To be Argued by:
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(Time Requested: 20 Minutes)

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Court of Appeals

of the

State of New York

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

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents.

(For Continuation of Caption See Inside Cover)

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

Defendants.

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

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PRELIMINARY STATEMENT

> God only knows what it's doing to our children's brains. The thought process that went into building these applications, Facebook being the first of them . . . was all about: 'How do we consume as much of your time and conscious attention as possible?' And that means that we need to sort of give you a little dopamine hit every once in a while, because someone liked or commented on a photo or a post or whatever. And that's going to get you to contribute more content, and that's going to get you ... more likes and comments. It's a social-validation feedback loop . . . because you're exploiting a vulnerability in human psychology. The inventors . . . understood this consciously. And we did it anyway.

Facebook Founding President, Sean Parker, Axios Interview, November 2017. R.130–31 (¶8).[1]

> I cannot express how much I regret all the decisions I made leading up to my actions on May 14th. I did a terrible thing that day. I shot and killed people because they were black. Looking back now, I can't believe I actually did it. I believed what I read on-line and acted out of hate.

Payton Gendron Allocution Statement, March 13, 2023. R.174 (¶178).

On May 14, 2022, 18-year-old Payton Gendron entered Tops Friendly Markets supermarket on the East Side of Buffalo and murdered ten Black citizens in a heinous act of racist brutality. As Gendron's attorney acknowledged, "the racist hate that motivated this crime was spread through on-line platforms." R.130 (¶4). Force-fed white supremacist screeds and livestreamed murder videos on

[1] As the appeal below was consolidated with the appeals in *Salter* (APL-2025-00170*), Jones* (APL-2025-00169), and *Stanfield* (APL-2025-00165), the Full Record on Appeal contains the papers from those appeals in addition to *Patterson*.

Respondents' apps,[2] Gendron was moved by "cries of help from my race" and determined that "I have to commit this attack . . . to fight The Great Replacement or it will end us all." Gendron livestreamed his murderous attack on social media, which furnished "motivation in the way that I know some people will be cheering for me." R.132 (¶13).

Plaintiffs alleged, *inter alia*, that "Gendron's radicalization on social media was . . . the foreseeable consequence of the defendant social media companies' conscious decision to design, program, and operate platforms and tools that maximize user engagement (and corresponding advertising revenue) at the expense of public safety." R.130 (¶5). The Social Media Defendants moved jointly for pre-answer dismissal, which Supreme Court (Feroleto, J.) denied. |However, in a split decision, the Fourth Department Majority reversed, holding that Plaintiffs' 140-page Complaint stated no legally cognizable cause of action and, failing to grasp the specific factual circumstances and limiting principles, concluded that permitting this case to proceed would "result in the end of the Internet as we know it." R.6623. By contrast, the two-justice Dissent concluded that Plaintiffs' allegations seek only to "hold defendants liable for failing to provide basic safeguards to reasonably limit the addictive features of their social media platforms, particularly with respect to minor

[2] The terms "apps" and "products" are used interchangeably to refer to Respondents' apps and/or platforms.

users." R.6626. Respectfully, this Court should reject the Majority's hyperbolic reasoning and reverse for the following reasons.

First, the Majority misapplied the appropriate standard for a C.P.L.R. § 3211(a)(7) motion by concluding that Plaintiffs' products liability claims related *solely* to Defendants' online recommendation algorithms while ignoring design defects specifically alleged in Plaintiffs' Complaint that rendered their products addictive to young users. The Majority compounded this error by relying on an amicus brief for the factual conclusion—expressly disputed in Plaintiffs' Complaint—that Respondents' recommendation algorithms function to reflect their "editorial judgment[s] of which content a user may wish to see first." Rather, Plaintiffs' Complaint expressly alleged the opposite—that the algorithms as designed recklessly push engagement-maximizing content without any editorial input by Respondents whatsoever.

Second, the Majority erred in holding that Plaintiffs' New York products liability claims were preempted by Section 230 because they purportedly sought to hold Respondents liable for the racist third-party content that Gendron viewed on their platforms. In *Shiamili v. Real Estate Group of N.Y., Inc*. (17 N.Y.3d 281 (2011)), this Court held that Section 230 only immunizes social media providers from legal claims "seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish,

withdraw, postpone or alter content." Under well-settled New York law, the proper focus of Section 230 preemption analysis is not whether the Plaintiff's harms arose from third party content, but whether the plaintiff seeks to hold a social media provider liable for its exercise of a publisher's traditional editorial functions.

Here, Plaintiffs alleged cognizable products liability claims under New York law focused on addictive design features unrelated to editorial functions and explicitly alleged that Respondents could design reasonably safe social media products "without altering, deleting, or modifying the content of a single third-party post or communication." R.241–42 (¶533). The Fourth Department should have accepted the truth of Plaintiffs' allegations and recognized that, although third-party content was related to Plaintiffs' harms, Plaintiffs' claims sound in traditional New York products liability principles and are therefore not immunized by Section 230 under these specific facts.

Third, the Majority erred in holding that Respondents' recommendation algorithms, which targeted Gendron with white supremacist propaganda and videos of mass shootings, were "expressive activity" protected by the First Amendment. This holding rests on the false premise that all Plaintiffs' liability theories arise from content-recommendation algorithms involving either first-party or third-party speech. Moreover, the Majority ignored the crucial distinction between constitutionally protected speech and tortious conduct; its holding would bar

common tort claims such as defamation, medical malpractice, and sexual harassment simply because the Respondents' conduct allegedly involved speech. Further, as the United States Supreme Court recognized in *Moody v. NetChoice, LLC* (603 U.S. 707, 717 (2024)), determining whether algorithmic features on social media platforms embody constitutionally protected editorial judgments or non-expressive AI outputs is a fact-specific inquiry that requires a fully developed factual record.

Finally, the Majority erred in holding as a matter of law that the addictive design features of Respondents' products were not a proximate cause of Gendon's heinous acts—and therefore Plaintiffs' injuries—because his intervening criminal conduct was unforeseeable in the normal course of events. This Court has repeatedly held that legal cause is a quintessential fact determination, and whether or not Gendron's acts were intervening or flowed naturally from Respondents' products liability cannot be determined pre-answer. The Majority should therefore have left the issue of causation to the trier of fact.

The Majority failed to even consider whether Respondents meet their initial motion burden with respect to Plaintiffs' common law substantive claims. New York courts narrowly interpret the scope of Congress's intended invalidation of state law whenever possible, and preemption is disfavored. Plaintiffs alleged cognizable products liability claims that do not seek to hold Respondents liable as publishers of third-party content but rather for designing unreasonably dangerous social media

products. Respondents could cure their products' dangerously defective design features without removing a single piece of content from their platforms. Accordingly, the Order should be reversed.

QUESTIONS PRESENTED

Question 1: Did Plaintiffs' Complaint state cognizable products liability claims under New York law?

Question 2: Did the Majority err in holding that Plaintiffs' New York products liability claims were preempted by Section 230 because they sought to hold Respondents liable as publishers of third-party content?

Question 3: Did the Majority err in holding that Respondents are entitled to First Amendment protection for designing the AI-powered algorithms that deluged Gendron with white supremacist propaganda and racist murder videos?

Question 4: Did the Majority err in holding as a matter of law that Respondents were not the proximate cause of Plaintiffs' harms because Gendron's purported intervening criminal conduct was not foreseeable in the normal course of events?

STATEMENT OF JURISDICTION

The Court has jurisdiction over the appeal pursuant to C.P.L.R. § 5601(a) because the underlying action originated in the Supreme Court of the State of New York, County of Erie, the order of the Appellate Division contains a two-justice dissent in favor of Plaintiffs-Respondents on a question of law, and the order is a final determination that disposes of the matter as to all of the claims asserted against Defendants-Respondents. R.6614-30. This Court conducted a jurisdictional inquiry, and on December 12, 2025, terminated its inquiry and permitted this appeal to proceed in the normal course.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

1. Respondents' Products Are Tangibly Distributed And Addictive By Design

Respondents tangibly "distribute[] digital products available through mobile- and desktop-based applications ('apps')" (R.136, 157-58 (¶¶23–24, 102–03)) and act as a "seller or distributor" in the same manner that a tangible product seller does. R.182, 195, 205, 211, 214, 219 (¶¶223, 276, 334, 362. 377, 406). Respondents earn their revenue from indirect advertising rather than a traditional cash exchange; consequently, they deliberately designed their social media platforms to be addictive to users to maximize the amount of advertising users see. R.246 (¶551). Users pay by providing their personal data. R.186–87, 198, 247 (¶¶ 240–41, 244, 293–94, 556).

Respondents' products are particularly addictive to teenagers whose frontal cortexes—which play an essential part of high order cognitive functions, impulse control, and executive decision making—are underdeveloped. R.166, 244 (¶¶149, 546). The frontal lobes of the brain, particularly the prefrontal cortex, play an essential part in higher-order cognitive functions, impulse control, and executive decision-making. R.166 (¶149). Respondents are not only aware of young users' neurologic vulnerabilities; their business models are expressly designed to exploit them. R.162 (¶¶152, 167–68); *see, e.g.*, R.187–189 (¶¶44–253).

To achieve their pecuniary goal of maximum engagement, Respondents' AI-driven algorithms select content not based on what users search for or want to see, but on "content from which they cannot look away." R.173 (¶172). Because psychologically discordant content triggers a greater dopamine response in young users than soothing or affirming content, Respondents' algorithms "are prone to recommending harmful content." R.189 (¶251). Respondents' AI does not foist harmful content on young users because they seek it out or select such content through editorial judgment, but simply in order to "maximize[their] engagement." *See* R.129–31, 136–37, 173, 187–89 (¶¶3–10, 25, 172, 174, 248–50).

2. Radicalization and Violence Are Foreseeable Consequences of Respondents' Design Decisions

Teenagers' incomplete neurological development makes them ideal targets for Respondents' addictive algorithms and highly susceptible to radicalization.

R.169 (¶156). In the case of young male adolescents such as Gendron, Respondents' addictive features (autoplay, infinite scroll, notifications, and social validation features including "likes"), when paired with engagement-maximizing algorithms, actively encourage, assist, and facilitate the spread of racist, antisemitic, and terrorist propaganda. R.158 (¶103).

Respondents not only could have foreseen the significant radicalization risk posed by their apps—they actually *saw* the risk. For example, Google recognized, anticipated, and even "rebuked internal attempts to mitigate . . . harms to [their] young users." R.201 (¶309). Facebook's Director of Content Policy explained that "not only did [Facebook] *anticipate* murders and suicides on [its livestreaming product], [Facebook] *anticipated far worse* ... [and the] top 5 predictions have played out." R.190–91 (¶257) (emphasis supplied). When it acquired Twitch, "Amazon *knew* that the product was used by criminals to livestream criminal activity and that *the ability to livestream acts of violence* [using Twitch's product] *motivates* [] *criminals ... to follow through with their plans*." R.209 (¶350) (emphasis supplied). Gendron's rampage was neither an accident nor a surprise. R.130 (¶5).

3. Respondents' Unreasonably Dangerous Products Caused Gendron To Commit Heinous Acts Of Racist Violence, And Therefore Substantially Contributed To Plaintiffs' Injuries

Payton Gendron became addicted to Respondents' social media products when he was a minor under his parents' legal control accessing his social media

accounts multiple times per hour and at all hours of the night. R.172, 246 (¶¶163, 553). He did not grow up in a prejudiced household and did not hold racist beliefs until he began using, and became dependent on, Respondents' apps. R.172 (¶¶169, 170). Gendron wrote that "when I was like 12, that was when I didn't dislike American blacks and liked listening to black music." *Id*.

Gendron did not initially seek out racist material, but because Respondents' apps were expressly designed to maximize engagement over his psychological and ethical well-being, they foisted upon him unsolicited material promoting racist hate and violence. R.173 (¶173). Exploiting Gendron's incomplete frontal lobe development, they "target[ed] him with increasingly extreme and violent content and connections which . . . promoted racism, antisemitism, and gun violence." *Id*. This was no mere accident or byproduct of poor software engineering; rather, these algorithms "were functioning as designed and intended." *Id*.

The material force-fed to Gendron progressed from white supremacist screeds to livestream videos of mass shootings and other extreme depictions of racist violence. *Id*. This material inspired Gendron to move forward with his murderous plan. He explained:

> Knowing that so many other attackers like myself are out there rooting for me gives me quite a bit of confidence. Every single White man has everything to lose by doing nothing, and everything to gain by taking action. Yes I do find inspiration from other attackers.

R.174 (¶176).

Gendron's ability to livestream his racist murder furnished the final motivation to carry out his evil plan. R.175 (¶179). With haunting insight, Gendron explained how Christchurch shooter Brenton Tarrant's livestreaming of his March 2019 massacre increased the power of his racist message exponentially over the written statement released by Charleston shooter Dylann Roof:

> Dylann Roof's manifesto is not that bad Livestreaming this attack makes a 1000x greater impact I most likely wouldn't even know about the real problems in the world if Brenton Tarrant didn't livestream his attack.

R.175 (¶ 181). Gendron wrote that livestreaming the attack would help him overcome his fear and any lingering sympathy for human life that could dampen his murderous intent. R.175 (¶ 182).

> It is very difficult for a normal person even with all the information to carry out an attack that will kill another human being, or the fact that you may die that day. . . . I think that live steaming this attack gives me some motivation in the way that I know that some people will be cheering for me.

Id.

B. PROCEDURAL BACKGROUND

On May 14, 2023, one year after the Tops massacre, Plaintiffs filed their 140-page Complaint against Respondents and, among others, several firearm product sellers. In lieu of filing an Answer, Respondents sought dismissal on the basis that Plaintiffs' New York tort claims were preempted by Section 230 of the Communications Decency Act and barred by the First Amendment. Supreme Court

(Feroleto, J.) denied the motions, concluding that Respondents' request was improper at this early stage of the litigation. R.2475–2653. In her written order, Justice Feroleto described the gravamen of Plaintiffs' complaint: that the social media platforms at issue "are sophisticated products designed to be addictive to young users, and they specifically directed Gendron to further platforms or postings that indoctrinated him with 'white replacement theory.'" R.33. Under this framework, Justice Feroleto concluded that "the factual allegations as a whole in the 715 paragraphs of the complaint are sufficient to allege viable causes of action against each of the social media/internet defendants." R.35.

The Majority acknowledged that the plaintiffs "seek to hold . . . [Respondents] liable as product designers, not as publishers of third-party content." R.6616. Nevertheless, the Majority concluded that "section 230 affords immunity to the social media defendants' tort causes of action against them," including products liability claims, which the Majority held were "based on the nature of content posted by third parties on the social media platforms," despite failing to examine Plaintiffs' claims in a fact-sensitive manner. R.6616, 6618. The Majority also concluded that the Respondents were entitled to First Amendment protection, even where the recommendation algorithms are *not* based on content a user may wish to see first but rather content recommended "for the purpose of maximizing his [Gendron's] engagement with their platforms." *Id*. It lastly held as a matter of law that Gendron's

criminal acts were the sole proximate cause of Plaintiffs' injuries. R.6622-23.

Two Justices dissented, rejecting "the foundation upon which the Majority's opinion is built—that plaintiffs' causes of action necessarily seek to hold defendants responsible for radicalizing the shooter given their status 'as the publisher[s] or speaker[s] of any information provided by another information content provider.'" R.6625. Rather, the dissent recognized that, accepting the factual allegations as true, Respondents "intentionally designed their platforms to be addictive, failed to provide basic safeguards for those most susceptible to addiction—minors—and failed to warn the public of the risk of addiction." R.6625. Indeed, "the shooter all but admitted those facts to be true." R.6624. Moreover, the Dissent observed that "other products liability actions similarly premised upon effective designs or failure to warn have been permitted to proceed past the motion to dismiss stage," including federal multi-district litigation whereby "the attorneys general of more than 30 states—including the New York Attorney General" have been pursuing "virtually identical strict products liability claims under substantive New York law." R.6626.

This appeal ensued. R.6580-6790.

ARGUMENT

I. THE MAJORITY FAILED TO RESPECT THE HIGH BAR REQUIRED FOR DISMISSAL AS A MATTER OF LAW

On appeal are pre-answer motions to dismiss pursuant to C.P.L.R. § 3211(a)(7), where the court must construe the complaint liberally, accept the pleaded

facts as true and accord every favorable inference therefrom to the plaintiff, view any proffered evidence in the light most favorable to the plaintiffs, and determine simply whether the facts as alleged fit into any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994); *see also Davis v. S. Nassau Communities Hosp.*, 26 N.Y.3d 563, 570 (2015). It is a defendant's initial motion burden to show, as a matter of law, that no cognizable claims exist. *See Connolly v. Long Island Power Auth.*, 30 N.Y.3d 719, 728 (2018).

The Majority failed to faithfully apply these principles when it held that, "[b]ased on our reading of the complaints, we conclude that plaintiffs seek to hold the social media defendants liable as publishers of third-party content." R.6618. In reaching this conclusion, the Majority ignored unambiguous language in Plaintiffs' Complaint "expressly disclaim[ing] any and all claims seeking to hold the Social Media Defendants liable as the publisher or speaker of any content provided, posted, or created by third-parties." R.241 (¶530). Instead, Plaintiffs' allegations focused on Respondents' "underlying design, programming, and engineering of their platforms." R.241 (¶532). Their Complaint made clear that "Plaintiffs' claims seek to hold the Social Media Defendants accountable for their own, operations, conduct, and products – not for the speech or content of others or for Defendants' content moderation decisions." *Id*. Indeed, Plaintiffs specifically alleged that Respondents could "manifestly fulfill their legal duty to design reasonably safe social media

products and furnish adequate warnings of foreseeable dangers arising out of the use of their products without altering, deleting, or modifying the content of a single third-party post or communication." R.241–42 (¶533). These are not merely conclusory allegations that a Court can disregard in adjudicating a motion to dismiss. *Cf. Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009) (only "claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss.").

Additionally, the Majority held that Plaintiffs' products liability claims "rests[] on the premise that the platforms of the social media defendants were defectively designed because they failed to filter, prioritize, or label content in a manner that would have prevented the shooter's radicalization." R.6622. This characterization of Plaintiffs' claims—on which the Court's Section 230 holding is premised—ignored specific product defect allegations in the Complaint that Respondents' products are (1) addictive to teenage users, R.242 (¶546); (2) frustrate the exercise of parental responsibility through lack of parental controls, permission, and monitoring capability available on many other devices and applications, R.242 (¶544); (3) provide no warnings to minor users or parents regarding their platforms' addictive design and propensity to promote radicalization and violence, R.248 (¶563); and (5) that foreseeable use of Respondents' products can be harmful to adolescents' mental health and sleep patterns and emotional well-being. R.248

(¶¶566–567).

The Majority also erred in finding as a matter of law that "[i]t was the shooter's addiction to white supremacy content, not to social media in general, that allegedly caused him to become radicalized and violent." R.6623. This holding ignored Plaintiffs' specific allegations that Gendron began using Respondents' apps "in his early teens," and "quickly became a problematic user" by "access[ing] his social media accounts multiple times per hour and at all hours of the night." R.172 (¶162). Contrary to the Majority's finding, Gendron's radicalization resulted from Respondents' AI-driven algorithms force-feeding him increasingly more violent material to maintain his *pre-existing* addiction to their apps:

> The videos and related content that triggered dopamine extrusion from the ventral tegmental area of Gendron's brain to his frontal cortex steadily lost their physiologic effect due to satiation. In order to *maintain* Gendron's level of engagement--and the resulting advertising revenue--the algorithms driving Defendants' social media products selected progressively more violent, racist, and graphic material to overcome the satiation effect and trigger a dopamine response in Gendron's adolescent brain.

R.174 (¶176) (emphasis supplied).

Finally, the Majority's legal conclusion that Respondents' content recommendation algorithms are immunized publishing activity under Section 230 and protected First Amendment Speech was solely based upon a factual

representation by *amicus curiae* Center for Democracy and Technology[3] that recommendation algorithms are "simply tools used by social media companies 'to accomplish a traditional publishing function.'" R.6621. In contrast, Plaintiffs' Complaint expressly alleged that the social media algorithms at issues in this case were not designed to exercise "editorial judgment," but rather to maximize user engagement irrespective of the third-party content used to accomplish that aim. *See* R.129–31, 173, 187–89 (¶¶3–10, 172, 174, 248–50).

II. PLAINTIFFS SUFFICIENTLY ALLEGE THAT THE SOCIAL MEDIA APPS ARE "PRODUCTS" SUBJECT TO COGNIZABLE PRODUCTS LIABILITY CLAIMS UNDER THE PARTICULAR FACTS OF THIS CASE

A meaningful analysis of Section 230 immunity cannot be undertaken without first addressing the substantive claims being alleged. Since Plaintiffs allege that the social media platforms at issue are "products," under our jurisprudence a duty is owed by Respondents and cognizable products liability claims are stated. This fact-intensive analysis, in turn, elucidates exactly why Plaintiffs' claims fall outside the sphere of Section 230 and the First Amendment. The Majority, however, conducted virtually no analysis as to the nature of the discrete products liability claims asserted. R.6599. This, respectfully, was error.

[3] The Majority's misplaced reliance here is further complicated by the fact that the lion's share of this organization's funding comes from Respondents Amazon, Google and Meta https://cdt.org/financials/ (accessed March 12, 2026).

A. The Contours of New York Products Liability Law Evolve As Technology Advances

New York products liability is a creature of common law. *See In re New York City Asbestos Litig. [Dummitt]*, 27 N.Y.3d 765, 786 (2016). Over a century ago, this Court recognized that existing principles of tort law must evolve with, and reflect, new developments in technology:

> Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.

MacPherson v. Buick Motor Co., 217 N.Y. 382, 391 (1916) (Cardozo, J.). The power to expand legal principles, albeit exercised cautiously, "*must* be used if the changing needs of society are to be met." *Davis, supra* (emphasis supplied). As the needs of the present should dictate the present rules, the application of existing tort principles to technological advancements is best viewed as a logical conformance rather than an expansion. *See, e.g.*, *Berkeley v. Park,* 47 Misc. 2d 381, 384 (Sup. Ct. Otsego Cnty., 1965) (although the automobile had not yet been invented at the time the Dram Shop Act was enacted, it applied thereto).

In no arena is this precept more applicable than products liability. *See Dummitt*, *supra* (a product manufacturer's liability for injuries caused by a product defect is both a "long-standing and evolving common-law tradition."). To this end, this Court has consistently declined to make bright-line pronouncements in the

context of our products liability jurisprudence, since doing so would invariably lead to harsh results. *See, e.g.*, *Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 59 (2014) (holding that a manufacturer "cannot *automatically* avoid liability" when a safety device is removed post-sale because it creates "[s]uch a broad rule" that it "would lessen the manufacturer's duty to design effective safety devices that make products safe for their intended purpose and 'unintended yet reasonably foreseeable use'" (emphasis in original)); *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 242 (1998) ("[t]he fact-specific nature of the inquiry into whether a particular risk is obvious renders bright-line pronouncements difficult"); *Cover v. Cohen*, 61 N.Y.2d 261, 270 (1984) ("[w]e decline the single standard invitation [regarding the admission of subsequent remedial measures] because of the different inquiries involved in the different types of cases"); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 385 (1976) (abrogating a bright-line patent-danger rule because "[i]ts unwavering view produces harsh results").

As to the definition of a "product," this Court has both declined to set forth a bright-line rule and has agreed that advancements in, and the complexity of, technology must be part of that metric. This Court, in fact, declared more than 50 years ago that "the product in the hands of the consumer is often a most sophisticated and even mysterious article," for which "advances in technology" have deprived consumers of the ability to comprehend how the product works, let alone "detect

when there may be a defect or a danger present in its design . . . ." *Codling v. Paglia*, 32 N.Y.2d 330, 340 (1973). And because technology has evolved exponentially since then, our tort principles "must keep pace." *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 292 (2007) (electronic records on a computer can be the subject of a tort claim because "we believe that the tort of conversion must keep pace with the contemporary realities of widespread computer use.").

More recently, it was recognized that our jurisprudence does not "provide a clear definition of a 'product,'" and that such a determination is—like in all other aspects of products liability—an "inherently fact-sensitive" analysis. *Matter of the Eighth Judicial Dist. Asbestos Litig. [Terwilliger]*, 33 N.Y.3d 488, 494, 502 (2019). In so doing, this Court declined to define a "product" using a finite set of characteristics, and it recognized the diminished relevance of even attempting to do so in light of the risk-utility balancing test that places greater emphasis on the dangers presented rather than the product's form. *Id.* at 494–95 ("our case law has not focused on creating an exhaustive list of the product's physical characteristics but has instead focused on th[e] potential dangers" attendant thereto) (*citing* RESTATEMENT [THIRD] OF TORTS: PRODUCTS LIABILITY § 19, Comment [a]) ("[g]iven that design and warning cases turn on essentially risk-utility evaluations, the practical importance of whether something is, or is not, a product has diminished somewhat").

Instead, to determine if something is a product, the *Terwilliger* Court identified policy-laden considerations—intertwined with the question of duty—of "defendant's control over the design of the product, its standardization, and its superior ability to know—and warn about—the dangers inherent in the product's reasonably foreseeable uses or misuses." *Id.* at 495, 496 (discussing "principles of reasonableness and public policy") (*citing Dummitt, supra* at 793, 800–01). The Third Restatement neither assumes nor demands tangibility as a prerequisite to this determination, as intangible items are "products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property." REST. 3D TORTS: PRODS. LIAB. § 19 cmt. [a]. The focus, thus, is on policy factors, including (1) the public interest in life and health; (2) the invitations and solicitations of the manufacturer to purchase the product; (3) the justice of imposing the loss on the manufacturer who created the risk and reaped the profit; (4) the superior ability of the commercial enterprise to distribute the risk of injury as a cost of doing business; (5) the disparity in position and bargaining power that forces the consumer to depend entirely on the manufacturer; (6) the difficulty in requiring the injured party to trace back along the channel of trade to the source of the defect in order to prove negligence; and (7) whether the product is in the stream of commerce. *Id.* The goal is simply 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.

Terwilliger, supra at 495–96 (*quoting Dummitt, supra* at 788).

These policy considerations should be viewed against the sophistication, novelty, and enigmatic nature of Respondents' social media apps.

B. Because Social Media Apps Are Distributed In A Tangible Way, They Constitute "Products" Under New York Law

Despite *Terwilliger*'s mandates, the Majority made no effort to conduct a "product" analysis and erroneously deemed it irrelevant to a Section 230 inquiry. R.6618. The Dissent, by contrast, correctly concluded that the "operative complaints, when read as a whole, as they must be, [] allege that defendants' platforms are 'products' subject to strict products liability that are addictive—not based upon the third-party content they show but because of the inherent nature of the design." R.6625. The Dissent aptly recognized that the *Terwilliger* factors should be considered in light of today's digital age:

> Defendants are multi-billion-dollar corporations that derive their revenue from maximizing user engagement on their platforms. They alone control the manufacture and distribution of their respective social media platforms. They are uniquely positioned to know of—and prevent—the harm posed by social media addiction generally and specifically in minors. Once injected into the stream of commerce, their platforms are uniform for all users. That users exchange their data as opposed to currency to use those platforms does not, in our view, vitiate their true nature as products.

R.6628.

In our ever-innovating digital world, neither tangibility nor the direct exchange of currency should be the *sine qua non* of a "product." This position is no outlier regarding social media and related apps. R.6628 (*citing Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021)); *Anderson v. TikTok, Inc.*, 116 F.4th 180, 183–84 (3d Cir. 2024); *A.M. v. Omegle.com, LLC*, 614 F. Supp. 3d 814 (D. Or. 2022); *In re Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig*., 702 F. Supp. 3d 908, 817 (N.D. Cal. 2023); *see also Brookes v. Lyft Inc*., 2022 WL 19799628, at *4 (Fla. Cir. Ct. Sept. 30. 2022) (products liability claim "arises from the defect in Lyft's application, not from the ideas or expressions in the Lyft application").

Buttressing this is the treatment of software and programs in other legal realms. *See, e.g.,* REST. 3D TORTS: PRODS. LIAB. § 19 cmt. [d] (courts "may draw an analogy between the treatment of software under the Uniform Commercial Code and under products liability law."). New York courts have recognized, for instance, that records in electronic form are subject to the tort of conversion despite being "intangible" (*Thyroff, supra*), that computer "software that is mass-marketed is considered a good," not a service (*Commc'ns Grps., Inc. v. Warner Commc'ns, Inc*., 527 N.Y.S.2d 341, 344 (Civ. Ct., N.Y. Cnty., 1988)), and that the evolution of software and source code from the tangible to the intangible does not alter its legal

status as a distributed product. *See People v. Aleynikov*, 31 N.Y.3d 383, 390 (2018) (concluding that source code was "related to a product" under the Economic Espionage Act). In *Aleynikov*, this Court rejected a definition of "tangible" that would restrict it to "touchable," instead adopting a broader interpretation whereby "[w]hat must be tangible is not the secret scientific material—here, the source code—*but the reproduction or representation thereof*." *Id.* at 398 (emphasis supplied). This aligns with the REST. 3D TORTS: PRODS. LIAB. § 19 cmt. [a] (intangible items that are distributed in a manner similar to tangible items are products).

Here, too, it can hardly be disputed that, while the social media apps may be intangible, their reproduction and distribution are real and tangible. To this end, it was the Respondents' burden to show, at this pre-answer stage where all the allegations are accepted as true and all evidence is viewed in the light most favorable to Plaintiffs, that their apps are not products as a matter of law. *Cf. Terwilliger, supra* at 496–97 (at the summary judgment stage, "[b]ased on this record, defendant has not met its burden in showing that the coke ovens at issue are not products as a matter of law."). Against Plaintiffs' robust allegations, Respondents failed to make this requisite showing.

Plaintiffs clearly alleged, *inter alia*, that Respondents "distribute[] digital products available through mobile- and desktop-based applications ('apps')" (R.136

(¶23–24)), "designed and chose to program, distribute, and operate their products…" (R.157–58 (¶102–03)), "made and distributed [their apps] with the intent to be used or consumed by the public as part of the[ir] regular business" of being a "seller or distributor" (R.182, 195, 205, 211, 214, 219 (¶¶223, 276, 334, 362. 377, 406)), promoted their "widely used and distributed products" (R.184, 196, 211, 214, 220 (¶¶ 235, 281. 365, 380, 409)), "designed and distributed" the products "in the United States" (R.243 (¶ 539)), knew of the design defects at the time of "manufacturer and distribution" (R.242 (¶537)), and made "intentional design, program, and distribution decisions" that foreseeably led to Plaintiff's injuries. R.132 (¶16). It is alleged that the apps operate in standardized ways to maximize engagement. R.213, 244–46, 252 (¶¶ 373, 546–52, 596).

It is further alleged that Respondents' business model is tailored to our digital world, i.e., rather than a traditional cash exchange, the product users pay by providing their personal data, which Respondents use to generate an indirect revenue stream from targeted advertising. R.186–87, 198, 247 (¶¶240–41, 244, 293–94, 556) (Respondent "monetizes its users and their data by selling ad placements to marketers."); R.132, 152, 174, 185 (¶¶15, 77, 176, 239) (Respondents actively promote their "products to teenagers to increase revenue" and "owe their financial success to their defective design, including their underlying computer code and algorithms…"); *see also* R.193, 196, 198, 201, 212 (¶¶263, 282, 291, 309, 369). It

is alleged that they earned such revenue from Gendron's product usage specifically, and thus he was a product user. R.254–55 (¶¶612, 618–19). It is even alleged, and evidence was proffered, that Respondents refer to their own apps as "products." R.206 (¶337), 1606, 1608, 1625, 1671.

Respondents are not merely "in a superior position to know of and warn against" the hazards at issue (*Terwilliger, supra* at 498; *Dummitt, supra* at 790); based on the complexity and secrecy of their apps' designs, they are the *only* parties in a position to know of the hazards. Concluding, therefore, at this pre-answer stage, that Respondents' apps are not products as a matter of law would be incongruous with the allegations, the fact-intensive nature of products liability, and the fundamental precept that our common law jurisprudence must keep up with the evolution of technology in our modern-day society.

The Majority respectfully erred in neglecting this material issue, which was then compounded by a misunderstanding of the discrete nature of the products liability claims asserted and the inherent limiting principle that permits a specific type of claim, such as here, to live harmoniously with the dictates of Section 230.

C. Respondents Owed A Duty To The Tops Shooting Victims

The imposition of a products liability duty has been recently examined by this Court in depth. *See generally Terwilliger, supra; Dummitt, supra.* Inasmuch as the analysis of whether Respondents' apps constitute "products" is "intertwined" with

the duty inquiry (*see Terwilliger, supra*), Respondents owed a duty to Plaintiffs for the same reasons that their apps are products.

Multiple legal principles buttress this conclusion. It is axiomatic that a manufacturer of a defective product owes a duty of care to "any person" injured from its product. *See Codling v. Paglia*, 32 N.Y.2d 330, 342 (1973) ("the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages"). It follows that neither "privity" nor "foreseeability" are required to impose a products liability duty. *Gebo v. Black Clawson Co.*, 92 N.Y.2d 387, 392 (1998) (*citing Voss, supra*, *Codling, supra*). The class of plaintiffs owed this duty include "bystanders" (*Ciampichini v. Ring Bros., Inc.*, 40 A.D.2d 289 (4th Dep't, 1973)) and "third persons." *McLaughlin v. Mine Safety Appliances Co.*, 11 N.Y.2d 62, 68 (1962).

These well-settled principles exist because the duty point is fixed upon policy consideration, including a weighing of logic, morality, science, and competing socioeconomic interests. *See Tenuto v. Lederle Lab'ys, Div. of Am. Cyanamid Co.*, 90 N.Y.2d 606, 611 (1997). Thereunder, a defendant's duty centers on whether it is "in the best position to protect against the risk of harm" and thus can be predicated *solely* upon its "relationship with [] *the tortfeasor*." *Hamilton v. Beretta U.S.A.*, 96 N.Y.2d 222, 233 (2001) (defendant owes a duty to a third party when its

"relationship with *either the tortfeasor* or the plaintiff places [it] in the best position to protect against the risk of harm.") (emphasis supplied).

In reaffirming this principle, this Court has found that medical providers owe a duty to unknown, random third parties under certain circumstances. *See Davis,* 26 N.Y.3d 563, *supra* at 570; *Tenuto, supra* at 612 ; *McNulty v. City of New York,* 100 N.Y.2d 227, 233–34 (2003). Undergirding these determinations is that the defendant's negligent conduct vis-à-vis its own patient or product user is what affirmatively "create[d] a peril" to "every" person with the vicinity of the dangerous instrumentality, and the defendant was the party that could have best protected against that risk. *Davis, supra* at 577 ("to take the affirmative step of administering the medication at issue without warning Walsh about the disorienting effect of those drugs was to create a peril affecting every motorist in Walsh's vicinity. Defendants are the only ones who could have provided a proper warning of the effects of that medication."); *Codling, supra* (duty owned to injured nonusers of a defective steering mechanism, who just happened to be in the wrong place at the wrong time, because "it is often only the manufacturer" that can know of the harm).

Here, Respondents failed to establish as a matter of law that they did not owe Plaintiffs a duty. Plaintiffs alleged that Gendron's radicalization on social media—and the resulting violence—"was neither a coincidence nor an accident," but "the foreseeable consequence" of Respondents' "conscious decision to design, program,

and operate platforms and tools that maximize user engagement . . . at the expense of public safety." R.130 (¶5). Gendron did not seek out this content; Respondents' AI-driven algorithms foisted increasingly violent and graphic content upon him to maintain his engagement. R.168, 173, 252 (¶¶153, 172, 596). Respondents "knew or should have known about the risks of radicalization and violence associated with their products…" R.252 (¶593). *See MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 390 (1916) ("the presence of a known danger, attendant upon a known use, makes vigilance a duty").

It is therefore alleged that Respondents had a direct and profound relationship with Gendron, and that their failure to act to mitigate the risk posed *to Gendron* from their defective apps is precisely what created the peril to the nonuser Plaintiffs. Given this relationship, Respondents were undoubtedly in the best—if not sole—position to protect Plaintiffs against the risk of harm arising from their own tortious conduct vis-à-vis their product user. *See Davis, supra; Codling, supra.* In other words, Plaintiff's injuries "resulted from [Respondents' failure to exercise their] duty of care owed to [their product user]." *McNulty, supra* at 233.

Respondents, therefore, failed to meet their initial motion burden of establishing, as a matter of law, that they owed no duty to Plaintiffs. *See Tenuto*, *supra* at 611 (reversing pre-answer dismissal on the duty issue because "[t]he courts

below too restrictively read plaintiffs' allegations contained in the complaint, bill of particulars and other papers.").[4]

D. Plaintiffs Have Alleged Cognizable Products Liability Claims Under New York Law

Respondents also failed to meet their initial motion burden of showing that Plaintiffs did not state cognizable products liability claims. A manufacturer may be liable for a design defect if its product is not reasonably safe and the defective design was a substantial factor in causing plaintiff's injury. *See Hoover v. New Holland North America, Inc.*, 23 N.Y.3d 41, 53–54 (2014). Defective design is a 'negligence-inspired' concept where liability arises when, "if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner." *Id.; Denny*, 87 N.Y.2d 248, *supra* at 258. This test involves weighing (1) the product's utility to the public as a whole; (2) its utility to the individual user; (3) the likelihood that the product will cause injury; (4) the availability of a safer design; (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user; and

[4] Notably, nothing about imposing a duty here would prohibit the Respondents from arguing, at a later stage, that no breach of duty occurred because the injuries were not foreseeable. *See Eiseman v. State*, 70 N.Y.2d 175, 187 (1987) (foreseeability is a "factual issue to be resolved on a case-by-case basis by the fact finder").

(7) the manufacturer's ability to spread the cost of any safety-related design changes. *Id.* at 257.

It is a conduct-based inquiry, whereby the fact finder will ultimately make "a judgment about [the manufacturer's] judgment." *Id.* at 258 (citation omitted). As such, it is "for the jury to decide whether a product [i]s not reasonably safe in light of all the evidence presented by both the plaintiff and defendant." *Voss,* 59 N.Y.2d 102, *supra* at 108. The same is true as to failure-to-warn claims, which do not even require a defect *per se*, but merely require a lack of adequate warning for a danger incident to the product's use. *See Dummitt, supra; Liriano, supra.*

Here, as with its treatment of the "product" inquiry, the Majority deemed it immaterial whether cognizable products liability claims were asserted, concluding that Section 230 immunity applied regardless of how Plaintiffs' claim were framed. R.6618-19. Yet the fact-intensive, conduct-driven nature of products liability claims is precisely what extricates this case from the orbit of Section 230—particularly at the pre-answer stage. The Dissent grasped the import of this, first focusing on Respondents' conduct of knowingly addicting minor users by harnessing AI to "force-feed[]" them with unwanted content that triggered engagement, and by failing to implement safety measures to mitigate the risks of addiction and attendant violence. R.6625, 6629.

Indeed, it was these addictive design features that ensnared Gendron—while a minor—as a captive audience, radicalized him with a barrage of discordant content he never sought out, and was a substantial contributing factor in compelling him to commit the horrific acts at issue. R.130, 173, 189, 241, 247 (¶¶8, 172, 252, 536, 558). The complaint alleges, *inter alia*, that the apps were not reasonably safe, that the specific risks at issue outweighed the utility in the design, that Respondents knew or should have known of the risks and foresaw that injury could occur, and that safer, alternative designs could have been implemented to mitigate or eliminate those risks while maintaining the utility. R.241–47, 257 (¶¶530–560, 633). This, and related allegations, make out cognizable products liability claims under our liberal pleading standard. *See* C.P.L.R. § 3026; *Leon, supra.*

Spurred on by Respondents' attempts to paint Plaintiffs' claims with the broadest of brushes, the Majority misapplied New York products liability law and, as a result, improperly deemed Plaintiffs' claims subject to Section 230 immunity. R.6618. The Majority asserts, for instance, that Plaintiffs allegations are that the apps are so "inherently dangerous" that they provided no utility at all. *Id*. The basic principle of products liability is that a product is "not reasonably safe." *Hoover, supra.* Plaintiffs' claims are couched specifically in terms of the risk-utility inquiry, which recognizes that there is utility in Defendants' products, but that a safer,

alternative design could be implemented to mitigate the risks. R.241–48 (¶¶530, 537–39, 554, 556, 562–63).

In a fact-specific analysis, how the product operates generally is only the first step in the analysis; it must still be determined how the product operated under the specific facts at bar. *See Terwilliger, supra* (tying the analysis to the "nature of the *given* transaction") (emphasis supplied). The Majority did not perform a fact-intensive analysis and improperly viewed the claims as an assault on the utility of the apps as a whole. R.6618.

III. THE MAJORITY ERRONEOUSLY HELD THAT SECTION 230 PREEMPTS PLAINTIFFS' NEW YORK LAW CLAIMS SIMPLY BECAUSE PLAINTIFFS' INJURIES WERE RELATED TO THIRD-PARTY CONTENT

A. The Majority Failed To Undertake The Requisite Preemption Analysis To Identify An Irreparable Conflict Between Section 230 And New York Tort Law

Section 230 of the Communications Decency Act mandates that "[n]o 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), and requires that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section. " 47 U.S.C. § 230(e)(3). On the other hand, Section 230 explicitly provides that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C. § 230(e)(3). Therefore,

to determine whether Plaintiffs' common law products liability claims are, as a matter of law, inconsistent with Section 230, the Court must start with New York preemption principles.

This Court has "cautioned [against] reading conflict preemption principles too broadly[.]" *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 617 (2018). Courts therefore "take heed of the rule of interpretation that preemption clauses in a statute are to be *narrowly construed* and that matters beyond their scope are not preempted." *Wallace v. Parks Corp.*, 212 A.D.2d 132, 138–9 (4th Dep't 1995) (emphasis supplied).[5] When faced with potential conflicts between state and federal law, New York courts seek a harmonious interpretation construing state law to align with federal law rather than setting up a direct conflict. *Sutton 58 Assocs. LLC v. Pilevsky*, 336 N.Y.3d 297, 309 (2020). Only where a harmonious interpretation is impossible because "the conflict between state law and federal policy [is] a sharp one," and the "conflict is so direct and positive that the two acts

[5] *See also Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 357 (2006) (noting that federal statute at issue "d[id] not contain an express statement by Congress" evincing intent to "preempt state laws regarding the permissible scope of recovery in personal injury actions predicated on state labor laws"); *Comm'r of the Dep't of Soc. Servs. v. Spellman*, 173 Misc.2d 979, 986 (Sup. Ct., N.Y. Cnty., 1997) (concluding that the Medicaid Act does not expressly preempt New York law), *aff'd* 243 A.D.2d 45 (1st Dep't 1998); *Tip Top Farms v. Dairylea Coop.*, 114 A.D.2d 12, 28 (2d Dep't 1985) (noting that "Congress has not preempted the field of antitrust law by passage of the Federal antitrust statutes [and a State] remains free to regulate in the area of antitrust despite the existence of the Federal antitrust provisions").

cannot be reconciled or consistently stand together," will federal law have preemptive force. *Id*.

The Majority held that Plaintiffs' New York law claims are *completely* preempted by federal law without any acknowledgment of New York's narrow construction rule or analysis demonstrating how Plaintiffs' state law products liability claims are irreconcilable with Section 230. The Majority's holding is based on an overly expansive interpretation of Section 230 immunity and unduly restrictive application of New York products liability law focused almost entirely on the laws of other jurisdictions rather than the well-established tort jurisprudence of this State. In contrast, the legal claims alleged in Plaintiffs' Complaint provide a harmonious path to reconcile the requisite protection of online publishers in Section 230 with New York products liability law. To the extent this Court finds that Plaintiffs' state law claims may "consistently stand together" with Section 230, Social Media Defendants' preemption defense must be rejected. *Sutton*, *supra* at 309. Moreover, at this pre-answer stage, even the possibility that Plaintiffs' claims are harmonious with Section 230's proscriptions is sufficient to deny dismissal.

B. Section 230 Preemption Analysis Focuses On The Source Of The Legal Duty Breached, Not Whether the Plaintiff's Harm Arose From Third-Party Content

In *Shiamili v. Real Estate Group of N.Y., Inc*., 17 N.Y.3d 281 (2011), this Court articulated the following three part test for determining whether Section 230

preempts New York law: First, the defendant must be a "provider or user of an interactive computer service;" second, the plaintiff's "complaint [must] seek[] to hold the defendant liable as a 'publisher or speaker'" under New York law; and third, the plaintiff's action must be based on "information provided by another information content provider." *Id*. at 287 (*quoting* 47 U.S.C. § 230) The Majority's holding that Plaintiffs' claims are preempted by federal law was based on an expansive reading of Section § 230(e)(3) as applicable to "any cause of action that would make service providers liable for *information originating with a third-party* user of the service." *Id*. at 34 (emphasis supplied, quotations omitted). The Majority's expansive interpretation of Section 230 immunity greatly exceeds this Court's circumscribed holding that Section 230 only immunizes internet service providers from liability "where[] such liability depends on characterizing the provider as a 'publisher or speaker' of objectionable material." *Shiamili*, *supra* at 280 (quotations omitted). *Shiamili* holds that Section 230 preempts New York law *only* to the extent it imposes a duty on Respondents as publishers or speakers; it does not immunize Respondents from duties that sound in other sources of legal obligation.

This Court's central focus in *Shiamili* on the legal characterization of the plaintiff's claims comes from the Ninth Circuit's holding in *Barnes v. Yahoo,* 570 F.3d 1096 (9th Cir. 2009). There, a victim of online revenge porn sued Yahoo for negligent undertaking and promissory estoppel for failing to take down the

compromising photos after promising to do so. The Ninth Circuit held that while the plaintiffs' negligent undertaking claim—which sought to hold Yahoo liable for failing to remove the offending material—was preempted by Section 230, her promissory estoppel claim was not. *Id*. at 1109. Although plaintiff's estoppel claim involved the same underlying conduct as her negligent undertaking claim (failing to remove embarrassing photos), because the estoppel duty did not arise from Yahoo's role as a publisher, Section 230 did not apply. The Court explained:

> [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. In a promissory estoppel case, as in any other contract case, the duty the defendant allegedly violated springs from a contract—an enforceable promise—not from any non-contractual conduct or capacity of the defendant.

Id. at 1107. "[E]ven though in Barnes Yahoo's promise was to take down third-party content from its website, which is quintessential publisher conduct, that did not alter the source of Yahoo's legal duty." *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 741 (9th Cir. 2024) (quotations omitted).

In the 15 years since this Court's holding in *Shiamili*, state and federal appellate courts continue to rely on *Barnes* in holding that Section 230 requires courts to "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 v. Amazon.com*, 76 Cal. App. 5th 200, 252, 254–57 (2022) (holding Amazon liable for "violation of its own independent [state law] obligations"). In *Doe v.*

Internet Brands, Inc., 824 F.3d 846 (9th Cir. 2016), for example, a fashion model who was sexually assaulted after being lured to a fake audition using a networking website brought a negligent failure to warn claim against the website owner who allegedly knew about the rapists but did not warn her or the other users. *Id.* The Ninth Circuit held that Section 230(c)(1) did not apply because the duty to warn under California law did not require the website to "remove any user content or otherwise affect how it publishes or monitors such content." *Id.* at 851. Accordingly, the "negligent failure to warn claim [did] not seek to hold Internet Brands liable as the 'publisher or speaker of any information provided by another information content provider.'" *Id.* (quoting § 230(c)(1)).

In *Webber v. Armslist LLC*, 70 F.4th 945 (7th Cir. 2023), family members of two individuals who died of gun violence sued the website that advertised the weapons alleging that it was designed to encourage and assist individuals in circumventing federal and state law regulating firearms. The Seventh Circuit rejected the website's argument that these claims were automatically foreclosed, holding that Section 230 "is not a comprehensive grant of immunity for third-party content. Instead, that subsection precludes liability only where the success of the underlying claims requires the defendant to be considered a publisher or speaker of

that content."[6] *Id.* at 957.

More recently, in *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 736 (9th Cir. 2024), plaintiffs alleged that they were harmed by fraudulent third-party advertisements posted on Meta's website in violation of Meta's terms of service. The trial court dismissed the claim under Section 230 because it arose from third party content; however, the Ninth Circuit reversed, holding that "it is not enough that a claim, including its underlying facts, stems from third-party content for § 230 immunity to apply." *Id*. at 742. Because the claims arose from a breach of contract, the Ninth Circuit explained that Section 230 did not apply:

> Meta's contract liability would come not from its publishing conduct, but from its manifest intention to be legally obligated to do something. . . . To the extent that Meta manifested its intent to be legally obligated to take appropriate action to combat scam advertisements, it became bound by a contractual duty separate from its status as a publisher. We thus hold that Meta's duty arising from its promise to moderate third-party advertisements is unrelated to Meta's publisher status, and § 230(c)(1) does not apply to Plaintiffs' contract claims.

Id. at 742 (citations and quotations omitted).

Here, in holding that Plaintiffs' products liability claims were inherently based on third party content, the Majority rejected the notion "that section 230 provides

[6] Though not preempted by Section 230, the Seventh Circuit held that the plaintiffs' Complaint failed to state a claim under Wisconsin law and affirmed the district court's dismissal. The court's conclusion rested upon the "Wisconsin legislature's judgment on which entities—i.e., firearms dealers—will be held liable for meeting the requirements of state and federal law." *Id.* at 962.

immunity for some tort claims but not others based on the same underlying factual allegations." *Id*. at 37. In support, the Majority reasoned that "Plaintiffs do not allege . . . that the shooter would have murdered Black people had he become addicted to anodyne content, such as cooking tutorials or cat videos." *Id*. at 40. Thus, in the Majority's view, Plaintiffs' claims "depend on the *content* of the material the shooter consumed on the Internet" and are therefore "'inextricably intertwined' with the social media defendants' role as publishers of third-party content." *Id*. (emphasis in original).

The fallacy in the Majority's reasoning is in triggering Section 230 immunity based on the relationship between third-party content and Plaintiffs' alleged harms rather than on the source of the legal duty Respondents allegedly breached. In *Barnes, Doe, Webber, Lee,* and *Calise*, as in this case, the plaintiffs' injuries were all "inextricably intertwined" with the content of the third-party material hosted on the defendants' websites. Had the defendant in *Barnes* posted innocuous pictures of the plaintiff instead of nude photographs, she would not have sustained actionable damages. If the website in *Doe* posted advertisements for gardeners, not fashion models, the plaintiff would not have been lured into a meeting with her assailants. In *Lee*, if the advertisements on Amazon's website had been for hand soap rather than mercury-containing skin-whitening cream, no violation of California's labeling law could have been alleged. And if the product advertisements posted on Meta's

website in *Calise* had contained truthful rather than fraudulent information, no breach of contract action would arise. The fact that each of these cases was allowed to proceed to discovery over a Section 230 challenge demonstrates the error of the Majority's reasoning.

C. Plaintiffs Seek To Hold Social Media Defendants Liable As Manufacturers Of Dangerous Products, Not As Publishers of Third-Party Content

Section 230 preemption applies where a plaintiff "seek[s] to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Shiamili*, *supra* at 289. In *Shiamili*, the plaintiff sued a website for defamation after failing to remove slanderous accusations posted by a competitor. *Id.* at 285. This Court held that the plaintiff's claims—defamation and unfair competition by disparagement—"clearly seek to hold the defendants liable as publishers and speakers." *Id*. at 290. Here, Plaintiffs' products liability claims are legally and factually distinct from publisher's liability.

While Section 230 "protects interactive computer service providers from liability as a publisher of speech, it does not protect them from liability as the seller of a defective product." *Erie Ins. v. Amazon.com, Inc.*, 925 F.3d 135, 40 (4th Cir. 2019). On this point, the Ninth Circuit's holding in *Lemmon v. Snap, Inc*., 995 F.3d 1085 (2021), is particularly instructive. There, three teenage boys were killed in a

high-speed auto accident. *Id*. at 1088. Minutes before the crash, one of the boys used Snapchat's Speed Filter to record their actual speed of 124 MPH and sent a message to other Snapchat users. *Id*. The boys' parents sued Snap for negligent design, alleging that the Speed Filter incentivized young drivers to drive at dangerous speed. *Id*. at 1089. As in this case, Snap sought dismissal arguing that because the accident arose out of third-party content—the decedent posting his speed on Snapchat—plaintiffs sought to hold it liable as a publisher. However, expanding on its holding in *Barnes*, the Ninth Circuit held that the appropriate focus of Section 230 preemption is the legal duty allegedly breached rather than the harm the plaintiff sustained or that third-party content was involved along the way:

> The Parents' amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker. Their negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat's reward system and the Speed Filter). Thus, the duty that Snap allegedly violated springs from its distinct capacity as a product designer. This is further evidenced by the fact that Snap could have satisfied its alleged obligation—to take reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat's users generate. Snap's alleged duty in this case thus has nothing to do with its editing, monitoring, or removing of the content that its users generate through Snapchat.

Id. at 1092–93 (quotations omitted).[7]

[7] The Majority sought to distinguish *Lemmon* on the basis that the plaintiffs' product defect claim was based solely on the Speed Filter design and "had nothing to do with the content of the messages sent or received by the users." R.6621 (citing footnote 4). However, the parents' product defect claim alleged that by allowing teenagers to send and receive Snapchat messages documenting their speed, the Speed Filter was "incentivizing young drivers to drive at dangerous speeds." *Lemmon*,

As in *Lemmon* and unlike in *Shiamili*, Plaintiffs' claims here are premised on Respondents' role as the designer, developer, marketer, distributor, and operator of defective and/or inherently dangerous products. Plaintiffs have alleged specific design defects that, if proven, would subject Respondents to products liability under New York law. R.241–52, 256–58 (¶¶529–94, 629–40). Plaintiffs' claims explicitly characterize Respondents as manufacturers, not publishers. R.241 (¶530). Moreover, none of Plaintiffs' allegations seek to hold Respondents liable for their content moderation decisions in failing to review, alter, or remove the content that their users generate. R.241 (¶532). The distributor of a product designed to addict minor users by deluging them with unsolicited and psychologically discordant material can hardly be deemed to be engaged in "a publisher's traditional editorial functions." *Shiamili*, *supra* at 280. Indeed, Plaintiffs expressly allege that Respondents could have designed reasonably safe social media products "without altering, deleting, or modifying the content of a single third-party post or communication." R.241–42 (¶533). Under *Shiamili*, Plaintiffs' liability claims against the Respondents are not based on their exercise of "a publisher's traditional editorial functions," and the Majority erred in concluding otherwise.

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supra at 1089. If the content of the message that decedents sent through Snapchat's Speed Filter was 35 MPH rather of 124 MPH, no cause of action would have accrued. Thus, contrary to the Majority's reasoning, the plaintiffs' claims in *Lemmon* were no less "based on the nature of content posted by third parties on the social media platforms" than the claims asserted by Plaintiffs herein. R.6618.

D. Respondents Are Content Providers

As the Dissent recognized here, the Court's analysis in *Shiamili* properly observes that Section 230 does not apply when liability arises from the defendant's own conduct or content. 17 N.Y.3d at 289. ("[I]f a defendant service provider is itself the 'content provider,' it is not shielded from liability."). Section 230 defines an "information content provider" as "any person or entity that is responsible, in whole *or in part,* for the creation *or development* of information provided through the Internet . . . ." 47 U.S.C. § 230(f)(3) (emphasis supplied.). Therefore, "[s]ince a content provider is any party 'responsible . . . in part' for the 'creation or development of information,' any piece of content can have multiple providers." *Shiamili*, *supra* at 289 (*quoting* 47 U.S.C. § 230(f)(3)).

In this case, Plaintiffs' claims clearly arise from Respondents' own conduct as product manufacturers, and the Majority erred in reading the Complaint to suggest otherwise. Yet even if Plaintiffs' claims somehow require that Respondents be treated as publishers, Plaintiffs established that Respondents' materially contributed to the malign content on their platforms. This evidence provides a separate and independent basis for this Court to conclude that Section 230 preemption is inapplicable.

In *Shiamili*, the defendant website added headings and illustrations to defamatory third-party content posted on its platform. *Id*. at 292. The Court held that

by virtue of this additional material, "the Defendants appear to have been 'content providers' with respect to the heading, subheading, and illustration that accompanied the reposting." *Id*.[8] Here, Respondents have done far more that simply repost white supremacist content on their platforms. Rather, as in *Shiamili*, they routinely augmented third party content with headings, memes, music, and videos and were therefore co-publishers of the content at issue in this case. *See* R.1492 (¶7), 1504 (Instagram stickers and gifs users can add to content); R.1493 (¶18), 1511 (Facebook offers music options to users to add to a Facebook Story); R.1493 (¶10), 1499–1502 (Facebook autogenerates webpages for white supremacist groups); R.1493 (¶¶154–16), 1508–10 (Snapchat filters alter user's image and add music); *see also* R.1677, 1724 (Reddit provides unique templates and emojis). Yet unlike *Shiamili*, this augmentation of content enhances social media products' addictiveness to minor users and thus adds to the tortious nature of Respondents' defectively and addictively designed apps.

E. Since Liability Is Marked By A Definable Limit, Products Liability Claims, Such As Those Here, Can Be Maintained Without Impinging Upon Section 230 Protections

The Majority's failure to (1) employ a fact-intensive analysis as to Plaintiffs' products liability claims, and (2) appreciate the distinction between Plaintiffs'

[8] However, because the Court determined that the defendants' website headings "were not defamatory as a matter of law," they did not contribute to the illegality of the third-party content under Section 230.

allegations that the products are "not reasonable safe" and the strawman argument that the products are so "inherently dangerous" that they have no utility at all, led directly to its erroneously conclusion of a doomsday scenario that allowing Plaintiffs' claims "would gut the immunity provisions of Section 230 and result in the end of the Internet as we know it." R.6623.

To the contrary, as in all products liability actions, liability is cabined by the specific factual circumstances of each case. *See Denny*, *supra* at 262 n.6 (remarking on the unfounded fear of limitless liability when a duty is simply "attendant to the normal use of the product"); *cf. Hamilton*, *supra* at 233 ("specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship"; defendant's relationship with "the tortfeasor" places it in the "best position to protect against the risk of harm"). Applied here, liability would not attach for any and all app-related or even app-induced injury. It attaches when the features themselves are alleged to be dangerously defective in a specific manner—as here, features designed expressly to target minor users and instill within them clinical addiction to the apps, and to deluge them with content that they do not seek and from which they cannot look away. R.173 (¶172).

At bottom, the fact-sensitive inquiry for the products liability claims is what should steer the Section 230 inquiry. *Compare Anderson, supra* (finding no Section 230 immunity for expressive algorithms and a minor user), *with Force v. Facebook*,

934 F.3d 53 (2d Cir. 2019) (finding Section 230 immunity where the adult user actively sought out terrorist information). This provides appropriate limiting principles that strike a balance between Section 230 protections and an injured plaintiff's ability to pursue New York products liability claims that, by their facts, do not encroach upon Section 230. *See* 47 U.S.C. § 230(e)(3). The Majority's fear of limitless liability is unfounded.

IV. THE FIRST AMENDMENT DOES NOT BAR PLAINTIFFS' CLAIMS

The Majority concluded that the "interplay between section 230 and the First Amendment gives rise to a 'Heads I Win, Tails You Lose' proposition in favor of the social media defendants." R.6621. This is, respectfully, analytical sleight of hand, made possible only upon the flawed assumption that Plaintiffs' theories of liability, and thus Defendants' various duties, all arise from content-recommendation algorithms involving either first-party or third-party speech. Such a narrow reading of Plaintiffs' complaint ignores the totality of Plaintiffs' allegations regarding Respondents' product designs. This is the same false dichotomy described by Justice Thomas and Justice Gorsuch, who wrote: "In the platforms' world, they are fully responsible for their websites when it results in constitutional protections, but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit than nearly any other industry." *Doe Through Roe v. Snap, Inc.*, 144 S. Ct. 2493, 2494, 219 L. Ed. 2d 1335 (2024)

(Thomas, J. dissenting). Instead, as the Dissent properly observed, Plaintiffs do not seek to hold Respondents liable for hosting racist content on their platforms, but for designing dangerously defective social media products that addict neurologically vulnerable adolescents by targeting them with harmful content they did not seek out and for failing to warn the users of the associated risks of harm. R.6629-30.

A. The First Amendment Does Not Protect Tortious Conduct

Conduct is not automatically shielded by the First Amendment just because it involves speech. *Rumsfeld v. F.A.I.R.*, 547 U.S. 47, 62 (2006). It is well-established that "the First Amendment does not prohibit restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *see, e.g., Cohen v. Cowles Media Co*., 501 U.S. 663, 669 (1991) ("generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on [speech]"); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573–578 (1977) (permitting right of publicity tort claim despite there being "no doubt" that the broadcast at issue was protected speech).[9]

[9] *See also Clift v. Narragansett Television L.P.*, 688 A.2d 805, 811 (R.I. 1996) (television station found liable for interviewing a suicidal man in a manner that disrupted police efforts to talk down); *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 48 (1975) (explaining that the First Amendment "does not sanction the infliction of physical injury merely because achieved by word, rather than act"); *cf. Kenneth R. v. Roman Catholic Diocese*, 229 A.D.2d 159, 165 (2d Dep't 1997) (explaining that while the First Amendment "prohibits regulation of religious beliefs, *conduct* by a religious entity remains subject to regulation for the protection of society" (cleaned up and emphasis supplied)).

In this case, Plaintiffs' Complaint does not seek to "limit the platforms' capacity to engage in content moderation—to filter, prioritize, and label the varied messages, videos, and other content their users wish to post." *Moody,* 603 U.S. at 717. The Majority ignored the fact that nothing within Plaintiffs' Complaint would require Respondents to moderate or censor content in any way. *See, e.g.*, R.241 (¶532) ("Plaintiffs' claims seek to hold the Social Media Defendants accountable for their own, operations, conduct, and products – not for . . . Defendants' content moderation decisions.") Instead, as the Dissent aptly explained, "[g]overnment-imposed content moderation laws that specifically prohibit social media companies from exercising their right to engage in content moderation is a far cry from private citizens seeking to hold private actors responsible for their defective products in tort." R.6629.

B. AI Driven Algorithms Are Not Entitled To First Amendment Protection

In its brief First Amendment analysis, the Majority assumes—without analyzing the issue—that the Court should treat Defendants' AI-driven algorithms as the equivalent of human speech. The First Amendment protects the freedom to think and speak as an inalienable *human* right. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Indeed, leading scholars have explained the deeply concerning consequences of assuming machine speech is legally equivalent to, and deserving of, the same constitutional rights as human speech. *See* Tim Wu, *Machine*

Speech, 161 U. PA. L. REV. 1495, 1496 (2013); Helen Norton, *Manipulation and the First Amendment*, 30 WM. & MARY BILL RTS. J. 221, 223 (2021).

Here, the "editorial decisions" that the Majority deemed worthy of constitutional protection consist of electronic impulses of AI-driven algorithms designed to exploit the neurological immaturity of minor users like Gendron and maximize their engagement by deluging them with psychologically discordant material that they are not seeking but from which they cannot look away. *See* R.166–69, 244 (¶¶148, 149, 152, 153, 156, 546; *Moody*, *supra* at 2393 (providing First Amendment protection to social media platforms only "[t]o the extent that [they] create expressive products"). These AI-driven algorithms are software, lines of code designed and written by software engineers to respond to specific variables without any underlying cognitive process or communicative intent. *See United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 742 (D.C. Cir. 2016) (holding that the First Amendment requires examination of the "communicative intent of the individual speakers"). In sum, Respondents' AI outputs in this instance 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, 451 (2d Cir. 2001) (using computer code to communicate with a computer is "never protected").

In a related case, the United States District Court for the Middle District of Florida grappled with the question of whether an AI chatbot's output qualified as speech for purposes of applying the First Amendment. *Garcia v. Character Techs., Inc.*, 785 F. Supp. 3d 1157, 1177 (M.D. Fla. 2025). The court explained: "[S]peech is expressive. Speech communicates ideas. Speech has a message even when the message is not clear or is open to interpretation." *Id*. at 1178 (internal citations omitted). Without the development of a more robust evidentiary record as to how the AI output was generated, the district court concluded it was "not prepared to hold that Character.AI's output is speech." *Id*. at 1179. Supreme Court herein properly reached a similar conclusion as to the technical functionality of Respondents' recommendation algorithms, and the Majority erred in finding the contrary, pre-discovery, as a matter of law.

C. First Amendment Analysis Requires A Robust Evidentiary Record

Contrary to the Majority's view, First Amendment adjudication is inherently fact-driven and requires a robust evidentiary record to first determine whether speech is even at issue, let alone whether it is protected. Under the facts alleged, which must be accepted as true, Respondents did not "exercise[] editorial discretion in the selection and presentation of third-party content." *Moody*, *supra* at 731. On the contrary, Plaintiffs alleged that the social media apps were intentionally designed to target minors with addictive features. In this regard, Respondents exercised no

editorial discretion whatsoever—they designed a recommendation algorithm that acted based on data analytics and user metrics, not upon any editorial judgments by Respondents as to desirable or undesirable content. At this early stage, the Majority erred in determining that Plaintiffs' claims implicate any form of speech, let alone protected speech.

The vast majority of appellate jurisprudence involving First Amendment challenges to the application of state and federal laws involve, unlike here, statutes explicitly enacted to regulate speech or expressive conduct. *See, e.g.*, *Moody*, *supra* at 720–21 (Florida and Texas statutes); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos*., 515 U.S. 557, 571–72 (1995) (Massachusetts statute); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (Georgia statute); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (Alabama statute); *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 548 (1989) (New York ordinance). In such cases, courts apply long established judicial principles to consider the legislative objective of the challenged statute; how the legislation impacts protected speech, if at all; and the relationship between a statute's legislative purpose and its burden on protected speech. *See Moody*, *supra* at 724–26 (First Amendment analysis requires court to "assess the state laws' scope" and identify which provisions, if any, "unduly burden expression"); *Hurley*, *supra* at 567 (First Amendment analysis requires

"independent examination of the record as a whole"); *Cox*, *supra* at 487–88; *Sullivan*, *supra* at 267–70; *Islip*, *supra* at 551–54.

Here, by contrast, Respondents do not challenge a statute or regulation enacted to regulate speech or conduct, but rather argue that Plaintiffs' invocation of longstanding New York tort law to attack the social media apps' design features abrogates First Amendment principles by interfering with Respondents' constitutionally protected editorial judgment. Respondents do not argue that New York products liability law itself violates the First Amendment, only that Plaintiffs' application of such law is constitutionally infirm. While a state's application of tort law is not shielded from First Amendment scrutiny, adjudication of such challenges is a highly factual undertaking seldom, if ever, appropriate at the motion to dismiss stage.

In *Moody*, a case heavily relied upon by the Majority, the United States Supreme Court unanimously rejected a facial challenge to Florida and Texas statutes—which regulated large social media companies and other internet platforms—for lack of a developed factual record. *supra* at 717. The Court explained that, to prevail on a facial challenge under the First Amendment, "a court must determine a law's full set of applications, evaluate which are constitutional and which are not, and compare the one to the other." *Id*. at 718. To accomplish this task, the Court emphasized the importance of a well-developed factual record, because

"[e]ven on a preliminary record, it is not hard to see how the answers might differ . . . ." *Id*. In his concurrence, Justice Alito emphasized the need for a robust factual record when applying well-settled First Amendment principles to emergent technologies:

> [W]hen confronted with the application of a constitutional requirement to new technology, we should proceed with caution. While the meaning of the Constitution remains constant, the application of enduring principles to new technology requires an understanding of that technology and its effects. Premature resolution of such questions creates the risk of decisions that will quickly turn into embarrassments.

Id. at 796 (Alito, J. concurring); *see also NetChoice, LLC v. Bonta*, 152 F.4th 1002, 1014 (9th Cir. 2025) ("The First Amendment analysis is 'fact intensive' and will 'surely vary' from 'platform to platform.'"). This inquiry is thus interlaced with the underlying design defect claims, and discovery is required before the true nature of Respondents' design features can be understood.

In denying Respondents' motion to dismiss, Supreme Court acknowledged that their arguments that recommendation algorithms enjoy protected First Amendment status "may ultimately prove true." R.35–36. However, Supreme Court recognized that before a dispositive ruling could be rendered, discovery examining how Defendants' algorithms functioned and whether those algorithmic feeds were "expressive" or merely the result of analytics, demographics, and other non-expressive metrics was necessary before a legal ruling could be rendered. R.36. The Majority should have displayed a commensurate level of restraint and declined to

rule on fact-dependent First Amendment issues in the absence of a robust factual record.

V. NEITHER PROXIMATE CAUSE NOR AN INTERVENING SUPERSEDING CAUSE DEFENSE CAN BE DETERMINED AS A MATTER OF LAW BASED ON PLAINTIFFS' COMPLAINT

In holding that Plaintiffs failed to state a cognizable claim for relief, the Majority concluded that "it cannot reasonably be concluded that the allegedly addictive features of the social media platforms . . . caused the shooter to commit mass murder . . . ." R.6622-23. The Majority strayed far from well-settled motion burden and causation principles by determining *the* cause of the injuries as a matter of law.

In products liability, as with virtually all other torts, a plaintiff need only establish that the defect in the product was *a* proximate cause of the injury. *See* P.J.I. 2:70 Proximate Cause In General, Comment, Caveat 1 ("care should be taken to use the phrases 'a cause' and 'a substantial factor' … to prevent the erroneous implication that there can be only one proximate cause"). The litmus test is whether the defect was a "substantial factor" in causing the injury. *Hoover*, *supra* at 54; *Voss, supra* at 106–07; P.J.I. 2:120 Strict Products Liability.

At its core, to be a substantial factor, the defect need only be more than a "slight or trivial" contribution to the injury. P.J.I. 2:70 ("[t]here may be more than one cause of an injury, but to be substantial, it cannot be slight or trivial."). Such a

determination turns on issues of foreseeability, which is the subject of varying inferences based on "the unique nature of the inquiry in each case." *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315 (1980); a*ccord Hain v. Jamison,* 28 N.Y.3d 524, 529 (2016). This question is thus for the fact-finder in virtually every circumstance except the rarest of instances "where only one conclusion may be drawn from the established facts." *Derdiarian, supra.*

Strikingly, no such rare instance has ever been presented to this Court in a products liability case, let alone, as here, at the pre-answer stage. Nonetheless, Respondents argued, and the Majority accepted, that their defective products could not have constituted a mere more-than-trivial contributing factor to Plaintiffs' injuries. In fact, in concluding that Gendron's criminal conduct (rather than his social media addiction) was the sole cause of Plaintiffs' injuries, the Majority improperly conducted "issue determination" at the motion to dismiss stage. *Sillman v Twentieth Century Fox Film Corp.,* 3 N.Y.2d 395, 404 (1956) (even on summary judgment, the court's function is "issue finding, not issue determination"). This flatly ignored the allegations, which must be accepted at true.

Plaintiffs' Complaint alleged that "as a proximate result of these dangerous and defective design attributes of Social Media Defendants' products, Payton Gendron was radicalized and motivated to commit the horrific act . . . ." R.247 (¶558); *see also* R.130, 132, 173, 174 (¶¶5, 16, 172, 177) (defects in Respondents'

apps caused Gendron's murderous acts). It is true that "the chain of causation must have an endpoint . . ." (*Hain, supra* at 258), but that endpoint cannot be the *first* link in the chain, as is the case here. The Dissent understood this, noting that the apps' defects were "force-feeding" Gendron unsolicited information. R.6629-30. These allegations are more than sufficient to survive pre-answer dismissal on an element that need only be a non-trivial contributing factor and is inexorably one for the jury.

Plaintiffs' position is even stronger as to Respondents' affirmative defense of intervening superseding cause. This Court has addressed an intervening cause defense at least seven times, all of which came at the summary judgment or post-verdict stage, and in *every* instance the issue was left to the jury. *See, e.g., Hain*, *supra*; *Mazella v. Beals*, 27 N.Y.3d 694, 705–06 (2016); *Cohen v. St. Regis Paper Co.*, 65 N.Y.2d 752, 754 (1985); *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33 (1983); *Derdiarian*, *supra*; *McLaughlin v. Mine Safety Appliances Co.*, 11 N.Y.2d 62, 70 (1962); *Rosebrock v. Gen. Elec. Co.*, 236 N.Y. 227 (1923). This is because:

> [w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. . . . If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus . . . Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve.

Derdiarian, supra.

Respondents argued that Gendron's criminality was an intervening act. But only a criminal act that is unforeseeable, extraordinary, independent, and which falls outside the normal course of events is one that breaks the causal chain. *See Derdiarian, supra.* This is why it has been referred to as "third party criminal conduct." *Kush, supra* at 33. Here, Gendron was no third party; he was the product user and thus his acts flowed naturally and directly from Respondents' tortious conduct. *Id.* (no defense where intentional act is "itself the foreseeable harm that shapes the duty imposed.").

CONCLUSION

For the foregoing reasons, it is submitted that the Order of the Fourth Department should be reversed, and Respondents' motions to dismiss should be denied.

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Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to 22 N.Y.C.R.R. § 500.13(c)(1) & (3), the undersigned, as attorney for Plaintiffs-Appellants, hereby certifies and affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 13,892 words, which complies with the limitations stated in § 500.13(c)(1).



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