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,

Plaintiffs,

v.

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

Defendants,

Hon. Paula L. Feroleto
Index No. 810317/2023

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS YOUTUBE, LLC'S AND REDDIT, INC'S MOTIONS TO DISMISS (Motion #003 & #005)

LAW OFFICES of BONNER and BONNER
Charles A. Bonner*
475 Gate Five Road, Suite 211
Sausalito, CA 94965
Phone: (415) 331-3070
cbonner799@aol.com

RYDER LAW FIRM
Jesse P. Ryder, Esq.
6739 Myers Road
E. Syracuse, NY 13057
Phone: (315) 382-3617
ryderlawfirm@gmail.com

**Pro hac vice motion forthcoming*

EVERYTOWN LAW
Eric Tirschwell
Aaron Esty
Val Rigodon
450 Lexington Avenue
P.O. Box #4184
New York, NY 10017
Phone: (646) 324-8222
etirschwell@everytown.org
aesty@everytown.org
vrigodon@everytown.org

Alison Barnes
P.O. Box 14780
Washington, DC 20044
Phone: (203) 738-5121
abarnes@everytown.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Plaintiffs in the *Jones* case (index No. 810316/2023) and *Stanfield* case (index No. 810317/2023) file this consolidated opposition to motions to dismiss filed by Defendants Alphabet, Inc., Google LLC, and YouTube, LLC (collectively, "YouTube") and Reddit, Inc. ("Reddit") (together, "Defendants").[1] As explained below, dismissal is not warranted pursuant to CPLR 3211(a)(7).

INTRODUCTION

It was by design. A year before the Shooter murdered ten Black people and terrorized scores of other victims using an illegal assault weapon he himself modified, he was a teenager with no criminal record, no known affiliation with any racist group or ideology, and no training in gunsmithing or combat. Jones Compl. ¶ 216; Stanfield Compl. ¶ 277; Affirmation of Eric Tirschwell ("Tirschwell Aff.") ¶ 12. The Shooter's own writings make clear that his turn to mass violence was directly precipitated by his obsessive and addictive engagement with YouTube and Reddit. Jones Compl. ¶¶ 73-74; Stanfield Compl. ¶¶ 154-55; Tirschwell Aff. ¶12(a-e). This was no mere unintended consequence: For years, YouTube and Reddit have been engineering products designed to facilitate addiction, radicalization, and gun violence, because these proclivities—while disastrous for public health and safety—lead to ever-increasing consumption of their products and help their bottom line. Jones Compl. ¶¶ 189-204, 224-33; Stanfield Compl. ¶¶ 250-65, 285-94; Tirschwell Aff. ¶ 3-11. The tragedy that took place on May 14, 2022, was the predictable result of YouTube and Reddit's misconduct.

[1] The opposition briefs and supporting affidavits filed by Plaintiffs in the two cases are substantively identical and are filed in response to separate briefs filed by YouTube and Reddit. Pursuant to the parties' stipulation (*Jones* NYSCEF Doc. No. 27 and *Stanfield* NYSCEF Doc. No. 30) and due to the overlapping arguments presented in the YouTube and Reddit briefs, Plaintiffs file a single consolidated brief. Plaintiffs' references to "Defendants" in their brief include only YouTube and Reddit, not the non-social media Defendants.

It is by design that so many teens and young adults today struggle with social media addiction. Defendants specifically facilitate it by deploying algorithmic reward cycles calculated to deliver powerful but fleeting dopamine rushes that leave users craving more—all in an effort to monopolize users' time and attention. Jones Compl. ¶¶ 181, 224; Stanfield Compl. ¶¶ 242, 285; Tirschwell Aff. ¶¶ 3-11. Particularly vulnerable to this process are teenagers like the Shooter, who was 17 years old when he described himself as having been "radicalized" online and as desperately wanting, but unable, to quit social media—often specifically in connection to his fears and reservations about carrying out his attack. Jones Compl. ¶¶ 71-78; Stanfield Compl. ¶¶ 156-57; Tirschwell Aff. ¶ 12(a-d).

It is by design that Defendants' products incite racism, violence, and hatred. Defendants algorithmically promote them because such sentiments help their profits. Jones Compl. ¶¶ 198-204, 224-33, 384; Stanfield Compl. ¶¶ 258-65, 285-88, 482. As a result of his engagement with Defendants' products, the Shooter became a virulent white supremacist who believed that all non-white people living in the United States must be eradicated. Jones Compl. ¶¶ 72-73; Stanfield Compl. ¶¶ 153-54. As alleged in Plaintiffs' Complaints, Defendants' applications were designed to—and did—feed the Shooter material that led him to adopt such beliefs. Jones Compl. ¶¶ 70-71; Stanfield Compl. ¶¶ 151-52; Tirschwell Aff. ¶12(a-b).

And it is by design that Defendants' products precipitate in so many young men and boys an obsession with military armaments, as well as violent fantasies about conducting military-style assault operations. Defendants' products glorify and promote firearms, shootings, and violence to immature users, even if those users display no personal interest in such subjects. Jones Compl. ¶

200; Stanfield Compl. ¶ 261.[2] The Shooter himself was originally an outsider to this world: He wrote that his "direct family never had any interests" in firearms, and lacked experience in gunsmithing, mechanics, combat, or military tactics. Jones Compl. ¶¶ 215-218; Stanfield Compl. ¶¶ 276-78; Tirschwell Aff. ¶ 12(f). Yet, as alleged in the Complaints, within months of "becoming serious" about the attack, Defendants had provided him with enough expertise to obtain combat-grade body armor and an illegal assault weapon and to conduct a military-style assault operation that killed ten people, including an armed security guard.

Defendants attempt to shirk responsibility for the consequences of their actions by claiming that they were merely hosting third-party content and that Section 230 of the Communications Decency Act, the First Amendment of the United States Constitution, and New York law of products liability, duty, and proximate causation all bar them from being held liable for such conduct. But none of these shield Defendants for facilitating addiction and violence by their own design, and Plaintiffs have alleged sufficient facts to state viable claims against Defendants pursuant to New York law.

Defendants must answer for putting profits before safety. Otherwise, it is only a matter of time before the next mass shooter—primed by YouTube and Reddit—strikes. The Court should reject Defendants' motions to dismiss and allow Plaintiffs' claims against YouTube and Reddit to proceed.

[2] Plaintiffs' Complaints allege that Defendants' algorithms specifically promote gun violence even to users who have no demonstrated interest in firearms and cite a corroborating study by the Tech Transparency Project: *Dangerous by Design* (May 2023). The study found that YouTube algorithmically promotes and recommends instructions on converting firearms to machineguns, as well as videos of school and other mass shootings, to boys who had watched clips of video games but never displayed any interest in real firearms. Jones Compl. ¶ 200; Stanfield Compl. ¶ 261

SUMMARY OF THE ARGUMENT

None of Defendants' arguments justifies dismissal of Plaintiffs' claims at this early stage of the case. *First*, there is no basis for Defendants' all-or-nothing contention that their websites and applications cannot possibly be "products" because they are not tangible. Instead of accepting Defendants' untenable position, the Court should apply New York law, which calls for a case-by-case inquiry, and find that Defendants' websites and applications have plausibly been pled to be products *for the purposes* of Plaintiffs' claims. At issue here is the allegation that Defendants added and profited from defective design features that make their products unreasonably dangerous. Products liability law is the logical vehicle for adjudicating such a claim. *See In re New York City Asbestos Litig*., 27 N.Y.3d 765, 788 (2016).

Second, Plaintiffs have sufficiently alleged that Defendants breached a duty to refrain from designing, marketing, and distributing unreasonably dangerous products, *see* N.Y. PJI § 2:126, as well as to exercise reasonable care to refrain from causing foreseeable injury or harm to others. *See Davis v. S. Nassau Communities Hosp*., 26 N.Y.3d 563, 572 (2015). At this stage, all that is required to defeat a motion to dismiss is that Plaintiffs' pleadings enable Defendants to prepare a response, which Plaintiffs have clearly done. *DaSilva v. Am. Tobacco Co.,* 175 Misc. 2d 424, 426 (New York County Sup. Ct. 1997).

Third, Plaintiffs' proximate cause allegations are more than sufficient at the motion to dismiss stage. The foreseeable act of a third party does not automatically sever the chain of proximate causation under New York law. *Turturro v. City of New York,* 28 N.Y.3d 469, 484 (2016). Here, the Shooter's conduct was foreseeable to Defendants, as they were the parties who, by design, facilitated his addiction, extremism, and violence. Furthermore, Defendants were specifically on notice that their design features directly contribute to mass shootings, as this was

not the first such occurrence that was fueled by their products. Jones Compl. ¶¶ 201-03, 224-25; Stanfield Compl. ¶¶ 262-64, 285-86.

Fourth, Section 230 of the Communications Decency Act ("Section 230") does not bar Plaintiffs' claims. Subsection 230(c)(1)—on which Defendants rely—does not create immunity here. *See City of Chicago v. StubHub!, Inc*., 624 F.3d 363, 366 (7th Cir. 2010). It merely states that online platforms shall not "be treated as the publisher or speaker" of third-party content—for instance, by attempting to impose on them "liability for defamation, obscenity, or copyright infringement" for content users posted on these platforms—otherwise, it is "irrelevant." *Id*. at 365-66. Section 230(c)(1) does not preempt claims—like the Plaintiffs'—that "rest[] on alleged product design flaws—that is, the defendant's own misconduct." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 18 (2020) (Thomas, J., statement respecting denial of certiorari).

Fifth, and for substantially the same reasons, the First Amendment is inapplicable. Plaintiffs' claims do not attempt to treat Defendants as speakers or publishers of content, but as designers of defective products that facilitate addiction and violence. Furthermore, even in the event that Plaintiffs' claims are construed as efforts to impose liability on the basis of publication, the algorithms and applications that caused Plaintiffs harm are not persons entitled to First Amendment protection. *C.f. Universal City Studios, Inc. v. Corley,* 273 F.3d 429, 451 (2d Cir. 2001).

Sixth, Plaintiffs in the *Stanfield* case ("Stanfield Plaintiffs") have sufficiently alleged a claim for negligent infliction of emotional distress. Horrific mass shootings like the one at issue in the instant case represent a "special circumstance" that gives rise to a negligent infliction of emotional distress claim as a matter of New York law. In addition, the Stanfield Plaintiffs' claim is sufficiently pleaded because it is based on a direct duty Defendants owed to Plaintiffs.

Defendants breached this duty by contributing to the mass shooting by their own design, even though they were specifically on notice that their products have previously contributed to similar attacks.

ARGUMENT

I. AT THIS STAGE, THE COURT MUST LIBERALLY CONSTRUE PLAINTIFFS' ALLEGATIONS, ACCEPT THEM AS TRUE, AND ASSESS WHETHER PLAINTIFFS HAVE ANY VIABLE CLAIM

In considering a defendant's motion to dismiss, a court must accept the plaintiff's allegations as true, liberally construe those allegations, and draw all reasonable inferences in the plaintiff's favor. *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 N.Y.3d 759, 764 (2015). The defendant bears the burden of establishing that the complaint fails to state viable claims. *Connolly v Long Is. Power Auth.*, 30 N.Y.3d 719, 730 (2018). Dismissal is warranted only if the complaint fails to allege facts that fit within *any* cognizable legal theory. *Lawrence v. Graubard Miller*, 11 N.Y.3d 588, 595 (2008). "[T]he criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). Defendants cannot clear that high bar here. Plaintiffs have alleged in significant detail the conduct by YouTube and Reddit that gives rise to liability and its substantial connection to the injuries Plaintiffs suffered in the May 2022 shooting.

In its brief, Reddit criticizes Plaintiffs' allegations against it, complaining that Plaintiffs treat Reddit as "just another YouTube." Reddit Br. at 1.[3] That ignores the Complaints' specific allegations regarding Reddit. Plaintiffs allege, with detailed factual support, that Reddit

[3] Reddit submitted duplicative briefs with identical pagination in the *Stanfield* and *Jones* cases. YouTube did the same. For convenience, Plaintiffs will reference one brief for each Defendant when citing Defendants' briefs for either *Stanfield* or *Jones*. *Stanfield* NYSCEF Doc. No. 60 and *Jones* NYSCEF Doc. No. 58 will be referred to as the Reddit brief. *Jones* NYSCEF Doc. No. 55 and *Stanfield* NYSCEF Doc. No. 39 will be referred to as the YouTube brief.

specifically facilitates addiction, radicalization, and violence and cite multiple studies demonstrating that Reddit's algorithms and design features precipitate animus (Jones Compl. ¶¶ 224-25; Stanfield Compl. ¶¶ 285-86), make users more likely to engage in hate speech (Jones Compl. ¶ 224; Stanfield Compl. ¶ 285), and foment extremism and outgroup hostility (*id*.). And they make specific allegations regarding the Shooter's Reddit usage, including that the Shooter himself cited Reddit as a source of his radicalization (Jones Compl. ¶ 227; Stanfield Compl. ¶ 288), reflected on how Reddit boards like "r/masskillers [wa]s very helpful" to him in his attack, (Jones Compl. ¶ 231; Stanfield Compl. ¶ 292), and detailed how he used Reddit to acquire the body armor that allowed him to withstand the defensive fire of the store's security guard and continue shooting and terrorizing more people (Jones Compl. ¶ 230; Stanfield Compl. ¶ 291). Reddit's argument challenging those allegations—including whether Reddit's engagement-maximizing algorithms facilitate addiction, radicalization, and violence—is best tested through discovery. It is not grounds for dismissal now.

YouTube's contention that Alphabet Inc. must be dismissed from this suit is similarly premature at this stage. YouTube Br. at 41. Plaintiffs allege that Alphabet owns and operates Google Brain, its proprietary artificial intelligence software that relies on unsupervised machine learning algorithms in order to maximize engagement, and that there was a corporate decision at Alphabet to deploy Google Brain in YouTube that precipitated the engagement and addiction of millions of users, including the Shooter—all to Alphabet's benefit. Jones Compl. ¶¶ 34, 189-95; Stanfield Compl. ¶¶ 108, 250-56. Alphabet's defense that it had no direct involvement also raises factual questions reserved for discovery.

If, however, the Court finds that Plaintiffs' allegations are deficient in some respect, Plaintiffs respectfully request that the Court grant them leave to amend their complaint. *See Thome*

v. Benchmark Main Tr. Assocs., LLC, 125 A.D.3d 1283, 1285 (4th Dep't 2015) ("'Generally, [l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend . . . is committed to the sound discretion of the court.'") (alterations in original) (citations omitted).

II. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED PRODUCTS LIABILITY CLAIMS UNDER NEW YORK LAW RELATED TO YOUTUBE AND REDDIT'S DANGEROUS AND DEFECTIVE SOCIAL MEDIA APPLICATIONS[4]

The animating principle of New York products liability law is to ensure public safety and wellbeing by distributing the legal responsibility of preventing harm to those "in the best position to have eliminated those dangers." *Micallef v. Miehle Co*., 39 N.Y.2d 376, 387 (1976); *see also Codling v. Paglia*, 32 N.Y.2d 330, 340 (1973). Here, the Complaints allege that Defendants added design features to their websites and applications that facilitate addiction, radicalization, civilian acquisition of military armaments, and violence. Jones Compl. ¶¶ 81, 356, 385-86; Stanfield Compl. ¶¶ 162, 442, 483. Plaintiffs further allege that these defects and dangers are both well-documented and known to Defendants; that Defendants nevertheless made these design choices to maximize engagement with, addiction to, and profit from their products; and that these choices substantially and foreseeably caused Plaintiffs' injuries. Jones Compl. ¶¶ 69-71, 79, 202-03, 224-25, 233; Stanfield Compl. ¶¶ 150-52, 160, 263-64, 285-86, 294; Tirschwell Aff. ¶ 4. Accepting

[4] Here and in sections III, V(B-C), and VI (pp. 15, 32, 40), Plaintiffs largely adopt the arguments made by the plaintiffs in a related case before this court: *Salter v. Meta Platform Inc.*, index No. 808604/2023. Those arguments appear in the *Salter* Plaintiffs' Memorandum of Law in Opposition of Defendants' Joint Memorandum of Law in Support of Their Motion to Dismiss (Motions Numbers 3, 6, 7, 8, 9, 12, and 18) NYSCEF Doc. No. 216. Like Plaintiffs here, the *Salter* Plaintiffs are family members of victims and survivors of the Tops shooting, and they are also suing YouTube and Reddit, among other defendants. Oral arguments involving YouTube and Reddit in the *Salter* case and the instant case have been consolidated and are scheduled for February 2, 2024.

these allegations as true, which is required at this stage of the case, the Court should find that Defendants' websites and applications are products for the purposes of Plaintiffs' claims.

Defendants attempt to evade liability by arguing that applications—which they, themselves, have referred to as products—are actually "services" given their intangibility. But such a distinction is unsupported by New York law and contrary the actual test: whether a commodity's function and purpose—along with the defendant's duty owed from placing it into the stream of commerce—logically places it within the ambit of products liability law. Here, products liability law is the appropriate vehicle for Plaintiffs' claim that Defendants' products facilitated addiction, radicalization, and violence by design.

A. Defendants' social media applications are products

What constitutes a product under New York law is not confined to tangible chattels. There is no bright line test as alleged by the Defendants. Restatement (Third) of Torts: Products Liability § 19, Comment *a* (1998) ("[a]part from statutes that define 'product' for purposes of determining products liability, in every instance it is for the court to determine as a matter of law whether something is, or is not, a product"). In *Matter of the Eighth Judicial District Asbestos Litigation* ("*Asbestos Litig*."), the Court of Appeals explained that the court's role in determining the applicability of products liability law is to "settle upon the most reasonable allocation of risks, burdens and costs among the parties and within society, accounting for the economic impact of a duty, pertinent scientific information, the relationship between the parties, the identity of the person or entity best positioned to avoid the harm in question, the public policy served by the presence or absence of a duty and the logical basis of a duty." 33 N.Y.3d 488, 495-96 (2019) (quoting *Asbestos Litig*., 27 N.Y.3d 765, 788 (2016)). The Court of Appeals also emphasized the following factors in determining whether an item is a product: (1) a defendant's control over the

design and standardization of the product, (2) the party responsible for placing the product into the stream of commerce and deriving a financial benefit, and (3) a party's superior ability to know—and address—the dangers inherent in the product's reasonably foreseeable uses or misuses. *Asbestos Litig*., 33 N.Y.3d at 496-97 (citation omitted).

Here, these factors weigh in favor of finding that Defendants' applications are products. First, as alleged in the Complaints, Defendants had control over the design of their respective applications and websites. Jones Compl. ¶¶ 40, 47; Stanfield Compl. ¶¶ 114, 121. Defendants designed the algorithms used in these applications to rely on unsupervised machine learning to draw personalized inferences about content that would maximize engagement and to systematically promote extremist, radicalizing, and violent content, including those involving firearms and other military armaments. Jones Compl. ¶¶ 195-200, 224, 386; Stanfield Compl. ¶¶ 256-261, 276, 285. Second, Defendants are responsible for placing their applications on the market and deriving a financial benefit from them. As alleged in the Complaints, Defendants' products facilitate addiction, radicalization, and violence as part of Defendants' objective of maximizing engagement with the products, which in turn increases profit through the sale of advertisement and personal data. Jones Compl. ¶¶ 70-71, 184, 194, 384; Stanfield Compl. ¶¶ 151-152, 245, 255, 482. Finally, Defendants are in the best position to know and address the dangers of their applications. Jones Compl. ¶¶ 201-202, 224-25; Stanfield Compl. ¶¶ 262-263, 285-86. The applications' tendency to undermine mental health—especially of minors—and incite violence has been well-documented. *Id.* And Defendants have specifically been on notice that their products have substantially contributed to previous mass shootings such as the Christchurch Mosque attack in 2019. *Id.* Under New York law, Defendants' applications, as specifically designed and placed into

the stream of commerce with the intent to lead consumers to the most usage possible, are products for purposes of Plaintiffs' products liability claims.

In addition, decisions from courts in New York and elsewhere regarding software and computer programs under the Uniform Commercial Code ("UCC") and products liability law support the conclusion that Defendants' applications are products. For example, New York and other courts recognize that "software that is mass-marketed is considered a good," and not a service. *Commc'ns Grps. v. Warner Commc'ns, Inc*., 138 Misc. 2d 80, 83 (New York County Civ. Ct. 1988) ("[I]t seems clear that computer software, generally, is considered by the courts to be a tangible, and movable item, not merely an intangible idea or thought and therefore qualifies as a 'good' under Article 2 of the UCC."); *see also Simulados Software, Ltd. v. Photon Infotech Priv., Ltd.*, 40 F. Supp. 3d 1191, 1199 (N.D. Cal. 2014) ("Generally, courts have found that mass-produced, standardized, or generally available software, even with modifications and ancillary services included in the agreement, is a good that is covered by the UCC."). These holdings reinforce the principle that, under New York products liability law, the context in which a product is distributed and used is more vital to a court's analysis than the product's physical attributes.

Here, Defendants are responsible for placing their products into the stream of commerce for billions of consumers. Jones Compl. ¶¶ 185-86, 223; Stanfield Compl. ¶¶ 246-47, 284. These products were known to be addictive but continued to be marketed and distributed with one goal in mind by Defendants—to maximize consumption, even if detrimental to the public. Jones Compl. ¶¶ 70-71; Stanfield Compl. ¶¶ 151-152.

Defendants ignore binding New York law and instead selectively and inaccurately cite the Restatement of Torts in an attempt to create a new rule in the context of products liability law that a "product" must be something tangible. Reddit Br. at 21-23; YouTube Br. at 25-27. New York

expressly rejected the very same bright-line rule for the application of products liability law that Defendants urge this Court to adopt. *See Asbestos Litig*., 33 N.Y.3d at 499-500 (rejecting the defense's argument that the Court should draw a "bright-line distinction" between products and certain building structures). *See also Espinal v. Melville Snow Contractors, Inc*., 98 N.Y.2d 136, 139 (2002) ("[T]he 'policy-laden' nature of the existence and scope of a duty generally precludes any bright-line rules.").

The New York case law cited by Defendants does not support their argument. Reddit Br. 21-23; YouTube Br. at 25-27. First, *Eberhart v. Amazon.com, Inc*., 325 F. Supp. 3d 393 (S.D.N.Y. 2018), made no determination as to whether Amazon's online marketplace was a product. Instead, the Court addressed whether Amazon, as an online marketplace, fell within a defective product coffee pot's "chain of distribution," as to subject it to strict liability. *Id*. at 397-98. The issue of whether something is a "product"—for purposes of bringing a products liability claim—was never raised, nor determined by, the *Eberhart* court. Thus, *Eberhart*'s holding is inapplicable.

Second, in *Intellect Art Multimedia, Inc. v. Milewski*, No. 117024/08, 2009 WL 2915273 (New York County Sup. Ct. 2009), the plaintiff filed a products liability claim, alleging that the defendant's negative review on a website titled Ripoff Report caused economic injuries to its summer program. 2009 WL 2915273, at *1-2. The plaintiff claimed that a negative post relating to its program on a second defendant's online-review website caused a drastic decrease in the academy's enrollment. *Id*. at *2, *7. The court did not determine, as a matter of law, whether a website was a product, but commented that it was not persuaded that this website was a product in this context (*i.e.*, claims arising from an online review board service that was established to allow individuals to review services and resolve complaints). *Id.* This analysis highlights New York's contextual approach to products liability claims. In *Milewski*, the court's inquiry did not involve

the website's design or innate characteristics—the court noted that the plaintiff "has not even alleged that the website was in a defective condition which gave rise to its claimed injuries." *Id.* at *7. It analyzed the website as a forum for third-party expression, which allowed for a negative post about the plaintiff's summer program. *Id*. That is a far cry from the allegations in Plaintiffs' Complaints, which state that Plaintiffs' claims arise from *the design of Defendants' applications* as products, not simply as a forum for third-party expression. Jones Compl. ¶¶ 354-355, 383-384; Stanfield Compl. ¶¶ 440-441, 481-482.

B. Plaintiffs' products liability claims survive pleading-stage scrutiny

Under New York law, a plaintiff's products liability claim is pled with sufficient particularity and defeats a motion to dismiss if the pleading enables the defense to prepare a response. *DaSilva,* 175 Misc. 2d at 426. Here, Plaintiffs have sufficiently alleged their claims of strict products liability.

To establish a *prima facie* case in strict products liability for design defect, the plaintiff must show that the defendant "[1] marketed a product designed [2] so that it was not reasonably safe and that [3] the defective design was a substantial factor in causing plaintiff's injury." *Adams v. Genie Indus*., 14 N.Y.3d 535, 542 (2010). This claim is derived from common-law negligence. *Denny v. Ford Motor Co*., 87 N.Y.2d 248, 258 (1995) (explaining that the "strict products liability" label is a misnomer when applied to claims based on design defect and inadequate warning). In the framework of strict products liability, Defendants have a duty to design their products so that they avoid an unreasonable risk of harm to anyone who is likely to be exposed to danger when the product is being used as intended. *See* N.Y. PJI § 2:120. And relevant to this case, the Court of Appeals has held that a defendant's duty extends to innocent bystanders, regardless of privity. *Codling v. Paglia*, 32 N.Y.2d 330, 342 (1973) ("[T]he manufacturer of a defective product is liable

to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages."); *see, e.g., Ciampichini v. Ring Bros., Inc*., 40 A.D.2d 289, 293 (4th Dep't 1973) ("[I]t is both reasonable and just to extend to bystanders the protection against a defective manufactured article.").

Plaintiffs allege that Defendants advertised, marketed, and distributed their products in New York. Jones Compl. ¶¶ 37, 46; Stanfield Compl. ¶¶ 111, 117. Further, Plaintiffs allege that Defendants designed, manufactured, and placed into the stream of commerce, these products for public use and consumption. Jones Compl. ¶¶ 185, 223; Stanfield Compl. ¶¶ 246, 284. Plaintiffs also allege that Defendants knowingly designed their applications to facilitate addiction, radicalization, and violence in order to maximize profits. Jones Compl. ¶¶ 147-52, 196-203, 382; Stanfield Compl. ¶¶ 60-61, 257-64, 285-86; Tirschwell Aff. ¶¶ 3-11. As alleged, these dangerous design defects, fueled by Defendants' own algorithms, target consumers' preferences and behaviors (and, in some cases, suggest new interests), and they promote addiction, extremism and violence, especially for young men. Jones Compl. ¶¶ 195-99, 224-25; Stanfield Compl. ¶¶ 256-60, 285. The Complaints further allege that Defendants were on notice that these design features expose users and the public to tremendous harm yet chose to continue profiting from them instead of addressing the dangers. Jones Compl. ¶¶ 202-03, 224; Stanfield Compl. ¶¶ 263-64, 286. As such, Defendants' products were not reasonably safe.

The Complaints also allege more than enough to show that the unsafe design of Defendants' applications was a substantial factor in causing Plaintiffs' injuries. The Shooter himself left extensive documentation of his own addiction to Defendants' products, as well as their role in radicalizing and training him, which led him to conduct and prolong his racist attack. Jones Compl. ¶¶ 71-79; Stanfield Compl. ¶¶ 152-60; Tirschwell Aff. ¶ 12. Taken as true and affording

them the benefit of every possible favorable inference, Plaintiffs' allegations sufficiently state products liability claims. *Martinez*, 84 N.Y.2d at 87.

III. PLAINTIFFS' NEGLIGENCE CLAIMS WITHSTAND DEFENDANTS' MOTION TO DISMISS BECAUSE DEFENDANTS OWE A DUTY OF ORDINARY CARE, WHICH THEY BREACHED

Plaintiffs have properly pleaded viable negligence claims based on three, separate duties owed by Defendants to the users of their products. First, each Defendant had a duty to design and market its application in a safe, non-negligent manner. Second, each owes a duty because it launched a force or instrument of harm—i.e., an unreasonably dangerous application. Such duties exist independent of Defendants' relationship with Plaintiffs. And third, each Defendant owes a duty of care as a result of entering into a relationship with the Shooter which created his addiction to its application and, in doing so, inspired violence.

A. Defendants were negligent in the design, marketing, and distribution of their unreasonably dangerous applications

Under New York common law, manufacturers or makers of products have a duty to exercise reasonable care in the design and marketing of a product. And a manufacturer or maker "that has negligently designed and marketed a product that is not reasonably safe is liable for injury that results from use of the product." N.Y. PJI § 2:126; *see., e.g., Adamo v. Brown & Williamson Tobacco Corp*., 11 N.Y.3d 545, 550 (2009). The plain letter of the law establishes the fallacy of the claim by Defendants that Plaintiffs cannot state negligence-based claims. YouTube Br. at 30-36; Reddit Br. at 25-28. Defendants have a duty to use reasonable care, just like everyone else, under New York law. That duty pertains to the design and marketing of their applications and supports the negligence-based causes of action asserted in Plaintiffs' Complaints. *See* Jones Compl. ¶¶ 364-377, 395-410; Stanfield Compl. ¶¶ 449-461, 491-503.

B. Defendants owe a duty to Plaintiffs under the "instrument of harm" doctrine

Defendants owe a separate duty of care to refrain from business practices that create an instrument of harm. Regardless of whether Defendants' self- described "online services," (YouTube Br. at 25-26; Reddit Br. at 21-24) are a "product" under New York products liability law, in operating their "online services" Defendants have "launched a force or instrument of harm" and therefore owe a duty of care to those harmed by their actions. *Espinal*, 98 N.Y.2d at 141 (quoting *H.R. Moch Co. v. Rensselaer Water Co*., 247 N.Y. 160, 168 (1928)).

According to Chief Judge Cardozo, writing for the New York Court of Appeals in *Moch*, "[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Moch*, 247 N.Y. at 167 (quoting *Glanzer v. Shepard*, 233 N.Y. 236, 239 (1922)). The Court of Appeals has recited this principle of New York tort law more recently in holding that "a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury." *Espinal*, 98 N.Y.2d at 141–42; *see also* Restatement (Second) of Torts § 324A(a).

Modern courts apply the "instrument of harm doctrine," *Spaulding v. Loomis Masonry, Inc*., 105 A.D.3d 1309, 1310 (4th Dep't 2013), most often as an exception to the "general rule . . . that 'a contractual obligation, standing alone, will . . . not give rise to tort liability in favor of a third party.'" *Bush v. Indep. Food Equip., Inc*., 158 A.D.3d 1130 (4th Dep't 2018) (quoting *Cooper v. Time Warner Ent. Advance/Newhouse P'ship*, 16 A.D.3d 1037, 1038 (4th Dep't 2005)) (alterations adopted); *see also, e.g., Bregaudit v. Loretto Health & Rehab. Ctr*., 211 A.D.3d 1582, 1583 (4th Dep't 2022) ("There is an exception to that general rule, however, where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm.") (internal quotation marks omitted) (alterations adopted). The doctrine is

more than an exception, however, and applies to impose a duty regardless of whether a defendant undertakes services "gratuitously or for consideration." Restatement (Second) Torts, § 324A; *see, e.g.*, *Golding v. Farmer*, 273 A.D.2d 834, 834 (4th Dept. 2000) (defendant negligently indicated to another driver it was safe to enter roadway).

A defendant may "assume a duty of care" to noncontracting third parties "by creating a dangerous condition." *Bush*, 158 A.D.3d at 1130. When such a duty arises, it is circumscribed "based on the interrelationship of all the parties, as framed by the evidentiary record." *Palka v. Servicemaster Mgmt. Servs. Corp*., 83 N.Y.2d 579, 590 (1994) (holding maintenance contractor assumed duty to noncontracting nurse injured by negligent performance). In other words, the scope of such a duty is an evidentiary question.

Defendants do not dispute that they made their respective products available to the public—they instead argue their products are "online services" and not products. YouTube Br. at 25-26; Reddit Br. at 21-24. Even if Defendants were correct that these "online services" are something other than "products," Defendants are nonetheless subject to a duty of reasonable care because they have negligently "create[d] or exacerbate[d] a dangerous condition." *Espinal*, 98 N.Y.2d at 141–42; *Moch*, 247 N.Y. at 167. Those "online services" were designed to facilitate addiction, radicalization, and violence, thereby *creating* a danger. Jones Compl. ¶¶ 70-71, 201; Stanfield Compl. ¶¶ 151-52, 262; Tirschwell Aff. ¶¶ 3-11; *cf. Spano v. Perini Corp*., 25 N.Y.2d 11, 18 (1969) (finding strict liability for blasting which "involves a substantial risk of harm"); *Williams v. Beemiller*, 103 A.D.3d 1191, 1191 (4th Dep't 2013) (duty arose from defendant selling a gun to an unlawful straw purchaser for trafficking into the criminal market). Stated differently, Defendants launched a force or instrument of harm by addicting users—including teens and

vulnerable young men—to consumption of ever more extreme, radical, violent images and video with their "online services." *See* Jones Compl. ¶ 71; Stanfield Compl. ¶ 152.

Defendants unleashed a force or instrument of harm, and they thus had a duty to act with reasonable care. Jones Compl. ¶¶ 366, 397; Stanfield Compl. ¶¶ 451, 493. Defendants knowingly designed their "online services" to be addictive, especially for immature users such as minors. Jones Compl. ¶¶ 189, 201, 226; Stanfield Compl. ¶¶ 250, 261, 287. The algorithmic feedback loops of their "online services," fueled by Defendants' targeted advertising business model, elevates hateful and violent ideas among young people—including those like the Shooter. Jones Compl. ¶¶ 76-79; Stanfield Compl. ¶¶ 157-160.

C. Public policy also supports finding a duty of care where the Complaints clearly allege that Defendants manipulated the Shooter

"Courts resolve legal duty questions by resort to common concepts of morality, logic and consideration of the social consequences of imposing the duty." *Davis v. S. Nassau Communities Hosp*., 26 N.Y.3d 563, 572 (2015) (quoting *Tenuto v. Lederle Labs*., 90 N.Y.2d 606, 612 (1997)). The "responsibility of care" is assigned "to the person or entity that can most effectively fulfill that obligation at the lowest cost." *Id*. (recognizing physician's duty to third-party motorists to warn patient of prescribed medication's side-effects).

> Common-law experience teaches that duty is not something derived or discerned from an algebraic formula. Rather, it coalesces from vectored forces including logic, science, weighty competing socioeconomic policies and sometimes contractual assumptions of responsibility. These sources contribute to pinpointing and apportioning of societal risks and to an allocation of burdens of loss and reparation on a fair, prudent basis.

Palka v. Servicemaster Mgmt. Servs. Corp., 83 N.Y.2d 579, 585 (1994). It is a "policy- laden" analysis requiring the balancing of interests. *Espinal*, 98 N.Y.2d at 139. *See also Prosser & Keeton, Torts* § 53, at 358 (5th ed. 1984) (duty is not sacrosanct but is "only an expression of the sum total

of those considerations of policy which lead the law to say that the plaintiff is entitled to protection").

Defendants argue they avoid a duty here because they do not have a "special relationship" with the Shooter. YouTube Br. at 31; Reddit Br. at 26. This argument is a red herring as this "special relationship" is irrelevant to whether it was foreseeable that Defendants' actions would cause harm. Here, a duty exists because Defendants placed harmful products into the stream of commerce and knew that those products had addictive qualities and had contributed to prior mass shootings. Jones Compl. ¶¶ 201-03, 224; Stanfield Compl. ¶¶ 262-64, 286; *see Pinero v. Rite Aid of N.Y., Inc*., 294 A.D.2d 251, 252 (1st Dep't 2002), *aff'd* 99 N.Y.2d 541 (2002) ("To establish a claim in negligence, plaintiff must show that the defendant owed her a duty to protect her from injury; a duty that only arises when the risk of harm is reasonably foreseeable.")

Regardless, Plaintiffs did allege facts sufficient to find the existence of a special relationship here, where the Complaints allege that Defendants created a monster and were in the best position to stop him. Defendants designed and controlled products that systematically facilitated addiction, radicalization, and violence in order to maximize engagement and profit. Jones Compl. ¶¶ 7, 70-71, 201; Stanfield Compl. ¶¶ 151-52, 262; Tirschwell Aff. ¶¶ 3-11. The Shooter here was, in fact, addicted to these products, was radicalized, and engendered violent plots and fantasies as a result. Jones Compl. ¶¶ 72-75; Stanfield Compl. ¶¶ 153-56. This continued to increase his engagement with Defendants' products, by Defendants' design. Jones Compl. ¶¶ 77-79; Stanfield Compl. ¶¶ 158-60. Indeed, the Shooter repeatedly expressed a desire to spend less time on social media, often in the context of discussing his fears and insecurities about carrying out the attack itself. Tirschwell Aff. ¶ 12(c-d).

It was Defendants' design choices and business practices that most shaped the Shooter's behavior, and it was Defendants who were best situated to avoid or minimize the harm their design choices caused. The Complaints allege that the Shooter's radicalization began when he became overexposed to extremist and racist views due to harmful design features in Defendants' products. Jones Compl. ¶ 69; Stanfield Compl. ¶ 150. And they allege that personalized algorithms used in Defendants' applications physiologically created an addiction to white supremist content in the Shooter—an addiction which was fed and exacerbated by the products. Jones Compl. ¶¶ 76-79; Stanfield Compl. ¶¶ 157-160. The Complaints further allege that Defendants' applications directed the Shooter to more and more extreme content to satiate his developing brain with an adequate dopamine response and desensitized him to violent content. Jones Compl. ¶¶ 212, 233; Stanfield Compl. ¶¶ 273, 294. As a result, the Complaints allege, the Shooter began to consider himself a partisan and a soldier in a political struggle to preserve the supremacy of white people thanks to indoctrination he received through Defendants. Jones Compl. ¶ 73; Stanfield Compl. ¶ 154. Indeed, by his own admission, the Shooter was radicalized and inspired because of his online product use, including of Defendants' applications. Jones Compl. ¶ 74, 208, 191, 227, 231; Stanfield Compl. ¶ 155, 269, 280, 288, 292. The violent, murderous attack that resulted in the deaths of ten innocent people and life-long harm to dozens of others on May 14, 2022, was therefore foreseeable, as Plaintiffs allege. Jones Compl. ¶¶ 202, 224; Stanfield Compl. ¶¶ 263, 286.

But that is not all Plaintiffs allege Defendants' products did to the Shooter. They contend that, in addition to radicalizing and inspiring him, they helped arm him. The Complaints allege that Defendants' products have a known proclivity to shepherd boys and young men towards firearms, mass shootings, and violence, even when they have not personally displayed any interest in such topics—presumably because they believe these tendencies tend to facilitate addiction,

engagement, and profit. Jones Compl. ¶¶ 200-202, 215-217, 224-226; Stanfield Compl. ¶¶ 261-63, 277-79, 285-87. Prior to his social media addiction, the Shooter had no discernible interests in firearms or other combat gear. He wrote that his direct family members had never had any interest in firearms, and emphasized multiple times in his writings that he was neither a gunsmith nor a mechanic, and that he had no military or combat training of any kind. Jones Compl. ¶ 216; Stanfield Compl. ¶ 277; Tirschwell Aff. ¶ 12(f). As alleged, Defendants' products nevertheless began to direct the Shooter towards firearms, military gear, and mass shootings, a trend which only amplified as his obsessions grew. Jones Compl. ¶¶ 211-19, 227-36; Stanfield Compl. ¶¶ 272-81, 288-95. The Complaints allege that, eventually, Defendants' products fed him material regarding illegal modification of firearms, assault weapons banned under New York law, federally prohibited machineguns, and even instructional videos on conducting military-style assault operations with military-grade firearms, shooting through bulletproof glass, and winning gunfights. Jones Compl. ¶¶ 86-90, 229-31; Stanfield Compl. ¶¶ 167-71, 290-92.

The specific nature of Defendants' relationship with the Shooter creates a special relationship sufficient to justify a duty in this case because it "place[d] [them] in the best position to protect against the risk of harm." *Davis*, 26 N.Y.3d at 576 (quoting *Hamilton v. Beretta U.S.A. Corp*., 96 N.Y.2d 222, 233 (2001)). In other words, had Defendants not intentionally created the Shooter's addiction, which led to radicalizing and inspiring the Shooter or otherwise enabling his acts, Defendants could have prevented Plaintiffs' injuries and the death of ten people.

Public policy supports recognition of Defendants' duty in this case. In formulating duty,

> [v]arious factors . . . have been given conscious or unconscious weight, including convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, [and] the moral blame attached to the wrongdoer . . . . [C]ourts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.

Davis, 26 N.Y.3d at 576-77 (quoting Prosser & Keeton, *Torts* § 53 at 359 (5th ed 1984)).

Here, each factor weighs in favor of recognition of a duty owed by Defendants. Plaintiffs have sued YouTube and Reddit—just two technology companies in a single industry—and the duty is confined to circumstances where the moral and public-policy considerations are clear. Defendants surely bear culpability for intentionally designing their products to be addictive, radicalizing, and conducive to violence, and for their knowledge of the harm they cause and refusal to correct those harms—a refusal that makes them significant profits from consumers' "engagement." The recognition of a duty in this case is needed—and supported. See *In re Social Media Cases*, JCCP No. 5255, 2023 WL 6847378 (Sup. Ct. Cal. Oct. 13, 2023) ("Social Media Cases") (holding social media companies owed tort duty of care to users and denying motion to dismiss).

IV. PLAINTIFFS' PROXIMATE CAUSE ALLEGATIONS ARE MORE THAN SUFFICIENT AT THE MOTION TO DISMISS STAGE

Defendants have failed to meet the heavy burden New York law imposes on parties moving to dismiss an action prior to discovery on the basis of proximate causation—which is "at its core, a uniquely fact-specific determination" that is generally "best left for the factfinder." *Hain v. Jamison*, 28 N.Y.3d 524, 530 (2016). Defendants argue that the causal link between Plaintiffs' injuries and their own misconduct is too attenuated, and that the Shooter's behavior represents an intervening act that severs the chain of proximate causation. YouTube Br. at 33-38; Reddit Br. at 30-35. However, whether a defendant's conduct was "*a* substantial cause of the events which produced the injury" and whether an intervening act is a "foreseeable consequence of a circumstance created by [a] defendant" both present factual questions typically reserved for the jury. *Hain*, 28 N.Y.3d at 529 (emphasis added).

Here, Plaintiffs allege that Defendants intentionally designed their products to facilitate addiction, radicalization, and violence in service of profit, and that Defendants were specifically on notice that engagement with their products can precipitate mass shootings. Jones Compl. ¶¶ 196-202, 224-227; Stanfield Compl. ¶¶ 257-264, 285-288; Tirschwell Aff. ¶¶ 3-11. Plaintiffs further allege that Defendants did, in fact, addict, radicalize, and help arm the Shooter for his attack. Jones Compl. ¶¶ 72-79; Stanfield Compl. ¶¶ 153-160; Tirschwell Aff. ¶ 12. These allegations, taken as true and accorded the benefit of every possible favorable inference, sufficiently establish that Defendants' conduct was a substantial cause of the Shooter's acts, and that his conduct was foreseeable. At the very minimum, they present a factual dispute that would allow a reasonable jury to find that Defendants' conduct was a substantial and foreseeable cause of Plaintiffs' injuries. *See Martinez*, 84 N.Y.2d at 87 (affording a "liberal construction" of the pleadings on a motion to dismiss and "accord[ing] plaintiffs the benefit of every possible favorable inference").

YouTube and Reddit attempt to distance themselves by arguing that the involvement of numerous co-defendants, as well as the behavior of the Shooter himself, somehow dilutes their responsibility in this case. YouTube Br. at 33-36; Reddit Br. at 31-35. But the involvement of other responsible parties does not negate the existence of proximate cause. To the contrary, "it is well settled that there may be more than one proximate cause of an injury . . . and that questions of proximate cause are generally for the jury to resolve." *Carpentieri v. 1438 S. Park Ave. Co., LLC*, 215 A.D.3d 1236, 1237 (4th Dep't 2023) (citations omitted). Here, the Complaints allege that Defendants' misconduct "qualifies as a proximate cause" in that it was "*a* substantial cause of the events which produced the injury." *Scurry v. N.Y.C. Hous. Auth.*, 39 N.Y.3d 443, 453 (2023) (emphasis added); Jones Compl. ¶¶ 220, 236; Stanfield Compl. ¶¶ 281, 297. That is enough.

Defendants further argue that the Shooter's conduct is an intervening act that severs the chain of proximate causation, emphasizing the "horrific" nature of his acts. YouTube Br. at 38; Reddit Br. at 31. However, the doctrine of intervening acts "has no application when the intentional or criminal intervention of a third party or parties is reasonably foreseeable." *Turturro*, 28 N.Y.3d at 484 (quoting *Kush by Marszalek v. City of Buffalo*, 59 N.Y.2d 26, 33 (1983)). And the foreseeability of third-party conduct does not turn on whether such conduct was "horrific." *See In re September 11 Litig.*, 280 F. Supp. 2d 279, 302 (S.D.N.Y. 2003) (refusing to dismiss claims against the owners and operators of the World Trade Center buildings for failing to provide adequate fireproofing and evacuation procedures even though those claims arose out of the "horrific" September 11 terrorist attacks); *Scurry,* 39 N.Y.3d at 444 (holding that a landlord's negligence could be the proximate cause of a tenant's death at the hand of a murderer, and that "[t]hough the sophisticated nature of an attack may in some cases be relevant to the proximate cause analysis, the fact that an attack was 'targeted' does not sever the *causal* chain between a landlord's negligence and a plaintiff's injuries as a matter of law" (emphasis added)). *See also Bonsignore v. New York*, 683 F.2d 635, 638 (2d Cir. 1982) (police officer's shooting of his wife did not automatically sever the city's liability because the city could have reasonably foreseen that its negligent practices in arming police officers unfit to carry arms would result in an unfit officer shooting someone).

Here, the sufficiency of Plaintiffs' proximate cause allegations does not turn on whether the Shooter's conduct was horrific and criminal—clearly, it was both. Instead, it turns on the connection between Defendants' alleged misconduct and Plaintiffs' injuries. Here, the Complaints allege that Defendants' products, by design, facilitated the Shooter's addiction, radicalization, and violence, and that Defendants intentionally added features to their products to promote addiction—

all in the service of profit. Jones Compl. ¶¶ 202-204, 224-225; Stanfield Compl. ¶¶ 263-265, 285-286; Tirschwell Aff. ¶¶ 3-11. And, as alleged, the Shooter's acts of violence at Tops were precipitated by his online activities and addiction. Jones Compl. ¶¶ 69-79; Stanfield Compl. ¶¶ 150-160. Thus, there is a direct connection between Defendants' conduct and Plaintiffs' injuries.

The fact that Plaintiffs were injured by the Shooter directly does not absolve Defendants of responsibility. Third party misconduct is "especially predictable when the defendant's tortious conduct foreseeably induces third parties to respond in certain ways." Lee S. Kreindler et al., New York Law of Torts § 8:15 (14 West's N.Y. Prac. Series Aug. 2023 Update). And Plaintiffs specifically allege that Defendants breached their duty not to induce addiction, radicalization, and violence. *See Kush*, 59 N.Y.2d at 33 ("When the intervening, intentional act of another is itself the foreseeable harm that shapes the duty imposed, the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs."); *Hoggard v. Otis Elevator Co*., 52 Misc. 2d 704, 708–09 (N.Y. Sup. Ct. 1966) (holding that an intervening act that results from the "stimulus of a situation created by the actor's negligent conduct[] is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about" (citing Restatement (Second) Torts § 443). At the very least, these allegations create a factual dispute regarding the foreseeability of the Shooter's conduct, and "[b]ecause questions concerning what is foreseeable and what is normal may be the subject of varying inferences, whether an intervening act is foreseeable or extraordinary under the circumstances generally [is] for the fact finder to resolve." *Turturro*, 28 N.Y.3d at 484 (quoting *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315 (1980)) (internal quotations omitted).

These principles of New York law also render inapposite the out-of-state federal anti-terrorism cases on which Defendants rely: *Crosby v. Twitter, Inc*., 921 F.3d 617, 625 (6th Cir. 2019); *Fields v. Twitter, Inc*., 881 F.3d 739, 749-50 (9th Cir. 2018); *Gonzalez v. Google, Inc*., 335 F. Supp. 3d 1156, 1178 (N.D. Cal. 2018), *aff'd*, 2 F.4th 871 (9th Cir. 2021), *vacated on other grounds*, 598 U.S. 617 (2023); and *Pennie v. Twitter, Inc.,* 281 F. Supp. 3d 874, 888 (N.D. Cal. 2017). Those cases involve the Anti-Terrorism Act ("ATA") and apply the federal common law of proximate causation developed for the application of aiding and abetting liability under that statute. They do not analyze or interpret New York proximate cause law. Moreover, the underlying allegations in those cases differ from Plaintiffs'. The ATA cases cited by Defendants involved allegations that defendant-social media companies failed to police and prevent violent content on their platforms, which led to acts of terrorism. *Crosby*, 921 F.3d at 625. Here, on the other hand, Plaintiffs allege that Defendants *knowingly* and *intentionally* developed their algorithms to facilitate addiction, radicalization, and violence because such tendencies increase user "engagement," which leads to more profits. Jones Compl. ¶ 71; Stanfield Compl. ¶ 152; Tirschwell Aff. ¶¶ 3-11. In this way, the Complaints allege that Defendants were no longer simply hosting or failing to regulate content; their actions affirmatively caused harm in a manner they knew precipitated mass shootings. Jones Compl. ¶¶ 196-204; Stanfield Compl. ¶¶ 259-265. Unlike the ATA cases, where the alleged acts of terrorism were too "far beyond the defendant's misconduct," *Crosby*, 921 F.3d at 625, dismissal is unwarranted here.

In a situation such as this—where parties dispute at the motion to dismiss stage the extent to which the Shooter's conduct was both foreseeable and precipitated by Defendants—New York law requires that the Court accept as true and accord the benefit of every favorable inference to the Plaintiffs' claims and leave the dispute to the factfinder. *Turturro*, 28 N.Y.3d at 483-84.

V. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT DOES NOT BAR PLAINTIFFS' CLAIMS

Defendants argue that section 230(c)(1) of the Communications Decency Act confers on them blanket immunity from all of Plaintiffs' claims because they were acting only as publishers of third-party content, and that Plaintiffs' claims should be dismissed because they are attempting to hold Defendants liable for content that they did not author. They are wrong.

First, Section 230(c)(1) does not confer immunity, and only requires that an internet service provider not be "treated as the publisher" of user-generated content. 47 U.S.C. § 230(c)(1). Second, Defendants have engaged in substantial misconduct that is separate from their alleged role as passive publishers of third-party content. Third, Plaintiffs' claims seek to hold the Defendants accountable for precisely such misconduct—their own design and distribution of defective and unreasonably dangerous products. These products' systematic facilitation of addiction, radicalization, and violence is neither content-neutral nor an exercise of traditional editorial decision-making within the meaning of *Force v. Facebook, Inc*., 934 F.3d 53 (2d Cir. 2019), or *Shiamili v. Real Estate Group of New York, Inc*., 17 N.Y.3d 281 (2011).

A. Section 230(c)(1) is not an immunity provision

In 1996, Congress enacted the Communications Decency Act in an effort to "modernize the existing protections against obscene, lewd, indecent or harassing uses of a telephone" and apply those protections to the internet. S. Rep. No. 104-23, at 59 (1995).[5] At the center of this landmark legislation were two provisions that sought to criminalize exposing minors to harmful content

[5] *See also* 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Senator James Exon introducing the bill as its author and sponsor) ("The information superhighway should not become a red light district. This legislation will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices.").

online. *See* 47 U.S.C. § 223 (1996). Section 223(a) criminalized the knowing transmission of "obscene" or "indecent" messages to persons under 18, while section 223(d) prohibited knowingly sending or displaying "patently offensive" messages "in a manner available" to viewers under 18. *Id.*

Congress qualified the breadth of these prohibitions by creating affirmative defenses for providers who took "good faith" measures to restrict access by minors, including by implementing age verification mechanisms. 47 U.S.C. § 223(e)(5)(A)-(B). Subsequently, the Supreme Court struck down as unconstitutionally overbroad portions of section 223 that criminalized "indecent" or "patently offensive" materials. *See Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 874-79 (1997).

When designing this statutory scheme, Congress sought to further encourage and empower voluntary self-censorship and adoption of safeguards; it did that through Section 230 of the same act, titled, "Protection for Private Blocking and Screening of Offensive Material." The operative provision was subsection 230(c), captioned "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material." Subsection 230(c)(1) simply states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Subsection 230(c)(2) commands that

> [n]o provider or user of an interactive computer service shall be held liable on account of—
>
> > (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> > (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material[.]

47 U.S.C. § 230(c)(2).

The statutory scheme, history, and text of the Communications Decency Act all make abundantly clear that "subsection [230](c)(1) does not create an 'immunity' of any kind." *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010). Plaintiffs do not dispute that Section 230 *as a whole* may be characterized as an immunity statute, *see, e.g., Shiamili*, 17 N.Y.3d at 288, especially given its command that "no [Good Samaritan self-censors] shall be held liable" for adopting voluntary safeguards against the dissemination of harmful material, 47 U.S.C. § 230(c)(2). However, the fact that Congress specifically used this immunity language for subsection 230(c)(2) only strengthens the conclusion that, had Congress intended subsection 230(c)(1) to confer immunity, it would have done so in the same plain language. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). Instead, Congress chose the words: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

The plain meaning of these words is that courts cannot treat internet service providers as the "publisher or speaker" of content that users merely post on their website or application. For instance, a technology company could not be held liable for defamation for simply displaying defamatory speech "provided" by a user—because the company could not, as a matter of law under subsection 230(c)(1), be said to have "published" such information, as is a necessary element for the tort. *See Zeran v. Am. Online, Inc.,* 129 F.3d 327, 332 (4th Cir. 1997) (finding that the term "publisher" in subsection 230(c)(1) derives "legal significance from the context of defamation law," and that "[b]ecause the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability"). Similarly, a website operator could not be held liable as the publisher of revenge pornography that a user posted on its website, *see Barnes v. Yahoo!, Inc*., 570 F.3d 1096, 1104-05 (9th Cir. 2009), though liability could

still attach to breach of duties that arise from a source other than the company's role as publisher—for instance, its contractual duties stemming from its promises to the victim to take down revenge pornography featuring them from the company's website. *Id.* at 1107.

Insofar as subsection 230(c)(1) can be said to provide "immunity" of any kind, it is only from those specific duties that arise out of a "publisher's traditional editorial functions." *Shiamili*, 17 N.Y.3d at 289 (quoting *Zeran,* 129 F.3d at 330). Accordingly, the central question for evaluating a defense under subsection 230(c)(1) is whether the "duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 626 (Cal. Ct. App. 2020). So although subsection 230(c)(1) may preempt some claims that treat defendants "as the publisher or speaker" of third-party content—for instance, attempts to impose on them "liability for defamation, obscenity, or copyright infringement" for content users posted on these platforms—it is otherwise "irrelevant." *StubHub!*, 624 F.3d at 366.

Accordingly, Section 230 had no bearing on a city's claim that a website operator has a duty to collect taxes on the sale of sports and concert tickets that takes place on its website, notwithstanding the company's defense that its website was merely a platform on which private users bought and sold tickets to and from each other. *Id.* at 366. Similarly, Section 230 did not absolve the operator of a website—that matches potential roommates, landlords, and tenants with each other—of its duties under state and federal housing law to refrain from collecting certain information about protected characteristics, as well as from algorithmically "matching" users with each other in a discriminatory manner. *See Fair Hous. Council of San Fernando Valley v. Roommates.com*, *LLC*, 521 F.3d 1157, 1163-1172 (9th Cir. 2008). These cases demonstrate that plaintiffs may allege that internet service providers breached their duties as intermediaries between

users without necessarily treating them as "publishers" in a manner that implicates section 230(c)(1).

Consider the following analogy: Some litigants begin bringing defamation and copyright infringement cases against certain private libraries because they contain books and videos, some of which infringe upon copyrights or make defamatory statements. Congress, in order to protect the libraries, passes a law clarifying that courts should not treat libraries as speakers or publishers of the works they collect, along with a "Good Samaritan" immunity provision for voluntary self-censorship to screen out potentially unlawful content. As a result, libraries can continue amassing large collections without having to scrutinize every page of every piece of work they collect in order to ensure that they are not displaying defamatory, copyright-infringing, or otherwise unlawful content. *Cf.* 47 U.S.C. § 230(b)(1)-(2) (declaring it "the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services" and "preserve the vibrant and competitive free market that presently exists for the Internet").

However, some librarians begin shoving, into the face of every teenage boy who walks into their library, instructions on illegal weapons modifications, as well as addictive pornography. Yet others, picking up on a patron's burgeoning interest in white nationalism, begin bringing to their table, first, material on eugenics and Nazi propaganda, then vigilante militia recruitment, then finally, instructions on how to amass military armaments and conduct terrorist attacks. Assuming *arguendo* this hypothetical legal system previously imposed certain duties on librarians to refrain from such behavior, whether as tortious, non-compliant with relevant regulations, or otherwise unlawful, it would stretch both ordinary language and common sense to assert that the new law—which merely states that libraries shall not be treated as speakers or publishers of the works they collect—would somehow confer immunity from these duties, even if the librarians are, in a certain

sense, acting as intermediaries between patrons and the works that they collect. *Cf. StubHub!*, 624 F.3d at 366 (finding that subsection 230(c)(1)'s sole legal effect is to "limit[] who may be called the publisher of information that appears online").

So it is here. Plaintiffs' cases against Defendants are predicated on the claim that YouTube and Reddit design and distribute defective and unreasonably dangerous products that facilitate addiction, radicalization, and violence *on purpose*. The duty to refrain from such conduct emphatically does *not* stem from Defendants' self-proclaimed role as publishers of third-party content. The text, history, and statutory scheme of the Communications Decency Act all counsel against the dismissal of claims that "rest[] on alleged product design flaws—that is, the defendant's own misconduct[.]" *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 18 (2020) (Thomas, J., statement respecting denial of certiorari).

B. Defendants are not publishers, and Plaintiffs' claims do not treat them as such

Plaintiffs' claims—that Defendants' products facilitate addiction, radicalization, and violence by design—would stand, even without the need to reference any specific content for which Defendants served as intermediaries. This is because Plaintiffs' Complaints seek to hold Defendants liable for breach of duties outside their role as the publisher or speakers of third-party content. *E.g.*, Jones Compl. ¶ 7; Stanfield Compl. ¶¶ 107, 117. Despite this, Defendants reframe Plaintiffs' case as something which it is not: a case against Internet publishers. Reddit Br. at 8-13; YouTube Br. at 9-13. As explained, Section 230 preempts "liability for third-party content wherever such liability depends on characterizing the provider as a 'publisher or speaker' of objectionable material." *Shiamili*, 17 N.Y.3d at 289. The term "publisher" is not defined in Section 230; it depends on whether the provider is exercising "traditional editorial functions." *Id.* Traditional editorial functions include decisions "whether to publish, withdraw, postpone or alter

content." *Zeran*, 129 F.3d at 330. Plaintiffs' claims for Defendants' dangerous and defective products do not allege any violations regarding Defendants' exercise of any traditional editorial functions.

Plaintiffs' claims arise from Defendants' role in the design, development, management, operation, testing, control, marketing, and advertisements of their social media products, not Defendants' decisions whether to post certain content. This case is not about Defendants' editorial decisions. *Contra* YouTube Br. at 11-12; Reddit Br. at 11. Courts presented with this same distinction between publisher liability and products liability have declined to apply Section 230 to absolve social media defendants from liability. *See Social Media Cases*, 2023 WL 6847378, at *32 ("Where a provider manipulates third party content in a manner that injures a user, Section 230 does not provide immunity."); *A.M. v. Omegle.com, LLC*, 614 F. Supp. 3d 814, 819 (D. Or. 2022) ("[Defendant] could have satisfied its alleged obligation to Plaintiff by designing its product differently—for example, by designing a product so that it did not match minors and adults. Plaintiff is not claiming that [Defendant] needed to review, edit, or withdraw any third-party content to meet this obligation."); *Lemmon v. Snap, Inc*., 995 F.3d 1085, 1093 (9th Cir. 2021) ("The duty to design a reasonably safe product is fully independent of [Defendant's] role in monitoring or publishing third-party content."); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139-40 (4th Cir. 2019) ("[T]he underpinning of [plaintiff's] claims is its contention that [defendant] was . . . liable as the seller of a defective product. There is no claim made based on the content of speech published by [defendant] — such as a claim that [defendant] had liability as the publisher of a misrepresentation of the product or of defamatory content.").

Significantly, the controlling test is not whether the alleged misconduct *involves* publication of third-party content or even whether the alleged harm could have occurred *but-for*

third-party content. Instead, the relevant question is whether the alleged misconduct arises from the role and duties *attendant* on being a publisher. In *Hassell v. Bird*, the California Supreme Court explained that "not all legal duties owed by Internet intermediaries necessarily treat them as the publishers of third party content, even when these obligations are in some way associated with their publication of this material." 5 Cal. 5th 522, 542-43 (2018). More recently, in *Webber v. Armslist LLC*, the Seventh Circuit held that "§ 230(c)(1) is not a comprehensive grant of immunity for third-party content," but rather "precludes liability only where the success of the underlying claims *requires* the defendant to be considered a publisher or speaker of that content." 70 F. 4th 945, 957 (7th Cir. 2023)

(emphasis added). Courts accordingly reject a "but-for" test that would invoke Section 230 preemption simply because a state law cause of action would not have accrued in the absence of third-party communication. *See, e.g., Erie Ins. v. Amazon.com, Inc*., 925 F.3d at 139-40 (online seller was not protected by § 230 in a products liability suit even though publishing advertisement on website for defective product was a but-for cause of plaintiff's harm); *Lee v. Amazon.com, Inc.*, 76 Cal. App. 5th 200, 256 (2022) (same).

Rather than focus on the harm the plaintiff sustained, "courts must ask whether *the duty that the plaintiff alleges the defendant violated* derives from the defendant's status or conduct as a 'publisher or speaker.'" *Bolger*, 53 Cal. App. 5th at 464 (emphasis added). *Accord Barnes*, 570 F.3d at 1107 ("[S]ubsection 230(c)(1) precludes liability when the duty the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker"); *HomeAway.com, Inc. v. City of Santa Monica,* 918 F.3d 676, 682 (9th Cir. 2019) (same).

As such, courts must "distinguish claims that treat an interactive computer service provider as a publisher from claims that do not, despite being associated with third-party content." *Lee,* 76 Cal. App. 5th at 257. As the Fourth Circuit explained,

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

Henderson v. Source for Pub. Data, L.P., 53 F.4th 110, 122-23 (4th Cir 2022); *see also Force,* 934 F.3d 53, 82 (Katzmann C.J., dissenting in part) ("The CDA does not mandate 'a "but-for" test that would provide immunity . . . solely because a cause of action would not otherwise have accrued but for the third-party content.'") (quoting *HomeAway.com*, 918 F.3d at 682).

Here, Plaintiffs' allegations are not dependent upon Defendants' roles as the "publisher" or "speaker" of the content that radicalized the Shooter. Nor do Plaintiffs seek to hold Defendants liable for moderating content on their applications. As the courts found in *A.M.*, *Lemmon*, and *Erie*, Section 230 should not absolve Defendants of their duties regarding the design and operation of their dangerous and defective products, which are independent from their roles in publishing and monitoring content.

C. Plaintiffs do not argue that Defendants authored content

While Plaintiffs' Complaints are replete with instances where Defendants' applications contain white supremacist and other disturbing content, and Plaintiffs also allege that Defendants had full knowledge that their applications contained that content, nowhere in their Complaints do Plaintiffs attempt to hold Defendants liable for being the authors or publishers of that content.

Plaintiffs do not contest that the content that radicalized the Shooter was provided by third parties. What Plaintiffs do allege is that Defendants' dangerous and defective products made that content impossible to avoid. Jones Compl. ¶ 7; Stanfield Compl. ¶¶ 147-48. More than that, Defendants made products that made certain the Shooter would see that content—over and over again, repeatedly, and without having any choice in the matter—all for the sake of holding his attention, spurring outrage, and leading to his addiction. *See, e.g.*, Jones Compl. ¶¶ 76-79; Stanfield Compl. ¶¶ 157-60. It is a formula that has worked for years for the Defendants, ensuring that increased user engagement leads to increased profits. Jones Compl. ¶¶ 369, 401; Stanfield Compl. ¶¶ 437, 478; Tirschwell Aff. ¶¶ 3-11.

Plaintiffs' claims are distinct from those raised by the plaintiffs in *Force*, who sought to hold Facebook liable for providing Hamas with a platform to communicate and connect with interested parties. 934 F.3d at 57. The Second Circuit held that the *Force* plaintiffs' claims that Facebook's algorithm "matched" information and individuals was part of Facebook's editorial decisions as a publisher of information under § 230(c)(1). *Id.* at 67. In so holding, the court emphasized that the allegations in *Force* were that Facebook's matching algorithms were "neutral" in that they would treat *any* indicia of a user's personal preference equally and objectively, whether it concerns Hamas, "soccer, Picasso, or plumbers." *Id.* at 69-70. Such content-neutral algorithms were "merely arranging and displaying others' content," consistent with the traditional role of a publisher. *Id.* at 70.

Here, Plaintiffs allege that Defendants' algorithms are anything but neutral, and that they systematically reward and promote addiction, radicalization, and violence by design. Jones Compl. ¶ 195; Stanfield Compl. ¶ 256; Tirschwell Aff. ¶¶ 3-11. For example, the Complaints allege that YouTube's algorithm recommended "instructions on how to convert guns into automatic

weapons" as well as depictions of 'school shootings and other mass shooting events'" to immature male users whose only discerning interests were video games. Jones Compl. ¶ 200; Stanfield Compl. ¶ 261.

Additionally, the plaintiffs in *Force* did not assert any products liability claims. In contrast, Plaintiffs here allege that Defendants created products that deliberately encourage addictive behavior among users, especially adolescents, through recommendation algorithms and features that promote excessive and frequent use and create harmful cycles of repetitive and excessive usage that leads to addiction. Jones Compl. ¶¶ 351-57, 380-86; Stanfield Compl. ¶¶ 437-42, 478-83. Defendants know that they can increase "engagement" by promoting the most outrageous of stories and do so in the name of product; consequences be damned. Jones Compl. ¶ 70; Stanfield Compl. ¶ 151.

M.P. ex rel Pinckney v. Meta Platforms is also distinguishable. 2:22-CV-3830, 2023 WL 4853650 (D.S.C. July 24, 2023), *amended and superseded by M.P. ex rel Pinckney v. Meta Platforms, Inc.*, No. 2:22-CV-3830, 2023 WL 5984294 (D.S.C. Sept. 14, 2023). In that case, the plaintiff alleged that the defendant's algorithms directed the shooter to content provided by "'white supremacists/nationalists and Russian state operatives' and aided and abetted 'these evil actors in their brainwashing and radicalizing of users.'" *M.P.*, 2023 WL 4853650, at *1. The district court held that Section 230 barred the plaintiff's common law claims. But the important distinction in this case, again, is that Plaintiffs here have asserted distinct products liability claims. Plaintiffs do not claim that Defendants directed the shooter to racist content on their applications to "aid and abet" his radicalization. In this case, the Complaints allege that Defendants designed their products to prioritize "engagement over user safety, including without regard to use by minors" via the use of algorithms "designed with the singular goal of maximizing users' product engagement over

psychological, emotional, and ethical well-being." *Cf.* Jones Compl. ¶¶ 70, 76, 78; Stanfield Compl. ¶¶ 151, 157, 159; Tirschwell Aff. ¶¶ 3-11. It just so happens that the most engaging content is content that makes users extremely angry. Jones Compl. ¶ 195; Stanfield Compl. ¶ 256. By design, the Shooter (and users like him) are drawn, unknowingly, "to racist and extreme content" that "promote[s] racism, antisemitism, the Great Replacement theory, and the elimination of non-whites." *Cf.* Jones Compl. ¶¶ 204, 211, 224-25; Stanfield Compl. ¶¶ 265, 272, 285-86; Tirschwell Aff. ¶ 12.

Defendants misleadingly cite *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021), as support for their assertion that courts have "repeatedly" barred claims for liability for "publishing third-party content that allegedly inspired or caused real-world violence." YouTube Br. at 8; *see* Reddit Br. at 35. The Ninth Circuit held that Section 230 barred the plaintiff's claim that YouTube was a powerful tool that enabled ISIS to "recruit members, plan terrorist attacks, issue terrorist threats, instill fear, and intimidate civilian populations." *Gonzalez*, 2 F.4th at 881. The Supreme Court vacated that decision, however, and expressly declined to address Section 230. *Gonzalez v. Google LLC*, 598 U.S. 617, 622 (2023).

Daniel v. Armslist, LLC, is also easily distinguishable from this case. 386 Wis. 2d 449 (2019). The plaintiff in *Daniel* brought suit after the perpetrator of a mass shooting used the defendant's advertising website to illegally purchase the firearm he used to kill four people. *Id*. at 457-58. The defendant's website was a firearm marketplace that allowed the shooter to purchase a firearm illegally. *Id*. at 483. The plaintiff alleged that the defendant's website "provided an online forum for third-party content and failed to adequately monitor that content." *Id*. at 482. The court granted the defendant's motion to dismiss because Section 230 bars claims that treat "an interactive computer service provider[] as the publisher or speaker of information posted by a third party on

its website." *Id*. at 484. The court found that the plaintiff's allegations that the defendants facilitated illegal sales and failed to adequately screen unlawful content treated the defendant as a publisher. *Id.* at 482. Those claims, which invoke content moderation, are distinguishable from Plaintiffs' products liability claims here, which arise from Defendants' design, development, management, operation, testing, control, production, marketing, and advertisement of their products. *See, e.g.*, Jones Compl. ¶ 69-79; Stanfield Compl. ¶ 150-160. Plaintiffs make no allegations regarding Defendants' moderation of posts from information content providers.

Here again, Plaintiffs do not allege anywhere in their Complaints that Defendants are liable for publishing the content that radicalized and inspired the Shooter to murder innocent Black victims at the Tops Market. The crux of Plaintiffs' claims is not what he viewed but how years of exposure to Defendants' dangerous, defective, and addictive products led to his radicalization and encouragement—via the Internet—to commit murder.

Plaintiffs' claims are based on the addictive nature of defective features present in the design and operation of Defendants' products, and the harms they cause users. These claims are parallel to the plaintiffs' allegations in *Social Media Cases*. Assessing the plaintiffs' negligence claims in those cases, the California Superior Court held that "Section 230 does not bar a claim based on features of a social media site that have an adverse effect on users apart from the content of material published on the site." 2023 WL 6847378, at *30. The court reasoned that the defendants' alleged wrongdoing—designing and operating the interactive and addictive features of their platforms—did not fall within the ambit of Section 230. *Id*. at *32. The court distinguished liability under Section 230 in this context:

> So long as providers are not punished for publishing third-party content, it is consistent with the purposes of Section 230 to recognize a common law duty that providers refrain from actions that injure minor users by inducing frequency and length of use of a social

> media platform to the point where a minor is addicted and can no longer control the information they receive from that platform. *Id.*

Here, Plaintiffs' claims arise from addictive features that are fundamental to the design and operation of Defendants' dangerous and defective products. The harm at issue here is inextricably linked to the Shooter's addiction, which was the vehicle for his eventual radicalization.

VI. THE FIRST AMENDMENT DOES NOT PRECLUDE PLAINTIFFS' CLAIMS

Whether the First Amendment protects Defendants from civil liability in this case depends on whether holding social media platforms accountable for foreseeable, preventable, and life-altering injuries to vulnerable children, teens, and young adults constitutes an impermissible burden on free speech. It does not for four reasons: First, the First Amendment does not protect machine-learning algorithms. Second, it is not an absolute shield to protect defendants from tort liability when state law otherwise gives individuals a right to recover damages for injuries caused by defendants' wrongful conduct. Third, the Court cannot properly resolve this issue now because it lacks the factual record necessary to properly weigh the competing interests between the state's tort law and First Amendment values. Finally, Defendants' tort duty to design their applications safely amounts to a content-neutral "time, place, and manner" regulation that is valid under the First Amendment.

A. Artificial-intelligence-driven algorithms are not entitled to First Amendment protection

The First Amendment is inapplicable to this case because the "editorial judgments" that Defendants claim to have exercised were, in reality, only the output of unsupervised machine-learning algorithms—which are not persons entitled to its protection. Defendants contend that their "decisions" about what speech to disseminate "fit comfortably within the Supreme Court's editorial-judgment precedents." YouTube Br. at 21 (internal quotations omitted) (quoting

NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1214 (11th Cir. 2022)); Reddit Br. at 20 (same). Defendants assume—without acknowledging the issue—that the Court should treat their artificial-intelligence-driven algorithms as the equivalent of human speech. But Defendants have provided the Court with no authority that the algorithms at issue in this case or other artificial-intelligence models are entitled to First Amendment protection. The First Amendment protects the freedom to think and speak as an inalienable *human* right. *See Miles v. City Council of Augusta, Ga.*, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983). *See also Nonhuman Rts. Project, Inc. v. Breheny*, 38 N.Y.3d 555, 572 (2022) ("rights and responsibilities associated with legal personhood cannot be bestowed on nonhuman[s]" because "legal personhood is often connected with the capacity, not just to benefit from the provision of legal rights, but also to assume legal duties and social responsibilities"). Indeed, leading scholars have explained the deeply concerning consequences of assuming machine speech is deserving of unqualified constitutional speech rights. *See* Helen Norton, *Manipulation and the First Amendment*, 30 William & Mary Bill of Rts. J. 221, 222-24 (2021); Tim Wu, *Machine Speech*, 161 Univ. Pa. L. Rev. 1495, 1496 (2013).

Here, the "editorial decisions" for which Defendants seek constitutional protection consist of electronic impulses of artificial-intelligence-driven algorithms designed to exploit the neurological vulnerabilities of users like the Shooter and maximize their engagement by deluging them with psychologically discordant material that they are not seeking but from which they cannot look away. *See* Jones Compl. ¶¶ 71-78; Stanfield Compl. ¶¶ 152-59; Tirschwell Aff. ¶¶ 3-11. Defendants' artificial intelligence cannot be fairly characterized as constitutionally protected "editorial judgments." They serve no communicative purpose, are not "speech," and are not entitled to First Amendment protection. *See Universal City Studios, Inc. v. Corley*, 273 F.3d 429,

449, 451 (2d Cir. 2001) (using computer code to communicate with a computer is "never protected").

B. The First Amendment has never served as an absolute bar against tort liability claims

Even if the First Amendment were deemed applicable to Defendants' algorithms, it would not bar tort liability in the instant case. Citing almost exclusively cases invalidating laws that criminalize or outright prohibit speech solely because of its content, (YouTube Br. at 15-25; Reddit Br. at 13-20), Defendants claim that this civil lawsuit is barred by the First Amendment because it would "impose a tort duty to remove, suppress, or restrict access to speech" because of its content. YouTube Br. at 17; *See* Reddit Br. at 17. But nowhere do Plaintiffs allege that Defendants are liable solely because they disseminated the content that inspired the Shooter's attack. Rather, the Complaints allege that the Defendants are liable because of *their* reckless (and negligent) conduct. Specifically, Plaintiffs allege as follows: (1) Defendants intentionally designed their platforms to be addictive despite their knowledge of a substantial risk of harm to immature users and their communities (Jones Compl. ¶¶ 70-71, 354-56, 369-71, 383-86, 402-06; Stanfield Compl. ¶¶ 151-52, 440-42, 454-55, 480-83, 496-97, 509-10; Tirschwell Aff. ¶¶ 3-11); (2) because of the Shooter's foreseeable addiction to Defendants' applications, he was unable to appreciate the nature of the content that Defendants' applications recommended, suggested, and otherwise exposed him to (Jones Compl. ¶¶ 72-79; Stanfield Compl. ¶¶ 153-60); and (3) because of that content, the Shooter did in fact commit an act of mass racial violence on May 14, 2022, at the Tops Friendly Market in Buffalo, New York, killing ten innocent individuals, wounding three others, and harming many more (Jones Compl. ¶¶ 1, 7, 60-61, 116-18; Stanfield Compl. ¶¶ 147-48, 196-99; Tirschwell Aff. ¶ 12).

Plaintiffs' claims are based on actual injuries that were the direct and foreseeable result of Defendants' tortious conduct—their reckless disregard of a known, preventable, and unjustifiable risk of harm inherent in the design of their social media applications. Jones Compl. ¶¶ 70-71, 76, 78, 351-56, 369-71, 380-86, 401-04; Stanfield Compl. ¶¶ 151-52, 157, 159, 437-43, 454-56, 467-69, 478-83, 496-98, 509-11. Importantly, Plaintiffs are not attempting to outlaw or prohibit any particular kind of speech in this case—not even that which promotes objectively offensive, racially insidious conspiracy theories that encourage genocide. Imposing liability upon Defendants would not require them to monitor, alter, restrict, or even remove any content from their applications.

C. Plaintiffs' claims are based on the medium—not the content—of speech on Defendants' applications

Defendants ask this Court to conclude at the infancy of this litigation that their applications are automatically entitled to First Amendment protection from tort liability. But because the basis of Defendants' liability is the design of their respective applications—i.e., the medium of their speech, rather than its content—resolution of the constitutional issue at this stage would be improper, as there is no factual record that would allow the court to properly weigh any First Amendment interests against interests in protecting immature users and their communities from the harms inherent in giving Defendants an unfettered license to operate with reckless disregard toward known and foreseeable danger. *See Reno v. Am. C.L. Union*, 521 U.S. 844, 849 (1997) (explaining that the district court's "extensive findings of fact" "provide[d] the underpinnings for the legal issues" in the case, in which the Supreme Court first analyzed a First Amendment challenge to a regulation of speech on the internet the First Amendment context).

Regulating speech based on content differs slightly, but meaningfully, from the regulation of its medium or dissemination. For example, in *Roth v. United States*, the Court held that obscenity

is not protected speech under the First Amendment. 354 U.S. 478, 484-85 (1957). But in *Smith v. California*, 361 U.S. 147 (1959), the Court held that a statute criminalizing the sale of books containing obscenity would violate the First Amendment, based upon the statute's lack of any mens rea or other culpable mental state requirement. The fear in *Smith* was that if the bookstore owner could be held strictly liable for selling obscenity, then the owner would only sell books that he could inspect, which would result in "chilling" the dissemination of protected speech. *Smith*, 361 U.S. at 152-53 ("[T]hus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.").

Unlike a statute criminalizing the sale of a book without knowledge of its obscene contents, requiring Defendants to design their applications in a way that does not addict immature users does not require Defendants to inspect each piece of content that gets uploaded to their sites. Nowhere in Plaintiffs' Complaints do they allege that Defendants are liable based merely on the fact that any content was accessible on their applications. Rather, Defendants are liable because their addictive applications caused an already-vulnerable young mind to become so isolated that he completely lacked any regard for human life. Through their algorithms and other unescapably suggestive features, Defendants recklessly spoon-fed the Shooter increasingly extreme content, sending him into an addiction cycle, and leading him to kill ten innocent people and injure and harm dozens more in a grocery store. (Jones Compl. ¶¶ 70-79; Stanfield Compl. ¶¶ 151-60).

The constitutional inquiry is more nuanced that Defendants' briefs suggest because the ever-evolving nature of new technologies presents unique challenges for the First Amendment. *See, e.g., Red Lion Broad. Co. v. Fed. Commc'n Comm'n*, 395 U.S. 367, 386 (1969) ("Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to

them.") (citation omitted); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (discussing motion pictures); *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (discussing different media).

When the U.S. Supreme Court first addressed the intersection of the internet and the First Amendment, it began its analysis by comparing the regulation at issue to previous medium-based regulations. *See Reno*, 521 U.S. at 868-70. The Court noted that it previously upheld regulations of broadcast mediums based on the scarcity of radio frequencies and its "invasive" nature. *Id.* at 868-69. Notwithstanding, the Court determined that the internet was distinct from broadcast radio and held that regulations affecting the "entire universe of cyberspace" are subject to stringent scrutiny. *Id.* at 868-70.

Such stringent scrutiny, however, does not apply to Plaintiffs' tort claims here for three reasons. First, the statute at issue in *Reno* was content-based, whereas here the common-law tort duty (discussed more fully herein) is content-neutral. *Reno*, 521 U.S. at 868. Second, the criminal statute in Reno regulated the Internet in its entirety—it "applie[d] broadly to the entire universe of cyberspace." *Id*. Compared to the tort duty applicable to Defendants' social media applications here, the Reno statute's reference to "the internet," generally, encompasses a much wider array of means to access, receive, or share information. Third, *Reno*'s conceptualization of the internet as it existed in 1997, including its dangers and its benefits, is outdated. *Reno* fails to appreciate the challenges presented by social media applications that exist on the internet today. While the Court highlighted that the government had never supervised nor regulated the internet as it had with the broadcast industry, *Reno*, 521 U.S. at 868-69, the government regulates the internet today (as well as the communications that take place on it). The *Reno* Court also viewed the internet as "not as 'invasive' as radio or television," relying on the district court's finding that "[c]ommunications

over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden," and that "[u]sers seldom encounter content 'by accident.'" *Reno*, 521 U.S. at 869 (first alteration in original) (internal quotation marks omitted). Clearly, the Court in *Reno* had not contemplated the variety of internet-capable technology that exists today and its integration into our daily lives, social interactions, and homes. In contrast to the Court's conceptualization of the internet in 1997 as a relatively static resource for information, the social media applications on the internet of today present far different challenges.

This Court should not resolve to what extent the First Amendment regulates invasive social media applications without conducting a context- and fact-based analysis to account for the competing interests at stake. *See City of Los Angeles v. Preferred Commc'ns, Inc*., 476 U.S. 488, 494-96 (1986) (reversing dismissal and remanding to the district court, reasoning that it could not decide on a "proper resolution of the First Amendment question raised by the [plaintiff's] complaint and the [defendant's] responses to it without a fuller development of the disputed issues in the case"). Plaintiffs' Complaints contain detailed factual allegations that, taken together, show that Defendants should face liability in tort under the specific facts of this case.

D. There is a "strong and legitimate" interest in providing a remedy for those injured by tortious conduct

Plaintiffs' claims are rooted in well-established, venerated principles of common-law torts. It is well settled that states have an important and legitimate interest in promoting the general welfare of the public and protecting individual life. *See Kovacs*, 336 U.S. at 83 ("The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people." (footnote

omitted)); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942) (acknowledging that the punishment of using, in a public place, "words likely to cause a breach of the peace" is well "within the domain of state power"). And the Supreme Court has repeatedly acknowledged that the states possess a "strong and legitimate" interest in allowing private individuals to obtain compensation for their injuries through a civil action, even when the wrongful conduct alleged involves speech. *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 348 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 472 U.S. 749, 756-57 (1985).

New York courts have also made it exceptionally clear that the First Amendment cannot serve as a shield for tortious or unlawful conduct merely because a defendant's freedom of speech is implicated. *See, e.g., Le Mistral, Inc. v. Columbia Broad. Sys*., 61 A.D.2d 491, 494 (1st Dep't 1978) ("This court 'recognizes that the exercise of the right of free speech and free press demands and even mandates the observance of the co-equal duty not to abuse such right, but to utilize it with right reason and dignity.'" (quoting *Bavarian Motor Works Ltd. v. Manchester*, 61 Misc. 2d 309, 311 (New York County Sup. Ct. 1969))); *Lindberg v. Dow Jones & Co., Inc*., No. 20-CV-8231, 2021 WL 5450617, at *9 (S.D.N.Y. Nov. 22, 2021) ("[T]he Court disagrees with [the defendant's] argument that the First Amendment bars all claims . . . based on new[s] gathering or reporting activities. . . . 'There is no threat to a free press in requiring its agents to act within the law.'" (quoting *Galella v. Onassis*, 487 F.2d 986, 996 (2d Cir. 1973))). And New York common law recognizes a cause of action for negligence against a defendant that "launche[s] a force or instrument of harm" by "failing to exercise reasonable care in the performance of [its] duties," even when the injured plaintiff is not a party to the contract. *Espinal,* 98 N.Y.2d at 140 (alteration in original) (internal quotation marks omitted) (quoting *H.R. Moch Co.*, 247 N.Y. at 168).

E. Defendants' tort duty constitutes, at most, a permissible, content-neutral regulation

If imposing tort liability in this case results in any sort of "restriction" upon protected speech, it would be equivalent to a content-neutral, "time, place, and manner" requirement, at most. *See People v. Barton*, 8 N.Y.3d 70, 76-77 (2006) ("[A] regulation is content neutral" if it is "*justified* without reference to the content of the regulated speech" or, put another way, if it "serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." (emphasis in original) (internal quotation marks omitted) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))). Content-neutral time, place, and manner regulations are subject to intermediate scrutiny, and are valid if they (1) support a significant government interest, (2) are narrowly-tailored to achieve that interest, and (3) leave open ample alternative channels of communication. *Town of Delaware v. Leifer*, 34 N.Y.3d 234, 244 (2019) (citing *Clark v. Comty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) and *Barton*, 8 N.Y.3d at 76); *accord Dua v. New York City Dep't of Parks & Recreation*, 176 A.D.3d 91, 101-02 (1st Dep't 2019). As further explained below, the tort duty applicable to Defendants in this case satisfies all three requirements. Therefore, Plaintiffs' claims are not barred by the First Amendment.

Defendant's common law duty to design their applications in a safe manner (i.e., in a way that is not dangerously addictive to users) does not violate the First Amendment because the duty is narrowly tailored to ensure it does not infringe upon anyone's constitutional guarantee of free speech and a free press. A time, place, and manner restriction is narrowly tailored if the important state interest would be achieved less effectively without the restriction and "is not 'substantially broader than necessary to achieve [that] interest.'" *Leifer*, 34 N.Y.3d at 245 (alteration in original)

(quoting *Ward*, 491 U.S. at 799-800). The narrowly-tailored requirement does not mean that the regulation needs to be the "least restrictive means of advancing the government goal. . . ." *Id*.; *see also Ward*, 491 U.S. at 797 (explaining that a regulation is "not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech'" (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985))).

In this case, Defendants' tort duty satisfies these two elements for three reasons: First, this duty does not interfere with the kind of "editorial judgments" the First Amendment protects, largely because the manner in which content is uploaded, disseminated, and prioritized is entirely automated and lacks the traditional hallmarks of the editorial process. Social media applications are operationally distinct from traditional forms of media with respect to editorial decision-making. Therefore, they do not—and should not—receive the same constitutional protection as newspapers, radio stations, or other interactive online service providers. *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (describing the newspaper editorial process, which is unlike this case where information is shared based on algorithms).

Second, where a defendant acts with some degree of scienter, the First Amendment does not preclude tort liability. Defendants' design of their applications—to addict its users—amounts to negligence or recklessness; therefore, their mental state ensures that there is no "chilling effect" on the dissemination of protected speech. *See Smith*, 361 U.S. 150 (finding that a prohibition on sale of obscene books without a scienter requirement impermissibly chilled speech). To be clear: Defendants are free to communicate with their customers, but the First Amendment does not guarantee them an unfettered right to design addictive and dangerous products. *Frisby v. Schultz*, 487 U.S. 474, 483-84 (1988) (upholding ordinance which prohibited picketing directed towards an individual's residence, finding other alternative channels of communication existed); *City of*

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53-54 (1986) (finding no First Amendment violation in zoning restrictions on adult movie theaters and stating that reasonable alternative avenues of communication were available, even if they require that respondent theaters "fend for themselves" on the real estate market). Imposing tort liability on Defendants leaves open ample alternative channels for communicating content in non-addictive ways.

Defendants' reliance on cases involving the sale of violent video games to minors is misplaced. YouTube Br. at 15; Reddit Br. at 17 (citing *Sanders v. Acclaim Entertainment, Inc*., 188 F. Supp. 2d 1264 (D. Colo. 2002) and *Wilson v. Midway Games, Inc*., 198 F. Supp. 2d 167 (D. Conn. 2002)). First, neither of these cases (nor the others like them to which Defendants cite) is binding upon this court. Second, the courts in *Sanders* and *Wilson* misapplied the law regarding the intersection between the First Amendment and tort law.

In both *Sanders* and *Wilson*, the plaintiffs brought tort claims under state law against the manufacturers of violent video games after their loved ones' lives were taken by minors. *Sanders*, 188 F. Supp. 2d at 1268-69 (suing video game manufacturers after a 17-year-old armed with guns and bombs killed twelve students and a teacher at the Columbine High School); *Wilson*, 198 F. Supp. 2d at 169 (suing a video game manufacturer after a boy stabbed his 13-year-old friend to death). Although the plaintiffs' claims were based on the acts of young individuals who acted violently after playing those games, these cases are materially distinguishable from, and inapplicable to, Plaintiffs' claims here.

Importantly, *Wilson* recognizes that questions regarding the protection of speech require context- and fact-specific inquiries in each case. *See Wilson*, 198 F. Supp. 2d at 181 ("In short, the label 'video game' is not talismanic, automatically making the object to which it is applied either speech or not speech.") In *Wilson*, the only state tort claims weighed against the First Amendment

were the plaintiff's claims for negligent and intentional infliction of emotional distress, *see* Wilson, 198 F. Supp. 2d at 178-83; and in *Sanders*, negligence and strict liability. *Sanders*, 188 F. Supp. 2d at 1282. But rather than properly weighing the First Amendment interests at stake against the states' interest in permitting recovery for otherwise actionable torts, the courts uniformly applied the constitutional standards for laws criminalizing incitement to the plaintiff's claims. *See Wilson*, 198 F. Supp. 2d at 182 ("[T]he First Amendment precludes Wilson's action for damages unless Mortal Kombat's images or messages are 'directed to inciting or producing imminent lawless action and [be] likely to incite or produce such action.'") (alteration in original) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)); *Sanders*, 188 F. Supp. 2d at 1279-81 (same). Importantly, the state interest in criminalizing incitement is different than providing civil recovery for otherwise actionable negligence. Likewise, the burden on speech effected by making incitement a crime is different than a tort law which requires Defendants to design their applications in a way that protects users, including children and teens.

VII. THE STANFIELD PLAINTIFFS STATE VIABLE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS

Defendants argue that the Stanfield Plaintiffs' claims for emotional distress should be dismissed because they are duplicative of their negligence and products liability claims. YouTube Br. at 38-39; Reddit Br. at 29. Generally, a claim should be dismissed as duplicative where "the conduct and resulting injury" alleged in support of two separate claims are "identical." *Deer Park Enters., LLC v. Ail Sys., Inc.*, 57 A.D.3d 711, 712 (2d Dep't 2008). However, both claims survive where each alleges a distinct injury. That is the case here.

The negligence count in the *Stanfield* Complaint alleges that Plaintiffs suffered physical injuries. Three of the Stanfield Plaintiffs sustained traditional physical injuries. Stanfield Compl.

¶ 17 (scraped knee), ¶¶ 20-22 (injured wrist requiring surgery), ¶ 45 (burns to back and shoulder). All of the Stanfield Plaintiffs also "suffered . . . physiological injuries manifesting in continuing psychological symptoms." Stanfield Compl. ¶ 502. As alleged and supported by social science research, exposure to a mass shooting often causes physiological changes in survivors' brains—in other words, physical harm. Stanfield Compl. ¶¶ 141-42. This type of physical harm—like more traditional types of physical injuries—is appropriately alleged in a negligence claim rather than a negligent infliction of emotional distress ("NIED") claim. *See Ewing v. Roslyn High Sch.*, No. 05-CV-1276(JS)(ARL), 2009 WL 10705995, at *6 (E.D.N.Y. Mar. 31, 2009) (noting that "where there is no physical injury and the only harm in a negligence claim is emotional distress, the claim is one for negligent infliction of emotional distress").

The NIED claim asserted by the Stanfield Plaintiffs is predicated on a different injury. It seeks recovery for the "severe emotional distress" that Plaintiffs suffered. Stanfield Compl. ¶ 515. A claim premised on emotional harm is distinct from other tort remedies, even where the underlying conduct giving rise to injury is the same. *Hanly v. Powell Goldstein, LLP*, No. 05-CV-05089, 2007 WL 747806, at *6 n.9 (S.D.N.Y. Mar. 9, 2007), *aff'd sub nom. Hanly v. Powell Goldstein, L.L.P.*, 290 F. App'x 435 (2d Cir. 2008). *See also Lewis Fam. Grp. Fund LP v. JS Barkats PLLC*, No. 16-CV-05255, 2021 WL 1203383, at *9 (S.D.N.Y. Mar. 31, 2021) (NIED claim not duplicative of other claims if the claims "arise from different injuries"). In any event, at the pleading stage, separate negligence and NIED claims are not duplicative because the elements of the claims are different. *Farrell v. United States Olympic & Paralympic Comm.*, 567 F. Supp. 3d 378, 388-89 (N.D.N.Y. 2021); *Est. of D.B. by Briggs v. Thousand Is. Cent. Sch. Dist.*, 169 F. Supp. 3d 320, 338 (N.D.N.Y. 2016), *abrogated on other grounds by Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195 (2d Cir. 2017). For this reason, the negligence, products liability, and

NIED claims are not duplicative as alleged. The cases cited by Defendants do not suggest otherwise because there is no indication that they involved allegations of distinct injuries in support of their different claims. *See Fay v. Troy City Sch. Dist.*, 197 A.D.3d 1423, 1424 (3d Dep't 2021); *Doe v. Ward*, No. 950544/2021, 2023 NY Slip Op 33155(U), at *4 (N.Y. County Sup. Ct. 2023); *Lipshie v. Lipshie*, No. 604288/02, 2005 NY Slip Op. 30489(U), at *4 (N.Y. County Sup. Ct. 2005).

Defendants' arguments also rest on a misidentification of the substantive theories underlying the Stanfield Plaintiffs' NIED claims. Contrary to Defendants' contentions, the Stanfield Plaintiffs do not rely on the overlapping "bystander" or "zone of danger" theories. *See* YouTube Br. at 39-40; Reddit Br. at 29-30. *Cf. Greene v. Esplanade Venture P'ship*, 36 N.Y.3d 513, 523 (2021) (zone of danger rule incorporated into New York law with an objectively-defined class of bystanders, i.e., immediate family members). They rely instead on the "special circumstances" and "direct duty" theories.

"New York recognizes three variants of negligent infliction of emotional distress." *Ranta v. City of New York*, 481 F. Supp. 3d 115, 118 (E.D.N.Y. 2020). Those variants are: (1) the bystander theory; (2) the "direct duty" theory, under which "a plaintiff has a cause of action for negligent infliction of emotional distress if she suffers an emotional injury from defendant's breach of a duty which unreasonably endangered her own physical safety," *id.*; and (3) cases in which "'an especial likelihood of genuine and serious mental distress, arising from the special circumstances, . . . serves as a guarantee that the claim is not spurious.'" *Id.* at 119 (quoting *Johnson v. State*, 37 N.Y.2d 378, 382 (1975)). The Stanfield Plaintiffs' NIED allegations are more than sufficient to plead a claim under the latter two theories.

Courts applying New York law have found that the "special circumstances" theory applies in extreme scenarios in which the genuineness of a plaintiff's claimed emotional trauma cannot be doubted. *See, e.g.*, *Johnson*, 37 N.Y.2d at 383 (woman falsely informed by a hospital that her mother had died); *Baker v. Dorfman*, 239 F.3d 415, 422 (2d Cir. 2000) (plaintiff negligently provided with a positive HIV test which had a "predicable emotional impact"); *D.J.C.V. v. United States*, 605 F. Supp. 3d 571, 600-01 (S.D.N.Y. 2022) (parent and child separated from each other due to the federal government's child separation policy for migrant families which had an "intent to cause maximum harm and an *in terrorem* effect," including through government's failures to provide information to parents about their children's whereabouts); *Ranta*, 481 F. Supp. 3d at 119-20 (man's wrongful conviction of a crime for which he was framed "foreseeably ha[d] a genuine, albeit solely emotional, impact" on his family members). Rare and extraordinary violent events like a mass shooting present just such "special circumstances."

In *Quill v. Trans World Airlines, Inc.*, 361 N.W.2d 438, 443 (Minn. Ct. App. 1985), an airline passenger asserting an NIED claim against an airline relied on this theory. He alleged that he suffered emotional distress when the plane plunged into a tailspin for 40 seconds, causing the plane to violently shake and the plaintiff to "believe[] that his death was certain." *Id.* at 440. According to the court, the extreme nature of the experience showed that the plaintiff's emotional distress was genuine:

> [W]e believe the unusually disturbing experience plaintiff endured combined with his physical symptoms assure that his claim is real. There can be few experiences as terrifying as being pinned to a seat by gravity forces as an airplane twists and screams toward earth at just under the speed of sound. The nature of that experience guarantees plaintiff suffered severe emotional distress during the descent and the emergency detour to Detroit. This conclusion is supported by the suffering of many others who shared his experience. Plaintiff's recurring distress is no doubt genuine as well. His sweaty hands, elevated blood pressure and other signs of distress provide, in this case, sufficient physical symptoms to warrant the law's recognition of his claim. *Id*. at 443.

In their Complaint, the Stanfield Plaintiffs allege that their survival of a horrific mass shooting is likewise a special circumstance. Stanfield Compl. ¶ 140. The Shooter fired about 60 rounds, first shooting four people in the parking lot, shooting the store windows before entering, then shooting shoppers and a security guard in the store. Stanfield Compl. ¶¶ 196 (p. 46), 207 (p. 54)[6]. The Shooter continued walking around the store and shooting, including into the back wall where some Plaintiffs hid. Stanfield Compl. ¶¶ 14, 24, 27, 30, 66, 71, 78, 87. The Plaintiffs fled and hid in terror, Stanfield Compl. ¶¶ 24, 27, 30, 41, 49, 53, 59, 62, 66, 78, 81, 91, and feared for their lives. Stanfield Compl. ¶¶ 8, 13, 17, 21, 34, 45, 56, 69, 71, 75, 84, 87. As alleged in the Complaint, each Plaintiff has incurred severe stress and trauma as a result of the shooting at Tops, six of whom have been diagnosed with post-traumatic stress disorder. Stanfield Compl. ¶ 143. As the Complaint details, Plaintiffs have experienced depression, anxiety, difficulty sleeping, sensitivity to loud noises, and hyperawareness in public places, among other psychological impacts. Stanfield Compl. ¶¶ 11-92. Plaintiffs' emotional trauma was predictable and foreseeable: mass violence often causes serious and lasting psychological harm, and survivors of mass shootings who feared for their lives during the shooting are particularly at risk of experiencing ongoing mental health consequences, including post-traumatic stress disorder, depression, and anxiety. Stanfield Compl. ¶¶ 138-39. There can be no question that the Stanfield Plaintiffs' "alleged experiences . . . are undoubtedly horrific," as Reddit states. Reddit Br. at 29. Under the special circumstances theory, such an unusually horrific experience gives rise to an inference that Plaintiffs' emotional distress is genuine.

[6] The *Stanfield* Complaint contains two sets of overlapping paragraphs at paragraphs 187 to 206 and 304. Therefore, any paragraph cited in either of those ranges also cites to the page number on which that paragraph appears in the *Stanfield* Complaint.

In addition, the Stanfield Plaintiffs' NIED claims are sufficient under a "direct duty" theory. As discussed above, Plaintiffs have alleged that Defendants owed them a duty as a result of Defendants' negligent design and marketing of their products, their launching of an instrument of harm, and their special relationship with the Shooter. *See supra* at 16-22. Defendants' conduct unreasonably endangered Plaintiffs' physical safety and caused them to fear for their safety. *See Nicholson v. A. Anastasio & Sons Trucking Co.*, 77 A.D.3d 1330, 1331 (4th Dep't 2010) (lower court erred in dismissing NIED claim against trucking company that owned tractor-trailer that crashed into plaintiffs' home, resulting in no physical injuries, but causing plaintiffs to "have moments when they re[]live the terror, panic and shock of being trapped in their house and thinking that they would die").

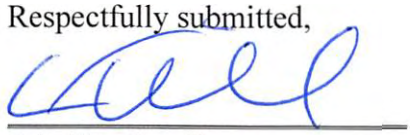
Because the Stanfield Plaintiffs have sufficiently alleged that their survival of the Tops shooting presents "special circumstances" that carry "an especial likelihood of genuine and serious mental distress," *Ranta*, 481 F. Supp. 3d at 119, and because Plaintiffs have sufficiently alleged facts showing that Defendants breached their duty to Plaintiffs, *supra* at 15-22, Defendants' request for dismissal of Plaintiffs' NIED claims should be denied. It would be premature to dismiss them at this stage, before allowing Plaintiffs a chance to prove their allegations through discovery. *See, e.g.*, *Colombini v. Westchester County Health Care Corp.*, 24 Misc. 3d 1222(A), at *14-15 (Westchester County Sup. Ct. 2009) (describing how plaintiffs were allowed to complete discovery and present proof alleging harms suffered), cited in Reddit Br. at 39.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss Plaintiffs' claims should be denied.

DATED: December 18, 2023

Respectfully submitted,



Eric Tirschwell

LAW OFFICES of BONNER and BONNER
Charles A. Bonner*
475 Gate Five Road, Suite 211
Sausalito, CA 94965
Phone: (415) 331-3070
cbonner799@aol.com

RYDER LAW FIRM
Jesse P. Ryder, Esq.
6739 Myers Road
E. Syracuse, NY 13057
Phone: (315) 382-3617
ryderlawfirm@gmail.com

**EVERYTOWN LAW*
Aaron Esty
Val Rigodon
450 Lexington Avenue
P.O. Box #4184
New York, NY 10017
Phone: (646) 324-8222
etirschwell@everytown.org
aesty@everytown.org
vrigodon@everytown.org

Alison Barnes
P.O. Box 14780
Washington, DC 20044
Phone: (203) 738-5121
abarnes@everytown.org

Pro hac vice motion forthcoming

CERTIFICATE OF COMPLIANCE

I certify that the word count of this memorandum complies with the word limits agreed to by counsel and memorialized with Stipulations filed by the parties on October 18, 2023. *See* NYSCEF No. 27, in *Jones*, Index No. 810316/2023; NYSCEF Doc. No. 30 in *Stanfield*, Index No. 810317/2023. According to the word processing software used to prepare this memorandum, the total word count, excluding the material exempted 22 NYCRR § 202.8-b, is 17,898 words. This affirmation also complies with the typeface requirements of 22 NYCRR § 202.5(a) because it has been prepared using Microsoft Word and Times New Roman typeface, 12-point font, and 1" margins.

DATED: December 18, 2023
New York, NY

Eric Tirschwell
EVERYTOWN LAW
450 Lexington Avenue
P.O. Box #4184
New York, NY 10018
Phone: (646) 324-8369
etirschwell@everytown.org