

To Be Argued By:
GLENN E. CHAPPELL
(admitted *pro hac vice*)
Time Requested: 15 Minutes

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

NEW YORK SUPREME COURT

APPELLATE DIVISION—FOURTH DEPARTMENT

Index No. 805896/23

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

Plaintiffs-Respondents,

—against—

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

Defendants-Appellants,

(Caption continued on inside covers)

**DOCKET
NOS.**

CA 24-00513

CA 24-00515

CA 24-00524

CA 24-00527

CA 24-01447

CA 24-01448

**BRIEF FOR PLAINTIFFS-RESPONDENTS IN *JONES AND HARRIS
STANFIELD* (CA 24-00515, CA 24-00527, CA 24-01447, & CA 24-01448)**

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24-01448)*

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

Defendants.

Index No. 808604/23

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

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.

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PRELIMINARY STATEMENT

In this appeal, two powerful companies—Defendants-Appellants YouTube and Reddit (collectively, “Defendants”)—seek a pronouncement from this Court that they bear no legal responsibility for the harms caused by their internet products. They tout their websites and applications as proprietary products to investors and advertisers, and they reap billions of dollars in revenues from their design choices and business strategy of facilitating addictive engagement. But when tragedy strikes, they deny responsibility for the horrible and foreseeable consequences of their actions. Before this Court, they disclaim all responsibility for their intentional choice to design a highly addictive and dangerous interface, waving off any harms as caused by third parties. The Trial Court properly rejected these arguments in denying the Defendants’ motions to dismiss, and this Court should affirm.

As alleged in Plaintiffs-Respondents’ (collectively, “Plaintiffs”) operative pleadings in *Jones* and *Stanfield*,¹ Defendants played key roles in the Tops shooting—a 2022 racially motivated mass murder committed by Peyton Gendron (hereinafter, “the Shooter”) that killed ten Black people, wounded three more people, and upended the lives of countless others (including Plaintiffs). A year before the murders, the Shooter was a teenager with no criminal record, no known affiliation with any racist group or

¹ The operative pleadings are the Amended Complaint in *Jones* and the Second Amended Complaint in *Stanfield*. For ease of reference, the term “Amended Complaint(s)” refers to these pleadings, not the superseded pleadings.

ideology, and no training in gunsmithing or combat. His own writings make clear that his turn to mass violence was directly precipitated by his obsessive and addictive engagement with YouTube and Reddit. As a result of this engagement, the Shooter became a virulent white supremacist who believed that all nonwhite people living in the United States must be eradicated.

This engagement was by design. For years, YouTube and Reddit have been engineering products designed to facilitate addiction and radicalization, because these proclivities—while disastrous for public health and safety—lead to ever-increasing consumption of their products and help their bottom line. Perhaps the most powerful addiction-fostering tools in their arsenals are algorithms designed by Defendants to make computer-driven judgments about which content will drive a user’s engagement with (in other words, addiction to) their platforms.

These algorithms do not implement a human editorial judgment based on *what* a video or post says; they only care about what will induce the user to become and stay addicted. And it is for that content-agnostic reason that Defendants’ products glorify and promote firearms, shootings, and violence to immature users, even if those users display no personal interest in such subjects. Engagement is the goal these algorithms pursue at all costs, irrespective of the content used to secure that result. When coupled with other design features like autoplay and forced notifications, they exploit built-in human vulnerabilities—making them as irresistible as slot machines or cigarettes—and cause or accelerate harmful outcomes like radicalization. The tragedy that took place on

May 14, 2022 was the predictable result of YouTube’s and Reddit’s misconduct.

It is difficult to imagine any non-social media defendant knowingly and intentionally designing a product that addicts millions of Americans (and young people in particular) and harms their mental health so severely that it drives them to mass homicide, releasing that product into the stream of commerce, and then enjoying what amounts to near-absolute immunity from civil liability. Yet that scenario is what Defendants ask this Court to enable. There is no foundation in the law for such extraordinary treatment.

To start, Section 230 of the federal Communications Decency Act provides no basis for social media super-immunity. That law protects platforms only when they are engaged in publisher activities. Publishers publish, unpublish, and edit. They do not make products (or if they do, they are not acting as publishers when doing so). No matter how many times Defendants summarily repeat it, this suit is not about any “editorial” choices of the type a publisher would engage in. Complying with the law here does not require Defendants to remove or edit *any* content on their platforms. It requires them only to design a safe product or adequately disclose the dangers.

Likewise, the First Amendment protects expression in all its myriad iterations, but it doesn’t protect other conduct. The product-design choices challenged in this case center on user addiction, not user (or platform) expression. And while Defendants make much of the fact that this lawsuit touches on how content is “displayed” or “organized,” such decisions are made by computer programs that function solely based

on engagement, not a human judgment about what is expressed in a post or video.

Nor does New York law offer social media platforms a special exemption from common law liability. There is no basis for Defendants' all-or-nothing contention that their platforms cannot be "products" because they are not tangible. In fact, New York law has long rejected such an arbitrary and nonsensical distinction between the tangible and the digital. And under New York's fact- and context-specific inquiry, Plaintiffs pled more than enough to establish that Defendants' platforms are products.

Plaintiffs also sufficiently pled that Defendants owe a legal duty to Plaintiffs. The harms Plaintiffs suffered were not just reasonably foreseeable—they were well-known prior to the Tops shooting—and New York courts have time and again confirmed that the maker of a defective product holds a duty to prevent foreseeable harms caused by the product to third parties.

Finally, Plaintiffs easily cleared the low bar for pleading proximate cause—an issue that is rarely appropriate for resolution on a motion to dismiss. The foreseeable act of a third party—regardless of whether that third party commits a criminal act or uses a product as intended—does not automatically sever the chain of proximate causation under New York law.

In sum, none of Defendants' arguments justifies dismissal of Plaintiffs' claims at this early stage of the case. The Trial Court properly denied Defendants' motions to dismiss. This Court should affirm in full.

QUESTIONS PRESENTED

1. Does Section 230 of the Communications Decency Act protect Defendants from tort claims that center on their design choices and rest on a legal duty that does not require them to publish, decline to publish, or alter any content? The Trial Court correctly ruled that it does not.

2. Does the First Amendment protect computer code (algorithms) that does not carry out human editorial decisions based on the content of social media posts, but instead prioritizes content based on what it thinks will facilitate user addiction? The Trial Court correctly ruled that it does not.

3. Does New York product-liability law apply to Defendants' social media platforms at the pleading stage, when Plaintiffs allege Defendants implemented standardized design choices, profited from them, and were well-positioned to address their harms, but refused to mitigate those harms even though they had advance knowledge of the risks long before the events giving rise to this litigation occurred? The Trial Court correctly ruled that it does.

BACKGROUND

I. Factual Background

The Amended Complaints allege the following, which the Court must accept as true for purposes of reviewing the Trial Court's rulings on the motions to dismiss.

In May 2022, obsessed with an invidious conspiracy theory that white people are being systematically "replaced" by nonwhite people, the Shooter stormed into the Tops

Friendly Markets store (“Tops”), an important source of food and community in a neighborhood in Buffalo, New York that he specifically targeted based on the number of Black people living there. R.5041 (¶¶ 68-71); R.6145-46 (¶¶ 140-43). Armed with a modified assault rifle emblazoned with racist slurs and the names of prior mass shooters, he opened fire. R.5041-42, 5054 (¶¶ 72, 116); R.6146, 6161 (¶¶ 144, 200). He murdered ten victims and wounded three, while traumatizing many more who survived and/or lost family members and friends. R.5054-55 (¶¶ 116-19); R.6161-62 (¶¶ 200-03).

Social media companies—including YouTube and Reddit—were instrumental in preparing the Shooter to commit his murderous rampage. For the sake of profit, they designed their social media platforms to achieve one result: addictive engagement. *See e.g.*, R.5077 (¶ 196); R.6183 (¶ 280). To foster that addiction, they designed their interfaces to exploit human cognitive vulnerabilities. *See* R.5076-77 (¶¶ 191-93); R.6182-83 (¶¶ 275-77). For example, certain design features of Defendants’ platforms cause interactions with them to release large amounts of dopamine into a user’s brain’s reward pathway—much like highly-addictive substances. *See* R.5075 (¶¶ 185-87); R.6181 (¶¶ 269-71).

Defendants’ algorithms especially facilitate their mission to addict. These algorithms use machine learning and data science to analyze users’ behavior on a platform and other online conduct, and then automatically generate more posts based on the likelihood that the user will want to see the suggested content. R.5075, 5086, 5096-97, 5105-06 (¶¶ 186, 220, 260-63, 296); R.6181, 6191-92, 6201-02, 6210 (¶¶ 270,

304, 344-47, 379). In turn, social media companies make more money through interaction-based advertising. R.5076 (¶ 189); R. 6182 (¶ 273).

In furtherance of their design to hook users, Defendants' algorithms prioritize any content that generates high levels of user engagement on a platform, such as reactions, comments, and shares. R.5087 (¶ 222); R.6192 (¶ 306). And because hate speech often elicits strong emotional responses (and thus drives engagement and virality), Defendants' algorithms purposefully promote and reward it, and then promote and reward it again, and again, and again—creating a feedback loop that rapidly amplifies such content *ad infinitum*, including among impressionable teenagers. R.5087-88, 5094, 5098-99, 5106-07 (¶¶ 222-24, 252-53, 269-71, 298-99); R.6192-93, 6199, 6203-04, 6210-11 (¶¶ 306-08, 336-37, 353-55, 381-82). A former YouTube software engineer explained that such escalation was a design choice in devising YouTube's algorithms. R.5099-100 (¶ 272); R.6204-05 (¶ 356).

Addictive engagement takes a heavy toll on users' mental health and overall well-being. R.5077 (¶ 195); R.6183 (¶ 279). It can hinder brain development and social skills, create stress, engender intense negative emotions, and cause impulsive decision-making. R.5079-81 (¶¶ 204-07); R.6184-87 (¶¶ 285-91). In part because their brains are still developing, adolescents and young people are particularly susceptible to exploitation based on these weaknesses. *See* R.5076-79, 5085, 5088-89 (¶¶ 191-93, 200-03, 218-19, 226); R.6182-85, 6190-91, 6194 (¶¶ 275-77, 284-87, 302-03, 310). Indeed, extremist groups are fully aware of the isolation that results from social media addiction, and they

exploit it to recruit new members, and young people in particular. R.5082-83, 5086-87, 5089 (¶¶ 208-11, 221, 227); R.6187-89, 6192, 6194 (¶¶ 292-95, 305, 311).

These effects are well-studied and well-known, and both Defendants were aware of them. *See e.g.*, R.5077-78, 5083-84, 5097-98, 5100-01, 5106-07 (¶¶ 195, 197-99, 212-13, 266, 273-74, 298-99); R.6183-84, 6189, 6202-03, 6205, 6210-11 (¶¶ 279, 281-83, 296-97, 350, 357-58, 381-82). YouTube’s former CEO even admitted that its operators purposefully designed YouTube to maximize engagement by “play[ing] into the addiction capabilities of every human.” R.5094 (¶ 251); R.6199 (¶ 335).

Defendants’ products worked as designed. The Shooter did, in fact, become addicted to YouTube and Reddit (among other platforms). R.5074, 5089-92, 5101-02 (¶¶ 181, 182, 229-45, 278-80); R.6180, 6194-98, 6206-07 (¶¶ 265, 266, 313-29, 362-64). This addiction, in turn, made him vulnerable to radicalization and indoctrination into fringe online communities and sent him spiraling into radicalization and violence. R.5089-94 (¶¶ 229-45, 250); R.6194-99 (¶¶ 313-29, 334).

The impact of Defendants’ products on the Shooter is not a matter of speculation. To the contrary, he has admitted their crucial role in transforming him into a mass murderer. R.5089, 5092 (¶¶ 229-30, 244); R.6194-95, 6197 (¶¶ 313-14, 328). Indeed, after his arrest following the shooting and consequent forced removal of access to social media, he expressed sorrow and remorse for his actions. R.5093 (¶¶ 246-49); R.6198-99 (¶¶ 330-33).

II. Procedural History

Plaintiffs in *Stanfield* are customers, employees, and community members who were caught in the attack and have had their lives upended after being a part of these horrifying events. *See* R.6116-36 (¶¶ 7-92). Each endured acute fear, severe distress, and the associated physiological effects of being traumatized. *See id.* The Plaintiff in *Jones* is the only child and administrator of the estate of Celestine Chaney, who was murdered by the Shooter. R.5029-31 (¶¶ 10-15). Plaintiffs brought actions against multiple entities involved in facilitating the Tops shooting, including Defendants (YouTube and Reddit), the Shooter's parents, as well as the companies who manufactured or sold the Shooter body armor, an assault rifle, and a gun lock. Plaintiffs brought claims against Defendants under New York common law. Plaintiffs' original complaints asserted product-liability claims under both strict liability and negligence theories in both actions, as well as a claim for negligent infliction of emotional distress on behalf of the *Stanfield* Plaintiffs.

After Plaintiffs filed their original complaints, Defendants moved to dismiss. They argued that Section 230 and the First Amendment bars all of Plaintiffs' claims, their platforms are not "products" and therefore are not subject to New York product-liability law, they owed no duty of care to Plaintiffs, and their conduct did not proximately cause Plaintiffs' injuries. R.4788-4821; R.5869-5902.

The Trial Court denied the motions to dismiss. As to Section 230 and the First Amendment, the Trial Court ruled that Plaintiffs' claims rested on a product-liability theory that, at least at the pleading stage, did not implicate those federal provisions. *See*

R.83-85; R.109-11. As for the merits of the claims, the Trial Court rejected each of Defendants' arguments, ruling that Plaintiffs pled ample facts sufficient to establish that Defendants' platforms are "products" under New York law, the maker of a product is liable for injuries to any person caused by its product under New York law, and that it was "far too early to rule as a matter of law" on proximate causation. *See* R.83-87; R.109-15.

Plaintiffs subsequently filed their Amended Complaints, which added claims for failure to warn under theories of negligence and strict liability, public nuisance, and unjust enrichment. Defendants again moved to dismiss, and the Trial Court again denied their motion in full. *See* R.95-97; R.122-24. This appeal followed.

STANDARD OF REVIEW

On a motion to dismiss pursuant to CPLR 3211, the court must afford the plaintiff's pleading a "liberal construction," "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The test is "whether the proponent of the pleading has a cause of action, not whether he has stated one." *Id.* at 88. And "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005).

ARGUMENT

The Trial Court correctly rejected Defendants' motions to dismiss because

Plaintiffs easily satisfied New York’s liberal pleading standard.

I. Section 230 does not reach the non-publisher conduct at issue in this litigation.

To begin, Section 230 of the federal Communications Decency Act does not shield YouTube and Reddit from liability for intentionally designing defective, dangerous products. The statute provides, “No 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 USC § 230(c)(1). No part of Section 230 “declares a general immunity from liability” based on a platform’s practice of hosting third-party content. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009).

Consistent with the statutory text, courts (including the Court of Appeals) apply a three-pronged test to assess whether Section 230 applies. Under that inquiry, Section 230 only shields a defendant from 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; and (3) the action is based on information provided by another information content provider.” *Shiamili v. Real Est. Grp. of New York, Inc.*, 17 N.Y.3d 281, 286-87 (2011) (cleaned up).

Here, the first prong is not at issue.² The second prong asks whether the “duty that the plaintiff alleges the defendant violated derives from the defendant’s status or

² Defendants also cannot satisfy the third prong, as this action is based on their own misconduct. However, there is no need to reach this issue, as Plaintiffs are not seeking to hold Defendants liable as publishers.

conduct as a ‘publisher or speaker.’” *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 626 (Cal. Ct. App. 2020). That is the case only where the legal duty arises out of a “publisher’s traditional editorial functions.” *Shiamili*, 17 N.Y.3d at 289 (internal quotation marks omitted). Traditional editorial functions include decisions “whether to publish, withdraw, postpone or alter content.” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

Under the second prong, plaintiffs may allege that platforms breached their duties as intermediaries between users without necessarily treating them as “publishers” in a manner that implicates section 230(c)(1). For example, Section 230 did not preempt a city’s claim that a website operator has a duty to collect taxes on the sale of sports and concert tickets conducted on its website, notwithstanding the company’s argument that it merely operated a platform for users to exchange tickets. *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010). Similarly, Section 230 did not absolve the operator of a website that matched roommates, landlords, and tenants of its legal duty to refrain from collecting certain information about protected characteristics, as well as from algorithmically “matching” users with each other in a discriminatory manner. *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163-1172 (9th Cir. 2008).

A. Plaintiffs’ claims against the Social Media Defendants seek to hold them liable as the designers of dangerous products, not publishers.

In this litigation, Plaintiffs seek to treat Defendants as product designers, not

publishers. To comply with their legal duties under Plaintiffs’ asserted causes of action, Defendants would not be required to publish, refuse to publish, or alter third-party content.³ Instead, they would be required to take reasonable safety precautions when designing and disseminating their products. While Defendants also act as publishers of third-party content, that role is separate from their conduct as the designers of dangerous products.

Courts presented with this same distinction between publisher liability and products liability have declined to apply Section 230 to absolve social media defendants from the latter. *See Social Media Cases*, No. 22STCV21355, 2023 WL 6847378, at *32 (Cal. Super. Oct. 13, 2023) (“Where a provider manipulates third party content in a manner that injures a user, Section 230 does not provide immunity.”); *A.M. v. Omegle.com, LLC*, 614 F. Supp. 3d 814, 819 (D. Or. 2022) (“[Defendant] could have satisfied its alleged obligation to Plaintiff by designing its product differently Plaintiff is not claiming that [Defendant] needed to review, edit, or withdraw any third-party content to meet this obligation.”); *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093 (9th

³ *See e.g.*, R.5134-35, 5141-42 (¶¶ 441-47, 481-85); R.6240-42 (¶¶ 554-60) (in design-defect counts, providing many illustrative examples of “cost-effective, reasonably feasible alternative designs” that Defendants could have implemented to avoid liability—none of which would involve increased editorial efforts by Defendants); R.5137-39, 5143-44 (¶¶ 456-68, 493-498); R.6244-46, 6248, 6250 (¶¶ 569-79, 581, 597, 609, 611) (in failure-to-warn counts, alleging how Defendants could comply by simply disclosing the risks); R.5145-46 (¶¶ 510-12); R.6254 (¶¶ 637-39) (alleging same in public-nuisance counts); R.6251-52 (¶¶ 618-23) (alleging same in NIED claim in *Stanfield*); R.5147 (¶ 519); R.6256 (¶ 646) (alleging same in unjust-enrichment counts).

Cir. 2021) (“The duty to design a reasonably safe product is fully independent of [Defendant’s] role in monitoring or publishing third-party content.”); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139-40 (4th Cir. 2019) (holding Amazon could be held “liable as the seller of a defective product,” and the plaintiff did not bring a claim “based on the content of speech published by [Amazon]”).

It is irrelevant that “some of the harms “allegedly flow[ed] from third-party content,” which Defendants incorrectly portray as the principal distinguishing factor under Section 230. AOB21, 23. Section 230 does not ask whether the alleged misconduct involves publication of third-party content or even whether the alleged harm could have occurred but-for third-party content. Rather, Section 230 “precludes liability only where the success of the underlying claims requires the defendant to be considered a *publisher or speaker* of that content.” *Webber v. Armslist LLC*, 70 F. 4th 945, 957 (7th Cir. 2023) (emphasis added); *see also Hassell v. Bird*, 5 Cal. 5th 522, 542-43 (2018) (explaining 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”).

Indeed, courts routinely reject a “but-for” test that would apply Section 230 simply because a claim could not lie in the absence of third-party communication. *See e.g., Erie Ins.*, 925 F.3d at 139-40; *Lee v. Amazon.com, Inc.*, 76 Cal. App. 5th 200, 256 (2022). “[I]t is not enough that a claim, including its underlying facts, stems from third-party content for § 230 immunity to apply.” *Calise v. Meta Platforms, Inc.*, 103 F.4th 732,

742 (9th Cir. 2024). Courts must instead “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*, 53 Cal. App. 5th at 464 (emphasis added); *see also Barnes*, 570 F.3d at 1107 (same); *HomeAway.com, Inc.*, 918 F.3d at 682 (same).

The Ninth Circuit’s decision in *Lemmon* is instructive. There, the plaintiffs alleged that the combination of the Snapchat platform’s Speed Filter (a speedometer built into the app) and system of rewards for posting videos using its filters incentivized dangerous, high-speed driving. *See Lemmon*, 995 F.3d at 1088-90. The Ninth Circuit held that Section 230 did not apply because the plaintiffs’ claims rested on Snap’s duty to design a reasonably safe product, not publication—which “generally involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.” *Id.* at 1091-92 (cleaned up).

Lemmon looked at two key factors, which are instructive here. First, “entities acting solely as publishers” generally have no similar duty to the obligation to refrain from designing an unreasonably dangerous product. *Id.* Second, Snap could have satisfied its legal duty “without altering the content that Snapchat’s users generate.” *Id.* As such, Snap’s duty sprung from “its distinct capacity as a product designer,” and it was irrelevant that the plaintiffs’ claims “depend[ed] on the ability of Snapchat’s users to use Snapchat to communicate their speed to others.” *Id.*

Applying that rationale here, even if YouTube and Reddit must “consider the content posted” when designing their algorithms, *Calise*, 103 F.4th at 742, Defendants

cannot claim Section 230 protection because the duty to design a reasonably safe product is separate from traditional editorial functions like “review[ing] material submitted for publication, perhaps edit[ing] it for style or technical fluency, and then decid[ing] whether to publish it,” *Lemmon*, 995 F.3d at 1091-92. And Defendants can satisfy their duties without taking down or altering any user content—no matter how reprehensible and violent. They would instead be required only to design a product that does not force feed such content to users using a machine function built solely around engagement rather than safety.

B. Recent precedent from the U.S. Supreme Court confirms that algorithms that do not assist in the exercise of editorial judgment receive no protection under Section 230.

Defendants selectively cite the U.S. Supreme Court’s decision in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (U.S. 2024), but fairly (and fully) read, *Moody* only confirms the distinction between editorial functions and designer conduct. *Moody* involved facial First Amendment challenges to state laws prohibiting social media platforms from removing or suppressing content that was disfavored based on its political message, and it remanded the cases for more factfinding. *Id.* at 2394, 2395. Although *Moody* did not address Section 230, both the majority opinion and the concurrence by Justice Barrett drew important distinctions between algorithms that assist in carrying out *bona fide* editorial functions and algorithms that merely use machine functions to achieve other goals (such as maximize user engagement).

Writing for the majority, Justice Kagan observed that social media platforms

sometimes use algorithms “to implement” their content preferences—for example, “to prefer content deemed particularly trustworthy or to suppress content viewed as deceptive.” *Id.* at 2403-04. To flesh out this example, Justice Barrett explained in her concurrence that the operators of a platform might “decide to remove posts promoting a particular political candidate or advocating some position on a public-health issue.” *Id.* at 2410 (Barrett, J., concurring). If those operators “create an algorithm to help them identify and delete that content,” “the First Amendment protects their exercise of editorial judgment—even if the algorithm does most of the deleting without a person in the loop.” *Id.* That is because “the algorithm would simply implement human beings’ inherently expressive choice to exclude a message they did not like from their speech compilation.” *Id.* (cleaned up).

But the majority expressly distinguished algorithms used to help platforms “remove, label or demote messages they disfavor” from those that “respond solely to how users act online—giving them the content they appear to want.” *Id.* at 2404 & n.5 (Kagan, J.) (majority opinion). Justice Barrett built out this distinction, presenting the example of a case where “a platform’s algorithm just presents automatically to each user whatever the algorithm thinks the user will like—e.g., content similar to posts with which the user previously engaged.” *Id.* at 2410 (Barrett, J., concurring). She explained that “[t]he First Amendment implications . . . might be different for that kind of algorithm.” *Id.* (cleaned up).

While *Moody* did not directly address Section 230, this discussion provides a

crucial framework for distinguishing publisher functions from others when a social media platform uses algorithms. When an algorithm is used to implement a human choice based on the *expressive content* of third-party communications, it may be a machine-aided exercise of editorial discretion. But when an algorithm is designed for another purpose—such as maximizing user engagement, *regardless of* the expressive content of third-party posts—it does not evince editorial judgment and thus is not helping to carry out the platform’s function as a publisher.

Defendants cite the majority opinion’s observation that algorithms can assist platforms in the “selection and ranking” of content “based on a user’s expressed interests and past activities,” AOB30, but the Court observed that while reciting how Facebook’s News Feed and YouTube’s homepage works. *Id.* at 2403 (Kagan, J.) (majority opinion). But in the same paragraph, the Court then noted that those platforms *separately* write algorithms to implement Facebook’s Community Standards and YouTube’s Community Guidelines, which “detail the messages and videos that the platforms disfavor” and “prefer content deemed particularly trustworthy or to suppress content viewed as deceptive (like videos promoting conspiracy theories).” *Id.* at 2403-04 (cleaned up).

The Court suggested that it is in the exercise of that latter function (favoring and disfavoring content based upon the platforms’ content guidelines) that social media platforms exercise “protected editorial control.” *See id.* at 2405-06 (internal quotation marks omitted). That is because algorithms that implement those decisions make

“choices about whether—and, if so, how—to convey posts *having a certain content or viewpoint*,” qualitative judgments that “*rest on a set of beliefs* about which messages are appropriate and which are not (or which are more appropriate and which less so).” *See id.* (emphasis added).

That is not the case when an algorithm—like those alleged here—instead is designed only to exploit the neurological vulnerabilities of users like the Shooter and addict them to psychologically discordant material they are not seeking but from which they cannot look away. There is nothing editorial about that.

C. The cases cited by YouTube and Reddit do not support their argument for social media super-immunity.

None of the cases cited by YouTube and Reddit compels a different result.

We begin with *Force v. Facebook*, 934 F.3d 53 (2d Cir. 2019). Before discussing the portion of *Force* that Defendants cite, it is important to first examine the legal duties asserted by the plaintiffs in the case. In that regard, the differences from the legal duties in this case are stark.

The plaintiffs in *Force* did not assert any product-liability claims. Instead, they alleged that, under 18 U.S.C. § 2333, Facebook was liable for “aiding and abetting Hamas’s acts of international terrorism by giving “Hamas a forum with which to communicate and for actively bringing Hamas’ message to interested parties.” *Id.* at 61, 65. Contrary to Defendants’ out-of-context quotation, *see* AOB22, *Force* explained that *providing a platform* for Hamas’ message was “the heartland of what it means to be the

‘publisher’ of information under Section 230(c)(1).” 934 F.3d at 64. And trying to hold Facebook liable for its “alleged failure to delete content from Hamas members’ Facebook pages” was a quintessential example of trying to hold a platform liable for publisher conduct. *See id.* Thus, the legal duty invoked by the plaintiffs was inseparable from the act of publication—Facebook could only comply with the asserted duty by taking down content (that is, refusing to provide such a platform). That is not the case here. *See supra* p. 13 & n.3.

Defendants ignore these differences and instead focus on *Force*’s discussion of algorithms, *see* AOB31-32, but that discussion does not support Defendants’ unduly broad view of Section 230’s reach. *Force* rejected the argument that when a platform uses an algorithm, it cannot be acting as the publisher of content. *See Force*, 934 F.3d at 65-66. That is a different issue than the one presented here. Plaintiffs do not argue that Defendants’ use of algorithms in their products *ipso facto* removes them from Section 230’s protections. Rather, they argue that using an algorithm does not necessarily place a defendant *within* the scope of Section 230’s protections.

Force also predated *Moody*. Thus, to the extent some dicta in *Force* may be read to support Defendants’ construction of Section 230, *Moody*’s discussion is more instructive. Again, *Force* did not decide the issue presented here: it considered the argument that the use of algorithms automatically *excludes* a defendant from Section 230’s protections, not Defendants’ suggestion that it automatically *includes* them. And *Moody*’s analytical framework confirms that the answer to the question presented here

is “no.”

Similarly, the district court’s analysis in *M.P. ex rel. Pinckney v. Meta Platforms*, characterized the plaintiff’s causes of action as claims “based on the theory that the algorithms and internal architecture of social media sites direct hate speech to persons inclined to violence.” 692 F. Supp. 3d 534, 538 (D.S.C. 2023). The court did not address claims based on social media design features that only selected content based on what the algorithms thought would addict him—or harms inextricably tied to addiction—not mere exposure to racist content.

Defendants likewise cite the Ninth Circuit’s now-vacated decision in *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021), as support for their assertion that courts have “repeatedly held that using algorithms to arrange and display third-party content is protected by Section 230.” AOB30-31. Wrong again. The court in *Gonzalez* did not focus on the second prong of the Section 230 test (whether the plaintiffs sought to treat Google as a publisher or speaker). Rather, its analysis centered on the third prong (whether the content at issue was created by “another information content provider”). 47 U.S.C. § 230(c)(1). It was here that the court discussed arranging and displaying content with the help of an algorithm—specifically whether those functions were enough to transform the third-party content into Google’s own content. *See Gonzalez*, 2 F.4th at 892-95.

But when considering the second prong—the dispositive one here—the Ninth Circuit decided the issue quickly, and one need only look to the legal duties alleged there

to see the distinction between *Gonzalez* and this case. The plaintiffs invoked anti-terrorism laws prohibiting aiding and abetting terrorists, and the Ninth Circuit concluded that their legal theory boiled down to claiming that Google “did not do enough to block or remove content.” *Gonzalez*, 2 F.4th at 891. As shown in *Calise* and *Lemmon*, the Ninth Circuit has *never* held that “using algorithms to arrange and display third-party content” is categorically protected by Section 230, or that any claim that involves the display and arrangement of user content necessarily seeks to treat the platform as a publisher. *Gonzalez* certainly did not.

Dyroff v. Ultimate Software Grp., 934 F.3d 1093 (9th Cir. 2019), likewise concerned primarily the third prong of the Section 230 test and involved claims attempting to hold a website liable for merely directing users to harmful content. In assessing the third prong, the Ninth Circuit held that a site’s recommendation and notification functions were “tools meant to facilitate the communication and content of others,” and “not content in and of themselves.” *Id.* But on the second prong, the claims were premised on publisher conduct because they were based on either refusing to remove content/users or connecting users. *See id.* at 1095 (plaintiff alleged, for example, that the website “permitted users to remain active accountholders despite evidence that they openly engaged in drug trafficking”). And subsequent decisions from both the Ninth Circuit (such as *Lemmon* and *Calise*) and the U.S. Supreme Court (*Moody*) make clear that recommending content is not categorically a publisher function under the second prong.

In a similar vein, the Court of Appeals’ decision in *Shiamili* lends no support to Defendants. *Shiamili* simply held that playing an “active” role in promoting third-party content did not remove a publisher from Section 230 protections in “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—*such as deciding whether to publish, withdraw, postpone or alter content.*” 17 N.Y.3d at 289 (emphasis added). But *Shiamili* never decided whether a case like this one arising from product design seeks to hold a platform liable for such traditional editorial functions. It was undisputed in the case that the claims asserted against the operators of a blog—defamation and unfair competition by disparagement—sought to hold the defendants liable as publishers and speakers. *Id.* at 290.

Despite Defendants’ many attempts to rewrite Plaintiffs’ pleadings, Plaintiffs’ claims do not rest on the theory that Defendants “promoted objectionable content” to the Shooter. AOB23. The crux of Plaintiffs’ claims is not what he viewed but how a prolonged period of exposure to Defendants’ dangerous, defective, and addictive products led to his radicalization and encouragement to commit murder.

These claims are parallel to the plaintiffs’ allegations in *Social Media Cases*. Assessing the plaintiffs’ negligence claims in those cases, the California Superior Court held that “Section 230 does not bar a claim based on features of a social media site that have an adverse effect on users apart from the content of material published on the site.” 2023 WL 6847378, at *30. The court reasoned that Section 230 did not insulate the defendants where the claims rested on designing and operating the interactive and

addictive features of their platforms. *Id.* at *32. It ruled that, so long as providers are not punished for publishing third-party content, Section 230 permits recognition of a legal duty requiring them to refrain from designing platforms that induce engagement to the point where a minor is addicted and can no longer control the information they receive from a platform. *Id.*

That is the correct way to conceptualize and distinguish this litigation. The harm at issue here is inextricably linked to the Shooter’s addiction, which was the vehicle for his eventual radicalization. *See e.g.*, R.5089, 5092 (¶¶ 229-30, 244); R. 6194-95, 6197 (¶¶ 313-14, 328). The harm does not flow inexorably from the failure to remove or alter content.⁴

II. The First Amendment does not protect machine algorithms that do not carry out any human editorial decisions; even if it did, Plaintiffs’ claims are fully compliant with the First Amendment.

The Trial Court likewise ruled correctly in holding that the First Amendment does not bar Plaintiffs’ claims at the pleading stage. First, the First Amendment does not protect machine-learning algorithms. Second, even if it did, the Defendants’ tort duty to design their applications safely is a content-neutral “time, place, and manner”

⁴ For the same reasons, the host of other cases cited by Defendants are inapposite. *See* AOB28 & n.5 (collecting cases). Those cases all involved product-liability claims premised on the failure to remove or alter content. *See Estate of Bride v. Yolo Techs.*, 112 F.4th 1168, 1179-80 (9th Cir. 2024) (plaintiff’s claims “essentially fault[ed] YOLO for not moderating content in some way”); *Herrick v. Grindr LLC*, 765 F. App’x 586, 590 (2d Cir. 2019) (unpublished decision) (same); *Wozniak v. YouTube, LLC*, 100 Cal. App. 5th 893, 910 (2024) (same); *L.W. through Doe v. Snap Inc.*, 675 F. Supp. 3d 1087, 1095-96 (S.D. Cal. 2023) (same); *In re Facebook*, 625 S.W.3d 80, 93 (Tex. 2021) (same).

regulation that is valid under the First Amendment. Third, the Court lacks the factual record necessary to find in Defendants’ favor because it cannot properly weigh the competing interests between First Amendment values and this State’s tort law.

A. Plaintiffs seek to hold Defendants liable only for non-speech, non-expressive conduct, not speech.

The at-issue conduct here does not implicate the First Amendment because it is not expressive. Defendants state in conclusory fashion that Plaintiffs seek to hold them liable for “allegedly making protected speech available to Gendron,” and accordingly embark on a lengthy saunter through case law holding that offensive speech is protected under the First Amendment. *See* AOB37-42. All that is a distraction.

Try as they might, Defendants are not entitled to re-write Plaintiffs’ pleadings. Plaintiffs do not seek to hold them liable for disseminating third-party speech. Instead, they seek legal accountability for Defendants’ design choices—a form of ordinary commercial behavior that in this litigation rests on decisions divorced from editorial judgments. Further, any “editorial” work that is done by Defendants’ products is the output of unsupervised machine-learning algorithms—which are not persons entitled to First Amendment protection.

“[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). While the former is entitled to protection, “the First Amendment does not prevent restrictions directed at commerce or conduct from

imposing incidental burdens on speech.” *Id.* To determine whether the First Amendment applies, courts must first decide whether the challenged law seeks to regulate “conduct with a ‘significant expressive element’” or “has the inevitable effect of ‘singling out those engaged in expressive activity.’” *Int’l Franchise Ass’n v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986)).

Here, because the conduct at issue—designing unreasonably dangerous products—consists only of nonexpressive conduct, Plaintiffs’ claims do not implicate the First Amendment. *See HomeAway.com*, 918 F.3d at 684-85 (holding that First Amendment was not implicated in case involving ordinance prohibiting internet platforms from processing certain types of unlawful rentals—even if it incidentally touched upon publication of third-party content—because it targeted only “nonspeech, nonexpressive conduct”).

Additionally, the “editorial judgments” that Defendants claim to have exercised were only the output of unsupervised machine-learning algorithms—which are not persons entitled to its protection. As with Section 230 protections, functional design inputs like algorithms *may* be entitled to First Amendment protection where the regulation interferes with speakers’ attempts to use them for expressive purposes (such as carrying out publisher functions). *See Moody*, 144 S. Ct. at 2403-04 (majority opinion); *id.* at 2410 (Barrett, J., concurring). But that is not the issue here. *See supra* pp. 6-7, 16-19.

Instead, Defendants seek constitutional protection for electronic impulses of artificial-intelligence-driven algorithms designed to exploit the neurological vulnerabilities of users like the Shooter and maximize their engagement by deluging them with psychologically discordant material that they are not seeking but from which they cannot look away. *See supra* pp. 6-7. Used in this way, this artificial intelligence serves no communicative purpose, is not “speech,” and is not entitled to First Amendment protection. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449, 451 (2d Cir. 2001) (using computer code to communicate with a computer is “never protected”).

The cases cited by Defendants have nothing to do with the First Amendment issues presented here. In *Brown v. Entertainment Merchants Association*, the Supreme Court struck down a law banning the sale or rental of “violent video games” to minors, 564 U.S. 786, 789 (2011). Justice Scalia explained that video games “communicate ideas—and even social messages—through many familiar literary devices.” *Id.* at 790. But the statute sought to “create a wholly new category of content-based regulation” by targeting video games based on their content. *Id.* at 794. *Brown* did not say or suggest that video game design is categorically expressive; it held only that the *stories they tell* are expressive.⁵

⁵ For the same reason, Defendants’ reliance on two other cases involving the sale of violent video games and movies to minors is misplaced. AOB50 (citing *Sanders v. Acclaim Entertainment, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002)). In both cases, the plaintiffs’ claims were

Likewise, *Sorrell* had nothing to do with functional design regulations. The challenged law there targeted and restricted certain expressive uses of physician subscribing histories while allowing others. *See id.* at 571. The Court made clear that the marketing messages were protected speech, and it applied strict scrutiny because the law discriminated against one speaker’s viewpoint. *See id.* Thus, *Sorrell* stands for the commonsense proposition that heightened scrutiny applies when a law places targeted restrictions on *who* says *what*. That is not the case here.

This litigation is closer to those applying the First Amendment to architectural-design regulations. In *Burns v. Town of Palm Beach* a homeowner sought approval from the Town of Palm Beach’s architectural review commission to tear down his beachfront mansion and build a new one “in the midcentury modern style,” 999 F.3d 1317, 1322 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 1361 (2022). The commission rejected the proposed home design based on regulations requiring a home to be similar in design to other nearby homes. *Id.* The homeowner sued, arguing (among other things) that the

premised squarely on the publication and dissemination of harmful content. *See Wilson*, 198 F. Supp. 2d at 181 (the plaintiff’s allegations showed that her suit targeted “the expressive elements of the game: its plot . . . , its characters . . . , and the visual and auditory milieu in which the story line is played out”); *Sanders*, 188 F. Supp. 2d at 1269 (alleging, for example, that a scene from a movie in which “the protagonist inexplicably guns down his teacher and some of his classmates in cold blood” inspired teens to commit the Columbine mass shooting).

Sanders and *Wilson* also suffer from other problems that render them unpersuasive. The courts in those cases failed to weigh the First Amendment interests at stake against the states’ interest in requiring the defendants under tort law to design their applications in a way that protected users, including children and teens.

criteria used by the commission violated his First Amendment rights because “custom-designed residential architecture communicates a form of expressive conduct unique to the homeowner.” *Id.* at 1322, 1335.

The Eleventh Circuit rejected his overbroad argument. *Id.* at 1335-36. The court instead examined whether the challenged decision regulated conduct that a reasonable person would interpret as expressive. *Id.* at 1336-37. Examining the record before it, the court answered the question in the negative because the design features the homeowner cited as encapsulating an expressive message would not be visible to the public. *Id.* at 1337-43. But even if those features could be seen by the public, “there still would be no great likelihood they would understand that it conveyed some sort of message.” *Id.* at 1343. The court then comprehensively explained why, noting for example that there was also no evidence that the commission targeted “midcentury modern architecture” in its permitting decision or that the homeowner or the public had engaged in debate over such architecture which might have led to discrimination based on the homeowner’s viewpoint. *Id.*

This same analysis fits the common law duties at issue here when applied to the design of social media platforms. No reasonable person would understand an algorithm-driven design interface serving to mindlessly feed an avalanche of content it believes a user will like as communicating some expressive message on behalf of the platforms or any third parties. Here, at the pleading stage, apart from conclusory assertions in briefing, Defendants have made no factual showing that the algorithms

challenged by Plaintiffs serve any *bona fide* expressive purpose.

Plaintiffs' failure-to-warn claims likewise do not implicate the First Amendment. Defendants cite the Ninth Circuit's recent decision in *NetChoice v. Bonta* holding that the First Amendment likely prohibits a law requiring platforms to “opine on and mitigate the risk that children may be exposed to harmful or potentially harmful materials.” AOB49 (quoting 113 F.4th 1101, 1108 (9th Cir. 2024)). But Defendants omit key parts of *Bonta*'s analysis. The challenged law was a section of a statute (the “DPIA provision”) that required every business covered by the statute to proactively create and publish risk reports and adopt risk-mitigation plans before making the product, service, or feature available. *Bonta*, 113 F.4th 1101 at 1116.

The crucial factor in the court's First Amendment analysis—which Defendants conspicuously fail to acknowledge—was its finding that the “*primary effect* of the DPIA provision is to compel speech.” *Bonta*, 113 F.4th at 1117 (emphasis added). The Ninth Circuit explained that the law's purpose “distinguish[ed] it from statutes where the compelled speech was ‘plainly incidental to the [law's] regulation of conduct.’” *Id.* (quoting *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006)).

Here, any compelled speech (*e.g.*, a warning) is incidental to Defendants' legal duty. Unlike the regulation in *Bonta*, the primary purpose of Plaintiffs' failure-to-warn claims is plainly not to compel speech; rather, the focus of those claims (which rest on more than a century of common tort law) is Defendants' release of a dangerous product into the stream of commerce. *See Allen v. Am. Cyanamid*, 527 F. Supp. 3d 982, 994 (E.D.

Wis. 2021) (explaining that product liability claims, including failure to warn, “seek to hold the defendants liable for negligence or the production or sale of an unreasonably dangerous product,” and the First Amendment does not apply to such claims); *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 25 F. Supp. 2d 837, 848 (N.D. Ill. 1998) (“[T]here is no case authority for the proposition that the First Amendment provides immunity for defendants in failure to warn cases,” and adopting such a view “would ignore decades of tort law, dating back to at least 1892, holding that manufacturers can be liable for failing to warn consumers about dangers of their products”).

Moreover, Defendants ignore that the *Bonta* court expressed doubt as to whether the challenged law’s regulations of certain social media platform design features implicated the First Amendment at all. The court ruled that on the record before it, it was unclear whether the law’s prohibition on platforms implementing certain design features known as “dark patterns” to induce children to take harmful actions would “always trigger First Amendment scrutiny” or, if it did, it was “far from certain that such a ban should be scrutinized as a content-based restriction, as opposed to a content-neutral regulation of expression.” *Id.* at 1122-23.

If anything, *Bonta* cuts against Defendants’ overly expansive view of the First Amendment. This case does not implicate the First Amendment.

B. Even if Defendants’ tort duty regulated speech, it would constitute, at most, a permissible content-neutral regulation that passes intermediate scrutiny.

Even if the Court disagrees, it should still affirm on the alternative ground that

Defendants’ tort duty is a content-neutral “time, place, and manner” requirement that survives intermediate First Amendment scrutiny.

A regulation is content-neutral if it does not target specific content and its impacts on speech are incidental. *See People v. Barton*, 8 N.Y.3d 70, 76-77 (2006); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Content-neutral time, place, and manner regulations are subject to intermediate scrutiny, and are valid if they (1) support a significant government interest, (2) are narrowly tailored to achieve that interest, and (3) leave open ample alternative channels of communication. *Town of Delaware v. Leifer*, 34 N.Y.3d 234, 244 (2019).

Here, the tort duty alleged is plainly content-neutral. Plaintiffs invoke tort laws applicable to all sorts of conduct that do not involve expressive activity and which do not target Defendants based on any particular message. And the tort duty here satisfies all three requirements of the intermediate-scrutiny test.

As to the first requirement, New York’s interest in requiring Defendants to design their applications in a safe manner—especially when they know adolescents and young people are a primary audience—is time-tested and compelling. *See e.g., New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (“It is evident beyond the need for elaboration that a State’s interest in safeguarding the physical and psychological well-being of a minor is compelling.”) (internal quotation marks omitted); *see also United States v. Yazzie*, 743 F.3d 1278, 1288 (9th Cir. 2014) (acknowledging child well-being is a compelling interest); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (“A democratic society rests,

for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.”).

As to the second requirement, a law is narrowly tailored if the State’s interest would be achieved less effectively without the restriction, and the restriction “is not ‘substantially broader than necessary to achieve [that] interest.’” *Leifer*, 34 N.Y.3d at 245 (alteration in original) (quoting *Ward*, 491 U.S. at 799-800). The narrow-tailoring requirement does not mean that the regulation needs to be the “least restrictive means of advancing the government goal.” *Id.*; see also *Ward*, 491 U.S. at 797 (explaining that a regulation is not invalid simply because a less burdensome alternative is available).

Here, the important state interest would clearly be achieved less effectively in the absence of these tort duties. If Defendants were correct that a law violates the First Amendment any time it touches conduct that involves the publication or display of content on the Internet, the States would be forced to cede a substantial portion of their traditional police power.

Faced with emerging threats to adolescent health, states have long led the way in crafting responses. See e.g., Gaia Bernstein, *Unwired: Gaining Control over Addictive Technologies* 58-60, 78 (2023) (describing state efforts to confront the public health harms from adult and child smoking and child obesity). For example, states continue to adjust their laws (and common law judicial precedents) protecting consumers from the worst effects of addictive products. See e.g., *id.* at 47-78 (discussing state regulations of tobacco and junk food). These state laws include product-design regulations, such as holding

cigarette companies liable under state consumer protection laws for using design features that increase addictiveness. *See United States v. Phillip Morris USA, Inc.*, 449 F. Supp. 2d 1, 39 (D.D.C. 2006) (discussing design methods used by cigarette companies to better “create and sustain addiction”).

Courts have either held that these exercises of the police power are not subject to First Amendment scrutiny, or they have upheld them when applying that scrutiny. To illustrate, video gambling machine operators have tried and failed to invoke the First Amendment in defense of “entertaining displays” that simulate slot machines.⁶ A new rule for digital products would represent a departure from this jurisprudence and would affect states’ efforts to temper harmful addictive design in the digital space.

On the other side of the ledger, Defendants’ state common law tort duty is not broader than necessary. For one thing, it has little or no impact on the kinds of “editorial judgments” the First Amendment protects, because it focuses on algorithms that operate based on “engagement” or *user-specific* vulnerabilities. *See supra* pp. 6-7, 16-19. Thus, there is far less impact on *bona fide* editorial activities than in cases involving laws that regulate newspapers, radio stations, or other entities that publish, alter, prioritize,

⁶ *See e.g., Telesweeps of Butler Valley, Inc. v. Kelly*, No. 3:12-CV-1374, 2012 WL 4839010, at *6 (M.D. Pa. Oct. 10, 2012), *affd sub nom. Telesweeps of Butler Valley, Inc. v. Attorney Gen. of Pa.*, 537 F. App’x 51 (3d Cir. 2013) (“[T]he simulated gambling programs at issue here do not contain plots, storylines, character development, or any elements that would communicate ideas.”); *Hest Techs., Inc. v. State ex rel. Perdue*, 749 S.E.2d 429, 437 (N.C. 2012) (upholding ban on electronic machines that communicate sweepstakes through an “entertaining display”).

or display material based on the content itself. *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (describing the newspaper editorial process).

Further, where a defendant acts with some degree of scienter, the First Amendment often does not preclude tort liability. Defendants' design of their applications—to addict their users—amounts to negligence or recklessness. Therefore, their mental state ensures that there is no “chilling effect” on the dissemination of protected speech. *See Smith v. California*, 361 U.S. 147, 150 (1959) (finding that a prohibition on sale of obscene books without a scienter requirement impermissibly chilled speech).

As to the third factor, ample alternative channels remain open. Indeed, *the same* channels remain open. Defendants are free to communicate with their customers; they must only avoid designing and marketing addictive and dangerous products without disclosing their risks. They can choose to leave any content they wish on their platforms, or even recommend it in a safer way.

An online business's desire to present its goods or services in the manner most advantageous to its business model does not trump the States' interest in requiring a safer design format. “The First Amendment protects the right to express one's viewpoint, but it does not guarantee ideal conditions for doing so, since the individual's right to speech must always be balanced against the state's interest in regulating harmful conduct.” *Clementine Co., LLC v. Adams*, 74 F.4th 77, 87 (2d Cir. 2023) (internal quotation marks omitted). Plaintiffs' content-neutral claims advance an unassailable

state interest, and Defendants have not shown that they unduly burden expression.

C. In any event, it would be improper to dismiss Plaintiffs' claims at the pleading stage.

Even if this case implicated the First Amendment (it does not, *see supra* Part II.A), and even if Defendants had made enough of a showing at the pleading stage to create some doubt about the constitutionality of Plaintiffs' claims (they did not, *see supra* Part II.B), it would be improper to rule in Defendants' favor on First Amendment grounds at the pleading stage.

Whether a case is subject to intermediate scrutiny or strict scrutiny, courts must consider the State's interest in the challenged law and balance it against the alleged impact on the challengers' expressive freedoms. *See Town of Delaware*, 34 N.Y.3d at 244 (discussing intermediate-scrutiny standard applicable to content-neutral time, place, and manner laws); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 455 (2015) (explaining that "the First Amendment poses no obstacle" to enforcing content-discriminatory laws that are "narrowly tailored to serve a compelling government interest").

Here, assuming *arguendo* that Defendants have alleged an initial showing of a significant burden on speech, the factual record is too undeveloped to allow the Court to properly weigh that against New York's interest in protecting immature users and their communities from the harms inherent in giving Defendants an unfettered license to operate with reckless disregard toward known and foreseeable dangers. *See Reno v. Am. C.L. Union*, 521 U.S. 844, 849 (1997) (explaining that the district court's "extensive

findings of fact” “provide[d] the underpinnings for the legal issues” in case deciding First Amendment challenge involving Internet speech).

At this stage, even taking Defendants’ assertions as true, the claims here at most regulate the medium in which speech is communicated, not the speech itself. That distinction is meaningful under the First Amendment. For example, in *Roth v. United States*, the U.S. Supreme Court held that obscenity is not protected speech under the First Amendment. 354 U.S. 478, 484-85 (1957). But in *Smith*, the Court held that a statute criminalizing the sale of books containing obscenity would violate the First Amendment because the statute lacked any *mens rea* or other culpable mental state requirement. 361 U.S. at 152-153. The fear in *Smith* was that if the bookstore owner could be held strictly liable for selling obscenity, then the owner would only sell books that he could inspect, which would result in “chilling” the dissemination of protected speech. *See id.*

Here, unlike a statute criminalizing the sale of a book without knowledge of its obscene contents, Defendants’ legal duty to design their applications in a way that does not addict immature users does not require Defendants to inspect each piece of content uploaded to their sites. *See supra* p. 13 & n.3. Thus, Defendants’ citation to cases discussing laws that lack a *mens rea* requirement is not enough to find their First Amendment interests sufficiently strong to win on the pleadings as a matter of law. They have not established any claimed “chilling effect” with evidence, and instead rely on allegations.

At the same time, Plaintiffs' claims rest in deeply rooted principles of the common law. Again, the States have an important and legitimate interest in promoting the general welfare of the public, including minors, and protecting individual life. *See supra* pp. 32-34. And the Supreme Court has repeatedly acknowledged that they also possess a "strong and legitimate" interest in allowing private individuals to obtain compensation for their injuries through a civil action, even when the wrongful conduct allegedly involves speech. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756-57 (1985).

New York courts have also made it clear that the First Amendment cannot serve as a shield for tortious or unlawful conduct merely because a defendant's speech is implicated. *See e.g., Le Mistral, Inc. v. Columbia Broad. Sys.*, 61 A.D.2d 491, 494 (1st Dep't 1978) (explaining "that the exercise of the right of free speech and free press demands and even mandates the observance of the co-equal duty not to abuse such right") (internal quotation marks omitted); *Lindberg v. Dow Jones & Co., Inc.*, No. 20-CV-8231, 2021 WL 5450617, at *9 (S.D.N.Y. Nov. 22, 2021) (rejecting argument that the First Amendment "bars all claims based on news gathering or reporting activities" and explaining that "there is no threat to a free press in requiring its agents to act within the law") (cleaned up).

Thus, even if it is assumed that Defendants made enough of a showing in support of their motions to dismiss to justify further First Amendment inquiry, they would have at most created a fact-laden issue that requires discovery and further development—

not dismissal. *See City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494-96 (1986) (Court could not reach a “proper resolution of the First Amendment question” at the pleading stage “without a fuller development of the disputed issues in the case”).

III. Plaintiffs pled viable tort claims.

Turning to the merits, Plaintiffs’ tort claims are grounded in well-established law, and they are valid. First, Defendants’ platforms are products (as that term is understood under New York law), and this State’s product-liability law squarely applies to them. Second, Plaintiffs owed a duty of care to the victims of the shooting, because the risk of harm to them was reasonably (and readily) foreseeable. Third, Defendants’ conduct was a proximate cause of the at-issue injuries.

A. This is a case about products, not “ideas,” and Defendants are not entitled to a special exemption from this State’s product-liability laws.

New York law treats Defendants the same as any other designer of a product. Their social media platforms are products: They are designed, coded, engineered, manufactured, produced, assembled, and placed into the stream of commerce. R.5074 (¶ 183); R.6180 (¶ 267). They are mass-marketed and designed to be used or consumed by billions of consumers. *Id.* And they are advertised to appeal to the general public—and often adolescents in particular. *Id.* Like physical products, when installed on a user device, they have a definite appearance and location and are operated by a series of gestures, clicks, swipes, and user-interface actions. R.5074 (¶ 184); R.6181 (¶ 268). They are personal, moveable, and downloadable. *Id.*

In arguing otherwise based on a distinction between “tangible” and non-tangible products, *see* AOB58, Defendants seek application of a bright-line test that does not exist. Whether something is a “product” (that is, whether products-liability law applies) turns on a case- and fact-specific analysis. The Court of Appeals holds that the court’s role in determining the applicability of products liability law is to “settle upon the most reasonable allocation of risks, burdens and costs among the parties and within society, accounting for the economic impact of a duty, pertinent scientific information, the relationship between the parties, the identity of the person or entity best positioned to avoid the harm in question, the public policy served by the presence or absence of a duty and the logical basis of a duty.” *Matter of the Eighth Judicial District Asbestos Litigation* (“*Tervilliger*”), 33 N.Y.3d 488, 495-96 (2019) (internal quotation marks omitted).

In that vein, the Court emphasized the following factors in determining whether an item is a product: (1) a defendant’s control over the design and standardization of the product, (2) the party responsible for placing the product into the stream of commerce and deriving a financial benefit, and (3) a party’s superior ability to know—and address—the dangers inherent in the product’s reasonably foreseeable uses or misuses. *Id.* at 496-97 (citation omitted).

Here, the Trial Court correctly ruled that products-liability law applies to Defendants’ platforms because these factors weigh in favor of that conclusion.

First, Defendants had control over the design of their respective applications and websites. They designed the algorithms, which are used specifically for their platforms.

See R.5087-88, 5094, 5098-99, 5106-07 (¶¶ 222-24, 252-53, 269-71, 298-99); R.6192-93, 6199, 6203-04, 6210-11 (¶¶ 306-08, 336-37, 353-55, 381-82). Second, Defendants are responsible for placing their applications on the market and deriving a financial benefit from them. *See* R.5076, 5088 (¶¶ 189, 225); R.6182, 6193 (¶¶ 273, 309). Third, Defendants are in the best position to know and address the dangers of their applications. The applications’ tendency to undermine mental health—especially of minors—and incite violence has been well-documented, and Defendants have specifically been on notice that their products have substantially contributed to previous harm, including mass shootings. *See supra* p. 8.

Because they claim that their algorithms personalize content based on individual preferences, Defendants argue that they should get a special and categorical exemption from product-liability law on the ground that some harms caused by their products are not “standardized” or “reasonably foreseeable.” AOB61-62. Likewise, they claim that recognizing their platforms as products in this context will facilitate lawsuits “anytime one of their users commits an unlawful or tortious act.” AOB62-63.

These arguments quickly break down. Plaintiffs do not allege that Defendants can be held liable for all harms of any type associated with their products, no matter how atypical or individualized. Rather, they argue only that the harms suffered in *this* case were foreseeable. In a different case, if a harm is so specialized and extraordinary that it is not reasonably foreseeable, then the claim is not actionable. Thus, the reasonable-foreseeability requirement provides a limiting principle ensuring that a ruling

against Defendants here will not “open the door” to a flood of hypothetical lawsuits based on other one-off harms. That is no different than any case against any product maker.

Defendants try to twist *Terwilliger* to support their position, but that case does not hold that a company is exempted from product-liability laws if the harms associated with its product are not standardized. Instead, the Court of Appeals explained that products-liability law imposes “a duty upon a manufacturer whose wares serve a standardized *purpose*, such that the product’s latent dangers, if any, are known, or should be known, from the time it leaves the manufacturer’s hands.” *Terwilliger*, 33 N.Y.3d at 494 (emphasis added). Here, the aspect of Defendants’ products challenged serve a standardized purpose (maximizing addiction), *and* the specific latent harms alleged here (which were the result of that intentional design) were foreseeable. There is no valid basis to exclude Defendants from liability just because some *other* harms caused by their dangerous algorithms might be unforeseeable.

Far from being “unprecedented,” as Defendants claim (AOB52), the Trial Court’s ruling is consistent with rulings in New York and elsewhere regarding software and computer programs under the Uniform Commercial Code (“UCC”) and products-liability law. For example, New York and other courts recognize that “software that is mass-marketed is considered a good,” and not a service. *Commc’ns Grps. v. Warner Commc’ns, Inc.*, 138 Misc. 2d 80, 83 (New York County Civ. Ct. 1988); *Simulados Software, Ltd. v. Photon Infotech Priv., Ltd.*, 40 F. Supp. 3d 1191, 1199 (N.D. Cal. 2014) (“Generally,

courts have found that mass-produced, standardized, or generally available software . . . is a good that is covered by the UCC.”).

The New York case Defendants principally rely on for their position hurts them far more than it helps them. In *Intellect Art Multimedia, Inc. v. Milewski*, the plaintiff brought products-liability claims alleging that negative posts and reviews on a website caused economic injuries to its summer program. No. 117024/08, 2009 WL 2915273, at *1-2, *7 (New York County Sup. Ct. 2009). The court did not determine, as a matter of law, whether a website was a product, but in *that* context (an online message board serving purely as a forum for hosting reviews), it expressed doubt that the website was a “product.” *Id.*

This analysis only underscores that New York takes a contextual approach to product-liability claims—and that Defendants’ proposed bright-line test is wholly inconsistent with that approach. In *Milewski*, the court was not presented with a website’s design features or innate characteristics—indeed, the court noted that the plaintiff “has not even alleged that the website was in a defective condition which gave rise to its claimed injuries.” *Id.* at *7. Instead, its analysis was limited to a website functioning as a forum for third-party expression. *Id.* That is a far cry from the allegations here.

It is simply not true that “[t]he Internet-Defendants’ features that Plaintiffs object to here are alleged to be dangerous only because of the ideas they help convey.” AOB57 (emphasis omitted). Again, the harm at issue here is inextricably linked to the

Shooter's *addiction*, which was the vehicle for his eventual radicalization. R.5089, 5092 (¶¶ 229-30, 244); R. 6194-95, 6197 (¶¶ 313-14, 328). Seeing a video or videos that encourage radical ideas and violence is conceptually distinct from being force-fed, without a choice, an endless stream of those same videos in a way that is designed to addict and exploit.

The long string of other out-of-jurisdiction cases Defendants rely on can all be distinguished on this same basis. *See Walter v. Bauer*, 109 Misc. 2d 189, 190 (Sup. Ct. 1981) (content of scientific experiment in textbook); *Gorran v. Atkins Nutritionals*, 464 F. Supp. 2d 315, 324-25 (S.D.N.Y. 2006) (content of diet book); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1216-17 (D. Md. 1988) (content of nursing textbook); *Beasock v. Dioguardi Enters.*, 130 Misc. 2d 25, 29 (Sup. Ct. Monroe Cty. 1985) (published tire specifications); *Lacoff v. Buena Vista Publ'g*, 183 Misc. 2d 600, 611 (Sup. Ct. N.Y. Cty. 2000) (content of book); *James v. Meow Media*, 300 F.3d 683, 687 (6th Cir. 2002) (content of video games and movies); *Sanders*, 188 F. Supp. 2d at 1279 (content of video games and movies); *Wilson*, 198 F. Supp. 2d at 174 (content of video game); *Davidson v. Time Warner, Inc.*, No. CIV. A. V-94-006, 1997 WL 405907, at *1, *14 (S.D. Tex. Mar. 31, 1997) (content of rap album).⁷

⁷ The remaining cases cited by Defendants applied the products-liability laws of other states and did not address New York law's context-specific, multifactor standard. *See Social Media Cases*, 2023 WL 6847378, at *15-*19; *Ziencik v. Snap, Inc.*, 2023 WL 2638314, at *4 (C.D. Cal. Feb. 3, 2023); *Jacobs v. Meta Platforms*, 2023 WL 2655586, at *4 (Cal. Super. Ct. Mar. 10, 2023); *Grossman v. Rockaway Twp.*, 2019 WL 2649153, at *4 (N.J. Super. Ct. Law Div. June 10, 2019).

B. Under well-established New York law, Defendants owed a duty of care to Plaintiffs.

Plaintiffs also pled viable negligence and product-liability claims based on the legal duties owed by Defendants to the users of their products and the third parties (like Plaintiffs) harmed by them. It is black-letter law that those who make products have a duty to exercise reasonable care in the design and marketing of those instruments, and a maker “that has negligently designed and marketed a product that is not reasonably safe is liable for injury that results from use of the product.” N.Y. PJI § 2:126; *see e.g., Adamo v. Brown & Williamson Tobacco Corp.*, 11 N.Y.3d 545, 550 (2009). It does not matter that the harmed parties were not injured while using Defendants’ products, because under New York law, “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.” *Codling v. Paglia*, 32 N.Y.2d 330, 342 (1973) (emphasis added).

Take the duty to warn, for example. The Court of Appeals sustained a failure-to-warn claim where an automobile manufacturer and retailer failed to warn the purchaser/driver of a car of a defect in the car’s acceleration system, and that defect subsequently resulted in the plaintiff, a pedestrian, being injured as he walked along the sidewalk. *Cover v. Cohen*, 61 N.Y.2d 261, 274-275 (1984). Likewise, the Second Department upheld a verdict against a lawnmower manufacturer that failed to warn users of a certain type of improper use, and that improper use resulted in a rock striking an innocent bystander in the eye. *See LaPaglia v. Sears Roebuck & Co.*, 143 A.D.2d 173,

176-78 (2d Dep't 1988).

As a third illustration, applying New York law, a federal court ruled that the manufacturer of an industrial hot glue machine had a duty to warn operators of the risks of improper cleaning, and it sustained a claim by the plaintiff—a bystander—when such improper use resulted in a discharge of hot glue that burned her. *Bab v. Nordson Corp.*, No. 00CIV9060DAB, 2005 WL 1813023, at *15 (S.D.N.Y. Aug. 1, 2005). The court observed that “New York Courts have allowed a failure to warn claim by a bystander plaintiff injured by a product produced by a defendant manufacturer but used by third parties.” *See id.* (collecting cases).

Defendants try to distinguish these cases on the basis that the product directly harmed the third parties in those cases, AOB68, but that distinction is not persuasive. For example, in both *LaPaglia* and *Bab*, a person’s improper use of the product led to the injury, not just some inherent defect in the product that manifested regardless of how it was employed. *See Bab*, 2005 WL 1813023, at *2-*3; *LaPaglia*, 531 N.Y.S.2d at 623. Accordingly, the users of those products—not the products themselves—could be said to have “directly caused Plaintiffs’ injuries,” AOB69, because the injuries would not have happened if the operators had used them as intended.

Defendants rely heavily on *Hamilton v. Beretta U.S.A. Corp.*, but there, the Court of Appeals took pains to explicitly point out that the plaintiffs did not present a product-liability theory. *See* 96 N.Y.2d 222, 235 (2001). Nor did the plaintiffs assert “a defective warnings claim or present[] sufficient evidence to demonstrate that defendants could

have taken reasonable steps that would have prevented their injuries.” *Id.* Instead, the plaintiffs alleged that the defendants “*distributed* their products negligently so as to create and bolster an illegal, underground market in handguns.” *Id.* at 229, 231 (emphasis added). Based on a public-policy rationale that has no bearing in this product-liability litigation, the Court declined to recognize a gun maker’s duty to better control the distribution of their weapons to prevent their illegal use. *See id.* at 232-40. *Hamilton* thus offers no support to Defendants’ position on their duty as product makers.

Additionally, in the Trial Court, Plaintiffs explained that Defendants also separately owed a duty of care to Plaintiffs under the “force or instrument of harm” doctrine, an independent legal principle that Defendants do not address in their opening brief. This is an alternative ground for affirmance. *See Weissmann v. Euker*, 1 A.D.2d 30, 34, 106 (3d Dep’t 1955) (appeals court should “embrace any ground for affirmance”). Due to space limitations, we summarize this issue briefly here, but Plaintiffs briefed it more extensively in the Trial Court. *See* R.4916-18; R.5997-99.

Regardless of whether Defendants’ self-described “online services,” AOB1, are a “product” under New York products liability law, in operating them, Defendants “launched a force or instrument of harm” and therefore owe a duty of care to those harmed by their actions. *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 141 (2002), (internal quotation marks omitted). The Court of Appeals holds that “a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury.” *Id.* at 141-42; *see also*

Restatement (Second) of Torts § 324A(a).

Here, even if Defendants were correct that their “online services” are something other than “products” (they are not), Defendants are nonetheless subject to this duty because they negligently created or exacerbated such a dangerous condition. *Espinal*, 98 N.Y.2d at 141-42; *see also Spano v. Perini Corp.*, 25 N.Y.2d 11, 18 (1969) (finding strict liability for blasting which “involves a substantial risk of harm”); *Williams v. Beemiller*, 103 A.D.3d 1191, 1191 (4th Dep’t 2013) (duty arose from defendant selling a gun to an unlawful straw purchaser for trafficking into the criminal market).

For all these reasons, Defendants’ lengthy arguments concerning whether they had a “special relationship” with the Shooter, *see* AOB65-66, are a red herring. The existence (or not) of a “special relationship” is irrelevant to whether it was foreseeable that Defendants’ actions would cause harm.

Regardless, Plaintiffs alleged sufficient facts to establish that a special relationship existed here, because the Amended Complaints allege that Defendants created a monster and were in the best position to stop him. The Shooter was addicted to Defendants’ products, as a result of their design choices, and he was then radicalized, and engendered violent plots and fantasies. And Defendants were best situated to avoid or minimize the harm their design choices caused. For example, Plaintiffs allege that Defendants’ applications directed the Shooter to more and more extreme content to satiate his developing brain with an adequate dopamine response and desensitized him to violent content. R.5091 (¶ 242); R.6196 (¶ 326). Those products have a known

proclivity to shepherd boys and young men towards firearms, mass shootings, and violence, even when they (including the Shooter) have not personally displayed any interest in such topics. R.5098-99 (¶¶ 270-71); R.6203-04 (¶¶ 354-55).

Defendants' position as the entities "in the best position to protect against the risk of harm" justifies recognizing their duty under the special-relationship doctrine. *Davis v. S. Nassau Communities Hosp.*, 26 N.Y.3d 563 (2015). In formulating duty, courts consider various factors, including convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, and the moral blame attached to the wrongdoer. *See Davis*, 26 N.Y.3d at 576-77. Each of those factors weighs in favor of holding Defendants accountable here. *See In re Social Media Cases*, 2023 WL 6847378 (holding social media companies owed tort duty of care to users). Even if courts in this State have not yet recognized such a duty, this Court should do so now.

C. Defendants proximately caused Plaintiffs' injuries.

The Trial Court correctly concluded that Defendants failed to meet the heavy burden New York law imposes on parties moving to dismiss an action at the pleading stage based on proximate causation.

Proximate cause is an "intensely fact-specific" inquiry that is rarely, if ever, proper to adjudicate at the pleading stage. *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 243 (1998); *see also Hain v. Jamison*, 28 N.Y.3d 524, 529 (2016). Dismissal based on proximate cause is appropriate only where "only one conclusion may be drawn from the established facts." *Hain*, 28 N.Y.3d at 529. Defendants argue that the causal link

between Plaintiffs' injuries and their own misconduct is too attenuated, and that the Shooter's behavior represents an intervening act that severs the chain of proximate causation. *See* AOB73. But Defendants fell far short of showing that that is the one and only conclusion that could be drawn from the facts.

“A defendant's negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury,” *Scurry v. New York City Hous. Auth.*, 39 N.Y.3d 443, 453 (2023) (citations omitted), and where those events were a “foreseeable consequence of a circumstance created by the defendant,” *Hain*, 28 N.Y.3d at 529. Thus, the at-issue conduct (or non-conduct) need not be the only proximate cause of an injury to be actionable. *Carpentieri v. 1438 S. Park Ave. Co., LLC*, 215 A.D.3d 1236, 1237 (4th Dep't 2023). Here, when the Amended Complaints' allegations are taken as true and all reasonable inferences are construed in Plaintiffs' favor, there is little doubt that Defendants' conduct was one such substantial cause of the Tops Shooting. And based on their alleged knowledge and intentional design choices, it should have come as no surprise when the Shooter, like many users before him, committed acts of violence.

Defendants may disagree, but that factual dispute is for the jury to resolve on a full record, not the Court as a matter of law on a motion to dismiss. For example, a finding of proximate cause is supported by the Shooter's remorse and admissions after the shooting—which he experienced after being forcibly disconnected from social media products. *See* R.5093 (¶ 249); R.6199 (¶ 333). A reasonable jury could conclude,

based on these allegations and others, that the Shooter was not destined to commit the heinous acts he ultimately engaged in, and that different design choices or warnings concerning the dangers of Defendants' products would have dissuaded him from the path of addiction and radicalization that led to his violence.

It is not dispositive that the Shooter committed “extraordinary crimes.” *See* AOB73-75. The doctrine of intervening acts “has no application when the intentional or criminal intervention of a third party or parties is reasonably foreseeable.” *Turturro v. City of New York*, 28 N.Y.3d 469, 484 (2016) (internal quotation marks omitted). Moreover, the foreseeability of third-party conduct does not turn on whether such conduct was “extraordinary.” *See e.g., In re September 11 Litig.*, 280 F. Supp. 2d 279, 302 (S.D.N.Y. 2003) (refusing to dismiss claims against the owners and operators of the World Trade Center buildings for providing inadequate fireproofing and evacuation procedures, even though those claims arose out of the “horrific” September 11 terrorist attacks); *Scurry*, 39 N.Y.3d at 444 (holding that a landlord’s negligence could be the proximate cause of a tenant’s death at the hand of a murderer); *Bonsignore v. New York*, 683 F.2d 635, 638 (2d Cir. 1982) (police officer’s shooting of his wife did not automatically sever the city’s liability because the city could have reasonably foreseen that its negligent practices in arming unfit police officers would result in such an event).

In fact, third party misconduct is “especially predictable when the defendant’s tortious conduct foreseeably induces third parties to respond in certain ways.” Lee S. Kreindler et al., *New York Law of Torts* § 8:15 (14 West’s N.Y. Prac. Series Aug. 2023

Update). That is precisely what is alleged here. At the very least, these allegations create a factual dispute regarding the foreseeability of the Shooter's conduct.

The New York cases cited by Defendants do not support disregarding Plaintiffs' well-pled proximate cause allegations. Aside from *Turturro*, each of those cases merely found that a truly extraordinary intervening cause defeated proximate causation because it was unforeseeable as a matter of law. Each was based on the specific facts of the case before it. And each is distinguishable.⁸ Further, in *Turturro*, which Defendants curiously cite, the Court of Appeals rejected the defendant's proximate cause arguments, holding that a reasonable jury could conclude that a person's "speeding down Gerritsen Avenue was a foreseeable consequence of the City's failure to implement traffic calming measures." 28 N.Y.3d at 484.

These principles of New York law likewise render inapposite the out-of-state

⁸ See *Taylor v. Bedford Check Cashing*, 8 A.D.3d 657, 657 (2d Dep't 2004) (while standing in line in a business, plaintiff was knocked to the floor by other patrons after two men who were fighting outside entered the business, one fired shots at the other, and a panic ensued; this "sequence of events" was "so extraordinary and far removed from any alleged breach of defendant's duty of care as to be unforeseeable as matter of law"); *Tennant v. Lascelle*, 161 A.D.3d 1565, 1566 (4th Dep't 2018) (as a matter of law, it was not reasonably foreseeable that man would murder a child where it was undisputed that he had previously watched her "on more than 10 occasions, all without incident," they "got along well for years before the murder," defendant was "unaware of any mental problems" he suffered from, and there was "no suggestion" in the record that the murderer "had ever exhibited any questionable behavior or tendencies in the past"); *Dyer v. Norstar Bank*, 186 A.D.2d 1083, 1083 (4th Dep't 1992) (man was robbed at ATM, gave the assailant the money, then chased the assailant to try to recover the money, then was shot in the leg; as a matter of law, plaintiff's injuries were not reasonably foreseeable to bank).

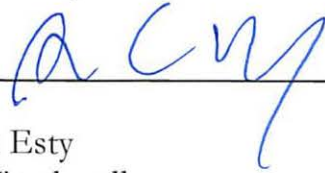
antiterrorism cases Defendants invoke. *See Crosby v. Twitter, Inc.*, 921 F.3d 617, 625 (6th Cir. 2019); *Fields v. Twitter, Inc.*, 881 F.3d 739, 749-50 (9th Cir. 2018). *Crosby* and *Fields* involved the federal Anti-Terrorism Act (“ATA”) and applied the federal common law of proximate causation developed for the application of aiding and abetting liability under that statute. They did not analyze or interpret New York proximate cause law. Moreover, those cases involved allegations that social media companies failed to police and prevent violent content on their platforms, which led to acts of terrorism. *See e.g., Crosby*, 921 F.3d at 625. But here—again—this case centers on dangerous design choices, not a mere failure to monitor content. *See supra* pp. 13-16.

CONCLUSION

For all these reasons, the Court should affirm the Trial Court’s rulings on Defendants’ motion to dismiss in *Jones* and *Stanfield* in full.

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Respectfully submitted,

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