

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

New York Supreme Court

APPELLATE DIVISION—FOURTH DEPARTMENT

Index No. 805896/23

DOCKET NOS.

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

CA 24-00513

CA 24-00515

CA 24-00524

CA 24-00527

CA 24-01447

CA 24-01448

—against—

Plaintiffs-Respondents,

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

Defendants-Appellants,

(Caption continued on inside covers)

**REPLY BRIEF FOR DEFENDANTS-APPELLANTS
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MEAN L.L.C.; PAUL GENDRON; PAMELA GENDRON,
Defendants.

Index No. 808604/23

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

Plaintiffs-Respondents,

—against—

META PLATFORMS, INC., f/k/a FACEBOOK, INC.; INSTAGRAM LLC; REDDIT, INC; AMAZON.COM, INC.; TWITCH INTERACTIVE, INC.; ALPHABET, INC.; GOOGLE, LLC; YOUTUBE, LLC; DISCORD INC.; SNAP, INC.; 4CHAN COMMUNITY SUPPORT, LLC,

Defendants-Appellants,

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

Defendants.

Index No. 810316/23

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

Plaintiff-Respondent,

—against—

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

Defendants,

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

Defendants-Appellants.

Index No. 810317/23

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

—against— *Plaintiffs-Respondents,*

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

Defendants,

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INTRODUCTION

Courts across the country have uniformly rejected efforts to hold online services liable for violent acts committed by extremists. Far from addressing a “young[er]” version of the internet, *Salter.Br.25*, these are recent precedents involving contemporary technology, including social-media algorithms. And they now include a decision from the United States Court of Appeals for the Fourth Circuit applying Section 230 to reject virtually identical claims also arising out of a racist mass shooting. *M.P. ex rel. Pinckney v. Meta Platforms*, 127 F.4th 516 (4th Cir. 2025). These courts did not create a “general immunity” for online services. *Jones/Stamfield.Br.11*. Instead, they applied established law: the protections Congress created in Section 230, core First Amendment principles, and basic rules of product-liability and negligence law, which preserve online expression arising from the publication and dissemination of speech.

Throughout their briefs, Plaintiffs respond that this is merely a case about “addiction” to social-media services, unrelated to particular third-party speech or content. But the operative pleadings tell a very different story. From the first page to the last, those Complaints

explicitly seek to hold Internet-Defendants liable for speech: the racist and violent third-party content that Internet-Defendants allegedly displayed to Gendron. Plaintiffs do not—and could not—argue that they would have been injured had Gendron become “addicted” to some other kind of content (e.g., cooking tutorials, sports highlights, or workout videos). Instead, Plaintiffs’ claims, and their theories of harm, turn entirely on the particular content that Internet-Defendants allegedly published. Because a proper understanding of Plaintiffs’ Complaints is central to numerous of the arguments before this Court, we address this cross-cutting issue first. *Infra* § I.

That being so, controlling precedent makes clear that Section 230 bars Plaintiffs’ claims. *Infra* § II. As in *M.P.*, which rejected identical efforts to plead around Section 230, Plaintiffs’ claims are “inextricably intertwined” with Internet-Defendants’ role as publishers of third-party content. 127 F.4th at 525. Indeed, that content is Internet-Defendants’ *only* alleged connection to Gendron’s shooting. Plaintiffs nevertheless argue that Section 230 does not apply because they seek to hold Internet-Defendants liable for *how* they published the relevant content, including that they used algorithms to disseminate it. But Section 230

draws no such distinction. Deciding how to publish content, including whether to present it to particular users, is part and parcel of publishing. Thus, whether asserted under a product-liability, negligence, or any other legal theory, claims that attack “the manner in which [an online service’s] algorithm sorts, arranges, and distributes third-party content ... are barred by Section 230.” *M.P.*, 127 F.4th at 521.

The First Amendment independently forecloses Plaintiffs’ claims. *Infra* § III. Plaintiffs do not dispute that the First Amendment protects both the third-party speech that Gendron allegedly viewed and Internet-Defendants’ choices “about what third-party speech to display and how to display it.” *Moody v. NetChoice*, 603 U.S. 707, 716 (2024). Labelling Internet-Defendants’ dissemination and curation of speech as “conduct” or “defective design” does not negate those protections. Moreover, as the Supreme Court has now made clear, the use of algorithms to sort and curate speech is itself protected by the First Amendment. That is especially so here, where Plaintiffs fault Internet-Defendants’ algorithms for the content of the third-party material they allegedly communicated.

Next, Plaintiffs' claims fail on multiple state-law grounds. New York product-liability law does not apply to publishers who allegedly expose the public to harmful ideas, nor does it allow claims that challenge individualized services rather than standardized products. *Infra* § IV. That also means there is no product-based legal duty here, and New York otherwise imposes no general duty to prevent third parties from harming others. *Infra* § V. The mere fact that Gendron was among Internet-Defendants' billions of users could not create a "special relationship" obliging them to prevent his aberrant conduct.

Finally, Plaintiffs fail to explain why the established rule that intervening criminal acts defeat proximate cause does not apply here. *Infra* § VI. Plaintiffs can point to no case finding proximate cause where an individual engaged in extreme criminal violence allegedly because they were exposed to objectionable speech, and courts have consistently held otherwise. And there is no foreseeable causal link between alleged addiction to Internet-Defendants' services and Gendron's crimes.

For all these reasons, the trial court erred in denying Internet-Defendants' motions to dismiss. No discovery is needed, or appropriate, to confirm that Plaintiffs' claims fail as a matter of law.

ARGUMENT

I. Each Of Plaintiffs' Claims Seeks To Hold Internet-Defendants Liable For Content They Allegedly Published.

Before turning to the legal bases on which each of Plaintiffs' claims must be dismissed, it is important to begin with a threshold point that cuts across multiple legal arguments. Throughout their briefs, Plaintiffs assert numerous times, in a variety of ways, that their claims are not premised on the *content* that Gendron allegedly viewed or produced on Internet-Defendants' platforms, but merely on Internet-Defendants' "conduct" as "product" designers. E.g., Patterson.Br.5; Salter.Br.14. And, they say, a ruling in their favor "[would] not require Defendants to remove or edit any content on their platforms." Jones/Stanfield.Br.3; *see* Salter.Br.32. Those contentions flatly contradict the Complaints.

Simply put: Plaintiffs' theories of liability all depend on holding Internet-Defendants liable for particular content posted on their services. Plaintiffs' fundamental theory is that "Gendron was motivated to commit his heinous crime by racist, antisemitic, and white supremacist propaganda recommended and fed to him by the social media companies." R.130(¶3); *see also, e.g.,* R.2664-65(¶3) (alleging

Gendron was “fed a steady stream of racist and white supremacist propaganda and falsehoods” and was “radicalized by overexposure to fringe, racist ideologies”); R.5043(¶75) (alleging Internet-Defendants “systematically promot[ed] extreme and harmful content” that gave Gendron “the mindset, knowledge, and motivation he needed to commit his racist attack”). The Complaints reprise this content-based theory of harm at every turn. *See, e.g.*, R.131(¶10); R.158(¶103); R.162(¶126); R.173(¶173); R.174(¶177); R.204(¶323); R.222(¶415); R.2696(¶148); R.2721(¶233); R.5043(¶75); R.5043-44(¶77); R.5103-04(¶286); R.6151(¶161); R.6208(¶370).

These pervasive allegations are not incidental. Each of Plaintiffs’ causes of action is expressly premised on particular kinds of objectionable content that Internet-Defendants allegedly disseminated:

Products liability. In support of their product-liability claims, Plaintiffs repeatedly assert that Internet-Defendants’ services were “defective” and “dangerous” *precisely because of* the mix of user-generated content that Internet-Defendants allegedly showed Gendron. Jones/Stanfield.Br.23; *see* R.5103(¶284) (alleging harm from allowing “extreme videos” to “remain[] on [Internet-Defendants’ platforms]” and

not removing them). The Complaints allege the services' designs are "not reasonably safe because they affirmatively connect minor users to racist, antisemitic and violent malefactors," R.243(¶539), and lead to "overexposure to extremist and racist views," R.5137(¶457); *accord* R.6244(¶570); R.2802(¶585); R.5134(¶444).

The Complaints similarly allege that Internet-Defendants' algorithms are "defective" because they supposedly "recommended and directed" to Gendron "videos promoting racism, antisemitism, and racial violence," R.173(¶174), and "facilitate[d] the spread of terrorist propaganda," R.158(¶103); *accord* R.162(¶126); R.5103-04(¶286); R.6208(¶370); R.2723(¶240) (alleging "Gendron began to view more and more extreme materials" as "a foreseeable result of the Social Media Defendants' dangerous and defective algorithms and promotion of violence and white supremacy").

Plaintiffs' other causes of action all depend on numerous similar allegations about content:

- **Failure to Warn.** Plaintiffs allege that Internet-Defendants "failed to warn minor users or parents that their children would be inundated with racist, antisemitic[,] and violent material." R.248(¶564); *accord* R.2763(¶408).

- **Negligence.** Plaintiffs allege that “Gendron was indoctrinated and radicalized by over exposure to extremist and racist views.” R.2808(¶617); *accord* R.2806(¶609) (Internet-Defendants “had a duty to protect young users engaging on their platform(s) from exposure to extremist and racist views.”); R.5140(¶478) (same).
- **Unjust Enrichment.** Plaintiffs allege “there were over 50 million displays of racist, antisemitic, and violence promoting material on the Social Media Defendants’ platforms resulting in millions of dollars in advertising revenue.” R.252(¶597); *accord* R.5147(¶518); R.2811(¶637) (same).

Plaintiffs’ “addiction” theories rest on the same content-based foundation: They assert that Internet-Defendants “addicted” Gendron to racist “conspiracy theories” and “material regarding gun violence,” R.5074(¶181), and that this addiction was harmful because it “led to his radicalization,” Jones/Stanfield.Br.19, 23. As the Complaints make clear, that theory depends *entirely* on the specific content Gendron purportedly engaged with: “extreme and harmful content” that supposedly gave Gendron “the mindset, knowledge, and motivation he needed to commit his racist attack.” R.5043(¶75); *see* R.158(¶103); R.162(¶126); R.2711-13(¶¶200-04) (alleging that social-media addiction is harmful because it “increase[s] ... the spread of white supremacist and white nationalist group imagery, content, and memes”).

The content-dependent nature of Plaintiffs’ claims is reinforced by the remedy they seek: for Internet-Defendants to publish and

recommend different content to users. The Complaints allege that “it is feasible ... to design recommendation algorithms that do not affirmatively direct teenage users to racist, antisemitic, and violent *content*.” R.201(¶¶307-08). And they assert that a “safer design” would not direct users “to unwanted and escalating racist, antisemitic, and violence-provoking *content*.” R.242(¶535) (emphasis added); R.5134(¶444); *see also* R.5101(¶275); R.6206(¶359); R.2796(¶561).

In short, no matter how many times Plaintiffs’ appellate briefs say otherwise, the Complaints they filed seek to impose liability on Internet-Defendants for publishing and recommending allegedly harmful speech—and for Gendron’s violent reaction to that specific speech. As we discuss next, that theory of liability is fundamentally incompatible with Section 230, the First Amendment, and foundational principles of New York product-liability law.

II. Section 230 Bars Plaintiffs’ Claims.

As the Opening Brief shows, each court to consider claims like Plaintiffs’ has rejected them on the pleadings. Meta.Br.17-18. Just last month, the Fourth Circuit added to that unanimous precedent. In *M.P. v. Meta Platforms*, the court held Section 230 precludes product-liability

and negligence claims seeking to hold an online service liable for allegedly radicalizing a user who committed a racist mass shooting. 127 F.4th at 521. Section 230 similarly requires dismissal here.

The only part of Section 230’s three-part test that Plaintiffs meaningfully dispute here is the second prong.¹ That prong plainly is satisfied because—as set forth in detail above, *supra* § I—Plaintiffs seek to hold Internet-Defendants liable “as a ‘publisher or speaker’ of objectionable material.” *Shiamili v. Real Estate Grp. of N.Y.*, 17 N.Y.3d 281, 289 (2011); *see* Meta.Br.20-25. To evade this authority, Plaintiffs recast their claims as challenging *how* Internet-Defendants publish rather than *what* they publish (*infra* § II.A), and they relabel Internet-Defendants’ publication methods as “product defects” (§ II.B). But courts have uniformly rejected these same arguments. Section 230 precludes claims that seek to impose liability for purported “design

¹ Only the *Patterson* Plaintiffs contest the third prong, and their effort fails on multiple grounds. *Infra* § II.C. Similarly, only the *Patterson* Plaintiffs argue that a separate preemption analysis is required. *Patterson.Br.23-25*. But *Shiamili* bars this argument; *Shiamili* held that Section 230 expressly preempts state law when its three statutory elements are established. *Shiamili v. Real Estate Grp. of N.Y.*, 17 N.Y.3d 281, 286-87 (2011) (applying 47 U.S.C. § 230(e)(3)); *cf. People ex rel. Spitzer v. Applied Card Sys.*, 11 N.Y.3d 105, 113 (2008) (“When dealing with an express preemption provision, ... it is unnecessary to consider ... implied or conflict preemption.”).

choices” or “product defects” that are simply means of publishing third-party content.

A. Plaintiffs seek to hold Internet-Defendants liable as publishers.

Plaintiffs acknowledge that Internet-Defendants “act as publishers of third-party content.” Jones/Stanfield.Br.13; *see* Patterson.Br.26. But, Plaintiffs assert, their claims seek to hold Internet-Defendants liable for “non-publisher conduct,” Jones/Stanfield.Br.11—namely, for how they “designed” their services. Jones/Stanfield.Br.12-16; Patterson.Br.32-33; Salter.Br.31-32. And, Plaintiffs maintain, their theory does not depend on Internet-Defendants’ publication of third-party content. Jones/Stanfield.Br.14-15; Patterson.Br.25-30; Salter.Br.33-34. These arguments are wrong on the law and irreconcilable with Plaintiffs’ own factual allegations.

1. Plaintiffs misstate the legal standard when they argue that “publishing” under Section 230 is limited to deciding *whether* to “publish, unpublish, and edit,” and does not include deciding *how* to publish or display content. Jones/Stanfield.Br.3; *see* Jones/Stanfield.Br.12; Patterson.Br.32; Salter.Br.28. On the contrary, Section 230 applies “even where the interactive service provider has an

active, even aggressive role in making available content prepared by others.” 17 N.Y.3d at 289; *see* Meta.Br.22-24. And actively “making available content” involves more than deciding whether to print or edit it. As courts repeatedly have held, publishing also includes decisions about “where ... particular third-party content should reside and to whom it should be shown,” and in what “format,” all of which are “editorial choices” protected by Section 230. *Force v. Facebook*, 934 F.3d 53, 66-67 (2d Cir. 2019); *accord M.P.*, 127 F.4th at 526 (“Decisions about ... how to display certain information provided by third parties are traditional editorial functions ...”); *id.* (“acts of arranging and sorting content are integral to the function of publishing”).

Plaintiffs’ cases do not hold otherwise. Jones/Stanfield.Br.12, 15. They say only that decisions whether to publish or withdraw content are *examples* of what publishing “generally involves.” *Lemmon v. Snap*, 995 F.3d 1085, 1091 (9th Cir. 2021) (cleaned up); *see also Shiamili*, 17 N.Y.3d at 289 (publishing involves functions “such as” those listed); *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997) (same).

Plaintiffs likewise cannot evade dismissal under Section 230 by claiming to challenge “design choices.” Jones/Stanfield.Br.5; *see*

Patterson.Br.32-33; Salter.Br.26, 31-32. The “design choices” they identify all concern what content to publish and how to publish it. *Supra* 6-7. For instance, Plaintiffs’ addiction theory alleges that Internet-Defendants “connected” and “deluged” Gendron with objectionable material, Patterson.Br.5, *see* Salter.Br.34—i.e., that Internet-Defendants displayed, and Gendron viewed, particular content. *Supra* 8. Plaintiffs now assert that the “crux” of their claims “is not what [Gendron] viewed” but his “prolonged exposure” to it. Jones/Stanfield.Br.23. But this assertion is belied by the Complaints, *see supra* § I, and in any event it is just another way of saying that Internet-Defendants displayed *too much* of certain content to Gendron. That theory still treats Internet-Defendants as publishers. *See M.P.*, 127 F.4th at 526 (publishing encompasses efforts to “increase[e] consumer engagement” by “recommend[ing]” content).

Plaintiffs next object that, if successful, their claims would require Internet-Defendants only to adopt “safety precautions,” not alter or remove content. Jones/Stanfield.Br.13; *see* Patterson.Br.32. Not so. Consistent with their theories of liability, Plaintiffs’ proposed “safety precautions” directly target whether and how content is published—for

instance, “prevent[ing]” the type of content that Gendron viewed “from being uploaded” (R.256 ¶627), and “restrict[ing] ... the length” of use or “end[ing] a user’s session or feed” (R.5135 ¶445); *see supra* 8-9. On Plaintiffs’ own theory, these content-moderation features would make it “more difficult” to view the allegedly harmful content or “easier” to “remove” it. *Herrick v. Grindr*, 765 F. App’x 586, 590 (2d Cir. 2019); Meta.Br.32-34. But courts have consistently “rejected claims that attempt to hold website operators liable for failing to provide sufficient protections to users from harmful content.” *Jane Doe No. 1 v. Backpage.com*, 817 F.3d 12, 21 (1st Cir. 2016); *see, e.g., Doe v. Grindr*, __ F.4th __, 2025 WL 517817, at *2-3 (9th Cir. Feb. 18, 2025) (Section 230 bars claims alleging that “safer alternative designs were available”); Meta.Br.32-34 (collecting cases).

2. Next, Plaintiffs mistakenly ascribe to Internet-Defendants what they call a “but-for” theory—that Section 230 applies whenever third-party speech “lies anywhere in the chain of causation.” Patterson.Br.27; *see* Patterson.Br.26-30; Jones/Stanfield.Br.14-15. As explained above, Plaintiffs do not just cite publication as a step in the causal chain; rather, each of Plaintiffs’ claims seeks to hold Internet-Defendants

liable for publishing third-party content, and would impose a duty not to publish certain speech. *Supra* § I.

The Fourth Circuit’s decision in *M.P.* rejects the very argument that Plaintiffs make here. Like this case, *M.P.* involved claims that Facebook algorithmically promoted “extremist content” that “radicaliz[ed]” a teenager into committing racially motivated killings. 127 F.4th at 521. The Court explained that such claims were not treating the publication as a mere “but-for” cause of the injury, but were “inextricably intertwined with Facebook’s role as a publisher of third-party content.” *Id.* at 525. That is because there, as here, plaintiffs sought to hold Facebook “liable for disseminating ‘improper content’ on [their] website[s].” *Id.* Thus, there was no way to show that the services were “designed in a manner that was unreasonably dangerous ... without also demonstrating that ... [they] prioritize[d] the dissemination of one type of content over another”—in other words, the claims challenged Facebook’s exercise of a “traditional editorial function.” *Id.* at 525-26. The same is true here. Plaintiffs take “issue with the fact that [Internet-Defendants] allow racist, harmful content to appear on [their] platform[s] and direct that content to likely receptive

users.” *Id.* at 525 (cleaned up). That is not a theory where speech incidentally happens to be in the causal chain; it is explicitly premised on the speech that Internet-Defendants published and how they published it.

Plaintiffs’ “but-for causation” cases, on the other hand, involve attempts to hold defendants liable, not for what they published, but for breaching legal duties distinct from publishing. In *Erie Insurance v. Amazon.com*, the plaintiff sued Amazon for selling a headlamp containing an allegedly defective battery that burned down a house. 925 F.3d 135, 137 (4th Cir. 2019), *cited at* Patterson.Br.28; Jones/Stanfield.Br.14. Although Amazon published speech in marketing the headlamp, “the plaintiff’s claim was not based on ‘the content of [that] speech’ but rested on the characteristics of the product”—the allegedly defective physical product Amazon sold. *M.P.*, 127 F.4th at 525 (distinguishing *Erie Insurance*).

Likewise, *Calise v. Meta Platforms* held that Section 230 did not bar contract claims that premised liability on the defendant’s “contractual duty separate from its status as a publisher.” 103 F.4th 732, 743 (9th Cir. 2024), *cited at* Patterson.Br.29; Jones/Stanfield.Br.14-

15. Plaintiffs assert no such claims here. Much more relevant is *Calise's* separate holding that Section 230 *did* bar tort claims (including for negligence and unjust enrichment) that sought to impose “a duty” based “on quintessential publishing conduct” (there, vetting ads). *Id.* at 744.

In short, Plaintiffs’ cases reflect the unremarkable principle that online publishers may owe duties that do not arise from publishing activity, such as when they sell physical products, *see Erie Ins.*, 925 F.3d at 137; enter a legally binding contract, *see Barnes v. Yahoo!*, 570 F.3d 1096, 1109 (9th Cir. 2009), *cited at* Patterson.Br.26; or are subject to general taxes, *see City of Chicago v. StubHub!*, 624 F.3d 363, 366 (7th Cir. 2010), *cited at* Jones/Stanfield.Br.12. Here, however, Plaintiffs do not claim that Internet-Defendants owed them any contractual or other such duty. Rather, they argue that Internet-Defendants breached a duty to them by selecting and displaying content to users that Plaintiffs believe should not have been displayed—quintessential publishing conduct. *But see infra* § V (explaining that there is no such duty). Thus, as in *Force*, “[a]ccepting plaintiffs’ argument would eviscerate Section 230(c)(1); a defendant interactive computer service would be ineligible for Section 230(c)(1) immunity by virtue of simply organizing and

displaying content exclusively provided by third parties.” 934 F.3d at 66.

3. Finally, Plaintiffs contend that the use of algorithms by some Internet-Defendants does not qualify as “publishing.” Jones/Stanfield.Br.16-18; Patterson.Br.32-33. But courts have consistently rejected the argument that a website’s “use of algorithms renders it a non-publisher.” *Force*, 934 F.3d at 66; see *M.P.*, 127 F.4th at 526 (A “service does not lose Section 230 immunity because the company automates its editorial decision-making.”); Meta.Br.23-24, 30-32. As the Second Circuit explained in the context of assessing algorithms, “it would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized from civil liability.” *Force*, 934 F.3d at 67.

Plaintiffs cannot distinguish the numerous cases that have dismissed allegations involving algorithms under Section 230. Plaintiffs contend that, in *M.P.*, there was no allegation that the algorithm promoted content based on addictiveness (Jones/Stanfield.Br.21), or that the shooter was not already inclined toward racist or violent beliefs

(Patterson.Br.35). But the theory of liability in *M.P.* was just like Plaintiffs' theory here: that Facebook's algorithm "radicalized" a teen user, 127 F.4th at 521, by "addicting him to the content it delivers," Complaint ¶61, *M.P. ex rel. Pinckney v. Meta Platforms*, No. 2:22-cv-3830-RMG (D.S.C. Nov. 2, 2022), ECF No. 1; *see also id.* ¶¶76-77, 111, 115, 172. And that theory of liability is "barred by the broad immunity conferred by Section 230." *M.P.*, 127 F.4th at 526.

Plaintiffs distinguish *Force* on the theory that it involved only an "alleged failure to delete content." Jones/Stanfield.Br.20. But Plaintiffs make that same allegation, *see* R.5103(¶284); R.6207(¶368); R.2722(¶235), and in any event, *Force* specifically rejected claims that Facebook was liable because of how its algorithms "suggest content to users" and "matched" users and content in an "automate[d]" process. 934 F.3d at 65-67. Ultimately, Plaintiffs concede that "*Force* may be read to support Defendants' construction of Section 230." Jones/Stanfield.Br.20. They are thus left asking this Court to follow *Force*'s dissent. Patterson.Br.33-34. But *Force*'s majority opinion, which

has been widely followed, articulates the same principles as the binding decision in *Shiamili*. See Meta.Br.31-32.²

Nor does a purported profit or “user engagement” motive change the legal analysis. Jones/Stanfield.Br.18-19; Patterson.Br.32-33; Salter.Br.32-34. Publishing has long been a for-profit venture; television stations and newspapers seek to increase viewership and readership so they can maximize ad revenue. Not surprisingly, then, courts have repeatedly rejected Plaintiffs’ argument. The Second Circuit held that a service employing algorithms to “suggest third-party content to users” based on what the service believes will “cause the user to use [the service] as much as possible” is simply “vigorously fulfilling its role as a publisher.” *Force*, 934 F.3d at 70. Similarly, *M.P.* held that Section 230 precludes allegations that Facebook uses algorithms to “direct[] ... content to likely receptive users to maximize [its] profits.” 127 F.4th at 525. The court explained that “us[ing] an algorithm to achieve the same

² Although Plaintiffs suggest otherwise, Jones/Stanfield.Br.21-22, *Dyroff v. Ultimate Software Group* and *Gonzalez v. Google* similarly held that the defendants were “acting as a publisher” in using algorithms “to facilitate the communication and content of others.” *Dyroff*, 934 F.3d 1093, 1098 (9th Cir. 2019); see *Gonzalez*, 2 F.4th 871, 895 (9th Cir. 2021).

result of engagement does not change the underlying nature of the act that it is performing”: publishing. *Id.* at 526.

Finally, the *Jones/Stanfield* Plaintiffs say that the Supreme Court’s recent decision in *Moody v. Netchoice*, 603 U.S. 707 (2024), means that using an algorithm constitutes “publishing” only if the algorithm “implement[s] a human choice based on the expressive content of third-party communications”—but not if it “maximiz[es] user engagement, regardless of the expressive content of third-party posts.” *Jones/Stanfield.Br.18* (emphases omitted); *see Jones/Stanfield.Br.16-18*. But as Plaintiffs acknowledge, *Moody* “did not address Section 230” at all. *Jones/Stanfield.Br.16*. It was exclusively a First Amendment case. And both before and after *Moody*, courts have consistently held that “automated editorial acts are protected by Section 230.” *Force*, 934 F.3d at 67; *see In re Social Media Adolescent Addiction*, 2024 WL 4532937, at *17 (N.D. Cal. Oct. 15, 2024) (collecting cases “dismiss[ing] claims under Section 230 alleging harms caused by content recommendation algorithms”); *M.P.*, 127 F.4th at 526 (relying on these cases post-*Moody*); *supra* 18.

B. Plaintiffs cannot circumvent Section 230 by asserting product-liability claims.

Plaintiffs argue that this well-developed body of caselaw can be set aside because they are challenging Internet-Defendants' services under a product-liability theory. Jones/Stanfield.Br.12-16; Patterson.Br.30-35. But courts have repeatedly rejected efforts to “plead around Section 230 immunity by asserting product liability claims.” *M.P. ex rel. Pinckney v. Meta Platforms*, 692 F. Supp. 3d 534, 538 (D.S.C. 2023), *aff'd*, 127 F.4th at 523 (holding the differences between product-liability and negligence claims “immaterial” to analysis of Section 230); *see, e.g., Lama v. Meta Platforms*, 732 F. Supp. 3d 214, 222 (N.D.N.Y. 2024); Meta.Br.26-28 (collecting cases).

Instead, in assessing how Section 230 applies to claims styled as product liability, the critical question is whether the features Plaintiffs challenge as defective or requiring a warning are “independent of [the defendant’s] role as a facilitator and publisher of third-party content.” *Grindr*, 2025 WL 517817, at *3. If not, the claims are barred. *Id.; accord Herrick*, 765 F. App’x at 590; *Estate of Bride v. Yolo Techs.*, 112 F.4th 1168, 1179 (9th Cir. 2024) (holding Section 230 barred design-defect and failure-to-warn product-liability claims). Here, Plaintiffs’ product-

liability allegations take direct aim at how Internet-Defendants published third-party content. Meta.Br.29-36; *supra* 6-7.

Plaintiffs barely try to distinguish the extensive authority set forth in the Opening Brief (at 28). Plaintiffs acknowledge that Section 230 bars “product-liability claims premised on the failure to remove or alter content,” Jones/Stanfield.Br.24 n.4; *see* Patterson.Br.35, but summarily assert that their claims do not do so. In fact, Plaintiffs’ product-liability claims assert that techniques used by Internet-Defendants to publish third-party speech are defective precisely because they allegedly resulted in objectionable third-party content being displayed to Gendron. *Supra* 6-7, 12-13.

By contrast, the product-liability cases cited by Plaintiffs do not target publishing third-party content. Jones/Stanfield.Br.13-16; Patterson.Br.30-33; Salter.Br.27-32. *Lemmon v. Snap* involved a “speed filter” that indicated how fast users were travelling, which allegedly induced users to drive recklessly while recording videos. 995 F.3d at 1094; *see Maynard v. Snapchat*, 870 S.E.2d 739, 743 (Ga. 2022) (same). The key to *Lemmon* was that the plaintiffs’ harm—fatal reckless driving—flowed directly from the alleged design defect: the Speed

Filter. The “claim did ‘not depend on what messages, if any, a Snapchat user employing the Speed Filter actually sends.’” *Bride*, 112 F.4th at 1180. The court made clear that Plaintiffs “would not be permitted under § 230(c)(1) to fault Snap for publishing other Snapchat-user content (*e.g.*, snaps of friends speeding dangerously) that may have incentivized ... dangerous behavior.” *Lemmon*, 995 F.3d at 1093 n.4. Plaintiffs’ claims here seek to do exactly that—to hold Internet-Defendants liable for publishing other users’ “content” that allegedly “motivate[d] [Gendron] to commit ... violence.” R.131(¶10); *see supra* § I; *Meta.Br.11-12*, 20-22; *accord Grindr*, 2025 WL 517817, at *3 (rejecting similar reliance on *Lemmon*); *see also Addiction Litig.*, 2024 WL 4532937, at *17 (same).

Like *Erie Insurance*, discussed above (at 16), *Bolger v. Amazon.com* involved claims against Amazon as the seller of an allegedly defective physical product (laptop batteries), claims that did not depend on the “content of the product listing.” 53 Cal. App. 5th 431, 464 (2020). In *A.M. v. Omegle.com*, the plaintiff challenged a function (“matching children with adults”) that “cause[d] ... danger” apart from any “information provided by a user.” 614 F. Supp. 3d 814, 821 (D. Or.

2022). Not only is *A.M.* distinguishable; it is a dead letter in the Ninth Circuit. In *Doe v. Grindr*, the Ninth Circuit held that Section 230 precluded product-liability claims based on that same theory (an online service’s alleged “fail[ure] to prevent a minor from being matched with predators”) because the alleged product defects were “features ... meant to facilitate the communication and content of others.” 2025 WL 517817, at *2-4.³

Plaintiffs also cite *Doe v. Internet Brands*, 824 F.3d 846 (9th Cir. 2016). Salter.Br.28-29. There, however, Section 230 did not bar failure-to-warn claims because the defendant had “failed to warn of a known conspiracy operating *independent of the site’s publishing function.*”

³ *In re Social Media Cases* is even farther afield. 2023 WL 6847378 (Cal. Super. Ct. Oct. 13, 2023), *cited at* Jones/Stamfield.Br.13, 23-24. There, the plaintiffs claimed that social media *users* are psychologically harmed by overusing online services—not, as here, that a third-party user’s exposure to content led him to commit a violent act that injured a different, uninvolved party. And, even in that very different context, the court held Section 230 inapplicable at the pleading stage only to a subset of negligence allegations that “d[id] not seek to hold Defendants liable for injury caused by third-party content.” *Id.* at *34. More relevant here, another ruling in the same case held that Section 230 barred allegations “seek[ing] to hold Defendants liable for recommending dangerous content to minors.” *Arlington v. TikTok*, 2024 WL 4003712, at *9 (Cal. Super. Ct. July 19, 2024).

In re Social Media Adolescent Addiction, 702 F. Supp. 3d 809, 831 (N.D. Cal. 2023), *cited at* Salter.Br.34-35, is distinguishable for the same reason. And Plaintiffs ignore that court’s express holding that Section 230 bars addiction-based challenges to services’ purported lack of safety features, *id.*, and use of algorithmic publication allegedly to promote excessive engagement, *Addiction Litig.*, 2024 WL 4532937, at *17.

Bride, 112 F.4th at 1181 (emphasis added). The Ninth Circuit itself has rejected efforts to rely on *Internet Brands* to assert failure-to-warn claims that “essentially fault[] [the defendant] for not moderating content in some way.” *Id.* at 1180; accord *Grindr*, 2025 WL 517817, at *3 (distinguishing *Internet Brands*; applying Section 230 to bar failure-to-warn claim). That is what Plaintiffs seek to do here. Meta.Br.32-34.

C. The Internet-Defendants did not provide the content at issue.

Finally, the *Patterson* Plaintiffs invoke the third prong of Section 230, arguing that Section 230 does not apply to certain Internet-Defendants who, Plaintiffs say, “co-created” the content.

Patterson.Br.35. Plaintiffs cite screenshots and text which show stickers, filters, music, and editing functions that some Internet-Defendants make available for users to edit their own content. R.1491-1512. These features do not change the Section 230 analysis.

As a threshold matter, Plaintiffs do not allege these features caused their injuries. They do not allege Gendron was radicalized by, for example, viewing “stickers” or using “beauty enhancement[]” filters (Patterson.Br.37-38), nor do they explain how a “font[]” (Patterson.Br.39) could induce someone to commit mass murder. They

assert that Facebook “auto-generates” pages (without supplying any basis for this claim, *see* R.2418), but they do not allege that Gendron ever viewed or was radicalized by auto-generated pages.

Patterson.Br.37-38. Similarly, they cite Reddit’s “Gold’ status” badge, but do not claim that Gendron either viewed or created posts with those badges. Patterson.Br.39.

Plaintiffs’ argument also misunderstands the statutory term “information content provider.” Plaintiffs contend that offering “headings” or “interface options” to augment third-party content—or indeed doing anything more than “simply repost[ing]” such content—opens a publisher to liability. Patterson.Br.36-37. But *Shiamili*, the only case they cite, held that Section 230 *did* apply where the defendant added a “heading, subheading, and illustration” to defamatory user content, because doing so did not “contribute[] materially to the alleged illegality” of the user content. 17 N.Y.3d at 292-93; *see id.* at 290 (“merely ... augmenting the content generally” is not enough); *see also Force*, 934 F.3d at 68; *Jones v. Dirty World Ent. Recordings*, 755 F.3d 398, 409-16 (6th Cir. 2014).

That is dispositive. The features that Plaintiffs highlight are neither themselves “unlawful” nor alleged to have “materially contribute[d]” to the purported unlawfulness of any of the content at issue. *Shiamili*, 17 N.Y.3d at 293. To the contrary, these are just “tools meant to facilitate the communication and content of others.” *Dyroff*, 934 F.3d at 1098; see *Doe v. Fenix Int’l*, 2025 WL 336741, at *6 (S.D. Fla. Jan. 30, 2025) (collecting cases).

III. The First Amendment Independently Requires Dismissal.

A. Plaintiffs’ claims impermissibly seek to hold Internet-Defendants liable for disseminating protected speech.

The First Amendment independently bars Plaintiffs’ claims because they challenge Internet-Defendants’ editorial choices in organizing and presenting constitutionally protected third-party speech. See *Meta.Br.36-51*. Plaintiffs’ primary response is that they “do not seek to hold the [Internet-Defendants] liable for hosting racist content,” *Patterson.Br.51*, but instead for their “conduct” in “designing unreasonably dangerous products.” *Jones/Stamfield.Br.26*; see also *Salter.Br.14-15*. These arguments are foreclosed by Plaintiffs’ allegations and established law.

As discussed above, Plaintiffs’ Complaints directly premise liability on the content and message of the third-party speech that Gendron allegedly viewed. *Supra* § I. Plaintiffs now say that their claims target “non-expressive conduct” and the “allegedly addictive effects” of “social media products.” *Salter.Br.13-15, Patterson.Br.7-10, Jones/Stanfield.Br.8, 24-26*. But Plaintiffs’ claims are not based on the generalized effects of social-media use. They arise from a specific attack committed by a third party whose actions allegedly resulted from the impact of speech communicating a specific ideological message. And Plaintiffs’ pleadings could hardly be clearer in asserting that Gendron was motivated—not by some content-neutral feature of Internet-Defendants’ services—but by the “radicalizing” information and viewpoints expressed in the particular content he allegedly encountered on those services. Plaintiffs’ claims thus necessarily seek to use state tort law to impose content- and viewpoint-based liability for allegedly disseminating that particular speech—contrary to settled First Amendment law. *See Meta.Br.40-42*.

Plaintiffs’ argument that their claims seek merely to impose content-neutral “time, place, and manner” regulations fails for the same

reason. Jones/Stanfield.Br.24, 31-36; Salter.Br.16-17. “[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.” *Consol. Edison v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980). Here, however, Plaintiffs expressly “target speech based on its communicative content.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015). Indeed, had Internet-Defendants operated their services exactly as they did, including using the same algorithms, but displayed to Gendron only anodyne content (e.g., posts about quantum physics or highlights of NFL games), Plaintiffs would have no possible claims. Plaintiffs’ allegations instead depend on, and repeatedly invoke, the *content*—indeed the *viewpoint*—of the material Gendron allegedly viewed. That is the antithesis of permissible time, place, and manner regulation. See *Snyder v. Phelps*, 562 U.S. 443, 456-57 (2011) (rejecting “time, place, and manner” argument where “any distress occasioned by” speech “turned on the content and viewpoint of the message conveyed”).

Nor can Plaintiffs justify such attempted content-based restrictions by suggesting that they target merely Internet-Defendants’ “nonexpressive conduct” in designing allegedly defective “products.”

Patterson.Br.52-54; Jones/Stanfield.Br.24-31, 37. What Plaintiffs characterize as the “conduct” of “functional design” (Jones/Stanfield.Br.28) are choices Internet-Defendants make about what third-party speech to publish and how to publish it. As the Supreme Court confirmed in *Moody*, those curatorial choices are “expressive activity” protected by the First Amendment. 603 U.S. at 717, 728, 731-33; see *Meta.Br.34-51*. Plaintiffs’ concern is not with some functional aspect of Internet-Defendants’ services distinct from the speech they disseminate, akin to a claim that a defective radio damaged a user’s hearing, or short-circuited and caused a fire. Their claim is that the services were allegedly designed in such a way that Gendron was presented with particular ideas and information that caused him to be radicalized.

Labeling such core publication functions as “conduct”—or challenging them under the rubric of product-liability law—does not remove them from First Amendment protection, any more than claiming that “publishing a newspaper is conduct because it depends on the mechanical operation of a printing press.” *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019); accord *Zhang v. Baidu.com*

Inc, 10 F. Supp. 3d 433, 441-42 (S.D.N.Y. 2014) (rejecting argument that search engine “‘is not speaking,’ but rather ‘engaging in discriminatory conduct’” by sorting and presenting search results to users).

Plaintiffs try to sidestep this precedent by suggesting that this case is “closer to those applying the First Amendment to architectural-design regulations” or those involving regulation of short-term property rentals. *Jones/Stanfield*.Br.28 (citing *Burns v. Town of Palm Beach*, 999 F.3d 1317 (11th Cir. 2021)); *Salter*.Br.15 (citing *HomeAway.com v. City of Santa Monica*, 918 F.3d 676, 684-86 (9th Cir. 2019)). But Plaintiffs’ reliance on these cases only underscores their argument’s weakness.

Burns held that a property owner’s design for a private mansion was not “expressive conduct”—but the Eleventh Circuit reached that “narrow and fact-specific conclusion” only because “no reasonable viewer could see the actual design because it was blocked by landscaping and fences.” 999 F.3d at 1331, 1336-37, 1339. *Burns* has nothing to do with the First Amendment’s protections for online services that curate and disseminate third-party speech.

By contrast, that was the precise issue that *Moody* resolved in favor of the First Amendment. *See* 603 U.S. at 727 (agreeing with Eleventh Circuit’s First Amendment analysis in *NetChoice v. Attorney General, Florida*, 34 F.4th 1196, 1212 (11th Cir. 2022), which held that “social-media platforms’ content-moderation decisions” about “whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First Amendment”). Especially in this context, efforts to “hid[e] speech restrictions in conduct rules is ... a losing constitutional strategy.” *Honeyfund.com v. Governor*, 94 F.4th 1272, 1278 (11th Cir. 2024).

HomeAway.com is similarly irrelevant. That case involved a “housing and rental regulation” that prohibited platforms from booking certain short-term property rentals. *HomeAway.com*, 918 F.3d at 685. The Ninth Circuit held that the ordinance did not implicate the First Amendment because it regulated only the “nonexpressive conduct” of “booking transactions,” and did not “target websites that post listings” or address the content those websites could display. *Id.* The claims here, by contrast, expressly target Internet-Defendants’ websites based on the third-party speech they curate and disseminate.

Plaintiffs also cannot avoid the First Amendment by asserting that restrictions on the speech published by Internet-Defendants are necessary to protect the well-being of minors. Jones/Stanfield.Br.32-38; Salter.Br.17-18. A state’s “legitimate power to protect children from harm ... does not include a free-floating power to restrict the ideas to which children may be exposed.” *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 794 (2011). That is exactly what Plaintiffs’ claims would do. They would impose a duty on Internet-Defendants not to “recommend[] and direct[]” users (minors or adults) to First Amendment-protected content that Plaintiffs deem “malign” because of its content and message. R.5103(¶286); R.173(¶174). To avoid liability, Internet-Defendants would have to present users with *different* speech “communicating different values and priorities.” *Moody*, 603 U.S. at 743. “But under the First Amendment, that is a preference [Plaintiffs] may not impose.” *Id.*

B. Plaintiffs cannot avoid the First Amendment with allegations about algorithms or excessive “engagement” with speech.

Plaintiffs further argue that the First Amendment does not apply where “unsupervised machine-learning algorithms” are used to

disseminate speech. Jones/Stanfield.Br.26; Patterson.Br.55; Salter.Br.16. That is incorrect. As *Moody* explained, the “prioritization of content” by online services is protected by the First Amendment, including where it is “achieved through the use of algorithms.” 603 U.S. at 734-35; *accord* Jones/Stanfield.Br.18 (recognizing that “machine-aided exercise of editorial discretion” is protected).⁴

1. Plaintiffs seize on a footnote in *Moody* which noted that the decision did “not deal” with “feeds whose algorithms respond *solely* to how users act online.” 603 U.S. at 736 n.5 (emphasis added). But, while *Moody* simply reserved judgment on that question, it is beside the point because it does not arise here either: Plaintiffs do not allege that Internet-Defendants’ algorithms respond *solely* to how users act online. Instead, Plaintiffs claim that Internet-Defendants served Gendron “psychologically discordant” material that Defendants allegedly “chose for Gendron” to “maximize engagement.” Patterson.Br.3; R.172-

⁴ The *Salter* Plaintiffs argue the First Amendment is not implicated “because algorithms are not persons.” Salter.Br.15. But Plaintiffs seek to hold *Internet-Defendants* liable, not their algorithms, and those companies undeniably are “persons” entitled to First Amendment protections. *E.g.*, *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 11 (1st Cir. 2012) (recognizing established precedent that First Amendment protections apply to “corporate persons”); *accord Zhang*, 10 F. Supp. 3d at 438-39 (algorithmically generated search results protected because “algorithms themselves [are] written by human beings”).

73(¶¶171-74); accord R.2721(¶¶229-33); R.4357-58(¶¶76-78). These allegations target the same kinds of algorithmically curated feeds that *Moody* held were protected: those that “present users with a continually updating, personalized stream of other users’ posts,” with “selection and ranking” accomplished “most often based on a user’s expressed interests and past activities,” but also “based on other factors, including the platform’s preferences.” 603 U.S. at 710, 734-35.

Plaintiffs’ suggestion that they “do not allege that such algorithms were used to carry out publisher functions” (Salter.Br.16) or that their claims are indifferent to the particular content the algorithms are used to disseminate (Jones/Stanfield.Br.26) is directly contradicted by the Complaints.⁵ Plaintiffs’ allegations about Internet-Defendants’ algorithms directly target Internet-Defendants’ content-moderation policies—namely, their determinations about what content to remove from their platforms or to include in users’ feeds. That is squarely

⁵ *Supra* § I; R.2721(¶233) (algorithms “directed Gendron to extremist views, white supremacy, racism, gun violence, and third-party websites with additional extremist views”); R.2720-23(¶¶221-32, 234-40), R.2753(¶386), R.2763(¶406) (similar); R.4357(¶75) (“[a]lgorithms and design features ... systematically promot[e] extreme and harmful content”); R.6252(¶625)(Defendants “algorithmically promoted extreme and violent content”); R.6149-51(¶¶155, 159-60), R.6195(¶320), R.602-03(¶350), R.6207-08(¶¶367, 370), R.6210-11(¶381) (similar).

foreclosed by *Moody*. See 603 U.S. at 719 (“major platforms cull and organize uploaded posts in a variety of ways,” including “in conformity with content-moderation policies”).

Insofar as Plaintiffs argue that the First Amendment excludes certain algorithms merely because they consider a user’s prior actions, that result would make little sense. Curating content based on a person’s interests or activities is no less worthy of protection than curating based on other factors. If a librarian recommends a book to someone because she knows that reader has enjoyed other books on the same subject, that is just as expressive and curatorial as if the librarian recommends a book merely because *other readers* (or the librarian herself) liked it. Plaintiffs do not explain why the First Amendment would protect algorithms that suggest content that is trending, popular, or recent, but not those that suggest content similar to what a user previously viewed. Either way, the algorithms “inherently incorporate” human “judgments about what material users are most likely to find responsive,” *Zhang*, 10 F. Supp. 3d at 438-39, and thus involve “editorial choices” that produce “distinctive compilations of expression,” *Moody*, 603 U.S. at 716.

2. None of Plaintiffs' other cases renders the First Amendment inapplicable to content curation aided by algorithms. Jones/Stanfield.Br.27; Salter.Br.15-16; Patterson.Br.55. *Universal City Studios v. Corley* had nothing to do with algorithms, much less curating speech. But the court did recognize that even "computer code, and computer programs constructed from code can merit First Amendment protection." 273 F.3d 429, 448-49 (2d Cir. 2001). *U.S. Telecom Association v. FCC* also did not address algorithms, and it certainly did not recognize First Amendment protection only for "individual speakers." Patterson.Br.55. Instead, it recognized that "entities that serve as conduits for speech produced by others receive First Amendment protection" when they apply "editorial discretion" "[i]n selecting which speech to transmit." 825 F.3d 674, 742 (D.C. Cir. 2016). That is the situation here.

3. Plaintiffs also point to no authority supporting their suggestion that First Amendment protection diminishes if the relevant speech is engaging, "addictive," or psychologically impactful.

Jones/Stanfield.Br.34 & n.6; see Patterson.Br.55. Nor could they. See Meta.Br.37-40, 49-51 (citing cases); accord *Brown*, 564 U.S. at 797

(rejecting argument that video games are less protected because they are “interactive” or potentially harmful to minors). Courts have consistently rejected similar allegations as barred by the First Amendment: that minors became “involuntarily addicted to and ‘completely subliminally intoxicated’ by the extensive viewing of television violence” (*Zamora v. CBS*, 480 F. Supp. 199, 200 (S.D. Fla. 1979)); that minors were “avid, fanatical and excessive consumers of violent video games” that “disconnected the violence from the natural consequences thereof” (*Sanders v. Acclaim Ent.*, 188 F. Supp. 2d 1264, 1268-69 (D. Colo. 2002)); and that minors became so “totally absorbed by and consumed” by the design of certain games that they “lost control” of their “own independent will” (*Watters v. TSR, Inc.*, 715 F. Supp. 819, 820 (W.D. Ky. 1989), *aff’d*, 904 F.2d 378 (6th Cir. 1990)). Plaintiffs discount these cases because the claims there were “premised squarely on the publication and dissemination of harmful content.”

Jones/Stanfield.Br.27 n.5. But the same is true here. *Supra* § I.⁶

⁶ The First Amendment cases Plaintiffs cite in support of their addiction argument are obviously distinguishable. They allowed regulation of electronic gambling devices—not because the gambling displays were “addictive,” but because sweepstakes contests disguised as slot machines or video poker displays were not expressive speech in the first place. *Telesweeps of Butler Valley v. Kelly*, 2012 WL

Similarly, editorial choices about how to present constitutionally protected speech do not lose First Amendment protection merely because they make that speech more enticing or engaging. Just as “a newspaper company does not cease to be a publisher simply because it prioritizes engagement in sorting its content,” an online service’s use of “an algorithm to achieve the same result of engagement does not change the underlying nature of the act that it is performing.” *M.P.*, 127 F.4th at 526.

C. Because Plaintiffs’ claims directly target speech, cases involving incidental burdens on speech are irrelevant.

Finally, Plaintiffs argue that the First Amendment does not provide a “shield for tortious or unlawful conduct” even where the “wrongful conduct alleged involves speech.” *Jones/Stanfield*.Br.38. But this is not a case in which the claims would incidentally burden speech that happens to occur as part of a criminal or tortious act. Instead, Plaintiffs would apply product-liability and negligence law to hold Internet-Defendants liable for disseminating speech that communicated particular messages to a particular person—in other words, for

4839010, at *6 (M.D. Pa. Oct. 10, 2012); *Hest Techs. v. State ex rel. Perdue*, 749 S.E.2d 429, 437 (N.C. 2012). Here, Plaintiffs do not dispute that the material displayed to Gendron was constitutionally protected third-party speech.

speaking. And under those circumstances—where a “generally applicable regulation of conduct” is directed at a speaker “because of what his speech communicated”—full First Amendment protection applies. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010); *accord Snyder*, 562 U.S. at 461 (First Amendment barred IIED claim aimed at particular speakers); Meta.Br.37-40.

None of the cases cited by Plaintiffs addresses a situation remotely like this one. *See Jones/Stanfield*.Br.32,38; *Patterson*.Br.52-53 & nn.11-13; *Salter*.Br.12-13,16,19. *Cohen v. Cowles Media*, 501 U.S. 663, 669 (1991), held that journalists could not breach an express promise of confidentiality to a source, while *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562, 573-78 (1977), held that broadcasters could not violate intellectual-property rights by airing the entirety of a performer’s act without paying for it. This case does not involve claims that Internet-Defendants broke any promises or infringed anyone’s intellectual property. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), addressed the interplay between the First Amendment and unprotected defamatory speech. This is not a defamation case, and it is undisputed

that the underlying speech is constitutionally protected. *Le Mistral v. CBS*, 61 A.D.2d 491 (1st Dep’t 1978), and *Lindberg v. Dow Jones*, 2021 WL 5450617 (S.D.N.Y. Nov. 22, 2021), held that the First Amendment does not bar trespass, defamation, and contract-related tort claims merely because the unlawful conduct occurred during “new[s] gathering or reporting activities.” *Lindberg*, 2021 WL 5450617, at *9. Nothing comparable is at issue here. And, in contrast to the content-neutral panhandling regulation upheld in *People v. Barton*, 8 N.Y.3d 70 (2006), Plaintiffs’ content-based claims are premised on the objectionable messages allegedly communicated to Gendron. Finally, *Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136 (2002), a slip-and-fall case, has nothing to do with the First Amendment.

Plaintiffs’ failure-to-warn claims doubly implicate the First Amendment, by also compelling Internet-Defendants to speak about their expressive editorial choices. Meta.Br.49 (citing *Netchoice v. Bonta*, 113 F.4th 1101, 1117 (9th Cir. 2024)). *Bonta* invalidated state-law provisions that similarly required online platforms to speak about whether their designs “may expose children to harmful or potentially harmful content” and “[w]hether the algorithms used” “could harm

children.” *Id.* at 1109-10, 1116-17. Plaintiffs try to distinguish *Bonta* by arguing that the impact of their failure-to-warn claims on speech is “incidental.” Jones/Stanfield.Br.30. Not so. Their claims not only seek to hold Internet-Defendants liable for having failed to speak; they would require warnings about the risk that users may be exposed to objectionable third-party speech. As *Bonta* makes clear, that targets expressive activity.⁷

Finally, as with the Section 230 defense, no discovery is necessary. Jones/Stanfield.Br.36-39; Salter.Br.23-24. The Internet-Defendants’ First Amendment defense is a legal one and must be decided on the pleadings “so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms.” *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 457 (S.D.N.Y. 2012) (quoting

⁷ Plaintiffs cite a passage in *Bonta* that declined to rule on the implications of regulating other features—such as “dark patterns” that encourage children to “provide personal information”—because the record needed further development. Jones/Stanfield.Br.31 (citing *Bonta*, 113 F.4th at 1122-23). That is irrelevant here. Plaintiffs’ failure-to-warn claims are not based on Internet-Defendants’ collection of personal information. The other cases Plaintiffs cite on this point (Jones/Stanfield.Br.30-31) are inapposite. *Allen v. Am. Cyanamid*, 527 F. Supp. 3d 982 (E.D. Wis. 2021), did not analyze the application of the First Amendment to failure-to-warn claims. *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 25 F. Supp. 2d 837 (N.D. Ill. 1998), did not address any alleged failure to warn about the dangers of speech or expressive activity. It involved warnings about contaminated blood.

Armstrong v. Simon & Schuster, Inc., 85 N.Y.2d 373, 379 (1995));

Meta.Br.5, 16.

IV. The Internet-Defendants’ Communications Services Are Not Products As A Matter Of Law.

Turning from federal to state law, Plaintiffs all but ignore the rule that New York product-liability law categorically excludes claims that a “product” exposed a user to harmful ideas. And Plaintiffs fail to explain how Internet-Defendants’ services—which they allege are *individualized* to users and operate by allowing users to connect with one another—are the sort of standardized, tangible products that product-liability law seeks to regulate.

A. Plaintiffs may not use New York product-liability law to impose liability for allegedly exposing Gendron to harmful ideas.

As the Opening Brief explains (Meta.Br.53-58), product-liability law cannot be used to challenge harm arising from exposure to allegedly dangerous ideas. Plaintiffs do not dispute this black-letter law.

Patterson.Br.22 (differentiating claims concerning “products” from “claims against ideas”); *see* Jones/Stamfield.Br.43-44; Salter.Br.39. And for good reason—any other rule would be devastating to free expression,

which is why claims like Plaintiffs' have been rejected by courts in New York and around the country.

Plaintiffs respond that their claims are not about harmful ideas. Jones/Stanfield.Br.43-44 (contending that Internet-Defendants' services are defective because they were addictive and not "because of the ideas they help convey"); Patterson.Br.41; Salter.Br.39. As explained above (at 8), that is incorrect. Plaintiffs' addiction theory is rooted in the ideas shared on Internet-Defendants' services. The Complaints expressly and repeatedly connect Plaintiffs' injury to Gendron's exposure to allegedly radicalizing ideas on Internet-Defendants' services. *See, e.g.*, R.247(¶558) (alleging Internet-Defendants' services were defectively designed because they "radicalized" Gendron and "motivated" him "to commit the" crime); R.2703(¶168); R.5089(¶229); R.5091(¶241). Even now, Plaintiffs argue explicitly that Gendron's supposed "addiction" to Internet-Defendants' services was "the vehicle for his ... radicalization"—in short, that Gendron's exposure to radical or extreme ideas caused changes in his own views. Jones/Stanfield.Br.43-44; *see also* Salter.Br.49-50 (arguing that Internet-Defendants "addict[ed] young users to their products, facilitating the consumption of ever more

extreme, radical, violent images and videos through their defective products”); Patterson.Br.41.

Plaintiffs try to recast their addiction theory as content-neutral by arguing that Internet-Defendants’ services are “harmful to vulnerable teenagers, like Gendron.” Salter.Br.26. But Gendron is not the plaintiff here, and the harm Plaintiffs allege is a racially motivated mass shooting, not internet addiction.

Plaintiffs attempt to distinguish the great weight of precedent rejecting claims for exposure to defective *ideas* (Meta.Br.53-56) by arguing that there is a difference between a service that transmitted *some* “videos that encourage radical ideas and violence” to Gendron and a service that transmitted *many* “of those same videos.” Jones/Stanfield.Br.44. But the legal rule does not turn on the quantity of allegedly harmful ideas: “ideas and expression” simply are not products at all. *E.g.*, *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991); *Walter v. Bauer*, 109 Misc. 2d 189 (Sup. Ct. Erie Cty. 1981), *aff’d as modified*, 88 A.D.2d 787 (4th Dep’t 1982). That is true even of ideas that are “mass-marketed” or made available in an “endless stream.” Jones/Stanfield.Br.39, 44. If product-liability law does not

govern a bookstore's sale of one textbook describing an allegedly dangerous scientific experiment, *see Walter*, 109 Misc. 2d at 190-91, it cannot govern the sale of many such textbooks. Similarly, Plaintiffs' contention that Gendron did not have "a choice" in what material the online services displayed (Jones/Stanfield.Br.44) has no legal significance. That is demonstrated by the cases dismissing claims against television broadcasters, which likewise provide material that viewers do not select. Meta.Br.39-40 (collecting cases). Plaintiffs' allegations that their harm was caused by the message, not the medium, is fatal to their product-liability claims.

At bottom, Plaintiffs' product-liability claims seek to punish Internet-Defendants for "publish[ing]" harmful ideas "which allegedly led to [their] injury." *Walter*, 109 Misc. 2d at 190. They therefore must be dismissed for the fundamental reason that "[s]trict liability in tort is meant ... to protect the customer from defectively produced merchandise"—not from dangerous ideas. *Id.* at 191.

B. Plaintiffs do not show that Internet-Defendants' services can or should be regulated as products.

The Opening Brief explains that Internet-Defendants' websites also cannot be regulated by product-liability law because they are

individualized services, not products. Meta.Br.58-63. Plaintiffs disagree on the theory that Internet-Defendants distribute mobile applications in the stream of commerce that can be used to access their services, and other courts in other contexts have analogized some software to goods rather than services. Patterson.Br.16-23; Jones/Stanfield.Br.39-44.

But Plaintiffs do not cite a single New York case holding that online services are products. And Plaintiffs entirely fail to distinguish *Intellect Art Multimedia v. Milewski*, 2009 N.Y. Slip Op. 51912(U) (Sup. Ct. N.Y. Cty. Sept. 11, 2009), which held that an online consumer review website was not a product. Nor do Plaintiffs persuasively argue that the common law could coherently subject *individualized* services like Internet-Defendants’—which, Plaintiffs concede, tailor the experience based in part on the actions, behaviors, and preferences of each user (Patterson.Br.7-8; Jones/Stanfield.Br.6)—to the same strict-liability regime as the standardized industrial “coke ovens” at issue in *Terwilliger*. See *Matter of Eighth Jud. Dist. Asbestos Litig.* (“*Terwilliger*”), 33 N.Y.3d 488 (2019).

The Court of Appeals has recognized that products are generally limited to “tangible personal property” and items whose “distribution

and use is *sufficiently analogous* to... tangible personal property.” *Id.* at 500 (citing Restatement (Third) of Torts: Prod. Liab. § 19). Attempting to evade that clear command, Plaintiffs argue that software is sometimes treated as a “good” for purposes of the UCC.

Patterson.Br.20-21; Jones/Stanfield.Br.42-43; Salter.Br.41-42. But this case does not concern software. As the Opening Brief shows (Meta.Br.59), the Complaints do not allege any defect in the software Internet-Defendants distribute. Rather, Plaintiffs’ challenge is directed to the *services* that users access *through* the software (or directly through a website) to engage with other users’ content. In any event, Plaintiffs do not and cannot allege that users *own* Internet-Defendants’ services as “personal property.”

That is why *Intellect Art* held that the defendant’s “Ripoff Report” website, which hosted allegedly defamatory user reviews, was not a “product.” 2009 N.Y. Slip Op. 51912(U), at *7. In *Intellect Art*, as here, “plaintiff’s claims [arose] from the fact that [defendants’] website is a forum for third-party expression” that offered communications services

to users. *Id.*⁸ Plaintiffs argue that *Intellect Art* shows that “New York takes a contextual approach to product-liability claims.”

Jones/Stanfield.Br.43. But under that “contextual approach,” the individualized intangible communications services here are not products—regardless of whether some other software could constitute a product.

Relying solely on *Terwilliger*, Plaintiffs ask this Court to ignore precedent (cited at Meta.Br.60) concerning intangible services. But *Terwilliger* is no help to Plaintiffs. The *Patterson* Plaintiffs misread the case entirely—they chastise Internet-Defendants for not “engag[ing] in the *Terwilliger* factor analysis.” Patterson.Br.21. But the seven factors that Plaintiffs quote and purport to apply (Patterson.Br.17-20) are from the Restatement. They are not quoted or cited anywhere in *Terwilliger*, and are not presented by the Restatement as a product-or-service test.⁹

⁸ The *Salter* Plaintiffs argue that the *Intellect Art* court did not analyze “the website’s design or innate characteristics.” Salter.Br.43. But that is not true—the court considered, and rejected, plaintiff’s argument that the website “was defectively designed to elicit defamatory statements from its users.” 2009 N.Y. Slip Op. 51912(U), at *7-8.

⁹ *Terwilliger* does not instruct courts to apply the Restatement generally, let alone quote or reference Plaintiffs’ seven factors. 33 N.Y.3d at 494. The Restatement presents those factors as merely the “public policies behind the imposition of strict liability in tort.” Restatement (Third) of Torts: Prod. Liab. § 19 Reporter’s Note cmt. a.

The *Jones, Stanfield, and Salter* Plaintiffs at least cite *Terwilliger* accurately (Jones/Stanfield.Br.40; Salter.Br.39-40), but they cannot explain how the defects they alleged—that Internet-Defendants’ services expose some users to harmful third-party speech—are “latent dangers” that “are known, or should be known, from the time [the services] leave[] the manufacturer’s hands.” *Terwilliger*, 33 N.Y.3d at 494. New York product-liability law imposes strict liability on the manufacturers of mass-produced, standardized goods because they are the actors best-positioned to identify latent dangers in a design that create risk for all users. See *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 255 (1995); *Barry v. Manglass*, 55 A.D.2d 1, 8 (2d Dep’t 1976). But Internet-Defendants’ services are not uniform in the same way that an industrial coke oven is. They are used and experienced differently by different people, among other reasons because of the very algorithms that Plaintiffs challenge. Unlike a defective gasket, which poses a risk to everyone who uses an industrial machine, the possibility that Internet-Defendants’ services may be used to communicate speech that some users find harmful is not a “latent danger” to all users of Internet-Defendants’ services. That is because, as the Opening Brief explains (at

62), speech that is anodyne to most people may be idiosyncratically harmful to some, based on the individual characteristics of the speech and the user. Plaintiffs ignore that argument entirely.

And Plaintiffs do not attempt to identify any design flaw in Internet-Defendants' products that would create a uniform risk of the harm *they encountered*. All users of Internet-Defendants' services are exposed to the same allegedly addictive (and dangerous) features, but the overwhelming majority do not commit violent acts. Plaintiffs appear to concede that, across Internet-Defendants' *individualized* communication services, different users are exposed to different third-party content—only some of which Plaintiffs contend is “radicaliz[ing].” Jones/Stanfield.Br.44; *see* R.4390(¶196) (alleging YouTube “exacerbates a user’s preexisting biases ... by personalizing recommendations based on a user’s ... preferences”). Further, Plaintiffs assert that, aside from Gendron, torts committed by users of the same services with the same alleged defects would be “atypical or individualized” and “so specialized and extraordinary that [they are] not reasonably foreseeable.” Jones/Stanfield.Br.41. Plaintiffs thus must admit that they have not identified a “latent danger” that is known or knowable “from the time

the [services] leave[] the manufacturer's hands." *Terwilliger*, 33 N.Y.3d at 494. Rather, any danger alleged manifests differently to each user of Internet-Defendants' highly individualized services.¹⁰

In short, Plaintiffs have wholly failed to show that individualized communications services are analogous to tangible, personal property mass-produced with foreseeable, uniformly harmful defects. Product-liability law therefore does not apply.

V. Plaintiffs' Negligence Claims Fail Because The Internet-Defendants Do Not Owe Them A Duty Of Care.

Well-established New York law holds that a defendant "generally has no duty to control the conduct of third persons so as to prevent them from harming others." *Hamilton v. Beretta U.S.A.*, 96 N.Y.2d 222, 233 (2001); *see Meta Br.63-70*. Plaintiffs respond with three theories why Internet-Defendants nonetheless owe a duty of care. Each fails.

First, Plaintiffs rely on cases involving bystanders injured by defective products. *Jones/Stanfield.Br.45-46*; *Patterson.Br.43-44*;

¹⁰ Plaintiffs' contention that Internet-Defendants' services "serve a standardized purpose" (*Jones/Stanfield.Br.42*) is also wrong. They are each a medium for many different kinds of third-party communication that are used to connect families, co-workers, hobbyists, and friends, as well as a forum for expression and debate. A large food manufacturer does not use its Facebook account for the same purpose as a grandmother, a college student, or a city councilmember.

Salter.Br.46-47. But Internet-Defendants’ services are not products (*see supra* § IV), and they therefore have no legal duty with respect to product design and marketing or a duty to warn.

Even if Internet-Defendants’ services were products, there still would be no relevant duty. The duty imposed on a manufacturer is limited to protecting against injury to “users of its product” or bystanders directly injured by the product itself. *See, e.g., In re New York City Asbestos Litig.*, 27 N.Y.3d 765, 790 (2016). Plaintiffs do not allege that they were injured as users of Internet-Defendants’ services. Instead, they point to cases about injured bystanders. Patterson.Br.43-44; Salter.Br.44-45; Jones/Stanfield.Br.45. But those cases are inapplicable because it was Gendron, not Internet-Defendants’ services, who proximately caused Plaintiffs’ injuries. Meta.Br.68-69.

Plaintiffs attempt to evade that problem by turning to cases where manufacturers failed to adequately warn of the risks of improper use of their products. *E.g., Bah v. Nordson Corp.*, 2005 WL 1813023, at *3 (S.D.N.Y. Aug. 1, 2005) (alleged failure to provide adequate warnings where plaintiff was injured by hot glue machine); *LaPaglia v. Sears Roebuck*, 143 A.D.2d 173, 174 (2d Dep’t 1988) (bystander injured by

object ejected by lawnmower); *see* Salter.Br.47-48; Jones/Stanfield.Br.45-46. Those comparisons are inapt: None of these cases imposed a duty where a plaintiff was harmed by the *intentional* conduct of a person who had previously used the product, rather than by the product itself. Meta.Br.69-70. After all, a defendant “generally has no duty to control the conduct of third persons so as to prevent them from harming others.” *Hamilton*, 96 N.Y.2d at 232-22.¹¹

Second, Plaintiffs fail to establish the existence of any special relationship that could give rise to a legal duty on Internet-Defendants. *Hamilton*, 96 N.Y.2d at 233. No Plaintiffs identify any such relationship between Internet-Defendants and Plaintiffs; the only special relationship that any Plaintiffs purport to identify is between Internet-Defendants and Gendron. Patterson.Br.45; Jones/Stanfield.Br.48. But a relationship between “a defendant and a third-person tortfeasor” qualifies as a “special relationship” giving rise to a duty to protect only

¹¹ Plaintiffs distinguish *Hamilton* on the grounds that the plaintiffs there “did not assert product-liability claims.” Salter.Br.47; *see* Jones/Stanfield.Br.46; Patterson.Br.46. The *Hamilton* plaintiffs did indeed bring a product-liability claim, which was dismissed by the trial court. 96 N.Y.2d at 229. In any event, even if Internet-Defendants’ services were products, product liability is not an exception to the rule that a defendant has no duty to prevent intentional third-party harm absent a special relationship. *Id.* at 232-33.

if it “encompasses [the] defendant’s *actual control* of the third-party’s actions.” *Hamilton*, 96 N.Y.2d at 233 (emphasis added). Such relationships are limited to, for example, “employers-employees, owners and occupiers of premises, [and] common carriers and their patrons.” *Einhorn v. Seeley*, 136 A.D.2d 122, 126 (1st Dep’t 1988).

Plaintiffs’ logic would create a special relationship between Internet-Defendants and every one of their millions or billions of users around the globe. But “[n]o website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users’ content.” *Dyroff*, 934 F.3d at 1101; *see also Davis v. S. Nassau Cmty. Hosp.*, 26 N.Y.3d 563, 573 (2015) (no duty owed to “an indeterminate, faceless, and ultimately prohibitively large class of plaintiffs”); *Meta.Br.66-67*.

Plaintiffs offer no response. Nor do they respond to the extensive caselaw refusing to recognize a duty on publishers to protect third parties from acts of violence by people who previously used their services. *Meta.Br.67-68*. There is no “special relationship” here.¹²

¹² The *Salter* Plaintiffs’ additional argument—that Internet-Defendants owe them a duty under a public nuisance theory—similarly fails. *Salter.Br.50-51*. Public

Third, Plaintiffs argue that Internet-Defendants’ services fall within the narrow “instrument of harm” doctrine. Jones/Stanfield.Br.47-48; Salter.Br.48-50. But that doctrine does not create new tort duties that do not otherwise exist. Instead, it creates an exception to the rule that a breach of contract does not constitute a tort. That exception applies in limited circumstances: where a defendant, by negligently performing a contract, created a harmful product or exacerbated a dangerous condition that directly caused the plaintiff’s injury. See *Bush v. Indep. Food Equip.*, 158 A.D.3d 1129, 1130 (4th Dep’t 2018); accord *H.R. Moch Co. v. Rensselaer Water*, 247 N.Y. 160, 168 (1928) (declining to apply doctrine where “liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty”).

Here, however, Plaintiffs do not allege that Internet-Defendants negligently performed any contractual duty. And the harm alleged was

nuisance law does not create a duty to protect against intentional third-party criminal harm, and in any event, Plaintiffs’ novel interpretation of that doctrine would produce absurd consequences. Plaintiffs seek liability for asserted harms to *non-users* of Internet-Defendants’ services caused by the criminal acts allegedly committed by users. That is precisely the kind of limitless liability that led the First Department to warn against making nuisance law “a monster that would devour in one gulp the entire law of tort.” *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 97 (1st Dep’t 2003).

directly caused not by Internet-Defendants’ services, but by Gendron’s intentional intervening criminal act. *See infra* § VI; Meta.Br.69-70.

VI. Gendron’s Crimes Defeat Proximate Cause.

Finally, an intervening criminal act generally defeats proximate cause. Meta.Br.71-76. Gendron’s choice to engage in a racially motivated mass shooting breaks any causal link between Internet-Defendants’ alleged conduct and Plaintiffs’ injuries.

Plaintiffs invoke the narrow exception to this rule: when a criminal act “is itself the foreseeable harm that shapes the duty” a negligent actor breached. *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33 (1983). For instance, a landlord may be liable for an intruder’s entry through an unsecured door to assault a tenant, because that harm is the “very risk” created by not providing functioning locks. *Scurry v. New York City Hous. Auth.*, 39 N.Y.3d 443, 455 (2023). And speeding could be a “foreseeable consequence of” the “failure to implement traffic calming measures” when the “purpose” of those measures is “to deter ... speeding.” *Turturro v. City of New York*, 28 N.Y.3d 469, 484 (2016).¹³

¹³ Plaintiffs’ other decisions follow the same logic. *See Bonsignore v. City of New York*, 683 F.2d 635, 638 (2d Cir. 1982) (city “was negligent precisely because of the risk posed ... by requiring all officers...to be armed” without “adequate screening”

That exception does not apply here. The duty Internet-Defendants allegedly breached was to prevent users’ “addict[ion]” to their platforms and exposure to harmful “content.” *E.g.*, R.242-47(¶¶534-57); R.5134-37(¶¶441-53). Whatever foreseeable risk of harm that breach might create, it would be a risk to the users themselves—not to every stranger those users might encounter throughout their lives. *Cf. In re Social Media Cases*, 2024 WL 2980618, at *11-14 (Cal. Super. Ct. June 7, 2024) (rejecting theory of liability that would hold social-media companies responsible for teenage users’ vandalism). Plaintiffs’ injuries are radically “different in kind than those which would have normally been expected” from social-media use. *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 316 (1980).

Plaintiffs do not attempt to reconcile those settled principles with their assertion that Gendron’s crimes were foreseeable. For instance, the *Salter* Plaintiffs assert that foreseeability is satisfied because others

for mental-health issues); *Green v. Tanyi*, 238 A.D.2d 954, 955 (4th Dep’t 1997) (risk patron “would injure other patrons ... was the risk created by the tavern’s failure to control him”); *McCarville v. Burke*, 255 A.D.2d 892, 893 (4th Dep’t 1998) (risk teenagers would throw bottle at plaintiff created by defendant throwing same bottle at teenagers); *In re Sept. 11 Litig.*, 280 F. Supp. 2d 279, 302 (S.D.N.Y. 2003) (“[l]arge-scale fire was precisely the risk against which” defendants “had a duty to guard”).

have committed mass shootings after viewing content online.

Salter.Br.54-55. But a crime being “conceivable” does not make it “foreseeable.” *Dyer v. Norstar Bank*, 186 A.D.2d 1083, 1083 (4th Dep’t 1992) (bank’s alleged negligence not proximate cause of robbery); *accord Tennant v. Lascelle*, 161 A.D.3d 1565, 1566 (4th Dep’t 2018) (alleged negligent supervision not proximate cause of child’s murder by family friend). Third-party violence is always an abstract possibility—but it cannot create liability unless it is the harm “ordinarily anticipated” when a given duty is breached. *Derdiarian*, 51 N.Y.2d at 316; *cf. Santiago v. New York City Hous. Auth.*, 63 N.Y.2d 761, 762-63 (1984) (landlord not liable when jammed door prevented tenant from escaping spontaneous shooting).¹⁴

Plaintiffs also distinguish *Tennant* and *Dyer* on their facts.

Jones/Stamfield.Br.52 & n.8. The point is not that the crimes occurred in the same way; it is that intentional crimes defeat causation when they are not the expected consequence of a particular allegedly negligent act.

¹⁴ That also distinguishes this case from those the *Salter* Plaintiffs cite. Salter.Br.53-54 (citing *Johnson v. Bryco Arms*, 304 F. Supp. 2d 383 (E.D.N.Y. 2004); *Williams v. Beemiller, Inc.*, 103 A.D.3d 1191 (4th Dep’t 2013)). The foreseeable risks of knowingly selling firearms for distribution in illegal markets cannot be credibly compared to the foreseeable risks of providing global communication tools.

And when courts *have* faced facts analogous to those here, they have deemed proximate cause lacking as a matter of law because social-media companies cannot predict how every user might react to an infinite range of third-party content. Meta.Br.74-76 (collecting cases).

The *Jones/Stanfield* Plaintiffs argue that these factually on-point decisions did not analyze New York law. Jones/Stanfield.Br.53. But the cases addressed the relevant question: whether it was “foreseeable” that a user would perpetrate a shooting after viewing violent content. *E.g.*, *Crosby v. Twitter*, 921 F.3d 617, 626 (6th Cir. 2019). Plaintiffs then attempt to distinguish those cases as “involv[ing] allegations that social media companies failed to police and prevent violent content on their platforms, which led to acts of terrorism.” Jones/Stanfield.Br.53. That is precisely what is alleged here: that Internet-Defendants failed to “protect young users” from “exposure to extremist and racist views to prevent these users from becoming indoctrinated and radicalized to commit ... violence.” R.5140 (¶478); *supra* § I. For their part, the *Salter* Plaintiffs argue that *Crosby* “did not allege that Twitter itself was a dangerously defective product.” Salter.Br.54n.13. But it does not matter how a claim is styled when the theory of harm is the same. Thus, they

fall back to arguing for an unprecedented expansion of tort doctrine, claiming that New York should be “at the forefront of the nation’s tort law.” Salter.Br.57. The Court should reject that invitation to disregard the widespread consensus in this State and other jurisdictions on basic rules of causation.

Lastly, Plaintiffs insist proximate cause is usually a factual issue. Patterson.Br.47; Salter.Br.51; Jones/Stanfield.Br.49. But like any issue, it may be resolved as a matter of law when there is “little factual controversy.” *Sheehan v. City of New York*, 40 N.Y.2d 496, 502 (1976). Plaintiffs’ causation theory would deem a racist massacre a foreseeable consequence of website-design choices. That would eviscerate the “manageable limits upon ... liability” that proximate cause is designed to impose, *Hain v. Jamison*, 28 N.Y.3d 524, 528 (2016), and ignore the “logic, common sense, justice, [and] policy” considerations at the heart of the doctrine, *Sheehan*, 40 N.Y.2d at 503.

CONCLUSION

The decisions below should be reversed and the Complaints dismissed in full as to the Internet-Defendants.

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