STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

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

Index No.: 810317/2023

Plaintiffs,

v.

MEAN LLC; VINTAGE FIREARMS, LLC; RMA ARMAMENT, INC.; ALPHABET INC., GOOGLE, LLC, YOUTUBE, LLC,; REDDIT, INC.; PAUL GENDRON; and PAMELA GENDRON,

Defendants.

MEMORANDUM OF LAW on behalf of ALPHABET, INC., GOOGLE LLC, AND YOUTUBE, LLC (collectively "YOUTUBE")

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Pursuant to CPLR 3211(a)(7), Defendants Alphabet, Inc. ("Alphabet"), Google LLC, and YouTube, LLC (collectively, "YouTube") submit this Memorandum of Law in support of their Motions to Dismiss all claims against YouTube asserted in the Complaint in *Jones v. MEAN LLC*, Case No. 810316/2023 ("*Jones*") and the Amended Complaint in *Stanfield v. MEAN LLC*, Case No. 810317/2023 ("*Stanfield*").

I. INTRODUCTION

These cases are the latest efforts by victims (and bystanders) of Payton Gendron's horrific attack at Tops Friendly Markets to assert claims against YouTube (and other online services) for the speech they allegedly published. Like the legal theories asserted in *Patterson* and *Salter*, Plaintiffs' claims fail under established law. Similar cases alleging that the dissemination of harmful speech—including television programming, movies, video games, and online content—helped cause violent crimes have been uniformly dismissed. The same result is warranted here.

First, Plaintiffs' claims against YouTube are barred by the Communications Decency Act, 47 U.S.C. § 230 ("§230"), a federal statute that "effectuate[s] Congress's policy choice … not to deter harmful online speech through the … route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Shiamili v. Real Estate Grp. of N.Y.*, 17 N.Y.3d 281, 288 (2011) (citation omitted). No matter the label Plaintiffs attach to their claims, they seek to do exactly what §230 forbids: hold internet service providers like YouTube liable for publishing allegedly objectionable or injurious content created by third parties. For over "a quarter of a century," courts have "addressed highly analogous claims by victims of terrorist violence … inflicted by actors who accessed and consumed hate material on social media sites," and they "have been in general agreement that the text of Section 230 should be construed broadly in favor of immunity." *M.P. ex rel. Pinckney v. Meta Platforms, Inc.*, 2023 WL 5984294, at *4

(D.S.C. Sept. 14, 2023) (applying §230 to dismiss product liability claims arising from racist mass shooting in Charleston).

Second, the First Amendment independently bars Plaintiffs' claims. Even ideologically odious speech like what Gendron allegedly viewed is constitutionally protected, as are videos that provide information about topics like firearms and body armor. Established First Amendment principles preclude Plaintiffs from imposing tort liability on YouTube for disseminating such protected speech. *See, e.g.*, *Sanders v. Acclaim Ent., Inc.*, 188 F.Supp.2d 1264, 1275 (D. Colo. 2002) (dismissing claims against publishers of video games and movies that allegedly caused mass shooting).

Third, Plaintiffs' product liability claims fail because YouTube is not a tangible "product" under New York product liability law, and that body of law is not (and cannot be) a vehicle for regulating the dissemination of allegedly harmful ideas or information.

Fourth, Plaintiffs' negligence-based claims fail because YouTube does not owe a general duty of care (whether to its users or the general public) to prevent violent crimes committed by third parties who may be influenced by information created by other users of YouTube's service.

Fifth, Plaintiffs fail to allege that the purportedly defective features of YouTube's service, or YouTube's alleged negligence in publishing speech, are the legal cause of Plaintiffs' injuries.

Sixth, claims in *Stanfield* for negligent infliction of emotional distress asserted by bystanders at the Tops market fail because they duplicate Plaintiffs' underlying tort claims and because so-called bystander liability is not available as a matter of established New York law in the circumstances alleged here.

Finally, Alphabet cannot be held liable for the alleged wrongs of its subsidiary, YouTube, LLC, and Plaintiffs do not allege any facts specific to Alphabet.

II. BACKGROUND

A. YouTube and Its Dissemination of Video Content.

Alphabet owns Google LLC, which in turn owns and operates YouTube. *Jones* ¶¶33, 35; *Stanfield* ¶¶107, 109.[1] YouTube is an online video platform that allows anyone with an internet connection to upload, search for, watch, and share videos of their choosing. *Jones* ¶¶180, 182; *Stanfield* ¶¶241, 243. "[E]very minute of the day, approximately 500 hours of video are uploaded to YouTube," and "users collectively watch more than 1 billion hours of video *every day*." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 480 (2023). This "immense ocean of content" has made YouTube effectively the world's largest video library, and a global hub for news, entertainment, and information. *Id.* at 506. The video content available on YouTube is almost unimaginably varied, and it has enabled creative, educational, political, and cultural expression on a vast scale. In short, YouTube offers "relatively unlimited, low-cost capacity for communication of all kinds," allowing users to communicate about topics "as diverse as human thought." *Packingham v. North Carolina*, 582 U.S. 98, 104-05 (2017) (cleaned up).

To "organize and present" this rich array of expression, YouTube uses algorithms that sift through the site's billions of videos to identify the ones that users might find most relevant based on user inputs and other information. *Taamneh*, 598 U.S. at 480. So "a person who watches cooking shows on YouTube is more likely to see cooking-based videos and advertisements for cookbooks." *Id*. at 481. Earlier this year, the U.S. Supreme Court held that allegations that YouTube hosted, failed to remove, and used its algorithms to "match[] ISIS-related content to users most likely to be interested in that content," (*id.* at 498) were insufficient, as a matter of law,

[1] "*Jones*" refers to the complaint from *Jones*, NYSCEF Doc. No. 2. "*Stanfield*" refers to the amended complaint from *Stanfield*, NYSCEF Doc. No. 3 (together, the "Complaints"). As discussed below, Plaintiffs have no basis for asserting claims against Alphabet that would hold it liable for the alleged actions of its subsidiary YouTube. *See infra* Section III.G.

for YouTube and other online services to be liable for aiding and abetting acts of international terrorism committed by ISIS. *Id.* at 499. The Court explained:

> As presented here, the algorithms appear agnostic as to the nature of the content, matching any content (including ISIS' content) with any user who is more likely to view that content. The fact that these algorithms matched some ISIS content with some users thus does not convert defendants' passive assistance into active abetting.

Id.

Here, Plaintiffs similarly try to use YouTube's general-purpose tools for curating and presenting speech to hold YouTube liable for the allegedly harmful consequences of some of that speech. To that end, Plaintiffs allege that YouTube's recommendation algorithm encourages viewers to watch more videos by "carefully target[ing] video content to each user." *Jones* ¶182; *Stanfield* ¶243. They further allege that videos are presented "through an 'autoplay' function that automatically starts playing other videos as soon as a consumer finishes watching one video" and by YouTube displaying "a variety of videos upon entering the site" and via a "side-panel" that "continues to recommend additional videos" while users playback a video. *Jones* ¶187; *Stanfield* ¶248.

B. Gendron's Attack at Tops Market and Plaintiffs' Claims Seeking to Hold YouTube Liable for Gendron's Criminal Misconduct.

On May 14, 2022, Payton Gendron "opened fire at Tops," shooting 13 people, murdering 10, and traumatizing additional Tops employees and shoppers "as they hid and fled in terror." *Jones* ¶¶1, 115, 117-18; *Stanfield* ¶¶196, 198-99. Plaintiffs attribute Gendron's racist ideology that motivated his attack largely to information he encountered online, including YouTube videos created by third-party users. *Jones* ¶¶74-77, 79, 205, 209, 211-13; *Stanfield* ¶¶155-58, 160, 266, 270, 272-74. Plaintiffs allege that Gendron began viewing videos on YouTube "[f]rom his early teens" (*Jones* ¶212; *Stanfield* ¶273) and that, over time, YouTube exposed Gendron to

"increasingly extreme content" that promoted "racism, antisemitism, the Great Replacement theory, and the elimination of non-whites." *Jones* ¶¶76-77, 209, 211-12; *Stanfield* ¶¶157-58, 270, 272-73. Plaintiffs further allege that Gendron used YouTube to view "videos regarding guns and offensive combat gear and operations" (*Jones* ¶¶214-15; *Stanfield* ¶¶275-76) including "instructional videos" on "illegal modification of firearms," "federally prohibited machineguns," and "military-grade firearms." *Jones* ¶215; *Stanfield* ¶276; *see also Jones* ¶¶81, 86, 89-90, 95; *Stanfield* ¶¶162, 167, 170-71, 176.

According to the Complaint, this YouTube content—in addition to "Reddit and other social media" (*Jones* ¶228; *Stanfield* ¶289)—"directed" Gendron "to the fringe website 4chan" where he was "further radicalized." *Jones* ¶213; *Stanfield* ¶274. Gendron then spent months methodically planning and researching the Buffalo attack, allegedly "[u]sing YouTube, Reddit, and other online sources," as well as off-line sources of information such as visits to "various gun stores, pawn shops, and flea markets." *Jones* ¶¶81, 87; *see also id.* ¶¶80-102; *Stanfield* ¶¶161-83.

While Plaintiffs' allegations about YouTube can be taken as true for purposes of this Motion, they stand in contrast to the findings of a detailed investigative report about the shooting by the New York Attorney General's Office, which concluded that content disseminated on ***other*** online services—***but not YouTube***—was "[f]ormative to [Gendron's] [i]deology of [h]ate." Ex. A at 24-26.[2] The Report also evaluated claims that YouTube videos provided information to Gendron about how to "equip his arsenal," and explained that the videos that Gendron claimed

[2] Office of the New York State Attorney General Letitia James, *Investigative Report on the Role of Online Platforms in the Tragic Mass Shooting in Buffalo on May 14, 2022* (Oct. 18, 2022), https://ag.ny.gov/sites/default/files/buffaloshooting-onlineplatformsreport.pdf ("Report"). This publicly available government report is before the Court in *Patterson* and *Salter*, and it can similarly be considered here, including through judicial notice. *See Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 667 (2d Dep't 1989) ("this court may, in general, take judicial notice of matters of public record"); *Rex Paving Corp. v. White*, 139 A.D.2d 176, 183 n.2 (3d Dep't 1988) (judicial notice for "official Executive memorandum"). Exhibits are attached to the supporting affirmation of Thomas S. Lane, dated November 9, 2023.

provided him with instructions on how to illegally convert an AR-15-style rifle actually did ***not*** in fact provide instructions on how to do so. *Id.* at 28. The Report further found that none of the YouTube videos cited by Gendron violated YouTube's policy prohibiting content "intended to sell firearms, instruct viewers on how to make firearms, ammunition, and certain accessories, or instruct viewers on how to install those accessories." *Id.* at 29.

On August 15, 2023, following two similar cases pending before this Court (*Patterson v. Meta Platforms Inc.*, Case No. 805896/2023 and *Salter v. Meta Platforms Inc.*, Case No. 808604/2023), Plaintiffs filed these two cases against YouTube and Reddit (and other unrelated defendants). *Jones*, brought on behalf of the estate of Celestine Chaney and her surviving son Wayne Jones, asserts causes of action against YouTube for strict liability (Count 12) and negligence (Count 13) under product liability theories for defective design in YouTube's "recommendation algorithm and other product features." *Jones* ¶¶349-77. *Stanfield* asserts the same strict liability and negligence claims under the same theory of product liability (Counts 15 and 16 respectively). *Stanfield* ¶¶435-61. The *Stanfield* plaintiffs—25 surviving Tops employees and shoppers—also bring a claim for negligent infliction of emotional distress ("NIED") (Count 17). *Stanfield* ¶¶462-75. Only two of the *Stanfield* plaintiffs allege physical injuries (though none were shot), and none allege that they witnessed physical harm to any member of their immediate family. *Stanfield* ¶¶7-103.

Because the Plaintiffs in *Jones* and *Stanfield* are represented by the same attorneys and allege identical claims against YouTube based on materially identical allegations (except for the additional NIED claim in *Stanfield*), YouTube submits this single cross-case Memorandum of Law in support of its Motions to Dismiss the operative complaints in both cases. *See* Stipulation, *Jones* NYSCEF Doc. No. 27 at 1 and *Stanfield* NYSCEF Doc. No. 30 at 2.

III. ARGUMENT

A. Section 230 of the Communications Decency Act Bars Plaintiffs' Claims.

Plaintiffs' claims are barred by §230 because they seek to hold YouTube liable as publisher of allegedly harmful third-party content—the racist content that allegedly radicalized Gendron and the informational videos that Gendron allegedly used to educate himself about the use of firearms and body armor.

Section 230 states that "[n]o provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Congress enacted this provision because it "recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium." *Shiamili*, 17 N.Y.3d at 287 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). Section 230 aims "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Force v. Facebook, Inc.*, 934 F.3d 53, 63 (2d Cir. 2019) (citation omitted).

New York has "follow[ed] … the national consensus" in interpreting "Section 230 immunity broadly, so as to effectuate Congress's 'policy choice ... not to deter harmful online speech through the ... route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.'" *Shiamili*, 17 N.Y.3d at 288 (citation omitted); *accord Force*, 934 F.3d at 64. Binding precedent applies §230 "to bar '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.'" *Shiamili*, 17 N.Y.3d at 289 (quoting *Zeran*, 129 F.3d at 330). And because the statute "protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles,'" §230 immunity should be resolved "at the earliest possible stage of the case." *Word of God Fellowship,*

Inc. v. Vimeo, Inc., 205 A.D.3d 23, 29 (1st Dep't 2022) (quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009)); *accord Shiamili*, 17 N.Y.3d at 286 (affirming dismissal based on §230 with no discovery allowed).

Consistent with that, courts have repeatedly—and prior to any discovery—applied §230 to dismiss claims seeking to hold online service providers liable for publishing third-party content that allegedly inspired or caused real-world violence, including terror attacks and shootings. *See, e.g.*, *Force*, 934 F.3d at 57 (claims alleging Hamas content on Facebook caused terrorist attacks in Israel); *Gonzalez v. Google LLC*, 2 F.4th 871, 907 (9th Cir. 2021) (claims alleging ISIS material on YouTube caused terrorist attacks in Paris), *vacated on other grounds*, 598 U.S. 617 (2023) and *rev'd by Twitter, Inc. v. Taamneh*, 596 U.S. 471; *M.P.*, 2023 WL 5984294, at *1 (product liability claims that racist user-speech on Facebook caused mass shooting); *accord Daniel v. Armslist, LLC*, 926 N.W.2d 710, 714 (Wisc. 2019) (claims seeking to hold website hosting online listings for gun sales liable for mass shooting). The established three-part test for §230 protection—and preemption of state law claims—applies when (1) a defendant is a "provider … of an interactive computer service" (2) faces claims by a plaintiff that treat the defendant as the "publisher" of the content at issue and (3) the content at issue was "provided by another information content provider." *Shiamili*, 17 N.Y.3d at 286; *see* 47 U.S.C. § 230(e)(3) (express preemption provision for state law "inconsistent" with §230). Each element is satisfied here.

1. YouTube Provides an "Interactive Computer Service."

Courts have uniformly held YouTube to be an "interactive computer service," since it "provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2); *accord Jones* ¶¶33, 35; *Stanfield* ¶¶107, 109. *See Gonzalez*, 2 F.4th at 895-96; *Lewis v. Google LLC*, 461 F.Supp.3d 938, 954 (N.D. Cal. 2020), *aff'd*, 851 F.App'x 723 (9th Cir. 2021).

2. Plaintiffs' Claims Treat YouTube as a Publisher.

Plaintiffs' legal theories and causes of action all attempt to hold YouTube liable as the publisher of allegedly objectionable third-party content—in particular, the material that either allegedly helped radicalize Gendron (*Jones* ¶¶60, 69, 77 ("videos promoting racism, antisemitism, and racial violence" and "racist conspiracy theories")), or that informed him about guns and combat gear (*e.g.*, *id.* ¶86 (instructional video on installing a magazine lock)). No matter how they seek to plead around §230 immunity—including by framing their claims as product liability theories alleging addiction to online content—both complaints are squarely within §230 because they are inescapably premised on YouTube's decisions "to publish, withdraw, postpone or alter" the underlying third-party content. *Shiamili*, 17 N.Y.3d at 289.

The statutory phrase "treat[] as the publisher" is construed broadly in favor of immunity. *Force*, 934 F.3d at 65. Publishing includes "organizing and displaying content," including "arranging and distributing third-party information" to form "'connections' and 'matches' among speakers, content, and viewers of content." *Id.* at 66; *accord Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) ("publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content"); *Shiamili*, 17 N.Y.3d at 289 (same).

Under §230, moreover, "what matters is not the name of the cause of action," but "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1101-02; *accord Force*, 934 F.3d at 64 n.18 ("well established" that Section 230 applies where "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher") (citation omitted). "This rule prevents plaintiffs from using 'artful pleading' to state their claims only in terms of the interactive computer service provider's own actions, when the underlying basis for liability is unlawful third-party content published by the defendant." *Daniel*, 926 N.W.2d at 724 (applying

§230 to bar negligence and NEID claims); *accord Ynfante v. Google LLC*, 2023 WL 3791652, at *3 (S.D.N.Y. June 1, 2023) (Section 230 bars claims "fundamentally premised on Google's actions related to publishing").

Plaintiffs' claims seek to impose core publisher liability: they are premised on YouTube's decisions about what third-party content to publish and how to publish it—and they allege harms supposedly caused by such content. Both the product liability and negligence claims, at bottom, seek to hold YouTube liable for "direct[ing] [Gendron] to … malign content." *Jones* ¶212; *Stanfield* ¶¶158, 273. Plaintiffs contend that YouTube violated a supposed duty not to display or make available certain allegedly objectionable or potentially injurious third-party videos to Gendron—videos that they say contributed to his radicalization and that gave him information he used in planning the attack. *Jones* ¶¶74, 211-12, 214-16; *Stanfield* ¶¶155, 272-73, 275-77. Just as in *Force*, where the plaintiffs sought "to hold Facebook liable ... for actively bringing Hamas' message to interested parties," Plaintiffs' theory here "falls within the heartland of what it means to be the 'publisher' of information under Section 230(c)(1)." 934 F.3d at 65; *accord Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) ("[T]he very essence of publishing is making the decision whether to print or retract a given piece of content—the very actions for which Klayman seeks to hold Facebook liable."); *Ynfante*, 2023 WL 3791652, at *2 ("The plaintiff therefore seeks to hold Google liable for its actions related to the screening, monitoring, and posting of content, which fall squarely within the exercise of a publisher's role….").

Plaintiffs cannot avoid that by casting their claims as alleging "design defects." The "unanimous view" is that §230 bars "claims alleging that defectively designed internet products allowed for transmission of harmful third-party communications." *In re Facebook, Inc.*, 625 S.W.3d 80, 94 (Tex. 2021); *accord Herrick v. Grindr LLC*, 765 F.App'x 586, 590 (2d Cir. 2019)

("[T]he manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and are barred by §230."); *M.P.*, 2023 WL 5984294, at *1 (allegations that algorithms directed mass-shooter to "white supremacist" content treated Facebook as publisher under Section 230); *Doe ex rel. Roe v. Snap, Inc.*, 2022 WL 2528615, at *14 (S.D. Tex. July 7, 2022) ("negligent design" claim based on alleged lack of safety features treated Snap as publisher because it "aims to hold Snap liable for communications" between users), *aff'd*, 2023 WL 4174061 (5th Cir. June 26, 2023); *L.W. through Doe v. Snap Inc.*, 2023 WL 3830365, at *5-6 (S.D. Cal. June 5, 2023) (Section 230 barred product liability claims challenging publication of third-party content); *Rodriguez v. Offerup, Inc.*, 2019 WL 13247290, at *3 (M.D. Fla. Aug. 29, 2019) (rejecting effort to plead around §230 with failure to warn claim; "if the warning is about user-generated content …it still goes to the heart of 'publishing functions'").

So too here, what Plaintiffs allege to be "defective" is simply the way that YouTube published content created by third parties to Gendron, including via algorithms that purportedly suggested certain videos because they matched his expected interests. *Jones* ¶¶71, 76-77, 181-82, 198-204, 352-53; *Stanfield* ¶¶152, 157-58, 242-43, 259-65, 438-39. Plaintiffs assert that YouTube's algorithm "promoted racism, antisemitism, the Great Replacement theory, and the elimination of non-whites," *Jones* ¶¶211-13, 360; *Stanfield* ¶¶272-75, 446, and directed Gendron, based on his "interest in firearms," to "more 'hard core' gun videos" that provided information about firearms, *Jones* ¶¶215-16; *Stanfield* ¶¶276-77. Such claims treat YouTube as the publisher of that content in precisely the ways Section 230 forbids because they seek to impose liability on YouTube for designing and operating publishing systems that supposedly disseminated harmful third-party material to users. As the Court of Appeal has explained, "reposting or otherwise

disseminating" injurious third-party content "is well within 'a publisher's traditional editorial functions.'" *Shiamili*, 17 N.Y.3d at 291 (quoting *Zeran*, 129 F.3d at 330).

Indeed, courts have repeatedly held that §230 bars near-identical claims that online service providers' "recommendation" algorithms promoted or helped disseminate objectionable third-party content. *M.P.*, 2023 WL 5984294, at *1 (allegations that Facebook's algorithms suggested racist content that helped radicalize mass shooter); *Dyroff v. Ultimate Software Grp.*, 934 F.3d 1093, 1098 (9th Cir. 2019) ("tools meant to facilitate the communication and content of others" are protected publisher functionality); *Gonzalez*, 2 F.4th at 896 (same, barring claims based on allegedly suggesting ISIS content); *Anderson v. TikTok, Inc.*, 637 F.Supp.3d 276, 280 (E.D. Pa. 2022) (§230 bars claims that TikTok used algorithms "to addict users" and to suggest dangerous "challenge'" video that resulted in user's death, explaining that courts "have repeatedly held" such alleged "action taken through their algorithm[s] … are the actions of a publisher" protected by §230).

The Second Circuit's decision in *Force* is directly on point. There, the court held that §230 barred claims brought by victims of Hamas terrorist attacks seeking to hold Facebook liable for using algorithms that "suggest content to users"—allegedly including Hamas propaganda. 934 F.3d at 65. Expressly rejecting the argument that such algorithms render Facebook a "non-publisher," the court explained that using algorithms and other technology "designed to match … information with a consumer's interests" is no different than exercising a decision to "place third-party content on a homepage"—a quintessential publisher function. *Id.* at 66-67. It would "turn Section 230(c)(1) upside down" to hold providers liable merely because technological tools allegedly made them "especially adept at performing the functions of publishers." *Id.*

These holdings follow from *Shiamili*'s explanation that §230 "does not differentiate between 'neutral' and selective publishers" and that Congress "made a … policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others." 17 N.Y.3d at 289 (citation omitted). Under settled law, in short, Plaintiffs' claims impermissibly seek to hold YouTube liable as a publisher because they allege that YouTube's publishing functionality defectively or negligently suggested injurious content to Gendron.

3. The Content at Issue Was All Provided by Third Parties.

Finally, this case clearly involves third-party content, not material created or developed by YouTube. All of the objectionable content at issue—the videos that allegedly caused Gendron's radicalization and those that informed him about weapons—was provided by YouTube users or other third-parties, what Plaintiffs allege to be "a racist, online community." *Jones* ¶¶73, 86, 128-29; *Stanfield* ¶¶154, 167, 189-90. Plaintiffs do not (and could not) allege that YouTube created any of that material or had any hand in shaping its content.

Under §230, a "Web site is generally not a 'content provider' with respect to [content] posted by third-party users." *Shiamili*, 17 N.Y.3d at 290. *Shiamili* expressly "reject[ed]" the "contention that defendants should be deemed content providers because they created and ran a Web site which implicitly encouraged users to post negative [content]." *Id.* "Creating an open forum for third parties to post content … is at the core of what section 230 protects." *Id.* at 290-91; *see also, e.g., Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 415 (6th Cir. 2014) ("courts have declined to hold that websites were not entitled to the immunity furnished by the CDA because they selected and edited content for display, thereby encouraging the posting of similar content"); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1269 (D.C. Cir.

2019) (presenting third-party content in new format "does not constitute the 'creation' or 'development' of information").

It makes no difference that YouTube, whether through algorithms or otherwise, allegedly helped make third-party content more accessible or actively helped bring it to the attention of Gendron or other users. "Merely arranging and displaying others' content to users … through such algorithms—even if the content is not actively sought by those users—is not enough to hold [a service provider] responsible as the 'developer' or 'creator' of that content." *Force*, 934 F.3d at 70-71 ("Plaintiffs' suggestion that publishers must have no role in organizing or distributing third-party content in order to avoid 'develop[ing]' that content is both ungrounded in the text of Section 230 and contrary to its purpose."); *accord Shiamili*, 17 N.Y.3d at 291 ("[r]eposting content created and initially posted by a third party" does not remove service provider from Section 230); *Herrick*, 765 F.App'x at 591 (online service did not create content by providing "tools and functionality available equally to bad actors and the app's intended users"). That is because functionality like "recommendations and notifications" are "tools meant to facilitate the communication and content of others. They are not content in and of themselves." *Dyroff*, 934 F.3d at 1098; *accord Gonzalez*, 2 F.4th at 915 (same) (citation omitted). In short, "proliferation and dissemination of content does not equal creation or development of content." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1271 (9th Cir. 2016).

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As in the many similar cases that have come before, Plaintiffs' attempt to hold YouTube liable for publishing allegedly injurious third-party content is barred by §230. This Court need go no further to dismiss Plaintiffs' claims against YouTube.

B. The First Amendment Bars Plaintiffs' Claims.

The First Amendment independently bars Plaintiffs' efforts, whether through product liability or negligence claims, to hold YouTube liable for the speech that it supposedly made available to Gendron. While it may be offensive or disconcerting, the speech that Gendron allegedly viewed on YouTube is constitutionally protected, and imposing liability on YouTube for disseminating or facilitating access to such speech—especially on theories of strict liability or negligence—is constitutionally impermissible.

1. The First Amendment Precludes Tort Liability for Protected Speech.

The First Amendment precludes tort liability for protected speech, including hateful or offensive speech. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). This includes speech that depicts violence and even "advocacy of illegal action at some indefinite future time." *Wilson v. Midway Games, Inc.*, 198 F.Supp.2d 167, 182 (D. Conn. 2002) (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1971)). Recognizing that "attaching tort liability to the effect that such ideas have on a criminal actor would raise significant constitutional problems under the First Amendment," *James v. Meow Media, Inc.*, 300 F.3d 683, 695 (6th Cir. 2002), courts have repeatedly rejected civil claims like those here for disseminating protected speech that allegedly led to violence.

For example, in a case arising from the mass shooting at Columbine High School, plaintiffs claimed the teenaged shooters "were avid, fanatical and excessive consumers of violent … video games," which allegedly precipitated their shooting by making "violence pleasurable" and "train[ing]" them "how to point and shoot a gun effectively." *Sanders*, 188 F.Supp.2d at 1268-69. The court dismissed product liability and negligence claims against the games' distributors as barred by the First Amendment. *Id*. at 1279-81; *see also, e.g.*, *Wilson*, 198 F.Supp.2d at 182 (First Amendment a "complete bar" to product liability claims alleging that a violent video game caused a child to become addicted and fatally stab his friend); *Olivia N. v. NBC*, 126 Cal.App.3d 488,

494-97 (1981) (First Amendment barred negligence claims alleging that TV broadcast of movie depicting sexual assault inspired real-life assault); *Zamora v. CBS*, 480 F.Supp. 199, 206 (S.D. Fla. 1979) (same for negligence claims alleging that minor's addiction to violent content on television led him to kill neighbor); *Davidson v. Time Warner, Inc.*, 1997 WL 405907 (S.D. Tex. Mar. 31, 1997) (same for negligence and product liability claims alleging that distribution of violent rap music led listener to kill policeman).

The First Amendment rule applied in these cases—prohibiting tort claims, whether styled as product liability, negligence, or otherwise, for disseminating allegedly harmful or violent speech—protects against tort liability's "devastatingly broad chilling effect." *Watters v. TSR, Inc.*, 715 F.Supp. 819, 822 (W.D. Ky.1989), *aff'd,* 904 F.2d 378 (6th Cir. 1990); *accord McCollum v. CBS, Inc.*, 202 Cal.App.3d 989, 1003 (1988); *Davidson*, 1997 WL 405907, at *22. Indeed, the "fear of damage awards" can "be markedly more inhibiting" to expression "than the fear of prosecution," *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964), making courts "particularly wary of governmental restrictions" on speech in the form of tort liability. *Sanders*, 188 F.Supp.2d at 1281 (citation omitted). This protection "is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas." *Herceg v. Hustler Mag., Inc*., 814 F.2d 1017, 1019 (5th Cir. 1987).

That is also why there is "'particular value' in resolving [such free speech] claims at the pleading stage, 'so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms.'" *Biro v. Conde Nast*, 883 F.Supp.2d 441, 457 (S.D.N.Y. 2012) (quoting *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 379 (1995)), *aff'd*, 622 F.App'x 67 (2d Cir. 2015).

2. Plaintiffs' Claims Seek to Impose Content and Viewpoint-Based Liability on Speech That Is Constitutionally Protected.

These established protections bar Plaintiffs' claims here, which seek to hold YouTube liable for disseminating speech. As discussed, Plaintiffs fault YouTube for making available to Gendron "a multitude of YouTube videos promoting racism, antisemitism, and racial violence" (*Jones* ¶¶74, 200, 211-12; *Stanfield* ¶¶155, 261, 272-73), as well as videos that allegedly provided information about guns and tactical gear (*Jones* ¶¶81, 86, 89-90; *Stanfield* ¶¶162, 167, 170-72). While this material is contrary to YouTube's policies and values,[3] Plaintiffs' attempt to impose a tort duty to remove, suppress, or restrict access to speech of this nature runs afoul of the "most basic" First Amendment rule—that the government may not "restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 790-91 (2011).

Indeed, Plaintiffs' claims are not merely content-based, they are *viewpoint based*. The premise of their theory is that YouTube is liable because it helped disseminate certain speech to Gendron that expressed a particular ideology. *Jones* ¶211; *Stanfield* ¶272. Had YouTube shown Gendron different content (cooking videos or nature documentaries), or videos addressing the same subjects (race relations, firearm use) but advocating a different point of view, Plaintiffs would have no claim. For example, Plaintiffs would seemingly have no objection to YouTube using the same methods to publish and disseminate videos that advocated for greater gun safety or for the prohibition of certain kinds of weapons. Nor would they take issue with videos advocating for greater racial tolerance and equality. But because YouTube allegedly displayed content to

[3] YouTube invests substantial resources removing content that contains hate speech or promotes violence on its service. *See* Ex. B, *Hate speech policy*, YouTube Help, https://support.google.com/youtube/answer/2801939?hl=en&ref_topic=9282436; Ex. C, *Violent or graphic content policies*, YouTube Help, https://support.google.com/youtube/answer/2802008?hl=en&ref_topic=9282436.

Gendron expressing the opposite viewpoints, Plaintiffs assert that YouTube is legally liable for the purported consequences of that speech. The "First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Matal v. Tam*, 582 U.S. 218, 234 (2017); *accord Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("government must abstain" from "regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction").

And, no matter how distasteful or offensive, the third-party speech Plaintiffs identify here does not fall into any of the limited categories of constitutionally unprotected speech. *Brown*, 564 U.S. at 791; *see People v. Marquan M.*, 24 N.Y.3d 1, 7 (2014) (other than "fighting words, true threats, incitement, obscenity, child pornography, fraud, defamation or statements integral to criminal conduct … speech is presumptively protected and generally cannot be curtailed by the government"). Information about topics like how to use firearms is protected by the First Amendment. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570-71 (2011); *Bartnicki v. Vopper*, 532 U.S. 514 (2001). Likewise, "[e]ven hateful, racist, and offensive speech … is entitled to First Amendment protection." *Million Youth March, Inc. v. Safir*, 63 F.Supp.2d 381, 391 (S.D.N.Y. 1999); *see, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969) (First Amendment protects speech by KKK leader, absent an exception, promising "revengeance" if the government "continues to suppress the white, Caucasian race"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) ("messages 'based on virulent notions of racial supremacy'"); *Volokh v. James*, 2023 WL 1991435, at *9 (S.D.N.Y. Feb. 14, 2023) (law targeting "speech that 'vilifies' or 'humiliates' a group or individual based on their 'race, color, religion, ethnicity, national origin, disability, sex, sexual orientation, gender identity or gender expression' clearly implicates [] protected speech" (quoting N.Y. Gen. Bus. Law § 394-ccc(1)(a)); *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 234

(6th Cir. 2015) (anti-Muslim hate speech); *Fenner v. News Corp*., 2013 WL 6244156, at *16 (S.D.N.Y. Dec. 2, 2013) (racist cartoon); *Skokie v. Nat'l Socialist Party of Am.*, 69 Ill.2d 605, 618 (1978) (display of swastika).

Snyder involved similarly abhorrent speech. 562 U.S. at 448. There, speakers picketed a Gold Star family's funeral carrying signs with messages like "Thank God for 9/11" and "God Hates Fags." *Id.* The Supreme Court held that these messages were constitutionally protected speech on matters of public concern because they "highlighted issues of public import," such as "homosexuality in the military" and the "political and moral conduct of the United States and its citizens." *Id.* at 444. Similarly here, the "Great Replacement theory" (*Jones* ¶211; *Stanfield* ¶272) and other ideologically objectionable content about race that Gendron allegedly viewed conveyed the speaker's "position on" "broader public issues." 562 U.S. at 454. As in *Snyder*, the First Amendment prohibits Plaintiffs' efforts to subject such speech to tort liability. *Id.* at 460-61; *accord Davidson*, 1997 WL 405907, at *15 ("First Amendment protection is not weakened" because speech "takes an unpopular or even dangerous viewpoint").

That the third-party speech here is alleged to have depicted or caused violence likewise does not remove it from the First Amendment's protections. Violent speech is protected, *see Brown*, 564 U.S. at 792-95, and "the fear that speech might persuade provides no lawful basis for quieting it," *Sorrell*, 564 U.S. at 576. Indeed, the unprotected category of "incitement" is narrowly limited to speech *intentionally* "directed to inciting or producing" and "likely to incite or produce" "*imminent* lawless action." *Brandenburg*, 395 U.S. at 447 (emphasis added) ("The mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."). "The government may not prohibit speech because it increases the chance an unlawful act will be committed at some

indefinite future time." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (cleaned up); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) ("mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment"); *Davidson*, 1997 WL 405907, at *20 ("Courts addressing similar issues have repeatedly refused to find a musical recording or broadcast incited certain conduct merely because certain acts occurred after the speech."). Nothing like incitement is alleged here.

To the contrary, far from being immediate, Plaintiffs allege that Gendron's attack was caused by years of gradual radicalization, beginning in "his early teens," *i.e.*, in 2016. *Jones* ¶212; *Stanfield* ¶273. Over time, Plaintiffs say, the speech Gendron viewed became "progressively more extreme" (*Jones* ¶214; *Stanfield* ¶275), and he was allegedly then "further radicalized" when he was eventually directed to different websites used by "hate groups and racists conspiracy mongers" (*Jones* ¶213; *Stanfield* ¶274). It was longer still before Gendron began meticulous planning for the attack, which he did for months before committing it in May 2022 (*Jones* ¶¶88-89, 91, 414; *Stanfield* ¶¶169-70, 172, 520). Courts have repeatedly rejected similar claims that "persistent exposure" to media eventually culminating in acts of violence amounts to incitement or otherwise removes such speech from full First Amendment protection. *James*, 300 F.3d at 698; *see Sanders*, 188 F.Supp.2d at 1279; *McCollum*, 202 Cal.App.3d at 1001; *Watters*, 715 F.Supp. at 823; *Davidson*, 1997 WL 405907, at *21-22.

3. The First Amendment Bars Claims That Would Hold Online Services Liable for Presenting and Disseminating Protected Speech.

Plaintiffs cannot evade these protections by bringing claims against YouTube for allegedly *disseminating* the speech, rather than against those who actually *created* the underlying content. Both "creation and dissemination of information are speech within the meaning of the First

Amendment." *Sorrell*, 564 U.S. at 570. And "[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference." *Brown*, 564 U.S. at 792 n.1.

Indeed, it is "well-established that a private entity has an ability to make 'choices about whether, to what extent, and in what manner it will disseminate speech.' These choices constitute 'editorial judgments' which are protected by the First Amendment." *Volokh*, 2023 WL 1991435, at *6 (citing *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1210 (11th Cir. 2022)), *cert. granted in part sub nom. Moody v. NetChoice, LLC*, 2023 WL 6319654 (Sept. 29, 2023); *accord Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 570 (1995) ("the presentation of an edited compilation of speech generated by other persons … fall[s] squarely within the core of First Amendment security"); *Rivoli v. Gannett Co.*, 327 F.Supp.2d 233, 241 (W.D.N.Y. 2004) ("the act of publication and the exercise of editorial discretion concerning what to publish are protected by the First Amendment") (citation omitted).

That principle fully applies to YouTube. When YouTube "deliver[s] curated compilations of speech created, in the first instance, by others," it "exercise[s] editorial judgment that is inherently expressive." *NetChoice*, 34 F.4th at 1213. Such "decisions about what speech to permit, disseminate, prohibit, and deprioritize … fit comfortably within the Supreme Court's editorial-judgment precedents." *Id*. at 1214; *accord Volokh*, 2023 WL 1991435, at *9 ("Social media websites are publishers and curators of speech, and their users are engaged in speech by writing, posting, and creating content."); *O'Handley v. Padilla*, 579 F.Supp.3d 1163, 1188 (N.D. Cal. 2022) ("Twitter has important First Amendment rights that would be jeopardized by a Court order telling Twitter what content-moderation policies to adopt and how to enforce those policies."), *aff'd sub nom. O'Handley v. Weber,* 62 F.4th 1145 (9th Cir. 2023).

Courts have repeatedly held that the First Amendment bars efforts to regulate how online services moderate and disseminate third-party content—or who can use those services to receive information. *See Reno v. ACLU*, 521 U.S. 844, 874-79 (1997) (invalidating statute limiting online dissemination of "indecent" and "offensive" speech to minors); *Packingham*, 582 U.S. at 109 (striking down law banning sex offenders from social-media websites); *NetChoice*, 34 F.4th at 1210-12 (enjoining law restricting social-media services' content-moderation policies); *Volokh*, 2023 WL 1991435, at *10 (enjoining New York law enacted in wake of Buffalo shooting requiring websites to develop and post policies regarding hate speech). Thus, just as Plaintiffs could not pursue tort claims directly against third parties who created the racist or firearm-instruction videos at issue, the First Amendment does not allow them to pursue such claims against YouTube for allegedly disseminating or making that speech more available.

For several reasons, that result does not change just because Plaintiffs allege that the features or techniques YouTube uses to disseminate speech (such as algorithms that curate and suggest content) are "defective," "addictive," or "dangerous." *Jones* ¶¶60, 77, 181; *Stanfield* ¶¶147, 158, 242.

First, YouTube's allegedly defective algorithm and other features are inseparable from the content of the third-party speech. As discussed, Plaintiffs' claims fault YouTube for allegedly exposing Gendron to speech expressing particular viewpoints or that allegedly educated him about weapons and armor. YouTube's features did not radicalize or educate Gendron apart from bringing that speech to his attention. Framing this case as challenging supposedly defective or negligent features does not change the fact that what Plaintiffs are attacking—what gives rise to their claims and what allegedly caused their injuries—is the third-party speech that YouTube helped disseminate (and the particular viewpoints expressed by that speech). As in similar cases,

where courts have rejected efforts to plead around speech, the objectionable content is the entire basis for Plaintiffs' claims. *See Bill v. Super. Ct.*, 137 Cal.App.3d 1002, 1007 (1982) (rejecting argument that failure-to-warn claim did "not seek to impose liability on the basis of the content of the motion picture" because if showing the movie "attract[ed] violence-prone persons to the vicinity of the theater, it is precisely because of the film's content"); *Est. of B.H. v. Netflix, Inc.*, 2022 WL 551701, at *2 & n.3, *3 (N.D. Cal. Jan. 12, 2022) (allegations that Netflix's algorithms manipulated viewers "into watching content that was deeply harmful to them" targeted speech because "[w]ithout the content, there would be no claim" (cleaned up)). Had YouTube used the same algorithms, but shown Gendron only government-approved public service announcements or serene classical music videos, there would be no case.

Second, even if Plaintiffs' claims could somehow be understood as targeting only YouTube's features for choosing and disseminating third-party content, the First Amendment would still apply. Plaintiffs allege that those features (principally, YouTube's "recommendation" algorithm) "prioritize[] engagement" with certain speech—material that is more extreme or polarizing. *Jones* ¶¶70, 76; *Stanfield* ¶¶151, 157. They thus seek to hold YouTube liable for "selecting which users' speech the viewer will see, and in what order"—classic editorial choices protected by the First Amendment. *NetChoice*, 34 F.4th at 1204. Plaintiffs' claims are akin to suing a newspaper for trying to maximize engagement with an ideologically offensive op-ed by running it on the front page or otherwise taking steps to draw readers' attention to it, *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974), or a library for recommending allegedly harmful books to a patron, *Fayetteville Pub. Libr. v. Crawford Cnty.*, 2023 WL 4845636, at *7 (W.D. Ark. July 29, 2023). Plaintiffs' theory is that YouTube's features are defective or negligent because they present speech in ways that increase its impact on its potential audience. *Jones* ¶¶71, 76, 181,

204; *Stanfield* ¶¶152, 157, 242, 265. But efforts to increase engagement are inherent in the creation and dissemination of speech, and imposing liability on such efforts would "shackle the First Amendment in its attempt to secure the 'widest possible dissemination of information from diverse and antagonistic sources.'" *Sullivan*, 376 U.S. at 266. Simply put: "That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers." *Sorrell*, 564 U.S. at 578.

Alleging that YouTube somehow "addicts" some users to speech similarly makes no difference. Addictive speech is not exempt from First Amendment protection, *see Brown, 564* U.S. at 800 (rejecting argument that the "interactive" and immersive nature of video games took them outside the First Amendment), nor is the "force of speech" a permissible basis for "attempts to stifle it," *Sorrell*, 564 U.S. at 577-78 (state cannot regulate "catchy jingles"). Indeed, courts have repeatedly rejected efforts to impose tort liability on the creation or distribution of speech because it supposedly "addicted" or exerted "mind control" over those exposed to it, leading them to engage in violent or illegal acts. *See Zamora*, 480 F.Supp. at 200-201; *Olivia N.*, 126 Cal.App.3d at 496; *Watters*, 715 F.Supp. at 380, 383; *Wilson*, 198 F.Supp.2d at 182. Far from avoiding the First Amendment, therefore, Plaintiffs' speech-addiction theory only underscores that their claims are barred by it.

Third, Plaintiffs' attempt to hold YouTube liable for disseminating speech to Gendron fails for the independent reason that Plaintiffs do not and cannot allege YouTube acted with a culpable mental state. Because "[p]rohibitions on speech have the potential to chill, or deter, speech outside their boundaries," the First Amendment will often "condition liability on the State's showing of a culpable mental state." *Counterman v. Colorado*, 600 U.S. 66, 75 (2023). In cases involving actual incitement, for example, "the First Amendment precludes punishment, whether civil or

criminal, unless the speaker's words were 'intended' (not just likely) to produce imminent disorder." *Id.* No less culpable intent is required to make those who distribute any other speech liable for violence that it allegedly fosters. Here, however, Plaintiffs' claims are based on theories of strict liability and negligence. This lack of allegedly intentional conduct does not provide the "precision of regulation" the First Amendment demands. *Claiborne*, 458 U.S. at 916-17; *accord Herceg*, 814 F.2d at 1024 (First Amendment protection cannot "be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as 'bad'").

C. Plaintiffs Do Not Plead Viable Product Liability Claims.

In addition to being barred by federal law, Plaintiffs' strict product liability and negligent design claims (*Jones* Counts 12-13; *Stanfield* Counts 15-17) fail under New York law. Plaintiffs seek to expand product liability law in an unprecedented way by holding YouTube—the provider of an intangible, online service—liable for harm arising from the ideas and content conveyed on that service. *Jones* ¶¶76-77, 79, 81, 86, 90, 95; *Stanfield* ¶¶157-58, 160, 162, 167, 171, 176. This unprecedented distortion of product liability principles should be rejected—as it has been in numerous other cases.

1. Plaintiffs' Product Liability Claims Fail Because YouTube Is an Interactive Communications Service, Not a Product.

Product liability law provides redress for injuries from tangible goods and products. To state a claim, a plaintiff's "complained-of injury" must be "caused by a defect in something within" the "definition of 'product.'" Restatement (Third) of Torts: Products Liability § 19 cmt. a (1998) ("Restatement"); *In re Eighth Jud. Dist. Asbestos Litig.*, 33 N.Y.3d 488, 494 (2019) ("[I]n every instance it is for the court to determine as a matter of law whether something is, or is not, a product."). And product liability law focuses on "the tangible world." *Gorran v. Atkins*

Nutritionals, Inc., 464 F.Supp.2d 315, 324 (S.D.N.Y. 2006), *aff'd*, 279 F.App'x 40 (2d Cir. 2008) (citation omitted); *accord Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991) (same). "A product is tangible personal property distributed commercially for use or consumption." Restatement § 19(a). Conversely, "[s]ervices, even when provided commercially, are not products." *Id.* § 19(b); cmt. f.

Plaintiffs repeatedly and conclusorily assert that YouTube is a "product." *See, e.g.*, *Jones* ¶¶7, 70-71, 180-86; *Stanfield* ¶¶151-52, 241-47. But incanting the word "product" in a complaint does not transform an intangible service into a tangible product for purposes of product liability law. YouTube is not "tangible personal property distributed commercially for use or consumption." Restatement § 19(a). Plaintiffs acknowledge that YouTube's "recommendation algorithm," "autoplay feature," and "user-feeds" are all tailored to individual users based on content those users engage with. *Jones* ¶¶182, 187, 204; *Stanfield* ¶¶243, 248, 265; *e.g.*, *Jones* ¶191; *Stanfield* ¶252 (YouTube's algorithm "draw[s] personalized inferences about what kind of videos and content individual users are most likely to spend time consuming, then auto-play[s] or recommend[s] those videos for them"). This does not describe a fixed and "tangible product," but instead an adaptable service of the sort that has never been covered by product liability law. *See* Restatement § 19(b); cmt. f.

New York courts have repeatedly refused to apply product liability law to online services. *See Eberhart v. Amazon.com, Inc.*, 325 F.Supp.3d 393, 397-400 (S.D.N.Y. 2018); *Intellect Art Multimedia, Inc. v. Milewski*, 2009 WL 2915273, at *7 (Sup. Ct. Sept. 11, 2009) ("[T]his court is not persuaded that this website in the context of plaintiff's claims is a 'product' which would otherwise trigger the imposition of strict liability."). Other courts uniformly hold likewise. *See, e.g.*, *Grossman v. Rockaway Tp.*, 2019 WL 2649153, at *4, *15 (N.J. Super. Ct. June 10, 2019)

(rejecting product liability claims premised on allegations that "Snapchat's [purported] product is designed to be addictive" and finding no authority "to support the conclusion that Snap's role of involvement in the events of this case constitute a 'product' rather than a 'service'"); *Ziencik v. Snap, Inc.*, 2023 WL 2638314, at *1, *4 (C.D. Cal. Feb. 3, 2023) (same); *In re Facebook, Inc.*, 625 S.W.3d at 85 n.1 (noting dismissal of product liability claim because "Facebook is not a 'product'"); *Jacobs v. Meta Platforms, Inc.*, 2023 WL 2655586, at *4 (Cal. Super. Ct. Mar. 10, 2023) ("as a social media platform that connects its users, Facebook is more akin to a service than a product"); *Quinteros v. InnoGames*, 2022 WL 898560, at *1, *7 (W.D. Wash. Mar. 28, 2022) (website and mobile app that enabled "interaction between online players" offered a service, "not a product"); *Jackson v. Airbnb, Inc.*, 639 F.Supp.3d 994, 1011 (C.D. Cal. 2022) (online "platform that connects users … is more akin to a service than to a product").

2. Plaintiffs' Product Liability Claims Fail Because Plaintiffs' Harms Flow From Intangible Information or Ideas.

Plaintiffs' claims fail for the additional reason that they impermissibly seek to hold YouTube liable for the particular ideas and expression it disseminated to Gendron. *See* Section II.B *supra*. But product liability law does ***not*** address "the unique characteristics of ideas and expression." *Winter*, 938 F.2d at 1034; *accord Est. of B.H.*, 2022 WL 551701, at *3 (product liability law does not extend to "books, movies, or other forms of media"). This limitation helps ensure that product liability law does not create "significant constitutional problems under the First Amendment." *James*, 300 F.3d at 695.

Courts thus have "unanimously opposed extending products liability law to … 'intangible thoughts, ideas, and messages contained within games, movies, and website materials.'" 2 Owen & Davis on Prod. Liab. § 17:28 (4th ed. 2023) (citation omitted); *e.g.*, *Gorran*, 464 F.Supp.2d at 324-25 (following ideas from a diet book); *Walter v. Bauer*, 439 N.Y.S.2d 821, 822-23 (Sup. Ct.

1981) (performing experiment described in a science textbook); *Winter*, 938 F.2d at 1036 (claims based on inaccurate information about poisonous mushrooms in encyclopedia); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230, 232, 239 (Tex. Ct. App. 1993) (rejecting product liability claim alleging that "ideas and information contained in the magazine encouraged children to engage in activities that were dangerous").

This unbroken line of cases squarely rejects the proposition that "'inciting' media speech is a 'product'" for purposes of product liability law, including in cases just like this where the "harm is a result of alleged exhortation, inspiration or 'brainwashing'" from the speech or ideas communicated. *Wilson*, 198 F.Supp.2d at 171-74 (holding that video game Mortal Kombat not a product and dismissing product liability claims arising from avid game-player's fatal stabbing of plaintiff); *accord James*, 300 F.3d at 701 (holding that "video game cartridges, movie cassette, and internet transmissions are not sufficiently 'tangible' to constitute products in the sense of their communicative content" and dismissing product liability claims alleging that "words and images" in video games and movies caused viewer "to snap and to effect the deaths of the victims" in mass shooting); *Sanders*, 188 F.Supp.2d at 1279 (holding that "intangible thoughts, ideas, and expressive content are not 'products' and dismissing product liability claim against video game makers and movie producers alleging that viewers' exposure to violent movie and video games resulted in mass shooting); *Est. of B.H.*, 2022 WL 551701, at *1 (dismissing product liability claim that online streaming-video content caused viewer's suicide).

This case is materially indistinguishable. Plaintiffs' product liability claims assert that YouTube is defective because it allegedly disseminated certain intangible ideas, information, and expressive content (videos), and because viewing that material caused Gendron to engage in abhorrent violent conduct. That is not the domain of product liability law. Providing tailored

suggestions of videos to particular users is a paradigmatic example of a service—not a standardized product—that disseminates information and ideas. It is no more subject to product liability law than recommendations made by a bookstore about books that a customer might like based on those she had previously purchased or browsed.

That YouTube uses algorithms to present third-party content does not transform its offerings into tangible "products." *See, e.g.*, *Rodgers v. Christie*, 795 F.App'x 878, 879-80 (3d Cir. 2020) (dismissing product liability claim against creator of "algorithm" used to generate information about whether to release criminal defendants prior to trial); *Est. of B.H.*, 2022 WL 551701, at *3 (dismissing product liability claim based on algorithmic dissemination of television show, since product liability law does "not support the application of strict liability to content."). A similar argument was made in *Wilson*, which involved the video game Mortal Kombat. The plaintiff there argued that the game should be understood as a "product" because "the nature of today's virtual reality technology merges the idea or expression with the technology" such that "there is no longer any way to distinguish between the physical 'container' of the ideas and the ideas themselves." 198 F.Supp.2d at 173-74. The court had little trouble rejecting that theory: "The pictoral representation that evokes the viewer's response is the essence of the claimed 'product,' regardless of whether that representation is viewed passively, as in a motion picture, or is controlled by the viewer." *Id*. at 174; *see also Quintero*s, 2022 WL 898560, at *1, *7 (rejecting argument that gaming app was "product" notwithstanding allegations that design features of the game made it "psychologically addictive").

Likewise, Plaintiffs' claims here focus on the alleged harm caused by the particular ideas or information that YouTube displayed to users. Plaintiffs do not take issue in the abstract with an algorithm that supposedly makes content more engaging—they fault YouTube for the specific

content that its algorithm allegedly suggested to Gendron (and others): "angry, violent, and extremist content." *Jones* ¶195; *Stanfield* ¶256; *see also Jones* ¶¶197, 199-200; *Stanfield* ¶¶258, 260-61. In other words, the alleged defect is that YouTube suggested "bad" speech, which led Gendron to be persuaded by a misguided ideology, obtain information that he misused, and ultimately to commit a terrible crime. No matter the degree of technological sophistication, this is not the kind of functionality that product liability law has ever regulated—nor would it be a proper application of such law, especially given the obvious First Amendment problems that would result.

D. Plaintiffs' Negligence-Based Claims Fail for Lack of a Duty of Care.

Plaintiffs independently cannot state negligence-based claims (*Jones* Count 13; *Stanfield* Counts 16-17) against YouTube because they cannot allege that YouTube owes them a legally cognizable duty of care. The existence of a duty of care is an element of all negligence-based claims. *Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016); *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (2001); *accord Est. of Morgan v. Whitestown Am. Legion Post No. 1113*, 309 A.D.2d 1222, 1222 (4th Dep't 2003) (reversing denial of motion to dismiss negligence claim because plaintiff failed to plead a cognizable duty); *Graber v. Bachman*, 27 A.D.3d 986, 987 (3d Dep't 2006) (claim of negligent infliction of emotional distress requires pleading a duty).

Plaintiffs allege both that YouTube was subject to a "general duty … to act reasonably not to expose others to reasonably foreseeable risks of injury" (*Jones* ¶365; *Stanfield* ¶¶450, 463), and that YouTube owed a duty to "prevent users, including minors and teenagers, from becoming addicted, radicalized, and committing violent acts as a result of their engagement with YouTube," *Jones* ¶366; *Stanfield* ¶¶451, 464. But Plaintiffs do not (and cannot) bring claims on behalf of Gendron for his own "radicalization" or criminal acts—so any purported duty YouTube owed to protect Gendron as a user of its service is irrelevant and cannot support a negligence claim here.

And YouTube did not owe any duty to the general public to control Gendron. "A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others." *Hamilton*, 96 N.Y.2d at 233 (citation omitted); *accord Einhorn v. Seeley*, 136 A.D.2d 122, 126 (1st Dep't 1988) (same). A duty arises only "where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others." *Hamilton*, 96 N.Y.2d at 233; *see also Pingtella v. Jones*, 305 A.D.2d 38, 42-44 (4th Dep't 2003) (granting motion to dismiss for lack of duty on this basis). This case involves neither.

Special relationships giving rise to duties are rare and limited to narrow circumstances not present here. *Einhorn*, 136 A.D.2d at 126; *Hamilton*, 96 N.Y.2d at 233. To establish such a relationship, the injured party must show that a defendant owed not merely "a general duty to society, but a specific duty to him"—"a duty running directly to the injured person." *Lauer v. City of N.Y.*, 95 N.Y.2d 95, 100 (2000). Plaintiffs do not allege that they have a special relationship with YouTube that required YouTube to protect them from criminal conduct by third parties. *Jones* ¶¶365-66; *Stanfield* ¶¶450-51, 463-64. Nor could they: Plaintiffs do not allege that they have *any* relationship to YouTube whatsoever. *See, e.g.*, *Doe v. GTE Corp.*, 347 F.3d 655, 661 (7th Cir. 2003) ("Plaintiffs do not cite any case in any jurisdiction holding that a [web] service provider must take reasonable care to prevent injury to third parties.").

As for Gendron, Plaintiffs do not and could not allege that YouTube had "authority and ability to control" his conduct, such that it would even arguably have a legal duty to prevent him from engaging in harmful wrongdoing. *Purdy v. Pub. Adm'r of Westchester Cnty.*, 72 N.Y.2d 1, 8-9 (1988); *see Jones* ¶366; *Stanfield* ¶¶451, 464. And it is well-settled that providers of internet

services do not owe a generalized legal duty to protect users from viewing or accessing objectionable third-party content. Indeed, as the Ninth Circuit has explained, "[n]o website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content." *Dyroff*, 934 F.3d at 1101; *see also, e.g.*, *Bibicheff v. PayPal, Inc.*, 844 F.App'x 394, 395-96 (2d Cir. 2021) (affirming dismissal of negligence-based claim because PayPal did not have a special relationship with its users); *Herrick v. Grindr, LLC*, 306 F.Supp.3d 579, 598-99 (S.D.N.Y. 2018) ("*Herrick II*") (granting motion to dismiss negligence-based claim because social networking application did not have a special relationship with its users), *aff'd*, 765 F.App'x 586; *Beckman v. Match.com, LLC*, 743 F.App'x 142, 143 (9th Cir. 2018) (plaintiff "failed sufficiently to allege a special relationship between her and [online dating website]"); *Klayman*, 753 F.3d at 1359-60 (no special relationship between Facebook and its users); *Herrick II*, 306 F.Supp.3d at 585-87, 599 (social networking application did not have a duty to prevent publication of allegedly dangerous and harassing content).

These cases are consistent with long-established law declining to extend tort duties to publishers of speech—including in cases like this where consumption of the speech at issue is alleged to have inspired real-world acts of violence. *See, e.g.*, *Abraham v. Entrepreneur Media, Inc.*, 2009 WL 4016515, at *1 (E.D.N.Y. Nov. 17, 2009) ("[U]nder New York law, a magazine publisher owes no duty of care to subscribers or readers."); *McMillan v. Togus Reg'l Office, VA*, 120 F.App'x 849, 852 (2d Cir. 2005) (same); *accord Watters v. TSR, Inc.*, 904 F.2d 378, 379, 381 (6th Cir. 1990) ("*Watters II*") (rejecting argument that video game manufacturer had a "duty to warn that the game could cause psychological harm in fragile-minded children," including suicide); *James*, 300 F.3d at 687 (rejecting argument that defendants owed a duty to victims of school shooting where the shooter was allegedly "desensitized" to violence by defendants' video

games, movies, and websites); *Sanders*, 188 F.Supp.2d at 1271-75 (holding that distributors of violent movies and video games had no duty to protect against violence caused by mass shooters' avid consumption of their content and explaining that "[p]lacing a duty of care on Defendants in the circumstances alleged would chill their rights of free expression"); *Zamora*, 480 F.Supp. at 202 (rejecting argument that television networks owed a duty to shooting victim where the shooter allegedly became addicted and desensitized to violence by watching defendants' television shows). In short, YouTube had no legal duty to prevent Gendron from accessing information that may have changed his ideological views—and no generalized duty to protect the public from people motivated to evil by the speech that they encounter online.

E. None of YouTube's Allegedly Wrongful Conduct Proximately Caused Gendron's Attack.

Plaintiffs' claims against YouTube also fail for lack of proximate cause. "The overarching principle governing determinations of proximate cause"—*i.e.*, legal causation—is that such "cause [must be] 'a substantial cause of the events which produced the injury.'" *Hain v. Jamison*, 28 N.Y.3d 524, 528-29 (2016) (citation omitted). Various factors are relevant to assessing proximate cause, including "the foreseeability of the event resulting in injury" and "whether and, if so, what other forces combined to bring about the harm." *Id.* at 530. Of these factors, foreseeability is often the "most significant." *Id*. That an outcome may be conceivable does not make it foreseeable. *Dyer v. Norstar Bank, N.A.*, 186 A.D.2d 1083, 1083 (4th Dep't 1992); *see also Perry v. Rochester Lime Co.*, 219 N.Y. 60, 63-64 (1916) (alleged harm must be "probable" or "within the range of reasonable expectation," not merely "possible").

Legal causation may be decided on the pleadings. *E.g.*, *Ventricelli v. Kinney Sys. Rent A Car*, 45 N.Y.2d 950, 951-52 (1978) (affirming dismissal of complaint for failure to allege proximate cause due to intervening and unforeseen act); *Dyer*, 186 A.D.2d at 1083 (reversing

denial of dismissal and finding lack of proximate cause); *Moore v. Shah*, 90 A.D.2d 389, 392 (3d Dep't 1982) (same). Indeed, cases involving third-party intervening acts, especially when criminal in nature, are often dismissed on the pleadings for lack of proximate cause. *E.g.*, *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 103-04 (1st Dep't 2003); *Taylor v. Bedford Check Cashing Corp.*, 8 A.D.3d 657, 657 (2d Dep't 2004). This is such a case. No proximate cause exists here as a matter of law because YouTube's alleged conduct is too "remote" to the injury, *Hamilton*, 96 N.Y.2d at 234, and an unforeseeable, superseding cause—Gendron's intentional criminal act—breaks any causal chain, *Lorenzo v. City of N.Y.*, 192 A.D.2d 586, 589 (2d Dep't 1993).

1. Plaintiffs' Alleged Chain of Causation is Too Attenuated.

First, Plaintiffs fail to allege that their injuries were within the range of reasonably foreseeable consequences of YouTube's provision of an online service to "billions" of users around the world. *Jones* ¶193; *Stanfield* ¶254. Plaintiffs allege that YouTube's algorithm and other "design choices" caused Gendron to become addicted to YouTube (*Jones* ¶¶7, 69; *Stanfield* ¶150), and that his "addiction was a substantial factor and motivating force in causing him to pursue the massacre at Tops," *Jones* ¶205; *Stanfield* ¶266. Despite these conclusory assertions, none of Plaintiffs' specific addiction allegations support the conclusion that YouTube's "design choices" caused Gendron's supposed addiction, much less his decision to commit the Tops massacre. *See Jones* ¶¶205-210; *Stanfield* ¶¶266-271. The "addiction" allegations are based on Gendron's own writings, which merely state that he "stay[ed] up late" watching YouTube" and would "sit[] around watching YouTube" for days (*Jones* ¶¶207-08; *Stanfield* ¶¶268-69). Even assuming that somehow amounts to "addiction," there is no allegation—nor any basis for alleging—that Gendron's avid viewing of videos on YouTube was caused by YouTube's

supposedly defective features or design choices, as opposed to independent volitional choices he made about how to spend his time.

Plaintiffs' effort to link YouTube's supposed defects to Gendron's actual attack are even weaker. Plaintiffs allege—upon information and belief, and with no factual support—that "YouTube's algorithm recommended and directed the Shooter to many if not most of the extreme videos that prepared and motivated him for the attack." *Jones* ¶220; *Stanfield* ¶281. According to Plaintiffs, this included a "video depicting an animated rendition of the Virginia Tech shooting of 2007," various "'hard core' gun videos concerning illegal modification of firearms," and "even instructional videos on conducting military-style assault operations." *Jones* ¶¶215, 217; *Stanfield* ¶¶276, 278.[4] Plaintiffs do not explain why viewing such videos would foreseeably lead someone to actually engage in mass murder.

The purported link between the violent content Gendron supposedly watched and his real-world attack is simply too "attenuated," *Martinez v. Lazaroff*, 48 N.Y.2d 819, 820 (1979), particularly given the extensive "series of new and unexpected causes" that Plaintiffs also allege. *Perry*, 219 N.Y. at 64. Those include: the conduct of Gendron's parents, including their alleged purchase of a rifle for Gendron and failure to properly respond to his alarming behavior by restricting his access to guns and combat-related gear (*Jones* ¶¶105-12; *Stanfield* ¶¶186-93); the conduct of the firearms dealer, who allegedly failed to reasonably vet Gendron prior to selling him an assault weapon and provided him with information regarding how to illegally remove a lock from the firearm (*Jones* ¶¶83, 90-91; *Stanfield* ¶¶164, 171-72); the conduct of the firearms lock designer (*Jones* ¶4; *Stanfield* ¶145); the conduct of the body-armor dealer and its agents, who

[4] As discussed above, Plaintiffs' "information and belief" allegations are contradicted by the Attorney General's conclusions that: (1) YouTube was ***not*** one of the online services that disseminated content formative to Gendron's hateful ideology; and (2) the firearm videos Gendron viewed on YouTube did ***not*** provide instruction on illegal modification of AR-15-style rifles. Report at 24-26; 28-29.

allegedly encouraged Gendron to purchase their body armor plates and sold them to him without conducting any reasonably inquiry prior to the sale (*Jones* ¶¶99-101; *Stanfield* ¶¶180-82); Gendron's alleged mental health issues (*Jones* ¶104; *Stanfield* ¶185); the decision by a hospital to release Gendron after a mental health evaluation (*id.*); and, of course, Gendron's own murderous choices (*Jones* ¶¶113-19; *Stanfield* ¶¶194-200).

None of these alleged facts and events were within the "range of reasonable expectation" to be foreseeable to YouTube. *Perry*, 219 N.Y. at 64 (no proximate cause where child's death was caused by intervening events not "within the range of reasonable expectation" of defendant's alleged conduct); *accord Hamilton*, 96 N.Y.2d at 234 (no liability where relationship between defendants' conduct and the injury is "remote, running through several links in a chain"); *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315-16 (1980) (alleged injury and intervening events must be "associated with the original negligence" (emphasis added)). Gendron's murder of his victims is "entirely different in character from any [harm] that would have resulted" foreseeably from YouTube's provision of its service. *Martinez*, 48 N.Y.2d at 820.

2. Gendron's Unforeseeable, Intervening Criminal Acts Break Any Causal Connection.

Even if there were an otherwise legally viable link between YouTube's alleged wrongdoing and Plaintiffs' injuries, proximate cause would not exist as a matter of law because Gendron's extraordinary criminal acts were an unforeseeable intervening act that severed any causal chain. It is settled law that causation is lacking where the chain of events between a defendant's alleged misconduct and the plaintiff's injuries includes an intervening act by a third party—especially a criminal act—that "is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct." *Hain*, 28 N.Y.3d at

529 (citation omitted); *accord Sturm*, 309 A.D.2d at 103 (no proximate cause between defendants' manufacture of handguns and harm caused by intervening criminal activity).

The "unusual circumstances" presented by the "intervening, intentional, and criminal act of [a] third-party gunman" is the paradigmatic example of such an unforeseeable intervening act. *Taylor*, 8 A.D.3d at 657. New York courts thus have held that criminal acts—especially those involving violence—that directly inflicted plaintiffs' injuries broke the chain of causation as a matter of law. *Dyer*, 186 A.D.2d at 1083 (dismissing complaint for lack of proximate cause where plaintiff sued bank for injuries sustained during a robbery); *Tennant v. Lascelle*, 161 A.D.3d 1565, 1566 (4th Dep't 2018) (no proximate cause where third party murdered the victim, despite defendant's negligence in supervising victim).

This principle has led numerous courts to dismiss claims seeking to hold YouTube and other online services liable for acts of violence committed by users exposed to harmful speech on their platforms. Such claims failed for lack of proximate cause even though the third-party content at issue there was allegedly designed specifically to promote terrorism and inspire acts of violence—something that Plaintiffs do not allege here. In *Crosby v. Twitter, Inc.*, for example, the plaintiffs alleged that ISIS used YouTube and other online platforms to "attract[] new recruits and inspir[e] 'lone actor attacks.'" 921 F.3d 617, 620 (6th Cir. 2019). Explaining that online services cannot "foresee how every viewer will react to third party content on their platforms," the Court of Appeals held that allegations that the attacker viewed ISIS content on defendants' platforms and became "self-radicalized" failed to establish foreseeability or that defendants were "a substantial factor in, or have any direct link to," the resulting terrorist attack. *Id.* at 625-26; *see also Fields v. Twitter, Inc.*, 881 F.3d 739, 741-50 (9th Cir. 2018) (allegations that Twitter knowingly hosted ISIS content intended to recruit terrorists and incite attacks failed to plead

proximate causation); *Pennie v. Twitter, Inc.*, 281 F.Supp.3d 874, 886-87 (N.D. Cal. 2017) (allegations that mass shooter was radicalized by Hamas content encouraging terrorist attacks insufficient to plead proximate cause); *Retana v. Twitter, Inc.*, 419 F.Supp.3d 989, 996-97 (N.D. Tex. 2019) (same), *aff'd* 1 F.4th 378 (5th Cir. 2021); *accord Sanders*, 188 F.Supp.2d at 1276 (dismissing for lack of proximate cause claims based on publication of violent movies and video games consumed by teenaged mass shooters because "the school shooting was not a normal response to dissemination" of such material).

Similarly here, it is not foreseeable that hosting and using general-purpose algorithms to display videos that may be of interest to users—even if some of that material is offensive, racist, or violent—would cause a user to plan and commit a horrific mass shooting. Gendron's highly unusual (and indeed monstrous) response to the material that he allegedly viewed online breaks any link between YouTube's dissemination of video content and the injuries Plaintiffs suffered.

F. Plaintiffs Fail to State a Claim for NIED.

The *Stanfield* Plaintiffs' NIED claim (Count 17) fails for several additional reasons.

First, an NIED claim requires Plaintiffs to identify some basis for liability independent of other torts. "Generally, a cause of action for infliction of emotional distress is not allowed if it is duplicative of a tort cause of action." *Doe v. Ward*, 2023 WL 5805977, at *4 (Sup. Ct. Sept. 7, 2023). But here, the *Stanfield* Complaint does just that: repackage existing negligence and product liability claims. *Compare Stanfield* ¶¶464-66 (alleging breach of duty of care through negligent product design) *with id.* ¶¶437-48 (alleging the same design defects) and *id.* ¶¶450-53 (alleging the same breach of duty). The court need go no further to reject the claim. *See, e.g.*, *Fay v. Troy*

City Sch. Dist., 197 A.D.3d 1424 (3d Dep't 2021) (dismissing NIED claim as duplicative of negligence claim); *Ward*, 2023 WL 5805977, at *4-5 (same).[5]

Second, the *Stanfield* Plaintiffs' claim fails under each of three theories for which New York law permits recovery for NIED. A "zone of danger" theory requires that "defendant's actions posed an actual risk to plaintiff's physical safety or caused plaintiff to fear for his or her own physical safety." *Bah v. Apple Inc.*, 2020 WL 614932, at *15 (S.D.N.Y. Feb. 10, 2020) (citations omitted). Plaintiffs appear to be pursuing a "zone of danger" theory of recovery, alleging that their emotional distress was caused by traumatic fear for their lives while in the vicinity of the shootings. *Stanfield* ¶¶8, 13, 17, 21, 30, 34, 45, 56, 63, 69, 75, 84, 87. But, as discussed in section III.E *supra*, *YouTube*'s actions did not pose an actual risk to Plaintiffs' physical safety: Gendron's did. Beyond that, Plaintiffs do not sufficiently plead they were in the zone of danger, as would be required for recovery under this theory.

In shooting cases, New York courts generally find plaintiffs in the "zone of danger" when the gun is pointed at them. *See Sylvester v. City of N.Y.*, 385 F.Supp. 2d 431, 445 (S.D.N.Y. 2005). Here, only one Plaintiff encountered Gendron: Julie Harwell alleges that "[t]he shooter looked at her;" not that he pointed the gun at or threatened her. *Stanfield* ¶69. Plaintiffs Fragrance Harris Stanfield, Shonnell Harris-Teague, Schacana Geter, Razz'ani Miles, Patrick Patterson, Nasir Zinnerman, LaRose Palmer, Jerome Bridges, Morris Vinson Robinson-McCulley, Kim Bulls, Carlton Steverson all fled the store's rear exit when they heard the shooting start. *See, e.g.*, *Stanfield* ¶¶7-11, 19-22, 38-44, 49-51, 52-54 65-67. Plaintiffs YAHnia Brown-McReynolds, Lamont Thomas, L.T., Tiara Johnson, Rose Marie Wysocki, Curt Baker, DennisJanee Brown, and Dana Moore all hid from Gendron in various locations. *Id.* ¶¶16-18, 23-37. Shamika McCoy,

[5] As discussed in Section III.D *supra*, the NIED claim fails for the further reason that YouTube does not owe a duty to its users or the general public to protect against the conduct of third parties.

Mercedes Wright, Quandrell Patterson, Von Harmon, and Quinnae Thompson were outside the store and never saw Gendron. *Id.* ¶¶45-48, 55-59, 62-64, 91. In short, none of the *Stanfield* Plaintiffs allege sufficient proximity to the attack to recover on a zone of danger theory.

A "bystander" theory of recovery "requires that plaintiffs have 'witnessed the death or serious injury of a family member due to the defendant's actions' and been threatened with personal physical injury." *Bah*, 2020 WL 614932, at *15 (citations omitted); *accord Bovsun v. Sanperi*, 61 N.Y.2d 219, 230-31 (1984). This theory is strictly limited to plaintiffs who observed physical harm to an "immediate family member," based on the "policy of 'limiting the availability of recovery for the negligent infliction of emotional distress to a strictly and objectively defined class of bystanders.'" *Greene v. Esplanade Venture P'ship*, 36 N.Y.3d 513, 526 (2021).

Insofar as Plaintiffs advance a bystander theory, it fails because no Plaintiff alleges they witnessed the death or serious injury of an immediate family member. *Stanfield* ¶¶7-67. The only qualifying immediate family members among the plaintiffs are Fragrance Harris Stanfield and her daughter YAHnia Brown-McReynolds, and Julie Harwell, Lamont Thomas, and their daughter L.T. Thankfully, all escaped without a serious physical injury—meaning none observed a physical injury to the other. *Id.* ¶¶7-15. Quandrell Patterson is the only Plaintiff who tragically saw a family member—his cousin—already deceased in the parking lot. *Id.* ¶¶59-61. But no New York case recognized a cousin as an "immediate family" member, and *Greene* specifically excluded more-immediate relatives from that category, 36 N.Y.3d 526. Accordingly, none of the *Stanfield* Plaintiffs can maintain a bystander theory, and their NIED claim fails as a matter of law.[6]

[6] Plaintiffs do not appear to advance a "direct duty" theory of recovery for NIED. That theory requires injuries be caused by the defendant's breach of a duty "specific to the particular person claiming to have been emotionally harmed" and "'not some amorphous, free-floating duty to society.'" *Bah*, 2020 WL 614932, at *16; *accord Simpson v. Uniondale Union Free Sch. Dist.*, 702 F.Supp.2d 122, 135 (E.D.N.Y. 2010). Here, Plaintiffs allege only that YouTube owed a general duty to all persons (*Stanfield* ¶463) and to its users (*Stanfield* ¶464). While even those allegations fail as a matter of law, *see* Section III.D *supra,*

G. Plaintiffs' Claims Against Alphabet Must Be Dismissed.

Finally, Alphabet, cannot be held liable for the actions of its subsidiary, YouTube. It is black-letter law that a parent corporation cannot be held liable for the alleged wrongs of its subsidiaries. *See Retropolis, Inc. v. 14th St. Dev. LLC*, 17 A.D.3d 209, 210 (1st Dep't 2005); *Feigen v. Advance Cap. Mgmt. Corp.*, 150 A.D.2d 281, 282–83 (1st Dep't 1989) (dismissing causes of action relying on "alter ego theory" given the "absence of specific factual allegations demonstrating fraud or other corporate misconduct"). The parent of an LLC like YouTube generally is not "liable for any … liabilities of the [LLC] … whether arising in tort … or otherwise," N.Y. Ltd. Liab. Co. Law §609(a), and as such it "is not a proper party to proceedings by or against [an LLC]." *Id.* §610. Here, while Plaintiffs name Alphabet and YouTube as Defendants, they fail to allege any facts specific to Alphabet, and their claims are clearly directed solely against YouTube. Plaintiffs have no basis for asserting claims against Alphabet. *See, e.g.*, *Lancaster v. Alphabet Inc.*, 2016 WL 3648608, at *7 (N.D. Cal. July 8, 2016) (dismissing claims against Alphabet in case about YouTube's content-moderation decisions).

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they certainly do not establish the kind of particularized duty that supports an NIED claim on a "direct duty" theory.

IV. CONCLUSION

For these reasons, the claims against YouTube should be dismissed.

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Dated: November 9, 2023

s/ Thomas S. Lane

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