To be argued by:
Jennifer D. Bennett
Time requested: 30 minutes

APL 2025-00165, APL 2025-00169, APL 2025-00170
Erie County Clerk's Index Nos. 808604/23, 810316/23, 810317/23
Appellate Division–Fourth Department Docket Nos. CA 24-01448, CA 24-01447, CA 24-00524

Court Of Appeals

of the

State of New York

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 Estate of PEARL LUCILLE YOUNG, MARK L. TALLEY, JR., Individually and as Administrator of the Estate of GERALDINE C. TALLEY, GARNELL W. WHITFIELD, JR., Individually and as Administrator of the Estate of RUTH E. WHITFIELD,

(Caption continued on inside cover)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS KIMBERLY J. SALTER, ET AL., FRAGRANCE HARRIS STANFIELD, ET AL., AND WAYNE JONES

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Completed: July 1, 2026

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, AHJALEAN SEGARS, and KISHA DOUGLAS,

Plaintiffs-Appellants,

– 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. and 4CHAN COMMUNITY SUPPORT, LLC,

Defendants-Respondents,

– and –

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

Defendants.

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

Plaintiff-Appellant,

– against –

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

Defendants,

– and –

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

Defendants-Respondents.

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

Plaintiffs-Appellants,

– against –

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

Defendants,

– and –

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

Defendants-Respondents.

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*APL-2025-00158, APL 2025-00165, APL 2025-00169, APL 2025-00170 will be heard together for oral argument

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PRELIMINARY STATEMENT

Across hundreds of pages of briefing, the social media companies repeat a single refrain: They bear no liability for the harms caused by their products. Ignoring this State's liberal pleading standard, the companies only offer arguments on a single theory of liability—that the plaintiffs' complaints seek to hold them liable for publishing racist, violent content. That may be the legal theory the companies would prefer to defend against, but it's not the only legal theory supported by the complaints' allegations. And at this stage, the companies bear the burden of showing that—reading the complaints liberally, accepting the allegations as true, and giving the plaintiffs the benefit of every possible favorable inference—the facts as alleged could not fit into *any* cognizable legal theory.

They haven't met that burden. Most notably, the companies all but ignore the legal theory that the Fourth Department dissent—along with virtually every court to have addressed the issue—concluded *is* viable: social-media addiction. As the dissent recognized, there are more than sufficient allegations in the complaints to support the theory that the social media companies' platforms are addictive, "not based upon the third-party content they show but because of the inherent nature of their design." And a claim that a social media company intentionally designed its product to addict kids and teens—regardless of the content they view—does not hold the company liable for disseminating improper content. So it is not foreclosed by

Section 230 of the federal Communications Decency Act. Nor does it even reach First Amendment-protected activity.

Accepting the social media companies' arguments here wouldn't just contravene this State's pleading standard. The companies also ask this Court to adopt the Fourth Department majority's conclusion that Section 230 and the First Amendment combine to give social media companies a "Heads I Win, Tails You Lose" categorical shield from any liability for their products at the pleading stage. No other court has held that companies that intentionally design addictive (and dangerous) products to hook young people are entitled to such blanket immunity. This Court should not be the first.

ARGUMENT

I. The social media companies must demonstrate that Section 230 and the First Amendment bar every cognizable legal theory, not just the one they prefer to defend.

A. The social media companies fault the plaintiffs (at 5) for "repeatedly emphasiz[ing] the early stage of this litigation." But the early stage of the litigation matters. The question at the motion to dismiss stage is whether there are *any* facts alleged that could support "*any* cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (emphasis added). "If in *any* aspect upon the facts stated," there is a cognizable theory, a motion to dismiss must "be denied." *Condon v. Associated Hosp. Serv. of New York*, 287 N.Y. 411, 414–15 (1942) (emphasis added);

see Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977) ("[I]f from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail.").[1]

And in determining whether there are any allegations that could support a cognizable claim, the complaint "is to be afforded a liberal construction … , accord[ing] plaintiffs the benefit of every possible favorable inference." *Leon*, 84 N.Y.2d at 87. "However imperfectly, informally or even illogically the facts may be stated, a complaint … is deemed to allege whatever can be implied from its statements by fair and reasonable intendment." *Condon*, 287 N.Y. at 414.

To demonstrate that dismissal is warranted, therefore, the social media companies have to prove that—giving the plaintiffs the benefit of every possible favorable inference—there are *no* allegations in the complaints that can support *any* cognizable legal theory. *See Leon*, 84 N.Y.2d at 87–88. That burden is especially steep here because the companies' core argument for dismissal is based on an affirmative defense: Adopting the "Heads I Win, Tails You Lose" view of the Fourth Department, the companies argue that either Section 230 or the First Amendment bars the plaintiffs' claims. Because plaintiffs need not anticipate an affirmative

[1] Unless otherwise specified, all internal quotation marks, citations, emphases, and alterations are omitted throughout the brief. Additionally, the opening brief for the Salter, Jones, and Stanfield appellants is cited as "Opening Br." The social media companies' joint brief is referred to as "Ans. Br." All other briefs are identified by party name. And unless otherwise specified, in-sentence citations to the defendants' arguments refer to the joint brief.

defense in the complaints, the companies must demonstrate that there is no possible legal theory that the plaintiffs could pursue that would not be barred by Section 230 or the First Amendment. *See* Opening Br. 21 (citing case law).

B. The social media companies do not dispute any of this. Instead, they simply ignore it. The defendants aim their fire at a single theory of liability: that the social media companies are liable because they published racist, violent content. That may be the legal theory the companies would prefer to defend against, but it's not the only possible legal theory that could be supported by the complaints' allegations.

For example, the companies all but ignore the legal theory that Justices Bannister and Nowak—along with virtually every court to have addressed the issue—concluded survives both Section 230 and the First Amendment: social-media addiction. R.6645–48; *see infra* n.2. As Justices Bannister and Nowak recognized, there are more than sufficient allegations in the complaints to support the theory that the social media companies' platforms are "addictive—not based upon the third-party content they show but because of the inherent nature of their design." R.6646; *see* Opening Br. 11–16.

The complaints extensively allege that the defendants intentionally designed their platforms to hook young users. *See* R.2709, 2710–11 ¶¶ 193, 198; R.5078, 5080 ¶¶ 200, 205; R.6184, 6186 ¶¶ 284, 289. As Facebook's founding president put it, the companies "consciously" "exploit[] a vulnerability in human psychology," implementing features designed to keep users scrolling as long as possible, R.2707–08 ¶ 189—regardless of the content, *see* R.2704 ¶ 171; R.5086 ¶ 220; R.6191 ¶ 304. For example, the companies send notifications day and night, to interrupt users who have logged off and draw them back in, *see* R.2796–97 ¶ 562; they make it impossible for users to know whether they have spent five minutes or five hours online, by designing the interface to infinitely scroll and autoplay videos, *see* R.2749, 2756–58 ¶¶ 373, 391–95; R.5095–96 ¶¶ 258–59; R.6200–01 ¶¶ 342–43; they use algorithms that analyze demographic information and behavioral data to drive users to posts that will maximize a user's screentime, *see* R.2803 ¶ 588(b); R.5138 ¶ 462; R.6245 ¶ 575; and they create barriers to deactivation and deletion to stop users from leaving, *see, e.g.*, R.2797 ¶ 562(j); R.5135 ¶ 445(i); R.6242 ¶ 558(i). The result is exactly what the platforms intend: young users can't leave. *See* R.2706–07, 2710 ¶¶ 183–86, 197; R.5076–77, 5079–80 ¶¶ 191–94, 204; R.6182–83, 6185–86 ¶¶ 275–78, 288.

The complaints allege that the social media companies are well aware that keeping young users compulsively stuck to their screens causes serious harm: social isolation, mental health issues, violence. *See* R.2708, 2719 ¶¶ 192, 218, 220; R.5078, 5088–89 ¶¶ 199, 225, 228; R.6184, 6193–94 ¶¶ 283, 309, 312. And, the complaints allege, that's exactly what happened to Payton Gendron, who was only nineteen at the time of the shooting. As Gendron wrote in his diary: "I'm a literal addict to my phone." R.5044 ¶ 78 n.8; R.6152 ¶ 162 n.16. "I'm having a really hard time thinking right now. Why do I always have trouble putting my phone down at night?" R.5044 ¶ 77 n.7; R.6151 ¶ 161 n.15. "It's 2 in the morning … I should be sleeping … I'm just browsing online." R.5044 ¶ 78 n.8; R.6152 ¶ 162 n.16. "I'll admit my mental health has seriously degraded these past few years, especially in the last few months." *Id.*

That addiction left him isolated, disconnected from other people, and emotionless. *See, e.g.*, R.5044 ¶ 78 n.8; R.6152 ¶ 162 n.16 (alleging that Gendron wrote that other people "make me feel so uncomfortable. I've probably spent actual years of my life just being online."). Before the shooting, he wrote: "You know I've been going through these days barely feeling anything. This attack is just something I'm going to do and I really don't feel any emotions connected to it. Everything just seems fake … I have no other choice but to commit this attack." R.5044 ¶ 79 & n.9; R. 6152 ¶ 163 & n.17. It was only in the aftermath of the shooting, disconnected from social media, that Gendron was finally able to realize what he had done. *See, e.g.*, R.2731 ¶ 271, 274–75; R.5093–94 ¶¶ 246, 249–50; R.6198–99 ¶ 330, 333–34.

Taken together, and read in the light most favorable to the plaintiffs, these allegations support a theory that social-media addiction itself—independent of the content the platforms host—was a substantial cause of the shooting. The companies do not seriously argue otherwise. Instead, they emphasize that the complaint also alleges that Gendron was radicalized by hateful, violent, white supremacist content.

But as explained below, an injury can have multiple causes. *See infra* Part V. And plaintiffs may plead allegations that would support multiple—even conflicting—theories. *Plant City Steel Corp. v. Nat'l Mach. Exch., Inc.*, 23 N.Y.2d 472, 477 (1969). Even if the social media companies might have a defense to some (or all) of the allegations they identify, that's not enough. If "*any* aspect" of the complaint supports a cognizable legal theory, a motion to dismiss must be denied. *Condon*, 287 N.Y. at 414–15 (emphasis added); *see also Leon*, 84 N.Y.2d at 88 ("[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.").

The social media companies barely even take on the addiction theory, let alone try to demonstrate that there is no legal theory at all that the plaintiffs could pursue that would not be foreclosed by Section 230 or the First Amendment. For that reason alone, this Court should reject their arguments.

II. The companies cannot show that Section 230 bars every cognizable legal theory that could be supported by the plaintiffs' allegations.

Courts across the country have held that Section 230 does not bar claims against social media companies for designing their platforms to addict young users. That's because Section 230 only bars claims that would hold a social media company liable for its users' posts. *See* Opening Br. 39–40. So the statute is no obstacle to a claim that a platform's design features themselves "keep users on the platform as long as possible, no matter the type of third-party content that may appear." *TikTok,* *Inc. v. Eighth Jud. Dist. Ct.*, 578 P.3d 640, 651 (Nev. 2025). After all, if a company is liable regardless of what content it publishes, it is not being held liable for that content. *See, e.g.*, *Massachusetts v. Meta Platforms, Inc.*, 277 N.E.3d 166, 187 (Mass. 2026) (where the complaint "alleges that the features themselves prolong users' time on the platform," regardless of the content, "the claim is indifferent as to the content published" and Section 230 does not apply); *Soc. Media Cases*, 2023 WL 6847378, at *31–33 (Cal. Super. Ct. Oct. 13, 2023) (where "[t]he features themselves allegedly operate to addict and harm minor users of the platform regardless of the particular third-party content viewed by the minor user," "Section 230 does not shield Defendants from liability for the way in which their platforms actually operate[]").[2]

[2] *See, e.g.*, *Snap, Inc. v. Eighth Jud. Dist. Ct.*, 584 P.3d 771, 2026 WL 501564, at *5 (Nev. Feb. 23, 2026) (because "the State sought to hold TikTok liable for its own conduct in designing an app aimed at cultivating addiction to serve its economic goals of driving ad revenue," the "underlying complaints [were] outside of Section 230 immunity"); *Meta Platforms, Inc. v. Eighth Jud. Dist. Ct.*, 588 P.3d 863, 2026 WL 11229147, at *3 (Nev. 2026) (similar); *North Carolina ex rel. Jackson v. TikTok Inc.*, 2025 WL 2399525, at *7–8 (N.C. Super. Aug. 19, 2025) ("anti-addiction claim" faulting TikTok for "offering a combination of features and social rewards that foster compulsive use by minors … does not implicate section 230, as many state courts have held"); *Tennessee v. Meta Platforms, Inc.*, No. 23-1364-IV, Slip Op. at 24, https://perma.cc/K5D3-WWJE (Tenn. Super. Ct. Oct. 17, 2024) (Section 230 is no bar where "it is the design and the way Instagram functions that makes it addictive and thus harmful to consumer … not the content itself."); *Vermont v. Meta Platforms, Inc.*, 2024 Vt. Super. LEXIS 146, at *13 (Vt. Super. Ct. July 28, 2024) (Section 230 does not bar claim "that the intentional *addictiveness* [of the platform design] itself harms Young Users' mental health, separate and apart from the *content* of what they see."); *Utah v. Meta Platforms, Inc.*, No. 230908060, Slip Op. at 11, https://perma.cc/69YA-9URD (Utah 3d Dist. July 25, 2024) (Section 230 is no bar because "the Division's claims rest on the Defendant's own acts: their use of features and practices to target children into spending excessive amounts of time on their platforms"); *Arkansas v. Meta Platforms, Inc.*, No. 57CV-23-47, Slip Op. at 5, https://perma.cc/C7PP-Y6LW (Ark. Cir. Ct. June 13, 2024) (Section 230 is no bar where "the design features of Meta's platforms themselves are [allegedly] hazardous to adolescents because the features are designed to addict and exploit the frailties of developing brains."); *District of*

Every Fourth Department justice here, majority and dissent alike, agreed: Section 230 does not bar social-media addiction claims. *See* R.6643–44, 6648. Instead of taking that ruling head on, the social media companies focus on arguing that Section 230 bars claims that *would* hold them liable for the content their users publish. Again, though, that is not enough to satisfy their burden. They cannot demonstrate that *every* legal theory is foreclosed merely by ignoring the ones they find difficult to defend.

Columbia v. TikTok, Inc., No. 2024-CAB-006377, at Tr. 65–66, https://perma.cc/F6W9-4QVG (D.C. Super. Ct. Feb. 24, 2025) (Section 230 is no bar where harmful "addiction is not to the content, but to th[e] expectation and anticipation [of dopamine] which is specifically engineered by" the platform); *New Hampshire v. TikTok, Inc.*, No. 217-2024-CV-00399, Slip Op. at 26–27, https://perma.cc/LXV9-UAAA (Merrimack Super. Ct. July 8, 2025) (Section 230 does not bar claims alleging liability "not in the way [TikTok's features] publish certain content, but in the way they manipulate young minds causing addiction, FOMO, and other psychological effects."); *New Hampshire v. Meta Platforms, Inc. et al.*, No. 217-2023-CV-00594, Slip Op. at 25–26, https://perma.cc/D493-JCLY (Merrimack Sup. Ct. Dec. 10, 2024) (Section 230 is no bar where "Meta's product design features, in and of themselves, are [allegedly] harmful to New Hampshire children regardless of the substance of the third-party content displayed."); *Montana v. Meta Platforms, Inc. et al.*, No. BDV-2024-797, Slip Op. at 26, https://perma.cc/4VUR-NCT9 (Mont. Dist. Ct. July 7, 2025) (Section 230 is no bar because "the State's claim is based on Meta's actions, namely: 'creating and marketing an app that is intentionally addictive'"); *District of Columbia v. Meta Platforms, Inc. et al.*, No. 2023-CAB-6550, Slip Op. at 20, https://perma.cc/BY7B-WFC5 (D.C. Super. Ct. Sept. 9, 2024) (similar); *Oklahoma v. Meta Platforms, Inc.*, No. CJ-2023-180, Slip Op. at 6, https://perma.cc/MLE8-Z937 (Okla. Dist. Ct. Nov. 20, 2024) (similar); *New Mexico v. Meta Platforms Inc. et al.*, No. D-101-CV-2023-02838, Slip Op. at 2, https://perma.cc/75FR-LM89 (N.M. 1st Jud. Dist. Ct. June 21, 2024) (similar); *Utah v. TikTok, Inc.*, Case No. 230907634, Slip Op. at 13, https://perma.cc/8CKX-FKL9 (Utah 3d Dist. Nov. 12, 2024) (similar); *Arkansas v. TikTok Inc.*, No. 12CV-23-65, Slip Op. at 13–14, https://perma.cc/6F98-3LK6 (Ark. Cir. Ct. May 15, 2024) (similar); *Nevada v. TikTok, Inc.*, No. A-24-886127-B, Slip Op. at 7–8, https://perma.cc/C8KQ-2NFH (Nev. Dist. Ct. Sept. 24, 2024) (similar); *New York v. TikTok, Inc. et al.*, No. 452749/24, Tr. at 66, https://perma.cc/ME7D-ECKU (N.Y. Sup. Ct. May 28, 2025) (similar); *Illinois v. TikTok Inc. et al.*, Case No. 2024CH09302, Slip Op. at 19–20, https://perma.cc/EHC6-36KJ (Cook Cnty. Cir. Ct. June 12, 2025) (similar); *South Carolina v. TikTok Inc. et al.*, No. 2024-CP-40-06018, Slip Op. at 10–11, https://perma.cc/6R7Q-2DZC (Ct. of Common Pleas, 5th Jud. Cir. May 6, 2025) (similar); *Vermont v. TikTok Inc.*, 2026 WL 1559356, at *6 (Vt. Super. Ct. May 27, 2026) (similar).

As our opening brief explains (at 25–48), there are three independent reasons why Section 230 does not bar an addiction theory of liability. First, Section 230 only applies to claims that "treat[ ]" an internet company as a "publisher"—that is, claims that seek to hold the company vicariously liable for their users' posts. 47 U.S.C. § 230(c)(1). And holding a company liable for intentionally addicting young users—regardless of what content they view—does not impose liability for that content. Second, Section 230 does not offer a shield to companies that materially contributed to the misconduct alleged. And, here, the misconduct alleged is the companies' own design choices. Finally, because Section 230 bars only publisher liability—not distributor liability—it does not apply where, as here, an internet company's alleged misconduct is knowing.

The social media companies have almost no response. The strongest argument they can muster (at 14) is that this Court, in *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281 (2011), seemed to suggest in passing the view that Section 230's bar on publisher liability also silently bars distributor liability—that is, it applies to claims that seek to hold a company liable for its users' posts even if the company knew the posts were harmful or illegal. But, again, the addiction theory does not hold the companies liable for its users' posts at all. Under *Shiamili*, and the consensus view of courts across the country, that means that Section 230 does not provide a defense. *See Shiamili*, 17 N.Y.3d at 288 (explaining that Section 230 bars claims that would hold an internet company liable for "other parties' potentially injurious messages," simply because the company serves as an intermediary); Opening Br. 30–48.

A. The social media companies have not demonstrated that every legal theory supported by the complaints' allegations would hold them liable solely because they published their users' posts.

This Court can begin and end its Section 230 analysis with publisher liability. Section 230 is not a categorical bar on imposing liability on internet companies. It provides a defense only to claims that "treat[]" an internet company as "the publisher" of its users' posts. 47 U.S.C. § 230(c)(1). The companies do not dispute that a claim treats a company as a publisher when it imposes liability on that company because it disseminated unlawful content. *See* Opening Br. 39. Conversely, everyone agrees, Section 230 does not bar claims that do not require holding the company liable for its users' posts—even if content is in the causal chain that led to the plaintiff's injury. *See, e.g.*, Ans. Br. 25.

That's sufficient to reject the companies' Section 230 defense. A claim that a social media company intentionally designed its product to addict kids and teens—regardless of the content they view—by definition, does not hold the company liable for disseminating improper content. Countless courts have held as much. *See supra* n.2.

The companies devote most of their brief to arguing that Section 230 bars claims that "take issue with the fact that [a company] allow[s] racist, harmful content to appear." Ans. Br. 23–24 (quoting *M.P. by & through Pinckney v. Meta Platforms Inc.*, 127 F.4th 516, 525 (4th Cir. 2025)). But that argument is simply not responsive to the theory that the companies designed their platforms to be addictive.[3] When the companies do turn to that theory, they have very little to say.

1. The companies' primary argument (at 33–35) is that Section 230 necessarily bars any legal theory based on those algorithms. They assert that recommendation algorithms provide posts to users, so imposing liability on a company for its recommendation algorithm necessarily treats that company as a publisher within the meaning of Section 230. But as the companies concede (at 24), whether a claim treats an internet company as a publisher depends on the duty that the claim would impose. *See* Opening Br. 38–43. The duty of a publisher is to avoid disseminating unlawful content. *Id.* at 39. But not every theory that would impose liability on a company because of its algorithm arises from a duty to avoid disseminating improper content.

[3] The same is true of most of the cases the companies cite. Those cases involved "decisions relating to the monitoring, screening, and deletion of [third-party] content." *In re Facebook*, 625 S.W.3d 80, 93 (Tex. 2021); *see, e.g.*, *M.P.*, 127 F.4th at 525 ("Simply stated, M.P. takes issue with the fact that Facebook allows racist, harmful content to appear on its platform and directs that content to likely receptive users to maximize Facebook's profits."); *Shiamili*, 17 N.Y.3d at 289–90 (bringing defamation and unfair competition by disparagement claims against blog operators for their "exercise of a publisher's traditional editorial functions"); *Force v. Facebook*, 934 F.3d 53, 64 (2d Cir. 2019) (seeking to hold Facebook liable for its "alleged failure to delete content from Hamas members' Facebook pages"); *Dyroff v. Ultimate Software Grp.*, 934 F.3d 1093, 1095 (9th Cir. 2019) (alleging claims based on recommendation of posts about illegal drugs).

See, e.g., *Massachusetts v. Meta*, 277 N.E.3d at 188 ("Contrary to Meta's argument, the fact that a claim concerns publishing activities, including the use of algorithms in connection with publishing activities, is not enough to bring the claim within the immunity provided by § 230(c)(1).").[4] Indeed, courts have repeatedly held otherwise. *See, e.g.*, *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024); *TikTok v. Eighth Jud. Dist. Ct.*, 578 P.3d at 651; *Vermont v. TikTok*, 2026 WL 1559356, at *6.[5]

Here, the complaints' allegations support a theory that recommendation algorithms are one way by which the social media companies ensure that young users stay hooked. The companies collect a trove of demographic and behavioral data on each user and program their algorithms to use this data to create a feed for each user that will maximize their engagement—that is, to keep the user on the

[4] The courts that have held otherwise have generated vociferous dissent. For example, the defendants repeatedly cite *Doe 1 v. Meta Platforms, Inc.*, 174 F.4th 1159 (9th Cir. 2026), but not a single judge on that panel believed that claims based on algorithms are barred by Section 230. *See id.* at 1171 (Berzon, J., concurring); *id.* at 1174 (R. Nelson, J., concurring). They concluded otherwise only because they felt bound by earlier precedent that had taken an expansive view of Section 230 unsupported by its text. *See id.* at 1168.

[5] The companies also attempt (at 31) a statutory argument based on the definition of an "access software provider." 47 U.S.C. § 230(f)(4). This argument is difficult to follow, but it appears to be this: Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as [a] publisher." An "interactive computer service" includes an "access software provider." *Id.* § 230(f)(2). And an "access software provider," in turn, is a "provider of software … , or enabling tools that," among other things, "filter," "pick," or "organize" content. *Id.* § 230(f)(4). Thus, one of the kinds of companies that Section 230 prohibits treating as a publisher is a company that provides tools to "filter," "pick," or "organize" content. The companies argue, therefore, that Section 230 necessarily bars imposing liability for any tool that filters, picks, or organizes content. But Section 230 requires *both* that a company be an access software provider *and* that the claim treat the company as a publisher. Thus, the structure of Section 230 only further demonstrates that a claim based on providing tools to filter, pick, or organize content does not necessarily treat the defendant as a publisher.

platform as long as possible. *See* R.2704–05, 2707 ¶¶ 172, 179, 187–88; R.5074–75, 5077 ¶¶ 182, 187, 195–96; R.6180–81, 6183 ¶¶ 266, 271, 279–80. The complaints can be read, then, to allege that the platforms do not consider the content of users' posts; they consider only data about their engagement.

The duty underlying a claim that these algorithms are designed to addict young users is not that social media companies must avoid publishing hateful, violent content; it's that they have a duty to design a reasonably safe product. And a product that runs on an algorithm intentionally designed to addict kids and teens is not reasonably safe. Courts have repeatedly held that Section 230 does not bar holding companies accountable for designing algorithms to addict young users. *See, e.g.*, *Massachusetts v. Meta*, 277 N.E.3d at 188; *TikTok v. Eighth Jud. Dist. Ct.*, 578 P.3d at 651; *Vermont v. TikTok*, 2026 WL 1559356, at *6.

2. But even if the companies were right about algorithms, that's not enough. The complaints allege that the companies have implemented a host of features designed to addict users. *See supra* Section I.B; Opening Br. 12–13. And, besides algorithms, the social media companies don't meaningfully address any of them. They do not argue, for example, that Section 230 requires that companies be permitted to incessantly ping teens' phones day and night or to make it impossible to deactivate an account.[6]

The companies try to wave off this failure in a footnote, asserting that the complaints don't allege that these features "have anything to do with his attack." Ans. Br. 34 n.10. That misses the point. The theory is not that Gendron was notified one too many times and that drove him to commit the shooting. It is that these features cause the social media platforms to be addictive to young users—that's their whole point—and that addiction was a substantial cause of Gendron's acts. Because the companies don't address any of these features, they necessarily have not shown that Section 230 bars an addiction theory of liability based on those features.[7]

3. Finally, the companies briefly take aim (at 37–38) at allegations that the companies could have implemented safety measures or provided warnings. But, as with the rest of their arguments, the companies again only contend with a theory that they should be held liable because they published hateful content. A warning that

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[6] Of course, not all of the platforms work the same way. But neither the trial court nor the Fourth Department considered these distinctions. And the need for factual development only highlights that dismissal cannot be granted as a matter of law.

[7] The social media companies also assert (at 34 n.10) that the plaintiffs "do not allege that Gendron used [these] features." It is not clear what they mean. Imposing barriers to deleting an account or designing the platform to make it impossible for users to realize how long they have been scrolling are not options users choose. They are features built into the design of the platform. And, in any event, at the motion to dismiss stage, a complaint is "deemed to allege whatever can be implied from its statements by fair and reasonable intendment." *Condon*, 287 N.Y. at 414. It is not unreasonable to infer that in alleging the platforms' addictive features, the plaintiffs intended to allege that they applied to Gendron.

the companies' platform is addictive says nothing about content at all. Indeed, the complaints' allegations that companies can avoid liability by implementing safety measures—or providing a warning—without monitoring, editing, or declining to publish third-party content only further demonstrate that they can support a legal theory that does not impose publisher liability. *See* Opening Br. 39–40; *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 744 (9th Cir. 2024) (explaining that, if a company need not "actively vet and evaluate third party" content, Section 230 would not bar failure-to-warn claims).

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Virtually every court to have addressed the issue has concluded that Section 230 does not bar claims based on social-media addiction. That's not because these courts allow claims otherwise barred by Section 230, as long as they're labeled product liability claims. It's because nothing in the statute requires that companies be permitted to design their platform to manipulate children's dopamine systems to keep them addicted to social media. This Court should reject the companies' plea to hold otherwise.

B. The companies concede that Section 230 does bar claims that they materially contributed to the alleged illegality, and they all but concede that the plaintiffs allege as much here.

Even if the social media companies were correct that every legal theory supported by the complaints depends on content, Section 230 still would not apply because the complaints allege that the companies materially contributed to the illegality of that content. The companies recognize (at 40) that, because Section 230 only bars claims that treat an internet company as the publisher of information "provided by *another* information content provider," 47 U.S.C. § 230(c)(1) (emphasis added), the statute provides no defense if the company is "responsible, in whole or in part, for [the content's] creation or development." *Id.* § 230(f)(3). And the companies agree (at 41–42) that the statute provides no defense to an internet company that "materially contributed to what made the content unlawful." *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 128 (4th Cir. 2022); *accord Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008).

But the companies dispute whether their conduct in designing addictive platforms amounts to such a material contribution.[8] They contend (at 41) that an internet company may "augment" content, *Shiamili*, 17 N.Y.3d at 289–90, make it more "visible, available, and usable," *Force*, 934 F.3d at 70, or "proliferat[e] and disseminat[e]" it, *Kimzey v. Yelp!*, 836 F.3d 1263, 1271 (9th Cir. 2016), without

[8] To the extent the companies suggest (at 41) that the plaintiffs should have raised this argument below, that misplaces the burden at the pleading stage. Because Section 230 is an affirmative defense, *see Calise*, 103 F.4th at 738 n.1, the companies bear the burden of showing that the defense forecloses the plaintiffs' allegations from forming any claim that would *not* "treat[]" the companies as "publisher[s]" of content "provided by another information content provider." 47 U.S.C. § 230(c)(1). Whether the companies materially contributed to the alleged illegality is subsumed in that inquiry.

materially contributing to the content's unlawfulness. But all of those discrete "interventions," *cf.* Ans. Br. 41, are distinct from the conduct at issue here.

The plaintiffs' complaints do not allege that the social media companies "co-created" the content at issue by offering any one particular feature. *Cf.* Ans. Br. 42. Rather, they allege that the companies intentionally created highly addictive platforms and force-fed users posts to fuel their addiction based on their demographic profiles and behavioral data—sending them notifications day and night, and trapping them in "psychological rabbit holes" they can't escape. *See, e.g.*, R.2664, 2749, 2751–52, 2756–58, 2779, 2796–97 ¶¶ 2, 373, 380–81, 391–95, 469, 562; R.5095–96, 5105–06 ¶¶ 258–62, 296; R.6200–01, 6210 ¶¶ 342–46, 379.

That conduct is not "simply … ordinary publishing activity." *Cf.* Ans. Br. 44. It is a violation of state tort law, regardless of the companies' use of "tools meant to facilitate the communication and content of others." *Dyroff*, 934 F.3d at 1098. And courts have explicitly rejected the companies' argument (at 42–43) that "internet companies enjoy absolute immunity from all claims related to their content-neutral tools." *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1094 (9th Cir. 2021); *see also, e.g.*, *Liapes v. Facebook, Inc.*, 313 Cal. Rptr. 3d 330, 347 (2023) (rejecting the argument that Facebook's "ad tools are neutral because third parties, not Facebook, create the allegedly illegal content").

To the contrary, "[t]hose who use the internet thus continue to face the prospect of liability, even for their 'neutral tools,' so long as plaintiffs' claims do not blame them for the content that third parties generate with those tools." *Lemmon*, 995 F.3d at 1094.[9] That's because "Section 230's protection of third-party publishing conduct … reach[es] only 'traditional' activities of publication and distribution—not every modern activity that bears some remote resemblance to it." *Doe 1 v. Meta*, 174 F.4th at 1176 (R. Nelson, J., concurring); *accord Gonzalez v. Google*, 2 F.4th 871, 913–18 (9th Cir. 2021) (Berzon, J., concurring), *vacated on other grounds*, 598 U.S. 617 (2023). The statute thus bars imposing liability on companies just because they "serve as intermediaries for other parties' potentially injurious messages." *Henderson*, 53 F.4th at 127. But when a company goes "beyond the exercise of traditional editorial functions" and "materially contributes" to the alleged illegality, it "stops being a mere intermediary for another party's message." *Id.* at 128. And it is the company's own conduct that causes harm. *Id.*

Lemmon v. Snap is illustrative. As our opening brief explains (at 40–41), in that case, the parents of two children who died in a high-speed car accident brought product-defect claims against Snap. *See* 995 F.3d at 1087. They alleged that Snapchat

[9] The statutory definition of an "access software provider" doesn't undermine that conclusion. *Cf.* Ans. Br. 43. As explained above, *see supra* Section II.B.2, if every activity listed in Section 230(f)(4) were a "publishing" activity, every "access software provider" would also be treated as a "publisher," and the language in Section 230(c)(1) would be meaningless.

employed defective features—including an incentive system and speed filter—that encouraged teen users to drive dangerously fast. *See id.* at 1088–89, 1091. After concluding that Section 230 did not apply under a duty-based analysis, *see id.* at 1092, the court held that the defense was also unavailable for another reason: The claim did not "turn on 'information provided by another information content provider,'" but instead "fault[ed] Snap solely for Snapchat's architecture, contending that the app's Speed Filter and reward system worked together to encourage users to drive at dangerous speeds." *Id.* at 1093. Because the claim did not seek to hold Snap responsible "in the least for publishing" any user's post, it stood "independently of the content that Snapchat's users create with the Speed Filter." *Id.*

The same reasoning holds here. Even if a social media company acts "as a publisher in releasing [its platform] and its various features to the public," the content-agnostic, addiction theory supported by the complaints' allegations "still rests on nothing more than" each company's "own acts." *Id.* at 1094 (quoting *Roommates.com*, 521 F.3d at 1165). And Section 230 does not provide any defense to claims based on a company's own conduct. *See Roommates.Com*, 521 F.3d at 1168.

C. The companies haven't meaningfully explained why Section 230 forecloses liability based on knowing misconduct.

Section 230 still would not foreclose the complaints' allegations for a third, independent reason. The social media companies concede that if Section 230 bars only publisher liability and not distributor liability—that is, if it does not bar claims based on knowing misconduct—it is not a defense to the plaintiffs' claims here.[10] Instead, they argue that although the text of Section 230 prohibits only "publisher" liability, there is an additional unwritten prohibition on distributor liability as well. Their arguments largely repackage the Fourth Circuit's decision in *Zeran v. America Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997), and this Court's passing reference to it in *Shiamili*, 17 N.Y.3d at 288–89. But as a growing chorus of judges and Justices has explained, the text and history of Section 230 make clear that Congress sought to prohibit publisher liability—that is, vicarious liability imposed solely because a company republished a statement—not a distributor's liability for knowing misconduct.

1. The companies argue (at 48) that the statute does not explicitly exempt knowing misconduct. But that's exactly what limiting the statute to "publisher" liability accomplishes. When Section 230 was enacted, that concept had "a well-defined meaning at common law." *Calise*, 103 F.4th at 738. Publisher liability was strict, vicarious liability imposed solely because a company published information—no knowledge necessary. *See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (statement of Thomas, J.); Opening Br. 6–8.

[10] The one exception is Twitch, but even Twitch ultimately concedes (at 31) that the complaints allege that it had knowledge.

Distributor liability was different. Unlike publishers, at common law, distributors could only be held liable if "they knew or had reason to know" that they were distributing unlawful content. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995) (collecting cases); *see* Restatement (Second) of Torts § 581 (1977). When Congress "transplanted" the concept of publisher liability from the common law into Section 230, it brought this traditional understanding with it. *Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019).

The companies try to elide that common-law distinction (at 47–49) by arguing that distributor liability is merely a subset of publisher liability. The companies' sole support for that assertion, however, is *Zeran*. They don't acknowledge—much less grapple with—the case that led to Section 230's passage: *Stratton Oakmont*. That decision explained that publishers were distinct from distributors at common law. *See* 1995 WL 323710, at *3. And Congress enacted Section 230 explicitly "to overrule *Stratton-Oakmont*" because it imposed publisher liability *instead* of distributor liability. S. Rep. No. 104-230, at 194 (1996) (Conf. Rep.). In overruling the imposition of "publisher" liability by *Stratton Oakmont*, then, it makes perfect sense that Congress used the word "publisher" in the same way that *Stratton Oakmont* used it. *See Malwarebytes*, 141 S. Ct. at 16.

The companies don't argue otherwise. Instead, they assert (at 49) that recognizing the common-law distinction between publisher and distributor liability cannot be reconciled with the statute's prohibition of treating an internet company as a speaker. *See* 47 U.S.C. § 230(c)(1) ("No [internet company] shall be treated as the publisher or speaker of any information provided by another information content provider.") According to the defendants, "[a] speaker is a speaker regardless of whether they know that the content they are speaking is unlawful." But the inclusion of the word "speaker" only undermines the companies' argument.

If, as the companies argue, Congress used the term "publisher" in its broadest sense to describe everyone involved in conveying information to the public, including "distributors," *cf.* Prosser & Keeton on the Law of Torts § 113, at 799 (5th ed. 1984), there would have been no need to include the term "speaker." A speaker publishes information, so a prohibition on treating a company as a publisher—on the companies' view—would automatically include speakers, publishers, and distributors. But Congress only barred claims that treat an internet company as two of those categories. *See* 47 U.S.C. § 230(c)(1). That choice must be given meaning, and "[a]ny construction that would render a portion of the statute superfluous must be avoided." *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 38 N.Y.3d 643, 651 (2022).[11]

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[11] The companies also suggest (at 46) that "subsequent legislative history contains explicit support" for the proposition that Section 230 bars distributor liability. *Barrett v. Rosenthal*, 146 P.3d 510, 523 (Cal. 2006). But they fail to explain what that subsequent history says, and, in any event, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Massachusetts v. EPA*, 549 U.S. 497, 530 n.27 (2007); *accord New York v. Lawrence*, 250 N.Y. 429, 447–48 (1929) (similar).

2. Unable to seriously refute the statute's text or common-law origins, the companies contend (at 46–49) that every court to consider a distributor-liability exception to Section 230 has rejected it. But three of the cases they cite (at 48) simply followed the Fourth Circuit's lead in *Zeran*. *See In re Facebook*, 625 S.W.3d at 91; *Barrett*, 146 P.3d at 518; *Doe v. Am. Online*, 783 So. 2d 1010, 1017 (Fla. 2001). And the fourth explicitly declined to "resolve the dispute at all." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1104 (9th Cir. 2009).[12]

After more closely examining the statute, several judges across the country have agreed that Section 230 does not shield internet companies from liability for knowing misconduct. *See, e.g.*, *Malwarebytes*, 141 S. Ct. at 14 (statement of Thomas, J.); *Calise*, 103 F.4th at 747 (R. Nelson, J., concurring); *Doe through Roe v. Snap, Inc.*, 88 F.4th 1069, 1071 (5th Cir. 2023) (Elrod, J., dissenting); *Anderson*, 116 F.4th at 192 (Matey, J., concurring in part); *see also Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (Easterbrook, J.).

That leaves the companies with *Shiamili*, which they insist (at 45–46) dooms knowledge-based claims. When deciding *Shiamili*, however, this Court did not have

[12] The Ninth Circuit has since acknowledged that its precedents have "expanded Section 230 and discarded the longstanding distinction between 'publisher' liability and 'distributor' liablility that existed at common law." *Doe 1 v. Meta*, 174 F.4th at 1170 n.5. But, as noted above, it did so in a decision where all three judges on the panel wrote separately to criticize the circuit's precedents for "unduly expand[ing] the scope of section 230 immunity," *id.* at 1171 (Berzon, J., concurring), and "straying from the original public meaning of the statutory text and creating an all-purpose liability shield for internet platforms," *id.* at 1174 (R. Nelson, J., concurring).

the benefit of the "growing chorus of voices calling for a more limited reading of the scope of [S]ection 230 immunity." *Gonzalez*, 2 F.4th at 913 (Berzon, J., concurring). Consistent with the "view that § 230(c) was intended to incorporate common law concepts and bring them online," *Calise*, 103 F.4th at 747 (R. Nelson, J., concurring), these judges have reasoned that the statute "does not preempt distributor liability," *Anderson*, 116 F.4th at 193 (Matey, J., concurring in part). So where, as here, there are allegations of knowledge, Section 230 provides no defense. To the extent this Court has previously held otherwise, it should reconsider that decision.

III. The social media companies haven't satisfied their burden of showing that the First Amendment bars the allegations from forming a viable legal theory either.

The social media companies attempt a similar two-step maneuver to argue that the First Amendment bars the claims here: First, they ignore the content-agnostic addiction theory in favor of a theory they'd rather defend against (that the platforms are liable for publishing hate speech). And then they attack that theory, invoking inapposite cases holding that tort claims based on disfavored viewpoints are not actionable. The tactic fares no better in the First Amendment context than it does with Section 230. Nothing about the theory that the companies engage in tortious conduct by addicting users (including Gendron) to their products, *irrespective* of the content involved, reaches First Amendment-protected activity. Even if it did, the theory would involve, at most, a content-neutral restriction that survives the intermediate-scrutiny standard the companies haven't even bothered to address.

Court after court facing this gambit have held that the First Amendment does not bar addiction-based claims like the ones here. Because the companies cannot meet their burden of showing that the First Amendment forecloses every possible legal theory, this Court should too.

A. The Court should reject the companies' attempt to ignore the complaints' viable theories.

The premise of the companies' First Amendment defense is that the complaints would necessarily "impose liability on [them] for having made third-party speech available to Gendron." Ans. Br. 54; *see also, e.g.*, *id.* at 57 ("Plaintiffs would impose liability on online publishing services for the effects of the third-party speech they communicate to their users."). We have already explained why that premise is mistaken. *See supra* Part I. One of the theories supported by the complaints is that the companies' social media platforms are addictive—not because of the content they show, but because of their intentional design.

That decimates much of the companies' First Amendment argument. Because the addiction theory is not about the "influence of violent content" that Gendron viewed, the companies' long list of cases (at 52 & n.20) holding that video-game and television producers cannot be held liable for the "influence of violent content" they distribute are inapposite. So too are the cases (at 54–56) on viewpoint-based restrictions on speech.

The Fourth Department's First Amendment analysis—which the social media companies barely mention—accepted that unilateral recharacterization of the complaints. *See* R.6641 ("[T]he social media defendants are entitled to First Amendment protection for third-party content recommended to the shooter by algorithms."). This Court should not make the same mistake.

B. The First Amendment does not protect non-expressive features designed to addict children.

As for the addiction theory supported by the complaints, the companies have fallen far short of satisfying their burden of showing that the First Amendment bars every possible claim. That's for two reasons. For one, the companies don't even attempt to address any of their platforms' non-algorithmic addictive features, so they can't possibly prove that the First Amendment would bar claims targeting those features. Nor have the companies shown that their algorithms are expressive either, such that the First Amendment is even implicated. And, even if the First Amendment did apply, the companies haven't shown that the claims here—content-neutral claims that do not actually impair the companies' ability to share their purported messages—would fail First Amendment scrutiny.

1. The threshold question in any First Amendment analysis is whether the proposed regulation actually restricts protected speech at all. Where a claim would not prohibit "the dissemination of particular materials" or ideas, it "has nothing to do with any expressive conduct at all." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 n.2 (1986). And, in that scenario, "the First Amendment simply [will] not apply to the case." *Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 636 (7th Cir. 1990); *see, e.g.*, *HomeAway.com, Inc., v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019) (claim targeting "nonspeech, nonexpressive conduct" will "not implicate the First Amendment"). It makes no difference whether the regulated entity is in the business of selling speech. "The fact that the publisher handles news," or any other protected speech, "does not afford the publisher a particular constitutional sanctuary in which he can with impunity violate laws regulating his business practices." *Associated Press v. United States*, 326 U.S. 1, 7 (1945).

For that reason, courts across the country have held that the First Amendment does not bar claims based on social-media addiction.[13] The companies offer no reason for this Court to depart from that consensus.

Indeed, with the exception of algorithms, the companies have nothing meaningful to say about those features at all. They do not explain, for instance, how limits on autoplay or infinite scroll would prevent the distribution of any protected

[13] *See, e.g.*, *Utah v. TikTok*, Slip Op. at 14–15; *New Hampshire v. Meta*, Slip Op. at 27; *Illinois v. TikTok*, Slip Op. at 23–25; *Vermont v. Meta*, 2024 Vt. Super. LEXIS 146, at *17–18; *Nevada v. TikTok*, Slip Op. at 8–9; *Oklahoma v. Meta*, Slip Op. at 7; *District of Columbia v. Meta*, Slip Op. at 25; *Utah v. Meta*, Slip Op. at 13; *New Mexico v. Meta*, Slip Op. at 2; *New Hampshire v. TikTok*, Slip Op. at 29; *South Carolina v. TikTok*, Slip Op. at 12; *Social Media Cases*, 2023 WL 6847378, at *47.

content when the exact same videos or posts would be presented to the user once they simply click the play button or click for the next post. Nor do the companies explain why pestering users with notifications is entitled to First Amendment protection, especially since the plaintiffs do not seek a categorical prohibition on notifications, only limits on their number and timing (akin to a rule that permits solicitors to ring a doorbell once but sanctions them doing so ten times in a row). *See, e.g.*, *District of Columbia v. TikTok*, Tr. at 74–76 ("TikTok is not … expressing any message by allowing its users to continue to scroll from one video to the next" or "by sending notifications to children" during the school and night hours).

The companies' failure to make *any* showing with respect to the addiction claims targeting their platforms' non-algorithmic features—their burden on a motion to dismiss—means that, at a minimum, an addiction theory is not barred by the First Amendment. The First Amendment inquiry, therefore, can end here: The defendants cannot meet their burden to show that every theory is barred.

But the companies' arguments about their platforms' algorithms are no more persuasive. As our opening brief explains (at 51–52), the complaints don't allege that those algorithms are expressive. Rather, the complaints can be read to allege that the platforms rely on the data they harvest to deliver users posts that will maximize screentime—not based on the content of those posts, but on each user's demographic profile, behavioral data, and engagement. *See, e.g.*, R.2751–52 ¶¶ 379–81; R.5096, 5105–06 ¶¶ 260–62, 296; R.6201, 6210 ¶¶ 344–46, 379. The platforms then analyze each user's engagement to deliver even more content that reflects the user's increasingly fine-grained profile again, and again, and again, "creating a feedback loop that encourages users, including children, to spend [even] more time on the platform[s]." R.2779 ¶ 469; *see, e.g.*, R.5096, 5105–06 ¶¶ 260–62, 296; R.6201, 6210 ¶¶ 344–46, 379.

Those allegations bring the companies' algorithms squarely within what the U.S. Supreme Court recently declined to find is protected under the First Amendment. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 736 & n.5 (2024). As Justice Barrett recognized in her concurrence, those types of algorithms don't implement a human's "inherently expressive choice to exclude a message they did not like from their speech compilation." *Id.* at 746 (Barrett, J., concurring). They just present content "automatically to each user" to achieve the highest possible levels of engagement. *Id.* Far from implicating the "exercise of editorial judgment," then, these algorithms pose "different" First Amendment considerations. *Id.* at 746. And unlike a human librarian suggesting books or a friend making a playlist, *cf.* Ans. Br. 65–66, they are "probably … not expressive." *NetChoice, LLC v. Bonta*, 152 F.4th 1002, 1014 (9th Cir. 2025) (citing *Moody*, 603 U.S. at 746 (Barrett, J., concurring)).

The companies offer three reasons why their First Amendment defense isn't barred anyway.

First, they assert (at 62) that *Moody* itself already held that Meta's and YouTube's algorithms receive First Amendment protection. That, of course, ignores the other defendants in the case. But it is not correct even as to Meta and YouTube. *Moody* didn't hold, as a matter of law, that those companies' algorithms deliver posts based on the content of those underlying posts. *See id.* at 740. Rather, it held that when Meta and YouTube choose not to publish certain content because of their moderation policies, the First Amendment protects the platforms from being forced to do so by the government—even if the entity uses an algorithm to execute its choice. *Id.* at 736. This case involves entirely different allegations about different algorithms—not the companies' algorithms that moderate content, but their engagement algorithms that feed posts to users based on their behavioral data. *Cf. id.* at 744 (emphasizing the holding was based "on the current record"). *Moody*, an opinion vacating a preliminary injunction issued without factual development, does not establish facts about how Meta and YouTube actually operate that nobody going forward can contest.

To the contrary, in criticizing the companies' attempt at a facial challenge, *Moody* establishes that these are fact- and product-specific questions that depend on how the record in each case develops. *Id.* at 726; *see also Bonta*, 152 F.4th at 1020 ("[T]he court cannot speculate whether a law unduly burden[s] expression without a developed record that explains … how [the companies'] platforms work."). That counsels in favor of allowing this case to proceed to discovery, not using the *Moody* record as a one-size-fits-all characterization to decide the issues prematurely here.

Second, the companies claim (at 63) that, because the complaints allege that the algorithms fed Gendron content he did not initially want, they do not fit within Moody's exception. This argument—based on *Moody*'s hypothesized algorithm that "giv[es] [users] the content they appear to *want*, without any regard to independent content standards," *id.* at 736 & n.5 (emphasis added)—misunderstands the distinction that *Moody* drew. The critical point for the Court was not that the hypothetical algorithm fed users what they "want" (as opposed to an algorithm that fed users what they hate), but that it "respond[ed] solely to how users act online" without regard to a platform's ideas. That's what the complaints allege here. *See supra* Section I.B.

Third, the companies argue (at 65–66) that, even if the complaints allege algorithms of the sort that *Moody* declined to reach, those purely engagement-driven algorithms are still protected by the First Amendment. There's a reason they leave this argument for last. As Justice Barrett explained in her *Moody* concurrence, the First Amendment protects the right of "each person to decide for themselves the ideas and beliefs deserving of expression, consideration, and adherence." *Id.* at 746 (Barrett, J., concurring) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994)). But the algorithms here relinquish that right and instead allow each user's behavior to dictate the content they receive. When a person (or here, a company) deploys a product without actually making a "choice" to "propound a particular point of view," regulating that product does not interfere with any First Amendment protected activity. *Id.* (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995)).

Multiple courts have recognized as much. *See, e.g.*, *TikTok v. Eighth Jud. Dist. Ct.*, 578 P.3d at 652 (explaining that *Moody* did not resolve "how the First Amendment would apply to algorithms and other design features that employ user-interaction data to shape an addictive user experience"); *New York v. TikTok*, Tr. at 69 (*Moody* inapplicable where design features alleged to "automatically, and without expressive curation, create an addictive environment that entices users to stay on the app to the detriment of their own health.").[14] This Court should as well.

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[14] *See also, e.g.*, *District of Columbia v. Meta*, Slip Op. at 2, 28 ("So although regulations of community norms and standards sometimes implicate expressive choices, the design features at issue here"—which included Meta's algorithm—"do not."); *Oklahoma v. Meta*, Slip Op. at 7 ("Here, the State's claims relate to Meta's algorithms and various design elements built to induce compulsive use by young users. Therefore, by the Supreme Court's own words, *Moody* is inapplicable."); *Vermont v. Meta*, 2024 Vt. Super. LEXIS 146, at *18 (finding *Moody* "does not change the result here" because "[u]nlike *Moody*, where the issue was government restriction on content, … it is not the substance of the speech that is at issue here"); *Montana v. Meta*, Slip Op. at 27–28 ("*Moody*'s dicta is not so clearly transferred to the case at hand because the question of whether non-expressive algorithm is a form of speech was not before the *Moody* Court."); *Illinois v. TikTok*, Slip Op. at 22–24 ("*Moody*'s holding explicitly excluded the type of claim that is framed within the State's Complaint.").

The companies may ultimately succeed in proving that their engagement algorithms reflect their own choices about what content to promote and are not driven solely by users' behavioral data—that is, that the companies deliberately promote hate speech. But proof of that requires just that: proof.

And again, at this stage, the Court need not decide *Moody*'s application to the engagement-driven algorithms. Because the companies failed to address the non-algorithmic features, the case must go forward regardless. But if this Court does reach the issue, it must be resolved on the allegations in the complaints.

2. Even if the social media companies were correct that their addiction-driving features implicate the First Amendment, that would not end the inquiry. Rather, it merely prompts the question whether the claims survive First Amendment scrutiny. Here, too, the companies wholly fail to address this key aspect of their defense.

And they couldn't had they tried. The addiction theory would not require the companies to restrict content based on any "disagreement with the message [that content] conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also id.* ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."). The companies could have avoided designing addictive platforms in any number of ways—by using more robust parental controls, providing warnings about the risks of addiction, or limiting autoplay and infinite scroll, to name a few.

None of those alternatives would restrict content, much less bar "particular speech because of the topic discussed or the idea or message expressed." *TikTok Inc. v. Garland*, 604 U.S. 56, 70 (2025).

The plaintiffs' claims are therefore, at most, content-neutral "time, place, or manner" restrictions. *People v. Barton*, 8 N.Y.3d 70, 76–77 (2006); *accord Ward*, 491 U.S. at 791. Unlike content-based restrictions, content-neutral restrictions are "subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *TikTok*, 604 U.S. at 70. And under that test, restrictions 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. *See Town of Delaware v. Leifer*, 34 N.Y.3d 234, 244 (2019).

The first and third factors are especially straightforward here. On the first, the social media companies have no First Amendment right to design their platforms to drive children to addiction. To the contrary, "[t]he compelling state interest in protecting children's physical and psychological welfare is well established." *NetChoice, LLC v. Yost*, — F.4th —, 2026 WL 1758907, at *12 (6th Cir. June 18, 2026); *accord Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.").

On the third, ample alternative channels of communication aren't just open; the exact *same* channels are open. The companies' users remain free to post content, and the companies are free to leave whatever content they want on their platforms. The complaints only ask that the companies avoid intentionally designing and marketing addictive products without disclosing their risks. In doing so, the plaintiffs seek a remedy that is entirely consistent with the First Amendment. *See, e.g.*, *Clementine Co., LLC v. Adams*, 74 F.4th 77, 87 (2d Cir. 2023) ("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.").

The second factor—whether the restrictions are narrowly tailored—presents a more "fact intensive" inquiry that "will surely vary from function to function and platform to platform." *Moody*, 603 U.S. at 747 (Barrett, J., concurring). That only underscores why dismissal under the First Amendment is inappropriate at this early stage. As this Court has explained, "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; *see also Ward*, 491 U.S. at 797 (restriction is "not invalid simply because there is some imaginable alternative that might be less burdensome on speech.").

And the companies cannot show that modifying their applications to avoid *intentionally* addicting kids would be unduly burdensome. *See, e.g.*, *Counterman v. Colorado*, 600 U.S. 66, 75 (2023) (showing some degree of scienter "lessens the hazard of self-censorship by compensating for the law's uncertainties"). The companies—including 4Chan and Discord—could, for example, limit autoplay and endless scrolling, or adopt a variety of age verification tools or parental controls. Any of this would work to curb addiction in kids and teens. And as courts have recognized, these measures are likely to be narrowly tailored. Those measures might include "[p]rospectively requiring parental consent before a [c]hild accesses a social media platform." *Yost*, 2026 WL 1758907, at *14–16 (recognizing that such a measure is likely narrowly tailored). Or they might require platforms employing "certain addictive features" to "require parental consent" for minor users. *Computer & Commc'ns Indus. Ass'n v. Uthmeier*, 2025 WL 3458571, at *1, *6 (11th Cir. Nov. 25, 2025) (same). Neither is categorically barred by the First Amendment.[15]

[15] The same is true of failure to warn. The companies declare (at 58) that "[c]ourts have consistently applied First Amendment protections … when an allegedly missing warning concerns the possibility of being exposed to harmful speech." But the cases they cite in support of that proposition (at 52 n.20, 58–59) alleged harm because of *content*. *See, e.g.*, *Bill v. Superior Court*, 137 Cal. App. 3d 1002, 1003 (Ct. App. 1982) (seeking to hold the director and producers of a violent film liable after a third party shot her outside a movie theater that showed the film). And courts have rejected the argument that the First Amendment would bar claims asking social media companies to be truthful and accurate in their voluntary statements about their platforms. *See, e.g.*, *District of Columbia v. TikTok*, Tr. at 78–79 (rejecting that claim was "compel[ling] speech to give warnings" where users and parents alleged they were "simply unaware of the potential risk[s] of the platform" and thus "misled by TikTok's assertions that everything on the platform is child

Ultimately, courts have had "little difficulty concluding that" even if addiction claims might "somehow burden[] [a social media company's] expressive activity," there is no reason to believe "at the pleading stage" that they would not "survive intermediate scrutiny." *District of Columbia v. Meta*, Slip Op. at 29; *see, e.g.*, *District of Columbia v. TikTok*, Tr. at 76–77 (similar). These types of content-agnostic claims advance a significant government interest, and the companies haven't shown that they unduly burden expression as a matter of law.

IV. The complaints adequately plead proximate causation.

The social media companies then argue (at 83–84) that the plaintiffs' claims—and, in particular, the addiction theory—fail for lack of causation. But they don't dispute that, because "[a] defendant's negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury," "there may be more than one proximate cause of an injury." *Scurry v. New York City Hous. Auth.*, 39 N.Y.3d 443, 453–54 (2023). "[T]he mere fact that other persons share some responsibility for [the] plaintiff's harm," in other words, "does not absolve [a] defendant from liability." *Hain v. Jamison*, 28 N.Y.3d 524, 529 (2016).

For that reason, this Court has recognized that, even if there are multiple proximate causes of a plaintiff's injuries, a single defendant who is just one cause

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safe"); *Social Media Cases*, 2025 WL 1364052, at *10–11 (Cal. Super. Ct. Jan. 8, 2025) ("The First Amendment does not bar the Plaintiffs' duty to warn claims based on dangers allegedly created by Defendants in the operation of their platforms.").

may be held liable—even if the other bad actors are not also defendants in the case. So a doctor's negligent prescription of medication without monitoring his patient was a proximate cause of the patient's death by suicide, even if the patient's intervening hospitalization and treatment by other providers were other proximate causes. *See Mazella v. Beals*, 27 N.Y.3d 694, 706–09 (2016). A farm's negligence in securing a calf who escaped was a proximate cause of a passerby's death, even if the decedent's actions in exiting her vehicle to help the calf (or the other driver's negligence in striking and killing her) were also proximate causes. *See Hain*, 28 N.Y.3d at 533–34. And a landlord's negligence in fixing a door lock was a proximate cause of its resident's injuries, even though the resident's assault by an unknown assailant was another proximate cause. *See Scurry*, 39 N.Y.3d at 449–50, 453–54.

Construed liberally, the plaintiffs' complaints here similarly allege multiple theories of harm. One of those theories is that Gendron's addiction to social media itself—regardless of the content he viewed—left him completely isolated and drove him to commit violence. *See supra* Section I.B.1.a. Notwithstanding the allegations supporting that theory, the companies still contend (at 83–84) that this is the "rare case[]" where "only one conclusion may be drawn from the established facts." *Hain*, 28 N.Y.3d at 529–30. According to the companies, there is no causation as a matter of law because Gendron's criminal acts break the causal chain, and his addiction cannot be separated from the content he consumed. Both arguments are incorrect.[16]

A. The companies first argue (at 86) that Gendron's criminal acts were not a "foreseeable risk" of their decision to design platforms that exploit human cognitive vulnerabilities and drive children to compulsive engagement. But the companies concede (at 88) that "addiction allegedly causes low self-esteem, social isolation, and [reduced] impulse control." And they don't deny that, especially in minors, those consequences can be catastrophic, resulting in sleep disturbances, mental health problems, and violence. *See, e.g.*, R.2711–12, 2715–16 ¶¶ 200, 212; R.5081, 5085 ¶¶ 207, 219; R.6187, 6191 ¶¶ 291, 303. Even mass shootings are not an unforeseeable consequence of social-media addiction. They have happened before. *See, e.g.*, R.2714 ¶ 205; R.5083 ¶ 212; R.6189 ¶ 296.

To the extent the companies suggest (at 85) that intervening criminal acts necessarily break causation as a matter of law, that isn't true. This Court's precedents make clear that intervening criminal acts can be a "foreseeable consequence of the situation created by the defendant's negligence." *Hain*, 28 N.Y.3d at 529. Indeed,

[16] Snap separately argues (at 11–13) that it cannot be held liable for Gendron's social-media addiction because, according to the company, Gendron stopped using Snapchat long before the attack. But that fact is contained nowhere in the record. The complaints do not allege that Gendron stopped using Snapchat at any time, and Snap did not submit records of Gendron's use of Snapchat—or any other documentary evidence—to show that Gendron stopped using its platform. In the absence of any "evidentiary material" for this Court to "consider[]," and "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all," "dismissal should not eventuate." *Guggenheimer*, 43 N.Y.2d at 275.

the Court has recognized as much across a range of contexts—including cases involving the theft of dangerous chemicals, reckless and criminal speeding, and even a shooting by an unknown assailant. *See Kush v. City of Buffalo*, 59 N.Y.2d 26, 33 (1983) (school could be held liable for injuries child suffered from playing with its stolen, abandoned chemicals because theft was foreseeable consequence of school's negligence in securing chemicals); *Turturro v. City of New York*, 28 N.Y.3d 469, 484 (2016) (intervening reckless and criminal speeding was foreseeable consequence of city's failure to implement traffic calming measures, such that city could be liable for bicyclist's injuries from speeding accident); *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 520 (1980) (building could be held liable for plaintiff's gunshot wound because criminal incident in unsupervised lobby was "a significant, foreseeable possibility" of building's negligence in failing to make its premises safer after extensive history of criminal activity).

The companies try to distinguish this body of precedent (at 90 n.24) by arguing that, in those cases, "foreseeability (and thus proximate cause) was established by a special relationship between the defendant and the plaintiff." But that conflates duty—"a legal question for determination by the court," *Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583 (1997)—with proximate cause—an "intensely fact-specific" inquiry that is "best left for the factfinder," *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 243 (1998). And this Court has distinguished between the *legal* scope of a party's duty and the "patently factual determination" of whether a party's conduct in discharging that duty would have prevented an intervening criminal act. *See Scurry*, 39 N.Y.3d at 452, 454. The latter was the basis of the Fourth Department majority's causation ruling, *see* R.6643, and the cases in our opening brief (at 37–38) illustrate why the majority was wrong to resolve that question as a matter of law. Because similar factual questions bear on causation here, this Court should reverse.

B. Undeterred, the companies fall back (at 88) on the Fourth Department majority's assertion that the complaints "do not allege, and could not plausibly allege, that the shooter would have murdered Black people had he become addicted to anodyne content, such as cooking tutorials or cat videos." R.6643. As explained above, however, the plaintiffs' complaints present multiple theories. One of those theories is that, regardless of content, vulnerable users addicted to the companies' platforms suffer from mental health problems, experience feelings of social isolation, and, like Gendron, engage in thoughtless violence. *See, e.g.*, R.2711–12, 2715–16 ¶¶ 200, 212; R.5081, 5085 ¶¶ 207, 219; R.6187, 6191 ¶¶ 291, 303.

So, even if content were *a* proximate cause here, that wouldn't be dispositive. New York law, as explained above, recognizes that "there may be more than one proximate cause of an injury." *Scurry*, 39 N.Y.3d at 454; *see Hain*, 28 N.Y.3d at 529 (same). And just as one defendant can be held liable even if the other bad actors are not in the case, courts regularly hold that, even where one proximate cause is off limits, liability can still be imposed for another. Thus, a municipality cannot "escape[] liability for the tortious conduct of its police officers" even if the individual officers who cause a plaintiff's injuries are entitled to qualified immunity. *Askins v. Doe No. 1*, 727 F.3d 248, 254 (2d Cir. 2013). And conduct that does not "provide a basis for a Sherman Act violation under the *Noerr-Pennington* doctrine"—which immunizes private entities from antitrust liability when they petition the government—may still supply another "basis of antitrust liability." *Amphastar Pharms. Inc. v. Momenta Pharms., Inc.*, 850 F.3d 52, 57 (1st Cir. 2017).

Contrary to the companies' parade of horribles (at 87), allowing the claims to proceed here would *not* leave companies "liable for seemingly endless acts of modern violence simply because the individual viewed relevant social media content before deciding to commit the violence." *Crosby v. Twitter*, 921 F.3d 617, 625 (6th Cir. 2019). It would not impose liability on the basis of content at all. *Cf. Sanders v. Acclaim Ent., Inc.*, 188 F. Supp. 2d 1264, 1269 (D. Colo. 2002) (alleging harm based on *content* of violent video games). Rather, it would permit a factfinder to make the "varying inferences" necessary to resolve whether violence is a "foreseeable" and "normal" consequence of social-media addiction. *Hain*, 28 N.Y.3d at 529. And it would still subject an individual company to liability only where the company itself engaged in misconduct—because it knew of the unlawfulness, contributed to it, or violated a duty separate and apart from not disseminating unlawful content.

But those are all questions for a later stage. *Cf.* Ans. Br. 89. At this point, it is sufficient that the complaints allege that the "very same risk" underlying the defendants' conduct—the intentional design of highly addictive platforms that engender isolation and inspire violence—"was, in fact, the risk that came to fruition." *Hain*, 28 N.Y.3d at 533. The companies' argument that there is no causation as a matter of law therefore fails.

V. This Court should decline to address the far-reaching questions that the social media companies' raise in their alternative arguments.

Falling back, the social media companies ask this Court to address a series of arguments the court below never reached. They argue (at 82, 90) that the plaintiffs' product liability claims fail, first, because those injured by defective products can only sue if the product is in active use at the time of the injury and, second, because their ubiquitous products are supposedly not "products" subject to product liability law at all. They also contend (at 71) that the plaintiffs' non-product liability negligence claims fail because the companies owe no duty, as a categorical matter, to any non-users of their products.

These arguments, if accepted, would have profound consequences for tort law in general. And they would upend the rules governing products that have transformed everyday life for millions of New Yorkers, including nearly every teen. The companies nonetheless ask this Court to decide these novel and far-reaching questions based on compressed briefing—*before* the Fourth Department has weighed in, and without even the benefit of the thinking of the trial court, which stated only that it found the complaints' allegations sufficient. R.35.

This Court should decline that invitation. The arguments are not even sufficient for this court to actually affirm the decision below. The companies offer no argument at all on the plaintiffs' public nuisance, negligent infliction of emotional distress, and invasion of privacy claims. So remand would be necessary whatever the merits of these alternative arguments. Even setting aside that threshold flaw, only brief consideration of each individual argument is necessary to see how poorly suited for resolution they are in this posture.

First, the companies did not raise their novel active-use argument before the trial court. While this Court does have authority to affirm on any ground, it addresses arguments raised for the first time on appeal only in "rare" circumstances—a principle that holds special force when a party, as here "seeks change in a long-established common-law rule." *Bingham v. New York City Transit Auth.*, 99 N.Y.2d 355, 359 (2003).

Waiver aside, the companies' proposed rule would yield bizarre, unjust results. Yet they ask this Court to adopt it based on a mere two paragraphs of argument. *See* Ans. Br. 82–83. If a product-defect suit can only be brought by someone injured while the product is in use, a manufacturer of a defective tire pump would be liable if an overinflated tire explodes during inflation, but not if the tire explodes after a driver pulls out of a driveway. A manufacturer of a defective measuring device that failed to properly weigh construction materials before they were installed in a structure, causing its later collapse, would escape liability entirely.

The companies' sole support for these counterintuitive results (at 82) is this Court's statement five decades ago that a plaintiff must prove that "at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended." *Codling v. Paglia*, 32 N.Y.2d 330, 331 (1973). In the years since, courts have understood this to refer to the widely applied rule that only intended (and foreseeable unintended) uses are actionable. *See, e.g.*, *Wheeler v. Sears Roebuck & Co.*, 37 A.D.3d 710, 711 (App. Div. 2007); 63A Am. Jur. 2d Products Liability § 1204 ("In most jurisdictions, a defense of misuse is recognized."). But the companies ask this Court to be the first to read "at the time of the occurrence" to impose an independent requirement divorced from the concerns of product liability law. This is not the occasion to stake out such a novel position that would leave New York an outlier.

Second, the companies' argument that there are no "products" at issue here raises not only novel, but also fact-intensive questions. The companies try to obfuscate that reality by urging this Court to apply (at 91) what they call the Third Restatement's supposedly "clear" rule that a "product" must be a "tangible" good.

But the Restatement expressly states that "other items" may be "products" when "the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property." Restatement (Third) of Torts: Prod. Liab. § 19(a). Numerous courts have held that social media products (including those of the defendants' here) and other mobile phone apps are "products," but they have often done so only after examining the specific allegations of the complaint. *See Ameer v. Lyft, Inc.*, 711 S.W.3d 534, 544 (Mo. Ct. App. 2025); *T.V. v. Grindr, LLC*, 2024 WL 4128796, at *26 (M.D. Fla. Aug. 13, 2024); *New Hampshire v. TikTok Inc.*, 2025 WL 2079814, at *47 (N.H. Super. July 08, 2025); *In re Social Media Adolescent Addiction*, 702 F. Supp. 3d 809, 849–53 (N.D. Cal. 2023) (applying New York law). And because there are eight different products here, the issue has the potential to generate eight different answers—a complexity that the lead brief elides, but 4Chan tacitly acknowledges (at 54–55) in arguing it is differently situated. Any answer on the current complaints also could not even justifiably end the cases, as the plaintiffs have not had an opportunity to amend. *See, e.g.*, *Favourite Ltd. v. Cico*, 42 N.Y.3d 250, 258 (2024).

Third, the companies' argument that they owe no duty to *any* non-user under ordinary (non-product liability) negligence principles is not fit for resolution at this stage for similar reasons. Here, too, courts have rejected the argument, and only after carefully examining the complaint's allegations. *See, e.g.*, *In re Soc. Media*

Adolescent Addiction, 754 F. Supp. 3d 946, 976–77 (N.D. Cal. 2024) (holding that social media companies owe duty to school districts impacted by addictive teen use); *In re Opioid Litig.,* No. 400000/2017, 2018 NY Slip Op. 31228(U), at 33–35 (Sup. Ct. June 18, 2018) (opioid distributors owed duty to counties harmed by opioid users); *cf. Davis v. S. Nassau Cmtys. Hosp.*, 26 N.Y.3d 563, 577 (2015) (hospital owed duty to members of the general public injured after failure to warn patient about risk of driving).

That makes sense, as the public policy considerations that go into determining whether to recognize a duty are numerous and nuanced—including, among others, who is in the "best position to protect against the risk of harm," the moral implications of a duty, and the scope and social consequences of liability. *See Davis*, 26 N.Y.3d at 572. No appellate court (in those cases or any other) decided how these questions apply to social media. This court of last resort should not be the first to do so.[17]

[17] Similar problems infect the additional alternative arguments presented outside the lead brief. The Amazon defendants contend (at 26–31) that the plaintiffs have failed to allege (1) that Twitch is unreasonably dangerous, (2) an alternative design consistent with the First Amendment, or (3) that Amazon can be held accountable. The first is not only fact-specific (how many times does a product need to incentivize mass murders for its risk to outweigh its benefits?), but also was not a part of Twitch's motion in the trial court. R.3376. The second raises novel questions about the free speech implications of a brief delay in livestreaming (akin to that on broadcast TV) that would allow for the detection of extreme violence. And the third involves a highly fact-specific question about the corporate form that is far afield from any other question in this appeal. Likewise, 4Chan urges (at 50–52) this Court to impose a new "foreseeability" requirement to determine when, under product liability, a duty is owed to a bystander—a duty that, under current law, is

CONCLUSION

This Court should reverse.

Respectfully submitted,

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categorical—that would have ramifications far beyond these cases. And 4Chan did not raise this issue in its motion to dismiss either. R.3773-74. This new-on-appeal, fact-specific argument is no more appropriate for first-time resolution in this Court than the lead brief's.

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