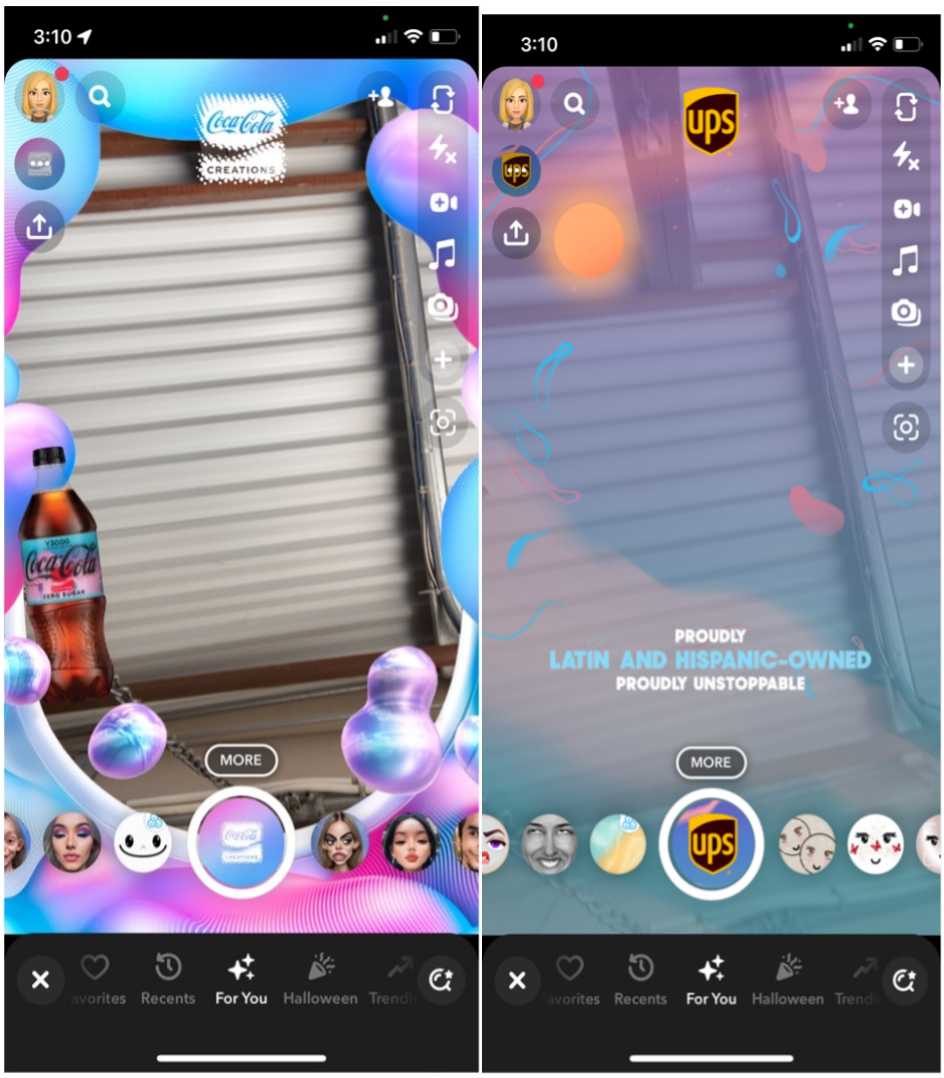
Facebook is aware that this its product is generating new Facebook pages for white supremacist organizations and does it anyway. Facebook is a content provider as described in Shiamili, because the Facebook product itself creates both pages and groups for white supremacist organizations. By auto-generating this content, Facebook is actively creating content for extremist organizations that are involved in real-world violence, and spread principles like those referenced in Payton Gendron's writings. The pages increase the harmful groups' visibility - and legitimacy - on the world's largest social network. These pages are not generated by Facebook users, but by created Facebook itself. Id.

c. Snap is responsible in part for the creation of content on its platform

Snapchat offers users of its product endless options for modifying and altering photos and videos. Id. ¶ 15. Snapchat provides users with a multitude of filters that use artificial intelligence to alter the user's face by beauty enhancements and comedic filters.

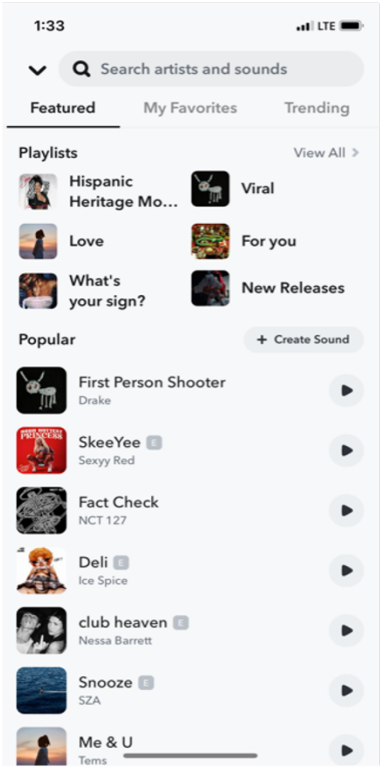


Id. Exhibit 15. These are filters that alter the user's image, while also promoting a product or service. These filters, along with the other ones that Snapchat provides, allow a user to completely alter a photo, to the point of being unrecognizable.

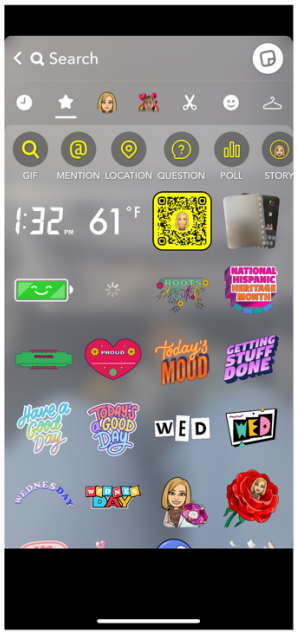


Id. Exhibits 11 and 12

Snapchat also offers users the ability to add music to their photos and videos. This product will recommend a user a song to add to their photo or video. Much like the Instagram product, Snapchat will also recommend the user select a certain part of the song to add to their photo or video. These songs are put into the following categories "Featured," "My Favorites," and "Trending."



Snapchat also allows a user to alter the speed of their video, by speeding it up, slowing it down, or having it run backwards. Id. ¶ 19. A user can add text to their image, by typing it out, or drawing it. Further, Snapchat also provides an endless number of gifs to which a user could add to their photo or video.



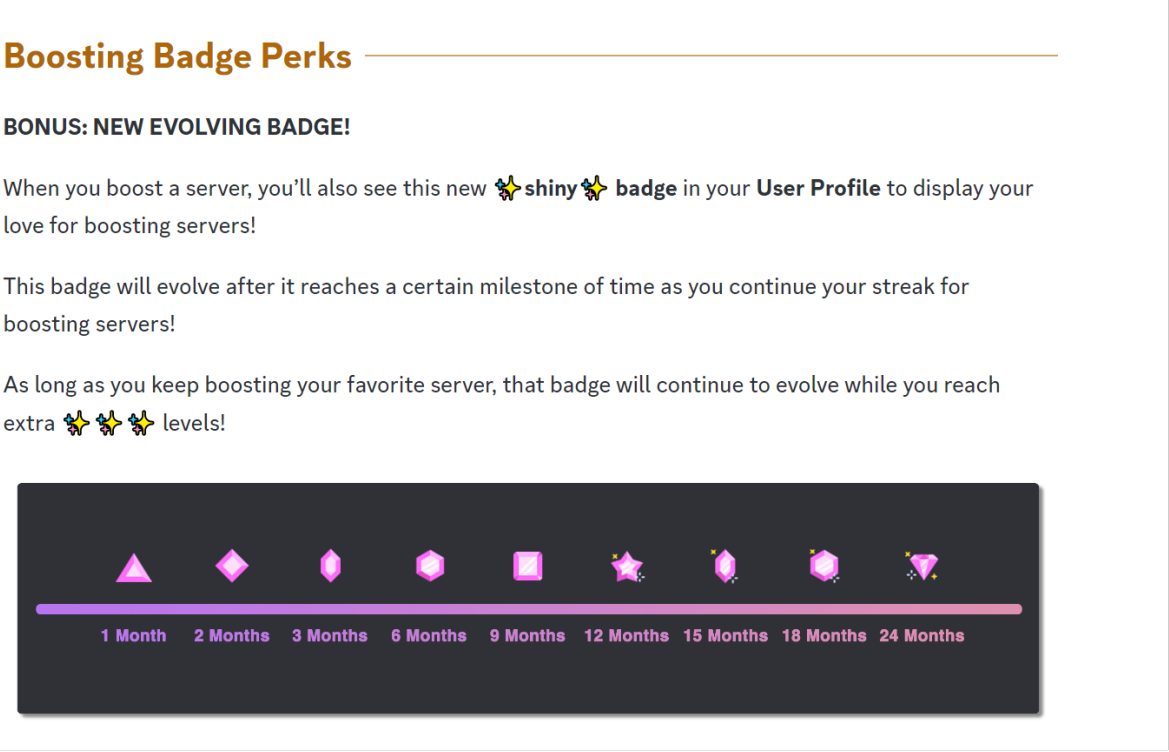
Therefore, Snap also generates content on its platform along with users. As the Court of Appeals noted in Shiamili, adding headings and illustrations is considered content provision. 17 N.Y. 3d at 292. Snapchat populates similar content for its users via songs, stickers, filters and gifs, with the Snapchat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

d. Discord is responsible in part for the creation of content on its platform

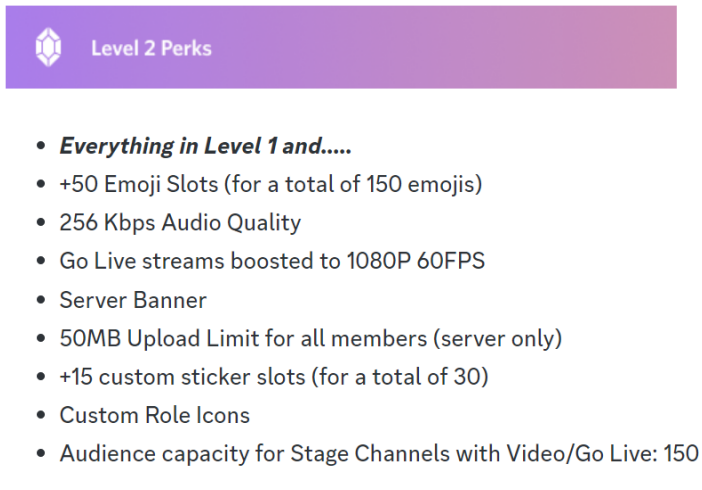
Discord creates and co-creates content according to its monetization programs, policies and practices. The manifestation of its content creation and co-creation is in how it rewards, grants, gifts, issues and otherwise provides highly custom graphics, tools, and adornments—above and beyond its entry level product features generally available to the public—to users, servers, corporations, and groups who interact with its platform meeting engagement metrics and in exchange for a subscription fee. Affirmation of Kristen-Elmore Garcia Exhibits B, C, and D.

One such example of Discord's content creation as it relates to its monetization policy are badges it designs, and assigns to users based on the amount of time the user has spent on the platform in a practice known as "Boosting." Id. Exhibit B. Discord provides better content and upgraded features to servers that meet the qualifications of achieving Boosting metrics. At times, Discord chooses to issue these benefits to communities that have violated their own Community Guidelines Exhibit and Terms of Service, attached to Defendant's motion as Exhibits 3 and 4. In addition to the upgraded platform capabilities, Discord also grants custom badges to its users when they participate in Boosting.

Another example of Discord's own content creation, and/or material contribution to third-party content functions in tandem with Boosting. Id. Exhibit B. Servers that achieve more boosts are granted custom links to access the server. Public servers are assigned a randomized link. Only those servers with high engagement and revenue are granted custom links. Along with the links come custom banners. Id. Exhibits B and C.



Discord co-creates the advertised emojis, stickers, and stages associated with each level of monetization. The outcome of the operation of Discord's design and co-creator status is that it promotes recruitment, and engagement. Users fear losing their upgraded status if not continually contributing to the server financially or otherwise.



Discord also provides its own content, and 74 pages of instructions for the use of its content. These are part of Discord's "Brand Guidelines." (Id. Exhibit E). It is a content provider in its

colors, fonts, layouts, spacing, text kerning, its logos, and characters. Not only is Discord a content creator, Discord is also sophisticated and deliberate in its assemblage of brand guidelines. (Brand guidelines page 41, "Our primary typeface is Ginto Nord, an exuberant geometric-humanist typeface that delights in tension, especially its own tension between circular and rectangular forms. The font is developed while researching sans-serif typefaces from the twentieth century, focusing on the shift from strict Modernist "purity" to the more baroque, animated styles that emerged during the phototypesetting period of the '50s and '60s.") It is a thoughtful 74 page dissertation of Discord's own content creation.

e. Reddit is responsible in part for the creation of content on its platform

Reddit is a provider of content in that it provides files as templates and other specifications for content—in the form of downloadable files—for the use of its own logo assets, fonts, layouts, and content templates. Those downloadable templates are offered to third party sites, and implemented on its own site, for use in the display of Reddit's content. In that aspect, Reddit is a provider of its own content. Id. Exhibit F at 9. See Shiamili, finding that the defendant internet service provider was a "content provider" with respect to the "heading, subheading, and illustration that accompanied the reposting."

It follows that Reddit is a content creator with respect to the extensive formats, templates, logos, and headings that it creates and distributes to others as downloads, and uses within its own website. Reddit also creates and distributes content in the form of user rewards, badges, custom logos, custom emojis, custom avatars, and user rewards programs. Reddit Karma is one such user reward. Both designations are intrinsic awards only relevant to the product Reddit maintains. Reddit is a content creator when it grants Karma to users.

A content feature created by Reddit that goes in tandem with Karma is Reddit Gold. At all times relevant to the Complaint, Reddit Gold was "a virtual good you can use on Reddit to reward, recognize, and celebrate content from redditors you love. If you like a post or comment and want to show your appreciation for it, you can give it gold." Id. Exhibit G.

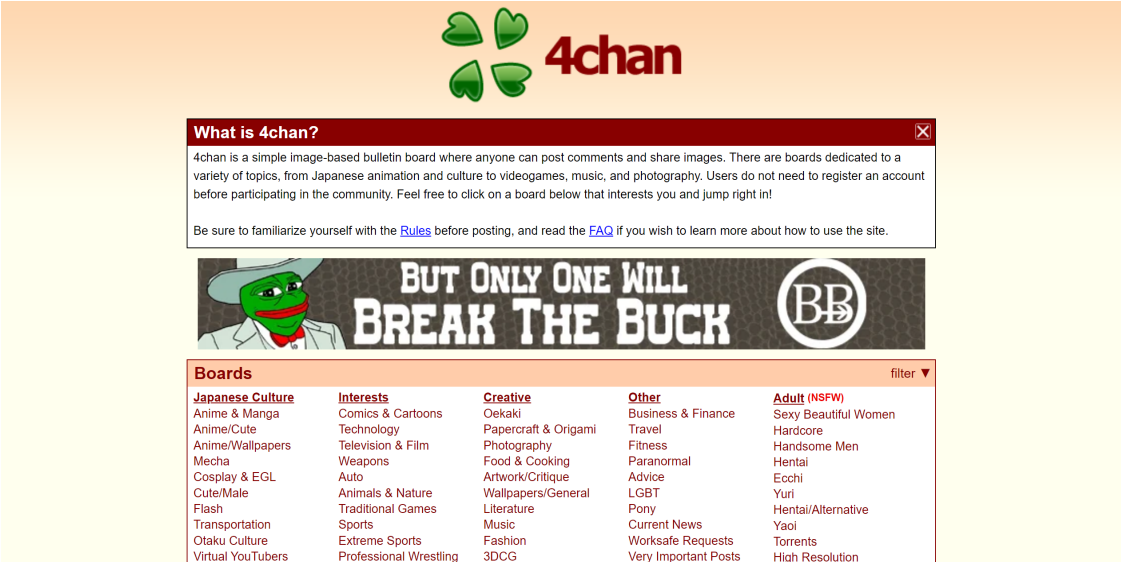
Reddit designed the mechanism of granting Gold, and all logos and emojis associated with the use of Reddit Gold on its platform. Therefore, Reddit is a content creator wherever a post

receives "Gold" status. Reddit and Karma are used in tandem, with Reddit stating in its own Gold instructions that, "sending gold carries the same karma value as a regular upvote, but with added design treatment." Id.

This evidence shows that Reddit generates content on its platform along with users in the form of its own logo assets, fonts, layouts, and content templates. As the Court of Appeals noted in Shiamili, adding headings and illustrations is considered content provision. 17 N.Y. 3d at 292. Reddit populates similar content for its users with its Karma and Reddit Gold features with Reddit selecting which items are available for platform users and which are not.

f. 4chan is responsible in part for the creation of content on its platform

4chan creates and or materially contributes to malign third party content in its advertising campaigns. Banner advertisements appear throughout 4chan.org.



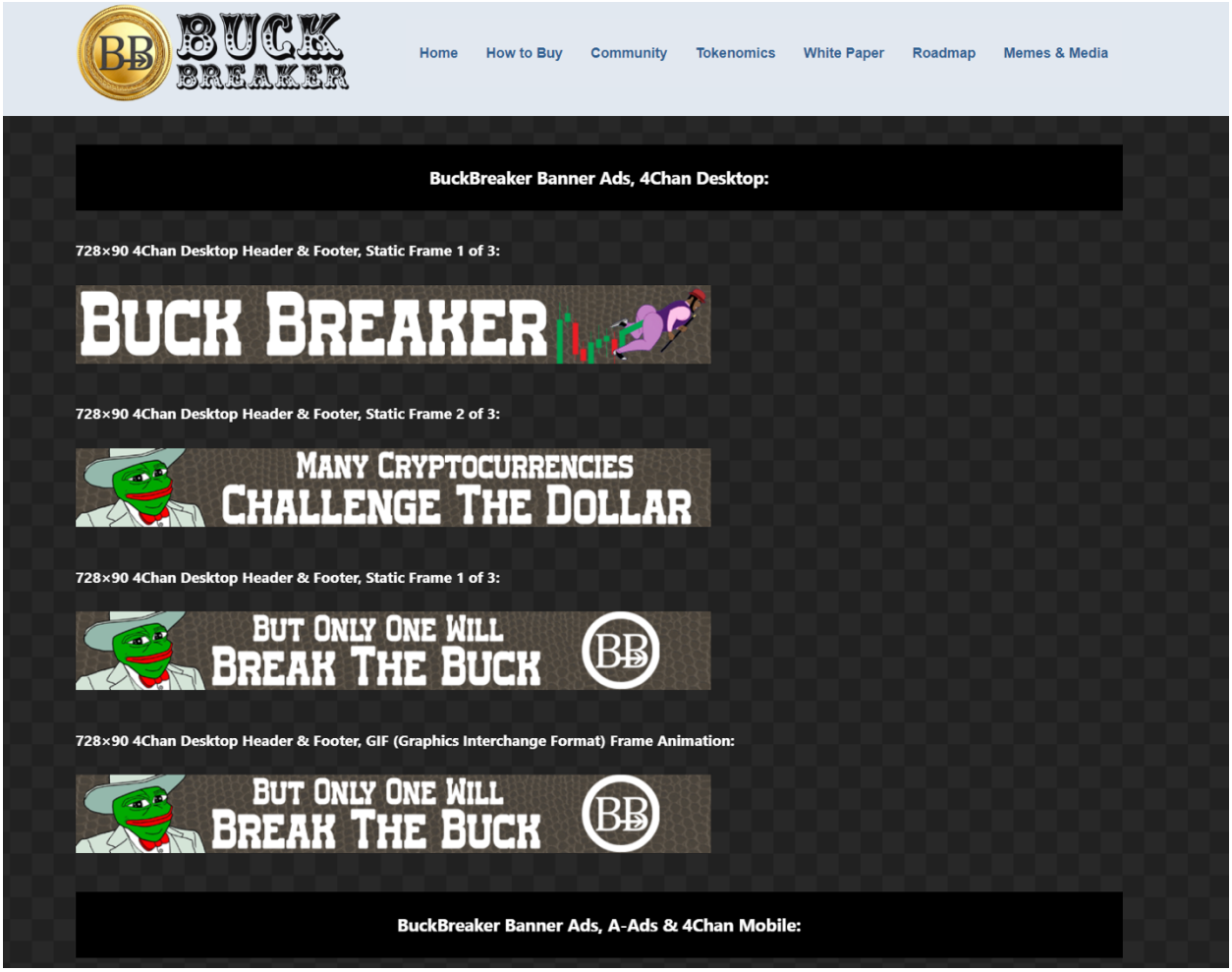
4chan creates and or materially contributes to malign third party content in its advertising campaigns. 4chan also deliberately spreads its internal content across the internet by making its codes, icons, layouts and formats available across the internet. Those formats are used in displaying 4chan content outside of 4chan.org or its mobile applications. 4chan is at least partially supported financially by advertising sales revenue. Banner advertisements appear throughout 4chan.org.

The banner advertisements appearing throughout 4chan frequently contain some of the

most spectacularly racist content on any of the public facing social media products in this matter. 4chan provides the specifications, requirements, and targeting demographic data to participate in its banner advertising campaign program.

4chan's advertising specs dictate the size and file format the ads should take. (Id. Exhibit L). 4chan also provides comprehensive data regarding the demographic the ads should targe. The data that 4chan produces includes gender, country of origin, education, and viewer interests. The advertising capabilities also boast geo-targeting, targeting to specific boards, and frequency displayed.

At the time of the filing of this brief, 4chan's main homepage banner advertisement markets a novel cryptocurrency. (Id. Exhibit M). Upon interacting with the advertisement, 4chan links the user to the cryptocurrency's promotional website. (Id. Exhibit N). Not only is the content on the third-party cryptocurrency website astonishingly racist—featuring illustrations of a sexual assault against a Black male, and text based references to slavery—but it also contains anti-Semitic rhetoric, only veiled by its explicitly anti-Black vocabulary. The homepage for the cryptocurrency contains digital assets for the user to download. Those downloadable digital assets are adjacent to labels for 4chan web and mobile advertising specifications. The following images and texts are from advertiser, to which 4chan materially contributed. 4chan co-created the racist, antisemitic and sexually explicit advertising campaign.



Id. Exhibit N.

The court cannot ignore 4chan's direct involvement and contribution toward the creation of racist advertising campaigns. It is upon information and belief that 4chan created and displayed advertising campaigns of equal character throughout the time the shooter interacted and used its product. Plaintiffs do not need to treat 4chan as a publisher of third-party content when it creates and materially contributes to its own content of abhorrent quality and character.

4chan is further a content creator with respect to its platform layout, design, typeface, text and color. The sandy colored background, signature green text, and four-leaf clover design (U.S. Trademark filing number 4644546) are markers used to identify 4chan content across the internet. (Id. Exhibit O)

An example of how 4chan's layouts, colorways and trademarks are part of its identity of

content creation, is its used on a external websites frequented by the shooter himself is called "greentext." The shooter espoused himself as a follower of "greentext" 4chan content across different platforms, including on Reddit in r/greentext, and in a Discord group of the same name. (Id. Exhibit A at 22). Greentext is known for, or associated with, an anonymous short storytelling format exclusive to 4chan, with the text appearing in the distinct color of green.

4chan is a content provider to all instances of stories embodying the greentext format across the web as seen in Reddit's r/greentext and [5] the Discord group the shooter purports himself to have been a member of. (Id. at 22). 4chan contributes to and cocreates the content stemming from its product for its greentext stories.

Lastly, the 4chan is a content provider in that it makes its Application Programing Interface (API) available for download. (Id. Exhibit P.) The API dictates how 4chan content is displayed outside of its platforms. The extensive library of graphic icons and layouts

g. Twitch Had Exclusive Possession of Gendron's Murder Video at the Time it Was Livestreamed

Twitch is a live streaming service owned by Amazon. Twitch markets itself as a service for video game live streaming, however; it is used in other ways as well. When Payton Gendron perpetrated his brutal attack in Buffalo, he was wearing a camera on his helmet, via which he live streamed the shooting. According to Gendron, he used Twitch because Twitch does not require users to login to view livestreams.

Gendron was able to livestream his shooting for 22 minutes prior to the video being taken down. Gendron wrote that he hoped that his livestream would radicalize others into copycat acts of violence. His malign objective was realized: the Twitch video was copied onto several other platforms before it was taken down and went viral on the internet.

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

[5] Wiktionary. (https://en.wiktionary.org/wiki/greentext#:~:text=greentext%20(plural%20greentexts),example%20for%20greentext%20on%20Wiktionary) (Internet slang, 4chan) A short anecdotal story written on the website 4chan, each line starting with >.

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

Basha Affirmation Exhibit 16

This restrictive license prevents users from distributing content that they created outside of the Twitch platform for 24 hours. This type of exclusive use license in essence is a right for Twitch to possess and a right to prevent others from using. The right to exclusive possession is the most important stick in the bundle of property rights. See, e.g., Matter of Smith v. Town of Mendon, 4 N.Y.3d 1, 12 (2004) ("the most important "stick" in the proverbial bundle of property rights, the right to exclude others.") During the crucial 24-hour period when Gendron's murder video was uploaded onto Twitch and proliferated onto other platforms, Twitch was the co-owner of its content and as such was itself an "information content provider" under Section 230. See Shiamili, 17 N.Y. 3d at 289.

5. Social Media Defendants' Cited Authorities are Unpersuasive and Distinguishable

Social Media Defendants suggest that "[c]ourts have uniformly held that § 230 bars claims like these" which seek "to hold online service providers liable for allegedly publishing objectionable third-party content on the theory that they inspired violence." However, the cases Defendants cite to support this purported consensus are both distinguishable and unpersuasive.

Social Media Defendants' citation to the Supreme Court's recent holding in Twitter, Inc. v. Taamneh, 598 U.S. 471 (2023) is misleading. The plaintiffs in Taamneh alleged that Google and Twitter had aided and abetted the Islamic State in violation of federal law that imposes civil liability on those who aid and abet terrorists. Id. at 1191. The Supreme Court narrowly held that Plaintiffs' failed to meet the standard for aiding and abetting and affirmed the dismissal, but

declined to base its holding on Section 230.[6] In contrast, Plaintiffs do not bring any allegations concerning conspiracy or aiding and abetting international terrorism, nor do they allege that Social Media Defendants aided or abetted Gendron in any way.

Social Media Defendants rely on the Second Circuit's split decision in Force v. Facebook, 934 F.3d 53 (2d Cir. 2019), asserting that a social media platform is not a publisher of algorithm recommendations because they are third party content. Joint Motion at 9. Because the plaintiffs in Force claimed that the defendants violated duties owed under the Anti-Terrorism Act and did not assert any product liability claims, the Second Circuit's holding is distinguishable. Moreover, while New York courts are "bound by the United States Supreme Court's interpretations of Federal statutes and the Federal Constitution," interpretations by the lower federal courts, including the Second Circuit, concerning federal questions are not binding. People v. Kin Kan, 78 N.Y.2d 54, 59-60 (1991) (citing New York R. T. Corp. v. City of New York, 275 N.Y. 258, 265 (1937), aff'd, 303 U.S. 573 (1938).[7] To the extent this Court looks to Force in adjudicating Defendants' motion to dismiss, Plaintiffs submit that the partial dissent of the late Chief Judge Katzmann represents a more persuasive analysis of Section 230 publishing activity than the majority's holding. See Force 934 F. 3d at 64 (Katzmann, J. dissenting in part) (it "strains the English language to say that in targeting and recommending these writings to users ... Facebook is acting as 'the *publisher* of ... information provided by another information content provider.). See also Gonzalez v. Google LLC, 2 F 4th 871, 913 (9th Cir. 2021) (subsequent history omitted) (Berzon, J. concurring) ("although we are bound by Ninth Circuit precedent compelling the outcome in this case, I join the growing chorus of voices calling for a more limited reading of the scope of section 230 immunity . . . for the reasons compellingly given by Judge Katzmann in his

[6] See Twitter, Inc. v. Taamneh, 598 U.S. 471, 507 (2023) (Jackson, J. concurring) (Court's ruling on application of Anti-Terrorism Act "narrow in important respects" and "the Court's view of the facts—including its characterizations of the social-media platforms and algorithms at issue—properly rests on the particular allegations in those complaints. Other cases presenting different allegations and different records may lead to different conclusions.")

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

partial dissent in Force v. Facebook"); (Gould, J. dissenting) ("I do not believe that Section 230 was ever intended to immunize such claims for the reasons stated in Chief Judge Katzmann's cogent and well-reasoned opinion concurring in part and dissenting in part in Force v. Facebook."). See also Statement of Justice Thomas Respecting the Denial of Certiorari Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 17 (2020) (quoting Katzmann dissent with approval).

Social Media Defendants rely on Gonzalez v. Google, where a split Ninth Circuit panel held that § 230 barred claims alleging content ISIS posted on YouTube inspired terrorist attacks. However, two of the three judges on the panel disagreed with the holding. The Supreme Court granted certiorari, but its disposition expressly declined to address Section 230.

> We granted certiorari to review the Ninth Circuit's application of § 230. . . . [I]t has become clear that plaintiffs' complaint—independent of § 230—states little if any claim for relief. . . . We therefore decline to address the application of § 230 to a complaint that appears to state little, if any, plausible claim for relief.

Gonzalez v. Google LLC, 598 U.S. 617, 622, (2023).

Rather than affirm the Ninth Circuit's split decision or dismiss the case on the ground that certiorari was improvidently granted, the Supreme Court vacated the Ninth Circuit's decision. Id. In the Ninth Circuit, vacated authority "has no precedential effect". United States v. Joelson, 7 F.3d 174, 178 n.1 (9th Cir 1993). It is therefore highly misleading for Social Media Defendants to argue that Gonzalez was "vacated on other grounds" and retains persuasive authority on the application of Section 230.

Social Media Defendants' other Section 230 cases are similarly distinguishable. For example, in Herrick v. Grindr LLC, a plaintiff alleged that a dating app was defectively designed because it "lacks safety features to prevent impersonating profiles and other dangerous conduct, and that Grindr wrongfully failed to remove the impersonating profiles created by his ex-boyfriend." 765 F. App'x 586, 588 (2d Cir. 2019) (emphasis supplied). The Second Circuit concluded that "Herrick's failure to warn claim [was] inextricably linked to Grindr's alleged failure to edit, monitor, or remove the offensive content [at issue]; accordingly, it [was] barred by § 230." 765 F. App'x 586, 591 (2d Cir. 2019) (emphasis added). Here, by contrast,

Plaintiffs allege that "Social Media Defendants could . . . furnish adequate warnings of foreseeable dangers arising out of the use of their products *without altering, deleting, or modifying the content of a single third-party post or communication*." Complaint ¶ 533 (emphasis supplied). Thus, Plaintiffs' claims here are not "inextricably linked" to any content moderation policies that Social Media Defendants may or may not enforce. 765 F. App'x at 591.

In M.P. v. Meta Platforms, Inc., the district court rejected the plaintiff's strict liability, negligence, and negligent infliction of emotional distress claims, reasoning that courts have "consistently interpreted [Section 230] to bar claims seeking to hold internet service providers liable for the content produced by third parties." No. 2:22-cv-3830-RMG, 2023 U.S. Dist. LEXIS 131413, at *9 (D.S.C. July 24, 2023). Here, Plaintiffs bring similar claims as those at issue in M.P. and likewise contend that Social Media Defendants' "algorithms directed [Gendron] to material of white supremacists." Id. at *4. But unlike M.P., Plaintiffs do not attempt to "plead around Section 230 immunity by asserting product liability claims based on the theory that the algorithms and internal architecture of social media sites *direct hate speech to persons inclined to violence* and inflict harm on minorities and other victims of random acts of violence." Id. at *6-7 (emphasis supplied). Instead, Plaintiffs specifically allege, that "Gendron did not grow up in a racially prejudiced household or a racially polarized community." Complaint ¶ 169. Plaintiffs allege that "[b]efore Gendron began using and became dependent on the Social Media Defendants' products, he did not hold racist beliefs." Complaint ¶ 170. Plaintiffs allege that Social Media Defendants sought to maximize engagement "not by showing them content they request or want to see, but rather, by showing them and otherwise recommending content from which they cannot look away." Compl ¶ 172. The content Plaintiffs' claims touch upon "was not content Gendron searched for, sought out, or even wanted to see." Complaint ¶ 174.

Daniel v. Armslist, Ltd. Liab. Co. is distinguishable for similar reasons. Daniel arose from a shooting that killed four people after the shooter illegally purchased the firearm from a private seller using Armslist's online firearm marketplace. Id. at 457-58. The plaintiff alleged that "Armslist provided an online forum for third-party content and *failed to adequately monitor that content*." Id. at 482 (emphasis added). The court concluded that Section 230 required the

plaintiff's complaint to be dismissed because Section 230 prohibits claims that treat interactive computer service providers as the publisher or speaker of information posted by a third party. Id. at 458. Like Herrick, and M.P., Daniel is distinguishable because the shooter there "*focused his search for a gun exclusively on Armslist.*" Id. at 486 (emphasis supplied). He was not a passive, involuntary viewer of "content from which [he] c[ould not] look away." Complaint ¶ 172. Instead, the killer involved in Daniel sought out Armslist's firearm marketplace and selected a specific listing of a third-party seller "because he knew that he could not acquire a firearm from a licensed dealer or from a private seller in his community who knew him, and that any contact with a legitimate seller could result in his plan of illegally purchasing a firearm being revealed to law enforcement authorities." 386 Wis. 2d at 486-87 (Bradley, J., dissenting) (emphasis added). By contrast, the content Plaintiffs' claims touch upon "was not content Gendron searched for, sought out, or even wanted to see." Complaint ¶ 174.

In summary, Plaintiffs state law claims are both harmonious and "consistent" with Section 230 and not preempted by federal law. See 47 U.S.C. § 230(e)(3). This, notably, does not open the floodgates of liability or render Section 230 meaningless. It is circumscribed to hold a social media entity liable only in the instances where permitted by state products liability laws, and then only where a captive audience like Gendron is at issue.

F. The First Amendment Does Not Bar Plaintiffs' Claims

Social Media Defendants argue that because "the material that allegedly shaped Gendron's ideology is constitutionally protected," "imposing liability for disseminating that speech—especially on theories of strict liability or negligence—is impermissible under the First Amendment." Joint Motion at 16. This is analytical sleight of hand. Plaintiffs legal claims seek to hold Social Media Defendants liable not because of the content they host, but regardless of it. Plaintiffs explicitly allege that Social Media Defendants "could manifestly fulfill their legal duty to design [] reasonably safe social media products and furnish adequate warnings of foreseeable dangers arising out of the use of their products without altering, deleting, or modifying the content of a single third-party post or communication." Complaint ¶ 533. Social Media Defendants either ignore the conduct-content distinction or simply wish to direct attention away from the conduct at

issue in this case.

1. The First Amendment Does Not Protect Tortious Conduct

Conduct is not automatically shielded by the First Amendment just because it involves speech. Rumsfeld v. F.A.I.R., 547 U.S. 47, 62 (2006). It is well established that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011). The United States Supreme Court has repeatedly rejected First Amendment defenses to similar claims targeting conduct. See, e.g., Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (explaining that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on [speech]"); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573-578 (1977) (permitting right of publicity tort claim despite there being "no doubt" that the broadcast at issue was protected speech).[8]

Social Media Defendants' expansive interpretation of the First Amendment would afford immunity for claims such as fraud, failure to warn, negligent misrepresentation, or medical malpractice.[9] Garden variety tort claims—a golfer's failure to warn those nearby of an errant shot,[10] or a golf club failing to give adequate warning to patrons about the presence of dangerous

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

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

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

conditions on the fairway[11]—would be barred under Social Media Defendants' absolutist rule.

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

Social Media Defendants contend that their "decisions" about what speech to disseminate "fit comfortably within the Supreme Court's editorial judgment precedents." Joint Motion at 21. Defendants assume—without acknowledging the issue—that the Court should treat their artificial intelligence driven algorithms as the equivalent of human speech. But Defendants have provided the Court with no authority that the algorithms at issue in this case or other artificial-intelligence models are entitled to First Amendment protection. The First Amendment protects the freedom to think and speak as an inalienable *human* right. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("compelling the flag salute and pledge transcends constitutional limitations. . . and invades the sphere of intellect and spirit which it is the purpose of the First Amendment."). Indeed, leading scholars have explained the deeply concerning consequences of assuming machine speech is legally equivalent to, and deserving of, the same constitutional rights as human speech. See Tim Wu, Machine Speech, 161 U. Pa. L. Rev. 1495, 1496 (2013); Helen Norton, Manipulation and the First Amendment, 30 Wm. & Mary Bill Rts. J. 221, 223 (2021).

Here, the "editorial decisions" for which Social Media Defendants seek constitutional protection consist of electronic impulses of artificial intelligence-driven algorithms designed to exploit the neurological immaturity of minor users like Payton Gendron and maximize their engagement by deluging them with psychologically discordant material that they are not seeking but from which they cannot look away. See Complaint ¶¶ 546, 148, 149, 152, 153, 156. Defendants' artificial intelligence cannot be fairly characterized as constitutionally protected "editorial judgments;" they serve no communicative purpose, are not "speech," and are not entitled to First Amendment protection. See Universal City Studios, Inc. v. Corley, 273 F.3d 429, 451 (2d Cir. 2001) (using computer code to communicate with a computer is "never protected").

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

3. Minor Users of Defendants' Addictive Social Media Products Such as Payton Gendron are a Captive Audience to White Supremacist Speech

The captive audience doctrine has been applied to protect audiences in instances where "substantial privacy interests are being invaded [by speech] in an essentially intolerable manner." Snyder v. Phelps, 562 U.S. 443, 459 (2011). The captive audience doctrine addresses those circumstances where listeners may be shielded from speech that is otherwise protected. See generally Caroline Mala Corbin, The First Amendment Right Against Compelled Listening, 89 B.U.L. Rev. 939, 943-51 (2009) (discussing the traditional captive audience doctrine).

For the captive audience doctrine to apply, the listener cannot readily avert their gaze or otherwise avoid objectionable speech. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 541-42 (1980). Additionally, "as a normative matter, the audience should not have to quit the space to avoid the message." Corbin, 89 B.U.L. Rev. at 944.

The location and circumstances of the captive listener are significant. For example, while "the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away . . . a different order of values obtains in the home." FCC v. Pacifica Found., 438 U.S. 726, 759 (1978) (Powell, J., concurring). As such, the Supreme Court has upheld an ordinance prohibiting picketing directed at a household, Frisby v. Schultz, 487 U.S. 474, 484 (1988), upheld municipal regulations concerning noise levels in residential areas, Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989); Kovacs v. Cooper, 336 U.S. 77, 87 (1949), and upheld the FCC's ability to regulate "patently offensive" broadcasts. FCC v. Pacifica Found., 438 U.S. 726, 727-28 (1978).

The home is not the only place where captive listeners may have substantial privacy interests that may be invaded by otherwise protected speech. The Supreme Court has explained that "the State's strong interest in residential privacy . . . [can be] applied by analogy to medical privacy." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994). Similarly, the Court has held that those riding public transportation are "a captive audience" because they are "there as a matter of necessity, not of choice." Lehman v. Shaker Heights, 418 U.S. 298, 302 (1974) (quoting Public Utilities Comm'n v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)).

Likewise, students may be a captive audience in circumstances where they are "required or expected to participate." Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2432 (2022).[12]

Here, as acknowledged by former Facebook President Sean Parker, Social Media Defendants' product features are "intrusive" by design.

> God only knows what it's doing to our children's brains. The thought process that went into building these applications, Facebook being the first of them, ... was all about: 'How do we consume as much of your time and conscious attention as possible?' And that means that we need to sort of give you a little dopamine hit every once in a while, because someone liked or commented on a photo or a post or whatever. And that's going to get you to contribute more content, and that's going to get you ... more likes and comments. It's a social-validation feedback loop ... exactly the kind of thing that a hacker like myself would come up with, because you're exploiting a vulnerability in human psychology. The inventors, creators — it's me, it's Mark [Zuckerberg], it's Kevin Systrom on Instagram, it's all of these people — understood this consciously. And we did it anyway.

Complaint ¶ 8.

Social Media Defendants' engagement-driven algorithms that deluged Payton Gendron with racist, antisemitic and violence promoting material were designed to target a "uniquely susceptible" audience: adolescents with undeveloped frontal cortexes. See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2442 (2022) (adolescents and teens have a heightened susceptibility to influence, coercion, and peer pressure); see also Complaint ¶¶ 7-9, 162-68, 172, 232, 244-55, 263-64, 285-289. Social Media Defendants target adolescents, teens, and young adults because their "fluctuating neurological development" makes them ideal targets for their algorithms. Complaint ¶ 156. Their "product features are designed to maximize the time [young] users spend using the product[s] through product designs that addict them to the platform." Complaint ¶ 551. Social Media Defendants' product features are "*psychologically* and *neurologically* addictive" by design. Id. For example, Facebook designed product features to leverage "short-term, dopamine-driven feedback loops." Complaint ¶ 252. Likewise, YouTube's recommendation algorithm promotes videos that will trigger a "dopaminergic response" and, therefore, be "more likely to be addictive"

[12] See also, Make the Rd. by Walking, Inc. v. Turner, 378 F.3d 133, 149 (2d Cir. 2004) (welfare claimants are a captive audience while waiting in social service waiting rooms.); R.O v. Ithaca City Sch. Dist., No. 5:05-CV-695 (NAM/GJD), 2009 U.S. Dist. LEXIS 130993, at *40 (N.D.N.Y. Mar. 23, 2009) (noting that school officials may punish and prohibit ordinarily protected speech because students "constitute a captive audience").

to young users. Complaint ¶ 300-01.

Social Media Defendants know that their addictive products can have and will continue to cause significant, even devastating psychic harm on young users. See Complaint ¶¶ 254-62, 540-41. Defendants' conduct inundates the personal, private cell phones of adolescents and young adults with unsolicited content in order to drive user engagement in service of profit. See, e.g., Complaint ¶¶ 7-9, 153-55, 162-68, 172, 232, 244-55, 263-64, 285-289. In doing so, Social Media Defendants threaten the health and well-being of adolescent and teenage users "at the expense of public safety." Complaint ¶ 5; see also Complaint ¶ 15 ("Until social media companies redesign their products to prioritize community safety over advertising revenue, teenagers like Gendron will continue to be radicalized on their platforms, and the endless cycle of racist and antisemitic carnage pulverizing our society will continue unabated.")

Social Media Defendants invade the privacy interests of young users because the product features are callously designed to leverage their "susceptibility to dopaminergic reinforcement," "purposefully and methodically exploit[ing known] vulnerabilities in adolescent and young adult psychology." Complaint ¶¶ 7-8. Established First Amendment doctrine has protected audiences from being similarly exploited under less egregious circumstances. Social Media Defendants' intrusive product features invade privacy interests more fundamental and deserving of protection than those that have been previously recognized and safeguarded. To conclude otherwise would be to conclude that adolescents, teens, and young adults may be protected from unwanted and objectionable speech in the privacy of their home but not in their person.

It is well established that "substantial privacy interests" justifies protecting certain audiences from "intrusive"—albeit protected—speech. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 541 (1980). If such interests justify protecting captive audiences in schools, in the home, in or around medical facilities, and even on public transit, then clearly, children, adolescents, and teens must also have "substantial privacy interests" in their own psychological and neurological development. Cohen v. California, 403 U.S. 15, 21 (1971) (emphasis supplied).

Facebook's President made clear that the goal was to "consume as much of [users] time

and conscious attention as possible" by "exploiting a vulnerability in human psychology." Complaint ¶ 8. Established First Amendment doctrine has protected vulnerable audiences from being similarly exploited under less egregious circumstances. Social Media Defendants' intrusive product features invade privacy interests more fundamental and deserving of protection than those that have been previously recognized and safeguarded. To conclude otherwise would be to conclude that adolescents, teens, and young adults may be protected from unwanted and objectionable speech in the privacy of their home but not in their person.

The First Amendment "has never been applied so as to confer a right to anyone to threaten the public safety." Employ't Div. v. Smith, 494 U.S. 872, 879-890 (1990). The Court should not apply the First Amendment to absolve Social Media Defendants from the foreseeable consequences of their deliberate efforts to addict young users such as Payton Gendron to their platforms at the expense of public safety. While the Constitution generally protects free speech from government interference—including the kind of odious and hateful speech involved in this litigation—the rapid expansion of social media and digital platforms presents a unique set of challenges and nuances that require a rigorous reevaluation of how the captive audience applies to the privacy interests implicated by human brain development.

4. Social Media Defendants' Reliance on *Snyder* and Similar Cases is Misplaced

In their First Amendment argument, Social Media Defendants place primary reliance on the Supreme Court's holding in Snyder, 562 U.S. at 443, arguing that "[t]his case is like Snyder" because it "also involved hate speech" and that this case, like Snyder, concerns constitutionally protected speech about "broader public issues." See Joint Motion at 19. Defendants' reliance is misplaced.

Snyder involved claims by the family of a deceased military servicemember against the Westboro Baptist Church for defamation, invasion of privacy and the intentional infliction of emotional distress for having picketed near the funeral of the deceased with signs that said, among other things, "Thank God for dead soldiers" and "Fag troops." Id. at 448. Snyder would be on point if Plaintiffs sought to hold Social Media Defendants liable for their speech. But, as noted, Plaintiffs' claims target conduct, not speech. In Snyder, "[i]t was what Westboro *said* that exposed

it to tort damages." 562 U.S. at 457 (emphasis supplied). Moreover, the speech at issue in Snyder took place on a single occasion in "the archetype of a traditional public forum." Id. at 456. The Court reasoned that, because the defendants' speech "was at a public place on a matter of public concern, that speech [was] entitled to 'special protection' under the First Amendment." Id. at 458. Social Media Defendants' offer no explanation for how speech at a traditional public forum is anything like computer-based algorithms inundating minor and teenage users with unsolicited content on their private, personal devices. See, e.g., Complaint at 59-6 (discussing how algorithmically generated user feeds are designed to maximize user engagement).

The other cases cited by Social Media Defendants are examples where plaintiffs sought to hold speakers liable for what had been said, or where defendants would have to alter what they expressed to avoid liability. See, e.g., New York Times v. Sullivan, 376 U.S. 254, 256 (1964) (Sullivan "alleged that he had been libeled by *statements* in a full-page advertisement" in the Times (emphasis added)); Reno v. Am. C.L. Union, 521 U.S. 844, 868 (1997) (invalidating "content-based blanket restriction on speech"); Ashcroft v. Free Speech Coal., 535 U.S. 234, 242 (2002) (invalidating a federal statute that sought to address harm which "flow[ed] from the *content* of the images, not from the means of their production") (emphasis supplied).[13] Social Media Defendants also cite James v. Meow Media, Inc., 300 F.3d 683, 699 (6th Cir. 2002), to support their contention that "[c]ourts have repeatedly rejected similar claims that 'persistent exposure' to media eventually culminating in acts of violence . . . removes such speech from full First Amendment protection." Joint Motion at 20. But James did not even resolve the First Amendment issue. The court explicitly stated that it "with[e]ld resolution of these constitutional questions given the adequacy of the state law grounds for upholding the dismissal." James, 300 F.3d at 699. Thus, Social Media Defendants' cases are all distinguishable or inapplicable.

Social Media Defendants' reliance on Sanders v. Acclaim Entertainment, Inc., 188 F. Supp.

[13] See also, James v. Meow Media, Inc., 300 F.3d 683, 698 (6th Cir. 2002) (plaintiff alleged that the content of defendant's speech was "excessively violent and [thus] constitute[d] obscene, non-protected speech"); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1277 (D. Colo. 2002) (noting that plaintiffs' allegations "stem[med] from the intangible thoughts, ideas and messages contained within [defendants'] movie and video games"); McCollum v. CBS, 202 Cal. App. 3d 989, 997 (1988) (plaintiff alleged that defendants' speech in the form of music and lyrics led to McCollum's suicide); Watters v. TSR, Inc., 715 F. Supp. 819, 821 (W.D. Ky. 1989) (plaintiffs' allegations involved "the *content* of the game" at issue and the effect the game had on her son (emphasis added)).

2d 1264, 1274 (D. Colo. 2002), is similarly misplaced. Sanders involved claims expressly targeted the violent content of defendants' video games and movies; the plaintiffs alleged that the violent content of defendants' movies and video games made violence pleasurable to the Columbine shooters. Id. at 1269. The court noted that, under the plaintiffs' theory, defendants would only be able to avoid liability "by ceasing production and distribution of their creative works." Id. at 1281.

In stark contrast to Sanders, "Plaintiffs in this case expressly disclaim[ed] any and all claims seeking to hold the Social Media Defendants liable as "speaker." Complaint ¶113. Social Media Defendants' reliance on Sanders that "Plaintiffs' attempt to impose a tort duty to discriminate against [certain content or] viewpoints," Joint Motion at 18, misses the critical conduct-content distinction and fails to engage with Plaintiffs' position that "Social Media Defendants could manifestly fulfill their legal duty to design a reasonably safe social media products and furnish adequate warnings of foreseeable dangers arising out of the use of their products *without altering, deleting, or modifying the content of a single third-party post or communication.*" Complaint at 114 (emphasis supplied).

G. Plaintiffs' Derivative Claims Must be Retained

Since Plaintiff's product liability and negligence claims cam withstand a motion to dismiss, all of Plaintiff's derivative claims should be maintained, including wrongful death, loss of consortium, and punitive damages. Defendant's assertions as to punitive damages are, in fact, premature. See Matter of Eighth Jud. Dist. Asbestos Litig. [Drabczyk v. Fisher Controls International, LLC], 92 A.D. 3d 1259, 1260 (4th Dep't 2012) (finding that punitive damages claims were properly charged to jury since there was a reckless finding at trial, although the punitive damages award was deemed legally insufficient under the particular facts of that case). As to joint and several liability, to be entitled to assert an exception to limited liability under C.P.L.R. 1601, a plaintiff is required to affirmatively plead all pertinent exceptions listed in C.P.L.R. 1602. See Cole v. Mandell Food Stores, Inc., 93 N.Y.2d 34 (1999) (noting that it is "procedurally awkward" to allege exemptions under Article 16 but plaintiff must do so); Roseboro v. New York City Transit Auth., 286 A.D.2d 222, 222-23 (1st Dep't, 2001). Here, Plaintiff pleaded those exemptions. See Complaint ¶¶ 709-715.

H. Defendants' Motion to Dismiss is Premature

Even assuming there was some merit to Defendants' legal arguments, they are premature at the motion to dismiss stage. Defendants' substantive assertions should be rejected pursuant to C.P.L.R. 3211(d), which provides that if "facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just."

Here, as set forth above, the allegations in Plaintiffs' 132-page Complaint state cognizable New York state product liability and negligence claims that are not preempted by Section 230 or barred by the First Amendment. However, many of the facts relevant to Plaintiffs' claims and Social Media Defendants' legal defenses is still unknown. Prior to the filing of Defendants' Motion to Dismiss, Plaintiffs served targeted discovery seeking the following information from each Social Media Defendant:

- Videos, images and written communications that Payton Gendron either viewed, was recommended or uploaded or on the Defendants' platforms;
- Internal reports discussing social media addiction and adverse mental health effects among minor users;
- Targeted advertising to minor users of Defendants' products;
- Radicalization of young users by racist antisemitic and misogynistic materials posted on Defendants' platforms
- Volent acts committed by young users associated with their social media use;
- Advertising by white supremacist groups on Defendants' platforms; and
- Defendants' response to prior of mass shooting incidence where social media was involved.

See Affirmation of Matthew P. Bergman in Opposition to Motion to Dismiss, Exhibits 1-8.

All of these discovery topics are germane to the legal issues raised in Social Media Defendants Motion to Dismiss and the Court should permit Plaintiffs to conduct discovery before ruling on the substantive merits of their claims. See Meyers v. Becker & Poliakoff, LLP, 202

A.D.3d 627 (1st Dep't 2022) ("motion court providently exercised its discretion in denying defendant's motion to dismiss the complaint on the ground that it was premature, and correctly concluded that discovery was needed to resolve the issues presented"); Wensing v. Paris Indus.—New York, 158 A.D.2d 164, 167 (3d Dep't 1990) ("where successor liability was challenged related to a bankrupt entity, discovery was deemed warranted and "Supreme Court properly noted that Leander retains the opportunity to move for summary judgment if such action is warranted. Accordingly, dismissal on this ground was properly denied.") While Social Media Defendants' Motion to Dismiss raises important legal issues regaining whether of Section 230 and the First Amendment vitiate Plaintiffs' New York State claims, the Court should defer ruling on these complex legal questions until discovery has produced a full record from which these weighty questions can be fully considered.

IV. RESPONSE TO SOCIAL MEDIA DEFENDANTS' INDIVIDUAL MOTIONS TO DISMISS

Social Media Defendants advance substantially similar arguments in their individual motions to dismiss which also repeat arguments contained in their joint motion to dismiss. Rather than belabor the Court with a duplicative rendition of common factual and legal issues, Plaintiffs have submitted an omnibus response Social Media Defendants' joint and individual motions to dismiss. The following section is limited to unique legal or factual issues raised in Social Media Defendants' individual motions that are not encompassed within Plaintiffs omnibus response.

A. Response to Alphabet's Individual Arguments

Plaintiffs alleged that "YouTube's algorithms directed Gendron to progressively more radical, racist, and violent videos which effectuated his transition from innocuous adolescent to racist mass murderer." Complaint ¶ 323. Alphabet castigates Plaintiffs for failing to identify the specific YouTube videos that Payton Gendron viewed that contributed to his radicalization and inspired his murderous violence.

Plaintiffs served Alphabet with discovery specifically seeking the videos that Gendron viewed, was recommended or uploaded on YouTube. Bergman Affirmation Exhibit 2. Without discovery, Plaintiffs are unable to identify a specific video that Gendron watched on YouTube,

which is why allowing Plaintiffs to proceed with discovery is so critical in this case. See Meyers, 202 A.D.3d at 627. Nevertheless, Plaintiffs' Complaint not only provided detailed allegations regarding how YouTube's design radicalized its users (Complaint ¶¶ 311-322) but quoted from Gendron's diary on how YouTube inspired his racist rampage.

> I've just been sitting around watching YouTube and shit for the last few days. I think this is the closest I'll ever be to being ready. I literally can't wait another week to do this. I'm not sure if I'm expecting any real change in the world after I do the attack It is certain my life will be changed. It all comes back to the saying that inaction is sure to end in defeat.

Complaint ¶ 324. Plaintiffs' YouTube allegations, liberally construed, are more than sufficient to state cognizable negligence and product liability claims arising out of Payton Gendron's use of the You Tube Product. See Leon, 84 N.Y.2d at 87-88.

Alphabet also seeks to dismiss Plaintiffs' New York Civil Rights Law claims arising out of the unauthorized display of Plaintiffs' decedents on Gendron's murder video displayed on YouTube and Alphabet's receipt of advertising revenue from these displays. Plaintiffs have served discovery on Alphabet directed toward these precise issues. The Court should defer ruling on the legal sufficiency of Plaintiffs New York Civil Rights Law claims until discovery is completed. See Meyers, 202 A.D.3d at 627.

B. Response to Amazon's Individual Arguments

1. Twitch is an Inherently Dangerous Product

Amazon argues that "Plaintiffs' allegations are a categorical challenge to the existence of livestreaming." Amazon motion at 7. This is incorrect. Plaintiffs simply allege that "Twitch is inherently dangerous because there is no way the product, as currently designed, can prevent the livestream broadcast of mass shootings which have been proven to motivate future acts of mass terror." Complaint ¶ 353.

The seminal case concerning inherently dangerous products is then Judge Cardozo's decision in MacPherson v. Buick Motor Co., 217 N.Y. 382, (1916) (Cardozo, J.), which held that "[i]f the nature of a [product] is such that it is reasonably certain to place life and limb in peril when negligently made, [then] it is then a thing of danger." Id. at 389. "Inherently dangerous products" are those "which in their *normal operation* are implements of destruction." Cleary v.

John M. Maris Co., 173 Misc. 954, 958 (Sup. Ct. 1940) (cleaned up and emphasis supplied). "[A] product is unreasonably dangerous *per se* if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product." McCarthy v. Sturm, Ruger & Co., 916 F. Supp. 366, 371 (S.D.N.Y. 1996) (cleaned up). New York courts have adhered to this general rule. See, e.g., Field v. Empire Case Goods Co., 179 A.D. 253, 256 (App. Div. 1917) (considering, among other things, whether "defects could have been discovered by reasonable inspection, and that inspection was omitted"); Quackenbush v. Ford Motor Co., 167 A.D. 433, 436 (App. Div. 1915) (noting that a "manufacturer's duty depends not upon the results of the accident but upon the fact that his failure to properly construct the car resulted in the accident"); McCarthy v. Olin Corp., 119 F.3d 148, 155 (2d Cir. 1997) (noting that an "unreasonably dangerous" product is one that is "defectively designed" and which, "at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer").

In La Barre v. Mitchell, the court concluded that a "defectively designed alarm system" was an "inherently dangerous product." 256 A.D.2d 850, 852 (App. Div. 1998). The court explained that "the failure of a fire alarm system to perform its intended function carefully and competently can have catastrophic consequences, and a design creating an unreasonable risk of failure in such a system would render it dangerous and defective." Id. Similarly, in Village of Groton v. Tokheim Corp., 202 A.D.2d 728 (App. Div. 1994), the court reasoned that a fuel dispensing system failed "creat[ing] a hazardous condition" that "was almost inevitable" and, accordingly, the defendant "failed to act reasonably to provide an appropriate warning." Id. at 729-31.

This case is like La Barre and Village of Groton because Social Media Defendants' products "design[s] creat[e] an unreasonable risk of [harm]." 256 A.D.2d at 852. The "normal operation" of Social Media Defendants' livestreaming products "are implements of destruction." Cleary v. John M. Maris Co., 173 Misc. 954, 958 (Sup. Ct. 1940) (cleaned up and emphasis added). Such purposeful design of Social Media Defendants' livestreaming products fits neatly within the meaning of Justice Cardozo's seminal words that, where the nature of the product "is such that it is reasonably certain to place life and limb in peril. MacPherson, 217 N.Y. at 389

(Cardozo, J.) (emphasis added); see also, e.g., Complaint ¶ 257 ("My team consulted for [Facebook's livestreaming feature], not only did we anticipate murders and suicides on [Facebook] Live, we anticipated far worse"). Social Media Defendants' livestreaming products are purposefully designed such that they will lead to addiction and "place life and limb in peril" and are clearly inherently dangerous products.

2. Plaintiffs' Claims Against Twitch Livestreaming Are Not Barred by the First Amendment

Contrary to Amazon's contentions, Plaintiffs do not "seek to prohibit livestreaming *per se* by imposing a 'time lapse' to prevent the live 'dissemination' of content," nor do Plaintiffs, as Amazon suggests, "demand" that Twitch's content moderators "monitor each second of the many millions of third-party content channels livestreaming on Twitch" to "instantly, 'identify acts of livestreamed violence, notify law enforcement, and prevent public viewing' of violent acts. Amazon Motion to Dismiss at 11 (quoting Complaint ¶ 353-355). Amazon's motion to dismiss mischaracterizes Plaintiffs' basic contention that it would be "feasible to design the products [at issue] in a safer manner." Complaint ¶ 537. Moreover, aside from two distinguishable or otherwise inapplicable Supreme Court cases, Amazon's First Amendment cases are not binding on this Court.

a. While livestreaming products touch upon constitutionally protected speech, the First Amendment does not sanction defective product design.

Amazon argues that "[l]ivestreaming is a particular form of live speech that is *doubly* protected as a two-sided conversation—i.e., speech from both streamers and their viewers." Amazon Motion at 11 (emphasis supplied). To be sure, the right to listen is constitutionally protected. See, e.g., Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring); First Nat'l Bank v. Bellotti, 435 U.S. 765, 806 (1978) (White, J., dissenting) (noting that "The self-expression of the communicator is not the only value encompassed by the First Amendment")). Protecting listeners furthers the core values of the First Amendment's free speech clause because "without both a listener and a speaker, freedom of expression is as empty as the sound of one hand clapping." Rodney A. Smolla, Freedom of Speech for Libraries and Librarians, 85 L. Libr. J. 71, 77 (1993). But it does not follow that, livestreaming

is "doubly" protected under the First Amendment's free speech clause. In fact, Amazon makes no argument that other First Amendment protections are at play here, for example, its protection of religious exercise. See, e.g., Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2433 (2022) (explaining that "personal religious observance [is] *doubly protected* by the Free Exercise and Free Speech Clauses of the First Amendment" (emphasis added)).

Amazon argues that courts have rejected the notion that live broadcasters can be liable for airing objectionable live content because they might be able to "implement a more effective screening system." Fox Television Stations, Inc. v. F.C.C., 613 F.3d 317, 329, 334 (2d Cir. 2010), vacated, 657 U.S. 39 (2012) (vacating on Due Process grounds and specifically noting that the Court "need not address the First Amendment implications of the [FCC's] indecency policy"). Not only did Amazon fail to cite negative subsequent appellate history, but even if the Second Circuit's decision was still good law, it would not be binding on this Court. See Kin Kan, 78 N.Y.2d at 59-60. Other cases cited by Amazon are not only nonbinding but distinguishable because, like Social Media Defendants' other First Amendment cases, they involved claims where the claims at issue concerned speech or content, whereas Plaintiffs' claims concern Amazon and other Social Media Defendants' conduct. See, e.g., Project Veritas v. Schmidt, 72 F. 4th 1043, 1050 (9th Cir. 2023) (concluding that state statute prohibiting recording of conversations "is a content-based restriction that violates the First Amendment right to free speech and is therefore invalid on its face"); Am. Broad. Cos. v. Cuomo, 570 F.2d 1080, 1082 (2d Cir. 1977) (concerning enforcement of a criminal statute which as applied would interfere with First Amendment rights of the press); Rodriguez v. Fox News Network, L.L.C., 238 Ariz. 36, 41 (Ct. App. 2015) (rejecting notion that "a broadcaster covering a matter of public concern to cut away whenever a violent or disturbing sight may be caught on camera").

The Supreme Court cases cited by Amazon are similarly distinguishable or not applicable here. See Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 193 (1999); Kleindienst v. Mandel, 408 U.S. 753, 762-765 (1972) (concerning Congress's plenary power to make rules for the admission and exclusion of aliens, but noting in dicta that the First Amendment protects right to receive information and ideas under some circumstances). Curiously,

Amazon's motion cites no binding New York State precedent to support its First Amendment contentions.

Amazon disingenuously suggests that Plaintiffs "demand that Twitch's team of 'content moderators' monitor each second of the many millions of third-party content channels livestreaming on Twitch" to "instantly, 'identify acts of livestreamed violence, notify law enforcement, and prevent public viewing' of violent acts. Amazon Motion to Dismiss at 11 (quoting Complaint ¶ 355). Instead, Plaintiffs allege that Amazon's Twitch product is "inherently dangerous because there is no way the product, as currently designed, can prevent the livestream broadcast of mass shootings which have been proven to motivate future acts of mass terror. No content moderation technology [exists] that can detect violence in time for Twitch to shut down the broadcast before it is seen by anyone." Complaint ¶ 353. Amazon essentially mischaracterizes Plaintiffs' basic contention that "it was feasible to design the products [at issue] in a safer manner." Complaint ¶ 537.

b. To the extent that Twitch's content moderation policies are constitutionally protected, the First Amendment does not sanction defective product design.

To be sure, "the creation and dissemination of information are speech for First Amendment purposes." Sorrell v. IMS Health Inc., 564 U.S. 552, 553 (2011); see also NetChoice, LLC v. Att'y Gen., Fla., 34 F. 4th 1196, 1210 (11th Cir. 2022) (collecting cases). Amazon contends that it has "a constitutional right to make editorial judgments . . . about whether, to what extent, and in what manner [it] will disseminate speech." Amazon MTD at 13 (cleaned up). But, as discussed above, the gravamen of Plaintiffs claims here concern Social Media Defendants'—including Amazon's—*conduct* and Plaintiffs allege that Amazon "could manifestly fulfill [its] legal duty to design a reasonably safe social media products and furnish adequate warnings of foreseeable dangers arising out of the use of [its] products *without altering, deleting, or modifying the content of a single third-party post or communication.*" Complaint at 114 (emphasis supplied). Amazon's motion to dismiss fails to address the critical conduct-content distinction.

3. Plaintiffs Factual Allegations are Adequate to Establish Amazon's Derivative Liability for Twitch's Unreasonably Dangerous Products

Finally, Amazon argues that it should be dismissed from this case because Plaintiffs failed

to allege sufficient facts to hold it liable for the actions of its wholly owned subsidiary Twitch. This is incorrect. Plaintiffs Complaint contains extensive allegations regarding Amazon's control in the operation of Twitch, knowledge of Twitch's dangerous propensities, and refusal to implement safety modifications. See Complaint ¶¶ 347-351, 354. Under New York liberal notice pleading standard, these allegations are sufficient to pierce the corporate vail between Amazon and Twitch. See Americore Drilling & Cutting, Inc. v. EMB Contr. Corp., 198 A.D.3d 941, 946 (2d Dep't 2021). ("A party seeking to pierce the corporate veil must establish that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury") (quotations omitted) Plaintiffs have also served discovery on Amazon specifically directed to Twitch. Bergman Affirmation Exhibit 2.

The Court should defer ruling corporate relationships until discovery has been completed. See Wensing, 158 A.D.2d at 167 (court properly deferred ruling on corporate successorship issue before discovery was completed). Meanwhile, the Court should grant Plaintiffs cross-motion to amend their Complaint to add Twitch as a party defendant.

C. Response to Discord's Individual Arguments

Discord argues that Plaintiffs do not allege that Gendron was radicalized by its social media product. This is inaccurate.

Plaintiffs' complaint contains detailed allegations how Discord's product design promotes radicalization by providing private opt-in channels where white supremacist hatred is incubated. Complaint ¶¶ 382-387. Plaintiffs allege:

> Discord an ideal place for far-right recruitment. Its spaces provide room for people to socialize in hate—to forge connections from which social beliefs can grow. If you hang out with Nazis and racists long enough, what begins as cruel humor can give way to a set of convictions.

Complaint ¶¶ 386. Plaintiffs allege that through these product features, Discord facilitated Gendron's radicalization and helped him obtain the body armor he used for his deadly attack. Complaint ¶¶ 388-396. These factual allegations are sufficient to state a claim under New York law.

D. Response to Meta's Individual Arguments

Meta argues that Plaintiffs' Complaint "fail[s] to connect Meta's provision of its Instagram and Facebook services with Gendron's alleged radicalization, let alone Plaintiffs' injuries." Meta motion at 4. This is incorrect. Plaintiffs alleged that Meta designed Facebook and Instagram with harmful defects that promote addictive use by teenagers. Complaint ¶¶ 244, 249. Meta's algorithmically generated user feeds are designed with the primary goal of maximizing user engagement and "are prone to recommending harmful content." Complaint ¶ 251. Gendron became addicted to Meta's products and accessed his social media accounts multiple times per hour and at all hours of the night. Complaint ¶ 163. In order to maximize Gendron's engagement, Instagram directed him to progressively more extreme and psychologically discordant material. Complaint ¶ 171.

Plaintiffs need not plead that Meta's conduct was the cause in fact of Plaintiffs injuries. New York Courts have repeatedly held that a defendant's negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury. *Burgos*, 92 N.Y.2d at 550, cited in Scurry v. New York City Hous. Auth., 39 N.Y.3d 443, 453 (2023). Here, Plaintiffs allege that Gendron became addicted to Meta's social media products, started being radicalized on Instagram which directed him to more extreme white supremacist material on other sites. Plaintiffs need only allege that Meta's conduct was a substantial factor in contributing to Plaintiffs distress, which they have done.

With respect to Meta's livestreaming feature, Plaintiffs do not alleged that the repeated display Gendron's murder video on Facebook was the cause-in-fact of the attack itself. Rather, plaintiffs argue that the video of the attack being posted on Facebook after the attack greatly contributed to the trauma that Plaintiffs experienced.

Plaintiffs need not use a but-for analysis. Plaintiffs have shown that Meta's conduct, of both radicalizing its users, and allowing and finally benefiting from the video of the shooting, were both substantial factors in the injuries that plaintiff have and are currently experiencing.

E. Response to Reddit's Individual Arguments

Plaintiff's Verified Complaint sufficiently pleads product liability causes of action against

Reddit for design defects and failure to warn. Plaintiff also successfully pleads other causes of action for negligence, negligent failure to warn, unjust enrichment, intentional infliction of emotional distress, invasion of privacy, negligent infliction of emotional distress, loss of parental guidance, wrongful death, and personal injuries. Dismissal of the claims against Reddit would be inappropriate. At the very least, dismissal of Plaintiff's claims against Reddit is pre-mature, and outside of the applicable standards of law.

1. Targeting Gendron with White Supremacist Material

Reddit claims that "Reddit is not alleged to have targeted Gendron with any type of content, let alone led him down a 'rabbit hole' of violence and racism." (See Defendant Reddit's Individual Memorandum of Law in Support of Motion to Dismiss at P4 [Reddit's Memo of Law]). Plaintiffs' Complaint explicitly details the how Reddit targeted the shooter and pulled him into a rabbit hole of racism and violence in exchange for engagement and profit. Plaintiffs direct the Court's attention to paragraphs 397-419, and 534-620 of the Verified Complaint specifically for further discussion of the allegations against Reddit.

Reddit promoted content that it created, and promoted content created by third parties within its products to Gendron. The content Reddit fed him, according to Reddit's intentional product design, was a mix of white supremacist ideology, and assault tools and tactics. See Complaint ¶ 419 ("Many of my beliefs came from reddit").

2. Reddit's Dangerous Product Features

Comment Feature. As alleged in the Verified Complaint, the design of the comment feature "promotes extremist content by elevating incendiary and hateful comments and images over positive and uplifting ones. This design feature works to radicalize youth by promoting racist, antisemitic, and violence-advocating communications." Complaint ¶ 411-417. The comment feature is merely one of the content design features of Reddit alleged in the Verified Complaint to be flawed and dangerous.

Karma. As alleged in the Verified Complaint, Karma is another content feature produced by Reddit without appropriate safety measures that lead to the complaint of injuries. Reddit Karma is a metric designed and implemented by Reddit to make posting on Reddit addictive, like

achieving a new level in a game. From Reddit 2018 Brand Guidelines, "Redditors accrue 'karma' when they participate on Reddit. Karma is a score that increases as a redditor performs certain actions, such as posting and commenting. Complaint ¶ 399. When a Redditor's posts or comments get upvoted, they also accrue karma." (Affirmation of Kristen-Elmore-Garcia Exhibit F at 14).

Some of the most incendiary posts gain Karma, and Reddit uses an algorithm to calculate and assign karma. Reddit grants Karma even to posts and comments that violate its own content policy. Reddit calculates Karma and grants the user an individual "level" of Karma designated by a proprietary calculation of the metric that Reddit creates. It is claimed upon information and belief that Reddit calculated and granted the shooter Karma as a reward for his own contributions to discussions on its message board leading up to the shooting.

Karma is an integrated feature associated with comments and user postings. Frequently, the more controversial a comment or post, the more users will interact with it in a way that prompts Reddit to Reddit to grant the user with Karma. Karma is one of the algorithmic features designed to keep the user engaged with the product "taking advantage of their susceptibility to dopaminergic reinforcement." Complaint ¶ 7.

3. Algorithmic Content Feeds.

Reddit claims it only uses an algorithm for sorting user content based on how recently it was posted, and the number of upvotes and downvotes it has received, not Reddit' s own judgments about what content to feature. As alleged in the Verified Complaint, Reddit does use algorithmic content feeds as part of its product design that targeted the shooter with white supremacist ideologies, and instructions for tactical combat. Complaint ¶ 400. The display of content on Reddit is driven by a centralized algorithm designed to funnel content both created and chosen by Reddit itself.

Although Reddit revises its Privacy Policy from time to time, and although it has been amended on multiple occasions since the year 2018, Plaintiff refers to Reddit's June 8, 2018, Privacy Policy in corollary to Defendant Reddit's use of a Transparency Report it issued from 2018 as Defendant's Exhibit C. Within the 2018 Reddit Privacy Policy, Reddit states that it uses information collected from cookies and similar technologies to "communicate with you about

products, services, offers, promotions, and events, and provide other news and information we think will be of interest to you." This is in stark contrast to Reddit's contention in its Individual Motion to Dismiss that "Reddit does not have a centralized 'recommendation' algorithm aimed at steering users toward specific categories of content." See Reddit's Individual Memorandum of Law in Support of Motion to Dismiss, at 7. The foundation of Reddit's Privacy Policy is itself how it promotes its "recommendations."

Reddit's 2018 Privacy Policy further goes on to detail the ways in which it can "personalize the services and provide advertisements, content and features that match user profiles or interests." Affirmation of Kristen Elmore-Garcia Exhibit H. Reddit is a provider of content and advertisements as defined in its own policy. This comports with another Reddit document, "Reddit 101," available on Redditinc.com. "Reddit has two important feeds — a Front Page that's customized to each user and a Popular feed that shows the top content across Reddit." See Exhibit J at 1.

The questions answered in its own Privacy and Account Settings policy are: "How does Reddit personalize the content and community recommendations I see?" and answers its own question with "It's science and the more we know about you and what you like the better our recommendations are." It goes on to detail that "the way we personalize ads and content are similar in some ways –they're both personalized using your activity."

Reddit's personalization and content recommendation data is collected and utilized in a manner that is so sophisticated that it does not merely include a user's sitewide activity, but it also includes activity about the user's device, content embedded into third party websites, and data from third party advertisers. (Id. Exhibit H and I). The use of algorithms is not only seen in the personalization experience for users. The design of its algorithm product feature as implemented in the comment tool, karma, and other design features is also flawed.

4. White Supremacist Content Fed to Gendron from Reddit

In Reddit's discussion regarding content moderation, it cuts short a quote and excludes important context directly from the shooter regarding the frequency and intensity of his use on Reddit. That quote is also contained within the Attorney General's Investigative report and in

Plaintiff's Verified Complaint at ¶ 418. Defendant's motion includes the first half of the quote "many of my beliefs came from reddit too, Many subreddits I joined have been banned" Disregarding the remainder of the statement mid-sentence, the shooter goes on to state, "but they show up on r/AgainstHateSubreddits all the time. One's [sic] that are still around include r/greentext, r/4chan, r/PoliticalCompassMemes, r/SocialJusticeInAction, r/LoveForLandlords, and r/AntiHateCommunites, of which I am actually in their discord :)" NYAG Report at Page 22.

Each of the titles of communities mentioned by the shooter stylized as "r/" are distinct message boards within Reddit that introduced the shooter to his ideologies and training. "Every subreddit is its own community, and the Front Page is made up of the top content from each subreddit." See Reddit 101. The shooter sold and traded in subreddits r/pmsforsale and r/GearTrade to raise funds and acquire equipment. NYAG report at 21.

For Gendron to state that the beliefs he was looking for show up on a subreddit "all the time," and for Reddit to expressly exclude that portion of the shooters statement as they attempt to limit the Court's perception of the amount of time that the shooter spent on Reddit, is disingenuous and misleading. It is impossible for Defendant's assertion that the shooter's time spent on the website was limited to be true when it reads the statement in its entirety. Plaintiff expressly alleges in its Verified Complaint that the shooter found Reddit to be addictive, and that he spent much of his time on the platform.

F. Response to Snap's Individual Arguments

Snap argues that Plaintiffs' allegation that algorithmic recommendation systems bombarded Gendron with hateful and violent content that drove him to murder does not fit Snapchat which does not recommend content but instead allow users to communicate directly with people they know.

Though Snap markets itself as a messaging app, it utilizes algorithms to recommend content to its users. Through its discover page, Snap recommends content to users based on their usage history. Recommendation algorithms and user feeds are designed to advance the specific goals of the particular social media organization. Snap's algorithmically generated user feeds are designed with the primary goal of maximizing user engagement. Complaint ¶ 373. Snap's

recommendation algorithms and user feeds were intentionally designed to prioritize user engagement over user safety by failing to include design alterations that would protect children from harmful content and predatory adults at the expense of their engagement with Snap's product. Complaint ¶ 373. It is through the Snapchat Discover page, where users, like Gendron could be repeatedly shown racist and antisemitic content, leading to radicalization.

Plaintiffs allege that through the Snapchat Discover page, which directs users to content and videos, as well as recommending "friends" via Snap's algorithm based "Quick Add" feature, that Defendant Snap directed Gendron towards antisemitic and racist content, which contributed to his radicalization. Through discovery, Plaintiffs will be able to locate and pinpoint specific content that was shown to Gendron, which contributed to his violent radicalization.

Snap relies on Attorney General James' report stated that investigators did not find graphic content on Snapchat. However, Snap fails to quote the statement that "That is not to say, however, that it does not exist on those platforms. Some of those platforms offer comprehensive non-public communications channels outside the scope of the OAG's search for purposes of this investigation.[14] More importantly, Plaintiffs have served discover on Snap specifically seeking all of Gendron's activities on Snapchat. Bergman Affirmation, Exhibit 1. Plaintiffs are entitled to conduct their own investigation of Gendron's activity on Snapchat before the Court concludes as a matter of law that Snap did not contribute to his radicalization.

Snap argues that Plaintiffs have failed to identify any defect linking Snapchat to Gendron's crime. However, Plaintiffs' complaint has identified multiple defects in the Snapchat product which contributed to Plaintiffs harms. First, Snapchat is designed to be addictive to teen users, like Payton Gendron. Nearly every feature incorporated into Snapchat is designed to increase and extend user engagement, ensuring users—in many case minors with developing prefrontal cortices—continue using the product for ever longer periods of time. Simply put, Snapchat's features drive addiction to the product. Complaint ¶ 371. Further Snap's algorithmically generated user feeds are designed with the primary goal of maximizing user engagement. (Complaint ¶ 373). Gendron's social media addiction was the underlying cause of his radicalization and Snapchat's

[14] Attorney General Report at 36.

unreasonably dangerous design was a substantial factor in developing this addiction. Plaintiffs' Snap allegation, taken as true, are therefore sufficient to state cognizable product liability and negligence claims under New York law.

V. CONCLUSION

For the foregoing reasons Social Media Defendants' motion to dismiss should be denied.

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Yours, etc.,
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I hereby certify pursuant to 22 N.Y.C.R.R. 202.8-b(c) that the word count of the attached memorandum of law and affirmations is 29,908 words, exclusive of the caption and signature block, in compliance with the word count limit set forth in 22 N.Y.C.R.R. 202.8-b(a), and by stipulation of this court.