To be Argued by:
JENNIFER BENNETT
(Time Requested: 30 Minutes)

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

Court of Appeals

of the

State of New York

KIMBERLY J. SALTER, Individually and as Executrix of the Estate of AARON W. SALTER, JR., MARGUS D. MORRISON, JR., Individually and as Administrator of the Estate of MARGUS MORRISON, SR., PAMELA O. PRICHETT, Individually and as Executrix of the Estate of PEARL LUCILLE YOUNG, MARK L. TALLEY, JR., Individually and as Administrator of the Estate of GERALDINE C. TALLEY, GARNELL W. WHITFIELD, JR., Individually and as Administrator of the Estate of RUTH E. WHITFIELD,

(For Continuation of Caption See Inside Cover)

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

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Completed: March 16, 2026

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JENNIFER FLANNERY, as Public Administrator of the Estate of ROBERTA DRURY, TIRZA PATTERSON, Individually and as parent and natural guardian of J.P., a minor, ZAIRE GOODMAN, ZENETA EVERHART, as parent and Caregiver of Zaire Goodman, BROOKLYN HOUGH, JO-ANN DANIELS. CHRISTOPHER BRADEN, ROBIA GARY, AHJALEAN SEGARS, and KISHA DOUGLAS,

Plaintiffs-Appellants,

– against –

META PLATFORMS, INC., f/k/a Facebook, Inc., INSTAGRAM LLC, REDDIT, INC, AMAZON.COM, INC., TWITCH INTERACTIVE, INC., ALPHABET, INC., GOOGLE, LLC, YOUTUBE, LLC, DISCORD INC., SNAP, INC. and 4CHAN COMMUNITY SUPPORT, LLC,

Defendants-Respondents,

– and –

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

Defendants.

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

Plaintiff-Appellant,

– against –

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

Defendants,

– and –

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

Defendants-Respondents.

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

Plaintiffs-Appellants,

– against –

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

Defendants,

– and –

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

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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

A divided panel of the Fourth Department made an extraordinary pronouncement in this case. It held that Section 230 of the federal Communications Decency Act and the First Amendment, taken together, create a "Heads I Win, Tails You Lose" proposition that shields social media companies from liability for their products. On this basis, it dismissed wholesale the claims brought against social media companies here by survivors and family members of the victims of the mass shooting at the Tops Friendly Market store in Buffalo, New York.

There is no foundation in the law for that sort of unbounded super-immunity. That's not how Section 230 or the First Amendment works, and it's not how motions to dismiss work. At this early juncture, the social media defendants bear the burden of showing that—reading the complaints liberally, accepting the allegations as true, and giving the plaintiffs the benefit of every possible favorable inference—the facts as alleged cannot fit into *any* cognizable legal theory. The companies failed to satisfy that burden at this early stage. The Fourth Department majority was therefore wrong to dismiss the claims.

These appeals arise from a tragedy committed by a teenager who, in his own words, was a "literal addict to [his] phone" and "spent actual years of [his] life just being online." R.5044 ¶ 78 n.8. After years of compulsive social-media use, he drove to the Tops store in the heart of a predominantly Black community on May 14, 2022.

He shot and killed ten people, injured three more, and upended the lives of countless others, including the plaintiffs. Following the shooting, sobered without access to the social media defendants' products, he expressed profound sorrow for his actions.

That tragedy shouldn't have surprised the social media companies. They purposefully design their platforms to keep users scrolling, clicking, and swiping as long and as often as possible. And they leverage features that exploit human cognitive vulnerabilities to drive vulnerable users (like minors) to compulsive engagement, reaping billions in profits along the way. Yet when tragedy strikes, they deny responsibility for the well-documented consequences of their actions—and the scores of addicted users who suffer from mental health problems, experience feelings of social isolation, and, like the shooter here, engage in thoughtless violence.

It is difficult to imagine any company enjoying blanket immunity after intentionally designing a product that not only addicts millions of Americans (and young people in particular), but also harms their mental health so severely that it drives them to mass violence. Yet that's exactly what the majority bestowed on social media companies in this case. In doing so, it didn't just overlook Section 230's text and the U.S. Supreme Court's interpretation of the First Amendment. It also ignored the companies' burden to show that, applying this State's liberal pleading standard, the facts as alleged can form *no* viable legal theory. This Court should reverse and allow the claims to proceed.

QUESTION PRESENTED

Do Section 230 and the First Amendment, taken together, hand social media companies a "Heads I Win, Tails You Lose" categorical shield from any liability for their products at the pleading stage, as the majority below held, or must the companies meet their burden to show that—reading the complaints liberally, accepting the allegations as true, and giving the plaintiffs the benefit of every possible favorable inference—the facts as alleged cannot possibly fit into any cognizable legal theory?

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under CPLR 5601(a). The Fourth Department majority's order was issued over a two-justice dissent on a question of law and finally determined these actions as to the respondents. That order reversed an order of the Supreme Court denying the social media companies' motions to dismiss for failure to state a claim under CPLR 3211(a)(7).

The question of law is preserved. It was briefed in the Supreme Court by the parties, and ruled on by that court and the Fourth Department. *See* R.65, 95, 122; R.6652, 6694, 6761.

STATEMENT

I. Statutory background

A. Congress enacted Section 230 to incentivize internet companies to remove offensive content.

1. Section 230 was passed in the mid-nineties, when to most people, the internet was "an absolutely brand-new technology." 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995). It was also rudimentary: The internet of 1996 had no Google or Facebook or Amazon; it took forever for webpages to load; information was shared on message boards; and news organizations had only barely begun putting articles online. *See, e.g.*, Farhad Manjoo, *Jurassic Web*, Slate (Feb. 24, 2009), https://perma.cc/XF68-ZVBP. Yet public access to the internet was growing. *See* Susannah Fox & Lee Rainie, *The Web at 25 in the U.S.*, Pew Research Center (Feb. 27, 2014), https://perma.cc/9Q5L-DCMU. And while there was much excitement about the potential of this new technology, the public—and Congress—had one major concern: "smut," and particularly the extent to which the internet made it available to children. *See, e.g.*, 141 Cong. Rec. H8470.[1]

In 1995, a study demonstrating the ubiquity of pornography on the internet—and expressing concern that there was no way to prevent children from accessing it—received widespread press attention. *See* Marty Rimm, *Marketing Pornography*

[1] Unless otherwise specified, all internal quotation marks, citations, emphases, and alterations are omitted throughout the brief.

on the Information Superhighway, 83 Geo. L.J. 1849, 1858 (1995). That study spawned "endless articles and editorials." Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 Fed. Comm. L.J. 51, 53–54 (1996). The July 1995 cover of Time Magazine screamed "CYBERPORN" in all caps, over an image of a wide-eyed toddler sitting at a keyboard. *Cyber Porn*, TIME (July 3, 1995), https://perma.cc/Q23P-T6SC. And within days, the Time article was reprinted in the Congressional Record and cited by senators rallying against the "flood of vile pornography" in cyberspace. 141 Cong. Rec. S9017 (daily ed. June 26, 1995). In both the House and the Senate, legislator after legislator rose to speak about the need to protect children. *See, e.g.*, 141 Cong. Rec. H8469–8472; 141 Cong. Rec. S9017; 141 Cong. Rec. S8293, S8329–48 (daily ed. June 14, 1995).

One possible way to combat this problem was to criminalize making "indecent" material available to minors. *See* 141 Cong. Rec. S8386 (daily ed. June 14, 1995). But legislators worried that wouldn't be effective. *See, e.g.*, 141 Cong. Rec. H8469–72. It would just lead to a game of whack-a-mole that, given the breadth of the internet, the government could never win. *See id.* So Congress also sought to empower internet companies—websites and internet service providers—to filter out offensive content themselves. *See id*.

2. But there was a problem: Under the existing legal regime, internet companies could not remove offensive content without risking being held liable for everything that anyone had ever posted on their site. *See id.* In assigning liability for disseminating unlawful content, the common law had long distinguished between publishers and distributors. *See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (statement of Thomas, J.); *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 739 (9th Cir. 2024); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, *3 (N.Y. Sup. Ct. 1995); *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 137–40 (S.D.N.Y. 1991).

Publishers, like newspapers and magazines, chose what they published and maintained editorial control over their publications. *See, e.g.*, *Malwarebytes*, 141 S. Ct. at 14; *Stratton Oakmont*, 1995 WL 323710, at *3. With this control came liability: Publishers could be held liable for the content they published. *See Malwarebytes*, 141 S. Ct. at 14 (publishers "could be strictly liable for transmitting illegal content"); *Calise*, 103 F.4th at 739; Restatement (Second) of Torts § 578 (1977) ("[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."). If the New York Times, for example, published a defamatory op-ed, both the author and the Times could be held responsible. To avoid this liability, publishers like the New York Times would have to monitor, edit, and remove material to avoid publishing unlawful content. *See, e.g.*, *Stratton Oakmont*,

1995 WL 323710, at *5; *Cubby*, 776 F. Supp. at 140; *see also Peck v. Trib. Co.*, 214 U.S. 185, 189 (1909) ("Whenever a man publishes, he publishes at his peril.").

On the other hand, distributors—like newsstands or bookstores—were passive conduits that passed on publications to readers "without exercising editorial control, and they often transmitted far more content than they could be expected to review." *Malwarebytes*, 141 S. Ct. at 14. Distributors, therefore, had no "duty to monitor" the material they disseminated to prevent the dissemination of unlawful material. *Cubby*, 776 F. Supp. at 140. And they could not be held liable "in the absence of fault"—that is, unless "they knew or had reason to know" that they were distributing unlawful content. *Stratton Oakmont*, 1995 WL 323710, at *3 (citing cases); *see* Restatement (Second) of Torts § 581 (1977); *Calise*, 103 F.4th at 739.

Congress was concerned about how courts might apply these longstanding common-law rules to the internet. A New York Supreme Court decision had recently held that Prodigy—which hosted online forums with 60,000 messages a day—could be held liable for every message its users posted as if the company had posted the message itself. *Stratton Oakmont*, 1995 WL 323710, at *3–5. Prodigy argued that it should be treated as a distributor—a mere conduit for its users' posts that could not be held liable absent fault. *See id.* But the court held that internet companies could only be treated as distributors if they did not exercise any editorial control over the content their users posted. *Id.* at *3. And Prodigy, in an effort to be "family oriented,"

endeavored to remove offensive content. *Id.* at *2, *5. That effort, the court held, constituted "editorial control" and meant that Prodigy must be treated as a publisher—that is, as liable for its users' posts as the users themselves. *Id.* at *4.

Congress passed Section 230 explicitly "to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated" internet companies "as publishers … because they have restricted access to objectionable material." S. Rep. No. 104-230, at 194 (1996) (Conf. Rep.); *see Shiamili v. Real Est. Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 287 (2011). In enacting the statute, Congress thus sought to remove the "perverse incentive" for internet companies "not to moderate any offensive content." *Calise*, 103 F.4th at 739; *see* 141 Cong. Rec. H8470–71.

B. Section 230 provides internet companies with an affirmative defense to traditional publisher liability.

1. Congress's goal—ensuring that internet companies aren't dissuaded from removing offensive content—is evident throughout its text, starting with the title: "Protection for private blocking and screening of offensive material." 47 U.S.C. § 230. And the heading of the statute's operative provision, Section 230(c), is "Protection for 'Good Samaritan' blocking and screening of offensive material."

That provision implements Congress's goal to "alter[] the *Stratton Oakmont* rule in two respects." *Malwarebytes*, 141 S. Ct. at 14. First, Section 230(c)(1) states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content

provider." And second, Section 230(c)(2) holds: "No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to … objectionable" material.

In plain English, Section 230 prohibits internet companies from being treated as the publisher of their users' content just because they host that content; and it shields internet companies from liability for removing content in good faith. "[I]f a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1)." *Malwarebytes*, 141 S. Ct. at 15. And "if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)." *Id.*

2. The provision at issue here is Section 230(c)(1), which preempts any state-law "cause of action" that would "treat[ ]" an internet company "as a publisher" of third-party content. 47 U.S.C. §§ 230(c)(1), 230(e)(3)). Although some courts have colloquially called this provision an immunity, it isn't one: The statute does not shield internet companies from liability for their unlawful conduct simply because they operate online. *See, e.g.*, *G.G. v. Salesforce.com, Inc.*, 76 F.4th 544, 566 (7th Cir. 2023); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) ("Subsection (c)(1) does not mention 'immunity' or any synonym."). Rather, in accordance with Section 230's limited purpose—to prevent internet companies from being subject to publisher liability—the provision has a limited scope: It provides an "affirmative

defense" to claims that would "treat[ ]" an internet company "as a publisher." *G.G.*, 76 F.4th at 566; *see Malwarebytes*, 141 S. Ct. at 14–15; *Calise*, 103 F.4th at 738–40.

Section 230 thus provides a defense solely to "publisher" liability—liability for unknowingly disseminating unlawful content. 47 U.S.C. § 230(c)(1); *see Malwarebytes*, 141 S. Ct. at 14–15. Nothing in the statute purports to eliminate distributor liability—liability for harm that the company knows or has reason to know about. *See Malwarebytes*, 141 S. Ct. at 14.

Nor does the statute purport to eliminate any other form of liability that does not "treat" an internet company "as a publisher." 47 U.S.C. § 230(c)(1). To hold a company liable "as a publisher" is to hold the company responsible solely because it disseminated content of an "improper nature." *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 122 (4th Cir. 2022). A claim therefore "treat[s]" an internet company "as a publisher" if, as in *Stratton Oakmont*, it rests on a duty to "edit[ ], monitor[ ], or remov[e]" unlawful material. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092 (9th Cir. 2021); *see Henderson*, 53 F.4th at 123. But where a claim imposes no such duty, Section 230 provides no defense. *See Lemmon*, 995 F3d. at 1092; *A.B. v. Salesforce, Inc.*, 123 F.4th 788, 795 (5th Cir. 2024); *HomeAway.com, Inc., v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019). Section 230 does not bar treating an internet company as, for example, a product manufacturer, with a duty to design a reasonably safe product; or a contracting party, with a duty to honor its promises.

See, e.g., *Lemmon*, 995 F.3d at 1092; *Calise*, 103 F.4th at 743. It is a defense only to claims that treat an internet company as a "publisher." 47 U.S.C. § 230(c)(1).

Finally, even if a claim "treat[s]" an internet company as a "publisher," Section 230 provides a defense only if the claim would hold the company liable for content "provided by *another* information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). The defense applies, in other words, only where an internet company's users are solely responsible for the unlawfulness. Where the company itself "materially contribut[es]" to the alleged illegality, Section 230 offers no shield from liability. *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008); *see, e.g.*, *Henderson*, 53 F.4th at 127 (collecting cases); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1200 (10th Cir. 2009).

II. Factual background

A. The social media companies designed their platforms to be addictive.

The defendants here are social media companies. They earn billions of dollars annually selling advertisements on their social media applications (or apps): Facebook, Instagram, YouTube, Reddit, Snapchat, Discord, Twitch, and 4Chan. *See* R.2704, 2753 ¶¶ 175, 384; R.5074, 5097 ¶¶ 183, 265; R.6180, 6202 ¶¶ 267, 349. Selling advertising is essentially selling attention. The longer users stay engaged on the apps, the more advertisements they see. *See* R.2706 ¶ 181; R.5076 ¶ 189; R.6182 ¶ 273. And the more advertisers can depend on the social media platforms to deliver

users to their ads, the more they will pay for the privilege. *See id.*; R.5094 ¶ 255; R.6200 ¶ 339. The goal of these social media platforms, as one founder put it, is "to consume as much user time as possible." R.2707 ¶ 189; R.5077–78 ¶ 197; R.6183 ¶ 281. For that reason, and to maximize profits, the social media companies design their apps to compel addictive engagement—and to keep users scrolling, clicking, and swiping as long as possible (and as often as possible). *See* R.2704–05, 2707 ¶¶ 172, 179, 187–88; R.5074–75, 5077 ¶¶ 182, 187, 195–96; R.6180–81, 6183 ¶¶ 266, 271, 279–80.

To foster that addiction, the social media companies employ interfaces that "exploit[]" human cognitive vulnerabilities. R.2707–08 ¶ 189; R.5077–78 ¶ 197; R.6183 ¶ 281. The companies do not pursue users' attention by controlling the content that is posted on their platforms; rather, their apps are designed to manipulate user behavior to keep them on their platforms, regardless of what a video or post says. *See* R.2704 ¶ 171; R.5086 ¶ 220; R.6191 ¶ 304. Much like a slot machine, the platforms provide intermittent rewards, conditioning users to continue scrolling in pursuit of the next reward. *See* R.2708 ¶ 192; R.5078 ¶ 199; R.6184 ¶ 283. Users are hit with dopamine and oxytocin when they receive their next reward, and feelings of isolation and loneliness when they don't. *See* R.2709–10 ¶¶ 195–96; R.5079 ¶¶ 202–03; R.6185 ¶¶ 286–87.

By sending strategically timed notifications that are impossible to fully understand without logging on, for example, the companies compel users to repeatedly open their apps throughout the day and night. *See, e.g.*, R.2796–97 ¶ 562. Through features like autoplay and infinite scroll, the platforms automatically play videos and load content without a user even pressing a button—keeping users in a flow state and giving them no opportunity to consider whether they actually want to continue. *See, e.g.*, R.2749, 2756–58 ¶¶ 373, 391–95; R.5095–96 ¶¶ 258–59; R.6200–01 ¶¶ 342–43. And by creating barriers to deactivation and deletion, the companies ensure that their spellbound users can't leave. *See, e.g.*, R.2797 ¶ 562(j); R.5135 ¶ 445(i); R.6242 ¶ 558(i).

To more effectively capture their users' attention, the social media companies harvest a vast amount of data from them. *See* R.2716–17 ¶ 214; R.5138 ¶ 460; R.6245 ¶ 575. Meta, for example, compiles an exhaustive dossier on each user by surveilling them on and off the platform, mining everything from their user profile to what features they use and how long they hover over a post. *See* R.2751–52 ¶¶ 379–81. Meta and other platforms then use these dossiers to tailor their efforts to keep users hooked. *See id.*

The social media companies' personalized algorithms facilitate their mission to addict. These algorithms rely on the dossiers the platforms collect to deliver users posts that maximize screentime—again, based not on the content of those posts, but

on users' demographic profiles and behavioral data. *See* R.2803 ¶ 588(b); R.5138 ¶ 462; R.6245 ¶ 575. The algorithms then analyze each user's engagement to deliver even more content that reflects the user's increasingly fine-grained profile again, and again, and again, "creating a feedback loop that encourages users, including children to spend [even] more time on the platform[s]." R.2779 ¶ 469; *see, e.g.*, R.5096, 5105–06 ¶¶ 260–62, 296; R.6201, 6210 ¶¶ 344–46, 379. By seeking and achieving high levels of user engagement, the platforms can better sell advertisers the ability to target the exact users they're most interested in reaching. *See, e.g.*, R.2718 ¶ 217; R.5088 ¶ 225; R.6193 ¶ 309.

The social media companies have long known that their platforms, designed to be addictive, *are* addictive. *See* R.2708 ¶ 191; R.5078 ¶ 198; R.6184 ¶ 282. And because their brains are still developing, children and adolescents—who already experience feelings of inadequacy, low self-esteem, and social isolation—are uniquely vulnerable to those efforts to keep users enthralled. *See* R.2706–07, 2710 ¶¶ 183–86, 197; R.5076–77, 5079–80 ¶¶ 191–94, 204; R.6182–83, 6185–86 ¶¶ 275–78, 288. Compulsive social-media use can hinder brain and social development, engender intense stress and negative emotions, and cause impulsive decision-making and risk-taking behavior. *See* R.2709, 2710–2711 ¶¶ 193, 198; R.5078, 5080 ¶¶ 200, 205; R.6184, 6186 ¶¶ 284, 289. To developing brains, these consequences can be catastrophic, resulting in mental health problems, suicidal ideation, and violence.

See, e.g., R.2711–12, 2715–16 ¶¶ 200, 212; R.5081, 5085 ¶¶ 207, 219; R.6187, 6191 ¶¶ 291, 303; *see also* R.2714 ¶ 205; R.5083 ¶ 212; R.6189 ¶ 296 ("[S]o-called manifestos published by mass shooters demonstrate that heavy social media product use goes hand-in-hand with mass shootings"). The social media companies are well aware of these consequences. *See* R.2708, 2719 ¶¶ 192, 218, 220; R.5078, 5088–89 ¶¶ 199, 225, 228; R.6184, 6193–94 ¶¶ 283, 309, 312.

But rather than fix the problem—or warn children and their parents—the social media companies have capitalized on it. *See, e.g.*, R.2748 ¶ 372 (alleging that "Meta, the company behind Facebook and Instagram, has deliberately incorporated detrimental elements into their platforms [to] encourage addictive behavior among adolescents"); R.2771 ¶ 441 (explaining that Snap "deliberately targets children, teenagers, and young adults in its marketing efforts" because their propensity for addictive engagement "ultimately benefits [its] advertising business"). The companies intentionally target teens and young adults, incorporating design features to ensure that minors remain loyal users—that is, to encourage compulsive use. *See, e.g.*, R.2767–68 ¶¶ 426–28; R.5096 ¶¶ 260–61; R.6201 ¶¶ 344–45. One former CEO admitted that his company's platform (YouTube) was specifically designed to "play into the addiction capabilities of every human." R.5094 ¶ 251; R.6199 ¶ 335. "Perhaps most tellingly about the negative effects that social media has on children,

tech moguls do not let their children use social media." R.5075 ¶ 188; R.6182 ¶ 272; *see* R.2706 ¶ 180.

B. This litigation

The social media platforms worked as designed. Long before the tragedy on May 14, 2022, their apps lured and entrapped Payton Gendron—like so many users before and after him. *See* R.2720–21 ¶¶ 226–32; R.5090 ¶¶ 231–37; R.6195–96 ¶¶ 315–321. Gendron began using Instagram, Snapchat, and YouTube in his early teens, later turning to Reddit, Discord, and 4chan. *See* R.2720 ¶ 225.

Gendron soon became addicted to these platforms, identifying himself as a social-media addict in his contemporaneous diary entries. *See* R.5044 ¶ 78, R.6152 ¶ 162. He wrote: "I'm having a really hard time thinking right now. Why do I always have trouble putting my phone down at night?" R.5044 ¶ 77 n.7; R.6151 n.15. "It's 2 in the morning … I'll admit my mental health has seriously degraded these past few years, especially in the last few months … I should be sleeping … I'm just browsing online." R.5044 ¶ 78 n.8; R.6152 ¶ 162 n.16. "I'm a literal addict to my phone. … It's not that I actually dislike other people. It's just that they make me feel so uncomfortable. I've probably spent actual years of my life just being online. And to be honest I regret it." *Id.* By Gendron's own admission, his addiction to social media led him to commit the mass shooting. *See* R.5044 ¶ 79 & n.9; R. 6152 ¶ 163 & n.17.

III. Procedural history

A. Proceedings before the Supreme Court

The plaintiffs here are survivors and family members of the victims of the mass shooting at the Tops store in Buffalo, New York. R.2666–75 ¶¶ 7–57; R.5029–31, ¶¶ 10–15; R.6116–36 ¶¶ 7–92. They bring claims against the social media companies under New York common law, including product-liability claims under strict liability and negligence theories. *See* R.2795–2832 ¶¶ 551–779; R.5133–47 ¶¶ 434–522; R.6217–59 ¶¶ 416–663. The plaintiffs assert that the social media companies intentionally designed their platforms to be addictive, failed to provide basic safeguards for those most susceptible to addiction (minors), and failed to warn of the risks of addiction, particularly with respect to minor users. *See id.* These platforms, according to the plaintiffs, did precisely what they were designed to do: They targeted and addicted minors to maximize their user engagement. *See, e.g.*, R.2795–99 ¶¶ 551–69; R.5133–37 ¶¶ 434–453; R.6239–44 ¶¶ 547–566. The plaintiffs further allege that Gendron became more isolated as a result of his social-media addiction, and this addiction drove him to commit violence, culminating in the tragedy on May 14, 2022. *Id*.

The social media companies moved to dismiss, arguing that Section 230 and the First Amendment barred the plaintiffs' claims; if these defenses did not bar the

claims, they argued that the plaintiffs failed to allege causation as a matter of law. *See* R.65–75, 95–99, 122–26.

The Erie County Supreme Court denied the motions in full. *See id.* It held that the plaintiffs "allege viable causes of action under a products liability theory" that, at least at the pleading stage, implicate neither Section 230 nor the First Amendment. R.71, 85, 111. The Supreme Court reasoned that the social media companies could later introduce evidence to prove that their platforms "do not contain sophisticated algorithms" but are instead "mere message boards"—such that they might be protected by Section 230 or the First Amendment. *Id.* But "at this stage of the litigation," the Supreme Court could only consider "the allegations of the complaint[s] and not 'facts' asserted by the defendants in their briefs or during oral argument." *Id.* Because those allegations are "sufficient to allege viable causes of action against each of the social media … defendants," the Supreme Court denied the motion to dismiss under Section 230 or the First Amendment. *Id.* It reached a similar conclusion on causation, holding that "it is far too early to rule as matter of law that the actions, or inaction, of the social media … defendants through their platforms require dismissal on proximate cause." *Id.*

B. Proceedings before the Fourth Department

The social media companies appealed, and a three-justice majority on the Fourth Department reversed. *See* R.6652–70, 6694–6712, 6761–79.[2] The majority's engagement with the plaintiffs' actual allegations—and the social media companies' burden at the pleading stage—was minimal. *See* R.6662. But in a sweeping decision, the majority wrote 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.6661. "Either the social media defendants are immune from civil liability under section 230," the majority reasoned, or "they are protected by the First Amendment." *Id.*

Two justices dissented. They concluded that, applying New York's liberal pleading standard, the plaintiffs more than adequately stated viable claims that did not depend on third-party content, and therefore, implicated neither Section 230 nor the First Amendment. R.6664–70. The majority's "vast expansion" of Section 230 and the First Amendment, the dissent further explained, would immunize virtually "every defendant … from all state law tort claims involving speech or expressive activity." R.6670. These appeals followed. R.6631–51, 6673–93, 6715–60.

[2] Because the Fourth Department adopted the "[s]ame opinion" in all three appeals, we cite only to the opinion in *Stanfield* for the remainder of the brief. R.6652, 6694, 6762.

STANDARD OF REVIEW

This Court reviews the denial of a motion to dismiss de novo. *See Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994). Giving "the pleading … a liberal construction," accepting "the facts as alleged in the complaint as true," and according the plaintiff "the benefit of every possible favorable inference," a court must determine "only whether the facts as alleged fit within any cognizable legal theory." *Id.* The question, in other words, is whether the plaintiff "has a cause of action, not whether he has stated one." *Id.* at 88.

"New York's liberal pleading standard requires only that the movant be placed on notice of the legal claim asserted." *Tax Equity Now N.Y. LLC v. City of New York*, 42 N.Y.3d 1, 12 (2024). "[T]he question is not whether a party will eventually prove its claim once those allegations are put to the test but whether the claim is based on a viable legal theory." *Id.* at 6–7. If, from the complaint's "four corners[,] factual allegations are discerned which taken together manifest any cause of action cognizable at law," the motion to dismiss "will fail." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). It is the defendant's burden to establish that the plaintiff's allegations can state no viable claim. *Connolly v. Long Island Power Auth.*, 30 N.Y.3d 719, 730 (2018).

Thus, where, as here, a defendant moves to dismiss based on an affirmative defense under CPLR 3211(a)(7), the defendant bears the burden of establishing that

its defense necessarily forecloses any viable cause of action that could be stated by the allegations. *See id.* at 728; *see also Calise*, 103 F.4th at 738 n.1 (Section 230 is an affirmative defense); *LaBrake v. Dukes*, 96 N.Y.2d 913, 914 (2001) (First Amendment is an affirmative defense). A plaintiff need not "anticipat[e] [an] affirmative defense." *Garcia v. Puccio*, 17 A.D.3d 199, 201 (1st Dep't 2005). And "the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party." *Sokol v. Leader*, 74 A.D.3d 1180, 1181 (2d Dep't 2010). Even when a defendant submits evidentiary material in support of the motion, those affidavits "will almost never warrant dismissal … unless they establish conclusively that the plaintiff has no cause of action." *Id.* at 1182.

SUMMARY OF ARGUMENT

A split Fourth Department panel declared that, in the majority's view, "there is no reasonable interpretation" of Section 230 that "allows plaintiffs' tort causes of action to survive as against the social media defendants, who are entitled to immunity under [Section 230] as the publishers of third-party content on their platforms." R.6644. That pronouncement didn't just vastly expand and misconstrue Section 230's text and common-law history. It also failed to engage with this State's liberal pleading standard. *See Leon*, 84 N.Y.2d at 87–88. To warrant dismissal at this stage, the social media companies had to prove that, because of Section 230, the plaintiffs' allegations could not form *any* "cause of action" that would *not* "treat[]"

the companies as "publisher[s]" of content "provided by another information content provider." 47 U.S.C. §§ 230(c)(1), 230(e)(3).[3]

The companies haven't satisfied that burden at this early stage. Nor could they. There are at least three ways by which the complaints' allegations could survive Section 230.

1. Section 230 only shields internet companies from the heightened standard of liability that applied to publishers at common law—vicarious liability imposed merely for publishing content. But it does not shield internet companies from distributor liability—liability for knowingly causing harm. Here, the plaintiffs have alleged knowledge, and the social media companies have not rebutted those allegations as a matter of law. For that reason alone, the companies cannot demonstrate that Section 230 necessarily bars the plaintiffs' claims.

2. Section 230 is only a defense to claims that "treat[]" an internet company as a "publisher." 47 U.S.C. § 230(c)(1). And the defendants cannot demonstrate that every claim that the plaintiffs' allegations could support would treat them as

[3] The Fourth Department majority and dissent considered the social media defendants across these three appeals collectively in determining whether they satisfied their burden to dismiss the claims at the pleading stage. We follow the same approach here. If the defendants ask this Court to decide these appeals on any ground not relied on by the Fourth Department—including, for example, that their platforms operate distinctively—that is not a question for this Court as "a court of review," but one for the Supreme Court on remand. *Seitelman v. Lavine*, 36 N.Y.2d 165, 170 (1975); *see, e.g.*, *People v. Pesky*, 254 N.Y. 373, 373 (1930) ("This court is a court of review, restricted in cases of this order to a pronouncement of the law, and without power to act as a trier of the facts.").

publishers. For one, there are allegations that do not implicate content at all—that Gendron's addiction to social media itself (apart from the content he consumed) led him to commit this tragedy. A cause of action cannot impose publisher liability—liability for disseminating unlawful content—if it has nothing to do with the content that was disseminated. Every Fourth Department justice, majority and dissent alike, agreed that such a claim would survive Section 230. But the majority believed that the complaints lacked any allegations that weren't based on content; and in any event, the majority said, the plaintiffs could not possibly allege proximate causation between Gendron's addiction to social media and the mass shooting. Applying New York's liberal pleading standard, the majority was wrong on both counts.

In addition, a complaint does not treat an internet company as a publisher simply because there is content somewhere in the causal chain. Courts must look to the legal duty underlying each claim. Does it stem from a publisher's duty to avoid publishing improper content? Or does the duty arise from some other source? As the dissent correctly explained (at R.6646–48), here, the complaints' allegations predicate liability on duties that have nothing to do with publisher liability—including the duty of a product manufacturer to design a reasonably safe product, and the duty to warn of known potential harm. That, too, means that the Fourth Department majority was wrong to hold that the claims must be dismissed.

3. Finally, Section 230 still offers a defense only to claims that treat an internet company as the publisher of information "provided by *another* information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). Where an internet company materially contributes to the illegality alleged, the company itself becomes responsible. That's precisely what's alleged here: The illegality is not the content that the companies' users posted. It's the companies' construction of highly addictive platforms that rely on demographic profiles and behavioral data harvested from their users—and features specifically designed to trap those surveilled users in psychological rabbit holes they can't escape from.

The majority held that if this conduct wasn't shielded by Section 230, it must be shielded by the First Amendment. The majority's sole support for that contention was the U.S. Supreme Court's decision in *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). But *Moody* was limited to algorithms designed to "control the content that will appear to users." *Id.* at 736. The Court explicitly declined to extend its analysis to platforms, like those alleged here, that seek to maximize engagement by "respond[ing] solely to how users act online," "without any regard to independent content standards." *Id.* at 736 n.5. The Court also made clear that determining whether and how the First Amendment applies is a fact-intensive inquiry that cannot be resolved at the pleading stage. *Moody*, therefore, cannot support the Fourth Department's majority ruling.

* * *

If any of these theories applies, Section 230 does not. And, after discovery, it may become clear that there are additional reasons why Section 230 doesn't offer each social media company a viable defense. But this Court need not conclude, at this stage, that the plaintiffs' claims will ultimately survive Section 230. *Cf. Tax Equity Now*, 42 N.Y.3d at 12. Rather, the question at this stage is whether the companies proved that no claim based on the allegations can possibly survive. They did not meet that burden, and the Fourth Department majority did not rule on any other ground. This Court should reverse.

ARGUMENT

I. Section 230 does not bar claims based on knowing misconduct.

A. Section 230(c)(1) provides a defense only where a claim "treat[s]" an internet company "as the publisher or speaker of any information provided by another information content provider." In determining the scope of this defense, then, the "key word" is "publisher." *Calise*, 103 F.4th at 738. The statute itself does not define that term; it didn't need to. By the time Section 230 was enacted, the concept of publisher liability had "a well defined meaning at common law." *Id.*; *see supra* Statement I.A.2. To impose publisher liability was to impose liability solely because a company disseminated unlawful content. *See* Statement I.A.2. Distributor liability was different: A distributor was not liable for all the content it disseminated.

See id. It was liable only if it acted with knowledge or reason to know of the unlawfulness. *See id.*

"In any case of statutory interpretation," this Court's task is to "ascertain the legislative intent and construe the pertinent statutes to effectuate that intent." *People v. Dondorfer*, — N.E.3d —, 2026 N.Y. Slip Op. 00823, at 5 (2026). "When a statutory term"—like publisher—"is obviously transplanted from another legal source, it brings the old soil with it." *Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019); *see George v. McDonough*, 596 U.S. 740, 752 (2022) ("The real question is not what" a statutory term might mean "in the abstract, but what was the prevailing understanding of this term of art under the law that Congress looked to when codifying it."). Here, that "old soil" is the traditional understanding of publisher liability as vicarious liability for the content a company published.

"Unless the statute otherwise dictates," therefore, Section 230 "must" be interpreted to "incorporate" this "well-settled" understanding. *Neder v. United States*, 527 U.S. 1, 22–23 (1999); *see Ezrasons, Inc. v. Rudd*, 44 N.Y.3d 532, 542 (2025) (underscoring that a "clear and specific legislative intent is required to override the common law and that such a prerogative must be unambiguous"). And nothing in Section 230 suggests that, despite incorporating the common-law concept of publisher liability, Congress intended the statute to have a broader reach. *Cf. Simmons v. Trans Express Inc.*, 37 N.Y.3d 107, 114 (2021) ("The legislature

is … presumed … to have abrogated the common law only to the extent that the clear import of the language used in the statute requires."). By prohibiting claims that "treat" an internet company as a "publisher," Congress barred holding those companies vicariously liable for the content they disseminate. 47 U.S.C. § 230(c)(1). But it did not bar liability for knowing misconduct.

B. Notwithstanding the text and common-law history of Section 230, some "[c]ourts have discarded the longstanding distinction between 'publisher' liability and 'distributor' liability." *Malwarebytes*, 141 S. Ct. at 15; *see also Calise*, 103 F.4th at 747 (Nelson, R., concurring); *Doe through Roe v. Snap, Inc.*, 88 F.4th 1069, 1071 (5th Cir. 2023) (Elrod, J., dissenting); *Anderson v. TikTok, Inc.*, 116 F.4th 180, 192 (3d Cir. 2024) (Matey, J., concurring in part).

That interpretation originated with the federal Fourth Circuit Court of Appeals. In *Zeran v. America Online, Inc.*, that court held that "distributor liability … is merely a subset, or a species, of publisher liability, and is therefore also foreclosed" by Section 230. 129 F.3d 327, 332 (4th Cir. 1997). Fifteen years ago, in *Shiamili*, this Court, without much analysis, seemed to follow the Fourth Circuit's lead. *See* 17 N.Y.3d at 288–89. But that interpretation can't be squared with the text or history of Section 230.

When Congress enacted Section 230, the difference between publisher and distributor liability was well-established. *See, e.g.*, *supra* Statement I.A.2; *accord*

Malwarebytes, 141 S. Ct. at 14; *Calise*, 103 F.4th at 739; *Cubby,* 776 F. Supp. at 139–41; *Stratton Oakmont*, 1995 WL 323710, at *3–5. Indeed, the problem with the decision in *Stratton Oakmont*—the decision that Section 230 was explicitly enacted to overrule—is that it imposed publisher liability *instead* of distributor liability. *See supra* Statement I.A.2. Congress, therefore, could hardly have been unaware of the distinction. And it makes perfect sense that in overruling the imposition of "publisher" liability by *Stratton Oakmont*, Congress used the word "publisher" in the same way that *Stratton Oakmont* used it. *See Malwarebytes*, 141 S. Ct. at 16.

Congress could easily have provided a defense to both publisher and distributor liability. But it chose to limit Section 230(c)(1) to "publisher" liability. That choice must be given meaning. *See George*, 596 U.S. at 752.

Statutory context supports the conclusion that Section 230(c)(1) doesn't bar distributor liability. Elsewhere in Section 230, Congress provided that "no provider"—that is, no internet company, regardless of whether it is a publisher or distributor—"shall be held liable" for removing third-party content in good faith. 47 U.S.C. § 230(c)(2). If Congress wanted to provide a defense to both publishers and distributors in Section 230(c)(1), it would have used the same term: "No provider shall be held liable for information provided by a third party." *Malwarebytes*, 141 S. Ct. at 16. But instead, it used the word "publisher." "Where, as here, the Legislature uses different terms in various parts of a statute, courts may

reasonably infer that different concepts are intended." *Dondorfer*, 2026 N.Y. Slip Op. 00823 at 5.[4]

In providing a defense to publisher liability, Congress did not also provide a defense to knowing misconduct. To the extent this Court has previously held otherwise, it should reconsider that decision.

C. The complaints here explicitly allege that the social media companies acted with knowledge: The social media companies knowingly designed their platforms to be addictive, they knew that their platforms would be especially addictive to kids, and they knew that this addictive engagement is especially harmful to children. *See* R.2704–06, 2707–08, 2719 ¶¶ 172, 179–80, 187–88, 191–92, 218, 220; R.5074–75, 5077–78, 5088–89 ¶¶ 182, 187–88, 195–96, 198–99, 225, 228; R.6180–82, 6183–84, 6193–94 ¶¶ 266, 271–72, 279–80, 282–83, 309, 312.

The companies haven't rebutted those allegations of knowledge as a matter of law, and at this early stage of the proceedings, the plaintiffs aren't required to prove

[4] In addition, Section 230(c)(1) says that an internet company may not be treated as "the publisher *or speaker*" of information provided by its users. 47 U.S.C. § 230(c)(1) (emphasis added). If, as the Fourth Circuit in *Zeran* believed, the "larger publisher category" encompassed "every party involved … with publication," there would be no need to include the term "speaker." *Cf. Zeran*, 129 F.3d at 332. A prohibition on treating an internet company as a publisher would include speakers. As this Court has long recognized, "[a]ny construction that would render a portion of the statute superfluous must be avoided." *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 38 N.Y.3d 643, 651 (2022).

what the companies did and didn't know. *See Tax Equity Now*, 42 N.Y.3d at 6–7. The social media companies therefore cannot meet their burden of proving that the plaintiffs' claims would impose publisher liability barred by Section 230. That, standing alone, is enough for this Court to reverse and remand.

II. The social media companies cannot demonstrate that the plaintiffs' claims would necessarily impose liability for violating a publisher's duty to avoid publishing unlawful content.

Even if Section 230(c)(1) covered knowing misconduct, the social media companies here still cannot demonstrate that the plaintiffs' claims necessarily treat them as publishers. The Fourth Department majority held otherwise because, in its view, the complaints' allegations could only support legal theories that "depend on the *content* of the material the shooter consumed." R.6643 (emphasis in original). That reasoning fails twice over.

First, the complaints include allegations that do not implicate content at all—including, for example, that Gendron's addiction to social media itself (apart from the content he consumed) led him to commit this tragedy. By definition, those allegations do not seek to impose liability on the social media companies for disseminating unlawful content.

Second, Section 230 does not bar liability simply because content is in the causal chain. Courts must still analyze the duty underlying each cause of action. *See, e.g.*, *Lemmon*, 995 F.3d at 1091. Does that duty arise from a defendant's status as a

publisher—that is, does it arise solely because the defendant publishes third-party content—or does it spring from another source, such as its role as a product designer or manufacturer? *See, e.g.*, *Calise*, 103 F.4th at 741. Applying that duty-based analysis, the social media companies cannot show that the claims fall within Section 230's scope.

A. Claims based on allegations that do not implicate content cannot be barred by Section 230.

Where allegations do not implicate content at all, they cannot possibly treat an internet company as the publisher of third-party content. Section 230 does not bar claims that rest on nothing more than an internet company's "own acts." *Lemmon*, 995 F.3d at 1094.

1. Applying this State's liberal pleading standard, the complaints allege that the defendants are liable because their platforms are addictive, regardless of content.

The majority didn't hold otherwise. Instead, the majority believed that the complaints contained only allegations seeking to hold the social media companies liable for the content Gendron viewed. *See* R.6643. But as the dissent explained, the complaints allege that the companies are liable because their platforms are "addictive"—"not based upon the third-party content they show but because of the inherent nature of their design." R.6646.

Each of the complaints alleges, for example, that the social media platforms are "not reasonably safe and defectively designed to be addictive to minors and

young adults"; the companies "failed to adequately remedy" those "defects or warn users"; and the companies "knew or should have known, by the exercise of reasonable care, that their respective products would cause injury, especially to susceptible young users who would use these products without inspection for their addictive nature." R.2796 ¶¶ 558–60; *see* R.5134 ¶¶ 441–43; R.6240–41 ¶¶ 554–56.

The complaints allege that each social media company "markets, promotes, and advertises its respective products to pre-teen and young consumers." R.2797–98 ¶ 564; *see* R.5135–36 ¶ 448; R.6242 ¶ 561. These young users "do not expect the … products to be psychologically and neurologically addictive when the products are used in its intended manner by its intended audience"; "do not expect the algorithms and other features embedded … to make them initially and progressively more stimulative in order to maximize young consumers' usage time"; and "do not expect" each company's "revenues and profits to be directly tied to the strength of this addictive mechanism and dependent on young consumers spending several hours a day using their respective products." *Id.*

And the complaints state that each of the social media platforms are "likewise defectively designed in that they create an inherent risk of danger; specifically, a risk of abuse, addiction, and compulsive use by youth which can lead to a cascade of harms." R.2798 ¶ 566; *see* R.5136 ¶ 450; R.6243 ¶ 563. "Those harms include but are not limited to social isolation; impulsive decision-making; increased risk-taking

behavior; overexposure to hate speech; indoctrination; radicalization; desensitization to violent behavior; instigation of racist, antisemitic, and violent behavior; and other harmful effects." *Id.*

Finally, the complaints allege that the social media companies "could have utilized cost-effective, reasonably feasible alternative designs including algorithmic changes and changes to the addictive features … to minimize the harms." R.2796–97 ¶ 562; *see* R.5134–35 ¶ 445; R.6241–42 ¶ 558. These alternatives include, among other things, "[p]rioritizing user mental health for adolescents over 'engagement'"; "[r]edesigning algorithms to limit addictive engagement"; "[w]arning of health effects of use and extended use upon sign-up"; "[r]equiring stronger, well-accepted controls for ensuring that certain features are disabled for those users under a certain age"; "[d]efault protective limits to the length and frequency of sessions"; "[o]pt-in restrictions to the length and frequency of sessions"; "[s]elf-limiting tools, including but not limited to session time notifications warnings, or reports"; "[c]reating a beginning and end to a user's 'Feed'"; "[l]imits on the strategic timing and clustering of notifications to lure back users"; and "[r]emoving barriers to the deactivation and deletion of accounts." *Id.*

In sum, construed liberally as they must be, the complaints allege that the social media companies designed their platforms to induce compulsive use and targeted them at children; they knew that their design choices were, in fact, causing

children to be addicted in dangerous ways; and they concealed that risk. *See* R.6645. For that reason, the majority's reliance (at R.6640) on *M.P. by & through Pinckney v. Meta Platforms Inc.*, 127 F.4th 516 (4th Cir. 2025), is unavailing. The plaintiff in that case took "issue with the fact that Facebook allows racist, harmful content." *Id.* at 525–26. But the plaintiffs here do not claim that the social media companies shouldn't have allowed their users to post racist, violent content. As the dissent recognized (at R.6646–48), the complaints contain allegations that don't depend on content at all.

2. The complaints adequately plead proximate causation under this addiction theory.

According to the majority, though, even that was not enough. The majority held that even if the complaints could be read to allege a claim based on social-media addiction—apart from content—that claim would fail for lack of causation. But the companies failed to meet their burden of showing that, at the pleading stage, a lack of proximate causation would foreclose the complaints from asserting any viable legal theory as a matter of law. *See Connolly*, 30 N.Y.3d at 728.

Proximate cause is an "intensely fact-specific" inquiry that is "best left for the factfinder." *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 243 (1998); *Hain v. Jamison*, 28 N.Y.3d 524, 530 (2016). That's because its resolution "turns upon questions of foreseeability," and "what is foreseeable and what is normal may be the subject of varying inferences." *Hain*, 28 N.Y.3d at 529. It can, therefore, be determined as a

matter of law only in "rare cases" where "only one conclusion may be drawn from the established facts." *Id.* at 529–30; *accord Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315 (1980).

The Fourth Department majority decided that this case was that rare case. According to the majority, "[i]t cannot be reasonably concluded that" social-media addiction, "regardless of content," could cause the violence here. R.6643. And anyway, the majority held, the "intervening criminal acts by the shooter" were—as a matter of law—"not foreseeable in the normal course of events and therefore broke the causal chain." *Id.* Neither assertion is correct.

a. As a general matter, "[a] defendant's negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury." *Scurry v. New York City Hous. Auth.*, 39 N.Y.3d 443, 453 (2023). Because of that substantial-cause framework, "there may be more than one proximate cause of an injury." *Id.* at 454. "[T]he mere fact that other persons share some responsibility for [the] plaintiff's harm," in other words, "does not absolve defendant from liability." *Hain*, 28 N.Y.3d at 529.

Construing the complaints liberally, taking their allegations as true, and drawing every possible favorable inference for the plaintiffs, as this Court must, *see Leon*, 84 N.Y.2d at 87–88, the social media companies' intentional design choices were a substantial cause of Gendron's acts here. The complaints allege that the

companies intentionally designed platforms that drive addictive engagement—even though it was widely recognized that, especially in minors, compulsive use evokes intense stress and negative emotions, and causes impulsive decision-making and risk-taking behavior. *See* R.2709, 2710–11 ¶¶ 193, 198; R.5078, 5080 ¶¶ 200, 205; R.6184, 6186 ¶¶ 284, 289.

To developing brains, the complaints further explain, those consequences can be catastrophic, resulting in sleep disturbances, mental health problems and suicidal ideation, and violent, hateful acts. *See, e.g.*, R.2711–12, 2715–16 ¶¶ 200, 212; R.5081, 5085 ¶¶ 207, 219; R.6187, 6191 ¶¶ 291, 303. Even mass shootings are not an unforeseeable consequence of social-media addiction. They have happened before: "Data from manifestos posted online by white nationalist groups shows that many mass shooters share a few common characteristics—they are young, white, male and they spend significant time online at the same websites." R.2714 ¶ 205; R.5083 ¶ 212; R.6189 ¶ 296.

At this early stage, the social media companies cannot show, as a matter of law, that their conduct wasn't one such substantial cause of the violence here. And Gendron's own statements in the aftermath of the shooting—after he was forcibly disconnected from the social media defendants' platforms—reinforce that conclusion. *See, e.g.*, R.2731 ¶ 271, 274–75; R.5093–94 ¶¶ 246, 249–50; R.6198–99 ¶ 330, 333–34. A reasonable factfinder could conclude, based on the plaintiffs'

allegations, that Gendron was not destined to commit the tragedy at the Tops store; alternative design choices and warnings about the risks of potential harm might have dissuaded him from the social-media addiction that led to his violence.

b. Contrary to the majority's reasoning, Gendron's criminal acts do not foreclose that theory of substantial causation. *See* R.6643. Intervening acts will not break the chain of causation if they are a "foreseeable consequence of the situation created by the defendant's negligence." *Hain*, 28 N.Y.3d at 529. And even the "intentional" or "criminal" intervening acts of a third party can be reasonably foreseeable. *Turturro v. City of New York*, 28 N.Y.3d 469, 484 (2016).

In *Scurry v. New York City Housing Authority*, for example, this Court held that a landlord's negligence could be the proximate cause of a tenant's murder by a third-party intruder. *See* 39 N.Y.3d at 449–50. That violent, targeted act did not "sever the causal chain between a landlord's negligence and a plaintiff's injury as a matter of law" because questions relevant to the landlord's negligence—including, for example, whether a functioning door lock would have prevented the attack—presented fact issues for a jury. *See id.* at 449–50, 453–54.

Similarly, the Southern District of New York refused to dismiss claims against owners and operators of the World Trade Center buildings for providing inadequate fireproofing and evacuation procedures—even though those claims arose out of the "horrific" September 11 terrorist attacks. *See In re Sept. 11 Litig.*, 280 F. Supp. 2d

279, 302 (S.D.N.Y. 2003); *see also, e.g.*, *Bonsignore v. New York*, 683 F.2d 635, 638 (2d Cir. 1982) (police officer's shooting of his wife did not automatically sever the city's liability because the city could have reasonably foreseen that its negligent practices in arming unfit police officers would result in such a tragedy).

As this Court has explained, the "line between those intervening acts which sever the chain of causation and those which do not cannot be drawn with precision." *Hain*, 28 N.Y.3d at 530. That's why "[p]roximate cause is, at its core, a uniquely fact-specific determination." *Id.* Because the complaints allege that Gendron's acts, while horrific and criminal, were a foreseeable consequence of the social media companies' intentional choices to design addictive platforms, this Court should reverse.

B. Even if content is in the causal chain, the duties underlying the allegations don't treat the social media companies as publishers.

Even if every viable legal theory rested on a causal chain that included content, that still would not be enough to hold that Section 230 requires dismissal. Section 230 does not bar every claim that includes content somewhere in the causal chain. It provides a defense only to claims that impose liability on an internet company as a "*publisher*." 47 U.S.C. § 230(c)(1) (emphasis added). And to determine whether a claim treats a company as a publisher, courts must examine the "legal duty" underlying that claim. *Calise*, 103 F.4th at 741. Publisher liability is liability that springs from a duty not to publish unlawful content. But where a claim

rests on another legal duty—such as the duty of product-makers to make a reasonably safe product or to warn of known risks—the claim does not treat the company as a publisher. As the dissent explained, that's precisely the case here.

1. Section 230 only forecloses claims that rest on a publisher's duty not to publish unlawful content.

a. Because Section 230 only preempts "cause[s] of action" that "treat[ ]" an internet company as a "publisher," the statute does not provide a defense to any claim that does not do so. 47 U.S.C. §§ 230(c)(1), 230(e)(3); *see Calise*, 103 F.4th at 740–42. It was well-established that, when Section 230 was enacted, to hold a company liable as a publisher meant to impose on the company a duty to avoid disseminating unlawful content. *See supra* Statement I.A.2; *Henderson*, 53 F.4th at 122. To determine whether Section 230 provides a defense to a cause of action, then, a court must analyze the "legal duty" underlying that cause of action. *See, e.g.*, *Calise*, 103 F.4th at 740–42. If the legal duty is a duty to avoid publishing improper content, Section 230 offers a defense. *See id*. If, on the other hand, the duty stems from another obligation—for example, the duty not to design a defective product—the claim does not treat the company as a publisher, and Section 230 does not preempt it. *See, e.g.*, *Lemmon*, 995 F.3d at 1092; *HomeAway.com*, 918 F.3d at 682–83.

That inquiry is particularly straightforward where the claim would not require the company to monitor, edit, or remove third-party content. *See, e.g.*, *Lemmon*, 995 F.3d at 1092; *HomeAway.com*, 918 F.3d at 682. If a company can avoid liability

without monitoring, editing, or declining to publish third-party content, that claim cannot possibly rest on a publisher duty—a duty to avoid disseminating unlawful content. *See id.*

b. The Ninth Circuit's decision in *Lemmon v. Snap* illustrates this analysis. There, the parents of two children who died in a high-speed car accident sued Snap, a respondent here and the maker of the social media app Snapchat, which enables users to upload and share photos and videos. *See* 995 F.3d at 1087. The parents claimed that the app was defectively designed, focusing on two features in particular: (1) an "incentive system" that Snap created to "keep its users engaged" by unpredictably "reward[ing] them with trophies, streaks, and social recognitions" for using the app; and (2) a "Speed Filter" that allowed users to overlay their real-time speed on top of a photograph. *Id.* at 1088–89, 1091. In combination, the parents alleged, those features encouraged teen Snapchat users to drive dangerously fast in an effort to seek a "reward." *Id.* Teenagers viewed this as "a game … with the goal being to reach 100 MPH, take a photo or video with the Speed Filter, and then share the 100-MPH-Snap on Snapchat." *Id.* The parents argued that Snap was liable for the defects in its product that encouraged teenagers to play that deadly game. *See id.*

After carefully analyzing the "specific duty" underlying this product-defect claim, the court held that Section 230 did not apply. *Id.* at 1092, 1094. The court began by determining whether the duty stemmed from Snap's status as a publisher.

The parents sought to hold Snap liable for "designing a product … with a defect." *Id.* at 1092. A negligent-design claim, the court explained, "rests on the premise that manufacturers have a duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public." *Id.* That duty "differs markedly from the duties of publishers"—"editing, monitoring, or removing" third-party content. *Id*. "It is thus apparent," the court concluded, that the claim does not stem from Snap's "conduct as a publisher." *Id.* It "springs from [Snap's] distinct capacity as a product designer." *Id.*

This conclusion was "further evidenced by the fact that Snap could have satisfied its alleged obligation" to design a reasonably safe product without "editing, monitoring, or removing" its users' content. *Id.* To provide a safer product, all Snap needed to do was change the features the company itself had designed. *See id.* It could have removed its speed filter, for example, or changed its incentive system. *See id.* Section 230 therefore did not apply. *See id.*

Courts across the country apply a similar analysis. Where a claim stems from the duty of a publisher to avoid disseminating unlawful content, Section 230 provides a defense. Where it does not, Section 230 poses no obstacle. *See, e.g.*, *Lemmon*, 995 F.3d at 1092; *A.B.*, 123 F.4th at 796–99; *G.G.*, 76 F.4th at 566–68; *A.M. v. Omegle.com, LLC*, 614 F. Supp. 3d 814, 818–20 (D. Or. 2022).

c. The Fourth Department majority believed that "[o]ne cannot plausibly conclude" that Section 230 "provides immunity for some tort claims but not others based on the same underlying factual allegations." R.6641. But different claims can rest on different duties—even when they stem from the same facts. Thus, a social media platform that publishes false information may not be held liable for defamation, because a defamation claim rests on a publisher's duty not to disseminate defamatory content. *See, e.g.*, *Calise*, 103 F.4th at 743. But if the same platform had contracted not to publish false information, a claim for breach of contract could proceed on exactly the same facts. *See id.* That's because a breach of contract claim does not stem from the duty of publishers to avoid publishing unlawful information; it stems from the duty of contracting parties to fulfill their promises. *See id.*

Similarly, a claim based on the failure to warn of that false information could also proceed, because again, the duty underlying that claim is not a publisher's duty not to disseminate illegal content, but instead a duty to warn of foreseeable harm. *See id.* at 741; *see also, e.g.*, *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016). And to satisfy that duty, the platform need not monitor, edit, or remove content. *Calise*, 103 F.4th at 741. It need only warn its users. *Id.* Where a claim seeks to hold an internet company liable for its own conduct—making and then breaching a contract, designing a defective product, or failing to warn—rather than simply for

disseminating the unlawful content of others, Section 230 does not bar the claim. *See, e.g.*, *id.*; *Lemmon*, 995 F.3d at 1092; *HomeAway.com*, 918 F.3d at 682–83; *Roommates.Com*, 521 F.3d at 1165.

Thus, Section 230 does not apply simply because "a claim, including its underlying facts, stems from third-party content." *Calise*, 103 F.4th at 742; *see, e.g.*, *Internet Brands*, 824 F.3d at 852 (explaining that the statute is not "a general immunity from liability deriving from third-party content"); *A.B.*, 123 F.4th at 794–95; *G.G.*, 76 F.4th at 567–68. Nor does Section 230 bar claims simply because they would not have occurred but for an internet company's "[p]ublishing activity." *Internet Brands*, 824 F.3d at 853; *see, e.g.*, *Henderson*, 53 F.4th at 122 (explaining that a " but-for test bears little relation to publisher liability at common law"). After all, "publishing content is a but-for cause of just about everything" a social media company does. *Lemmon*, 995 F.3d at 1093; *Internet Brands*, 824 F.3d at 853. Section 230 provides a defense only to claims that "seek to hold" an internet company liable "*as* a publisher"—claims that stem from a publisher's duty not to disseminate unlawful content. *Lemmon*, 995 F.3d at 1093 (emphasis added); *see Henderson*, 53 F.4th at 124.

2. Applying the requisite duty analysis, the social media companies cannot demonstrate that the plaintiffs lack any viable legal theory.

a. As the dissent correctly recognized (at R.6645), the plaintiffs' allegations "predicate liability" on duties that are entirely independent of the duty to avoid publishing improper content. These include, for example, the "duty to design a reasonably safe product," *Lemmon*, 995 F.3d at 1092, and the "duty to warn" of the risks of addiction. *Internet Brands*, 824 F.3d at 851. Neither of those duties spring from any social media defendant's status as a publisher; they spring from the duty of product manufacturers and designers.

Start with the duty to design a reasonably safe product. *See, e.g.*, *Adamo v. Brown & Williamson Tobacco Corp.*, 11 N.Y.3d 545, 550 (2008). Under New York law, a manufacturer must ensure that "its product is suitably designed and safely made for its intended purpose." *Fasolas v. Bobcat of N.Y., Inc.*, 33 N.Y.3d 421, 429 (2019). That duty "differs markedly" from a publisher's duty to monitor, edit, and remove unlawful third-party content. *Lemmon*, 995 F.3d at 1092. Indeed, the social media defendants can satisfy this duty without ever "editing, monitoring, or removing [ ] the content that its users generate." *Id.* As the dissent explained, the plaintiffs' complaints allege that the social media companies "could have designed their platforms to prevent addiction in any number of ways"—by "restricting minors' access to the platforms through age verification tools; instituting more

robust parental controls; removing push notifications; utilizing session time notifications; and otherwise removing barriers to the deactivation and deletion of accounts." R.6647. None of those alternatives would require "altering the content that [the companies'] users generate." *Lemmon*, 995 F.3d at 1092.

So too with the duty to warn. *See, e.g.*, *Liriano*, 92 N.Y.2d at 237. The duty to warn of the possibility of addiction does not arise from any company's choice to disseminate any particular post; it stems from the companies' decision to design and market products they know are dangerous. *See Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 N.Y.3d 488, 494–95 (2019). As the complaints allege, the social media companies have known for years that their platforms induce compulsive use, and that this addictive use causes profound harms—including mental health problems, social isolation, and even violent, hateful acts. *See, e.g.*, R.2711–12, 2714, 2715–16 ¶¶ 200, 205, 212; R.5081, 5083, 5085 ¶¶ 207, 212, 219; R.6187, 6189, 6191 ¶¶ 291, 296, 303. The companies also know that children and teenagers are particularly vulnerable, yet they continue to market their products to young people anyway. *See* R.2706–07, 2710 ¶¶ 183–86, 197; R.5076–77, 5079–80 ¶¶ 191–94, 204; R.6182–83, 6185–86 ¶¶ 275–78, 288; *see also, e.g.*, R.2748 ¶ 372; R.2771 ¶ 441.

It is that knowledge, not anything that the social media companies' users post, that gives rise to its obligation to warn. Manufacturers must warn of known dangers in their products, regardless of whether they make cars or cigarettes or social media

apps. That duty, too, "differs markedly" from the "duties of publishers." *Lemmon*, 995 F.3d at 1092. And, as with the duty to design a reasonably safe product, complying with the duty to warn would not require the social media companies to monitor—or edit or remove—third-party content. It would just require the companies to provide warnings that their products may foster compulsive use that is harmful to children. *See, e.g.*, *Internet Brands*, 824 F.3d at 851 (explaining that "an alleged tort based on a duty that would require such a self-produced warning falls outside of section 230(c)(1)").

b. The Fourth Department majority failed to confront any of this—much less hold the social media defendants to their burden of showing that the duties imposed by the plaintiffs' allegations would treat their platforms as publishers. Instead, it again relied (at R.6640) on the Fourth Circuit's decision in *M.P.* That case also involved a racially motivated mass shooting, and the plaintiff there claimed that the shooter was "radicalized online by white supremacist propaganda that was directed to him" by Facebook. 127 F.4th at 521. Reasoning that Facebook's "use of its algorithm to arrange and sort racist and hate-driven content" are "acts of arranging and sorting content" that are "integral to the function of publishing," the Fourth Circuit concluded that the plaintiff's complaint treated Facebook "as a publisher of third-party content," and it affirmed the complaint's dismissal on Section 230 grounds. *See id.* at 525–26.

As an initial matter, the allegations here form viable legal theories that were not asserted in *M.P.*—that the social media companies intentionally designed their platforms to addict children, regardless of content. *See supra* Section II.A.1. Additionally, as several judges have explained, *M.P.*'s view of Section 230, and the liability that it forecloses, cannot be squared with the text of the statute. *See, e.g.*, *Malwarebytes*, 141 S. Ct. at 17–18; *Anderson*, 116 F.4th at 184; *Force v. Facebook*, 934 F.3d 53, 83 (2d Cir. 2019) (Katzman, J., concurring in part); *Gonzalez v. Google LLC*, 2 F.4th 871, 914 (9th Cir. 2021) (Berzon, J., concurring), *vacated and remanded on other grounds*, 598 U.S. 617 (2023), *and rev'd sub nom. Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023).

Again, a "cause of action" treats an internet company as a publisher only when it imposes liability solely because the company disseminated unlawful content—that is, for violating its duty as a publisher. *See, e.g.*, *Henderson*, 53 F.4th at 122. Designing an algorithm to addict children has nothing to do with publishers' duties, even if the result of that algorithm turns out to be that it spews violent, racist content. *See, e.g.*, *Force*, 934 F.3d at 83 (Katzman, J., concurring in part). And companies can comply with a duty to avoid doing so without editing, monitoring, or removing any content that users post. *See, e.g.*, *Lemmon*, 995 F.3d at 1092. They can simply not use algorithms that prioritize engagement over all else. And they can warn of the

known risks of using their products without touching users' content. *See, e.g.*, *Internet Brands*, 824 F.3d at 851–52. Section 230 thus does not preclude either claim.

III. Neither Section 230 nor the First Amendment shields the social media companies from claims that they materially contributed to the alleged illegality.

There is a third reason that the defendants cannot demonstrate that Section 230 bars any viable legal theory: The plaintiffs allege that the social media companies materially contributed to the unlawfulness at issue here. Indeed, they are the sole contributors to that illegality. The illegality here is not the content posted by the social media companies' users. That content may be reprehensible, but it is not unlawful. It is the social media companies' own conduct in designing platforms that promote addictive engagement over all else—and failing to provide adequate warnings—that is unlawful. A claim that an internet company itself contributed to the unlawfulness does not seek to hold the company liable solely for disseminating "information provided by another information content provider." 47 U.S.C. § 230(c)(1). It seeks to hold the company liable for its own misconduct.

Section 230 provides no defense to a claim based on a company's own misconduct. *See, e.g.*, *Lemmon*, 995 F.3d at 1092. And, contrary to the Fourth Department majority's reading, the U.S. Supreme Court's decision in *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) does not provide any First Amendment cover either.

A. Because the social media companies materially contributed to the alleged unlawfulness, they cannot meet their burden of proving that Section 230 applies.

1. Section 230 bars only those claims that hold an internet company liable for disseminating "information provided by another information content provider." 47 U.S.C. § 230(c)(1). An "information content provider," in turn, is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3). Because 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*, 17 N.Y.3d at 289 (quoting 47 U.S.C. § 230(f)(3)). Accordingly, an internet company that "passively displays content that is created entirely by third parties" is not an information content provider. *Roommates.Com*, 521 F.3d at 1162. But a company that creates or develops, at least in part, the content it publishes is itself an information content provider. *Id.* Section 230, therefore, provides no defense.

Courts routinely hold that "the term 'development'" in this context "refer[s] not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness." *Roommates.Com*, 521 F.3d at 1168; *see Henderson*, 53 F.4th at 127 (collecting cases). "In other words, a website helps to develop unlawful content," and thus falls outside the scope of Section 230, "if it contributes materially

to the alleged illegality of the conduct." *Roommates.Com*, 521 F.3d at 1168; *see Henderson*, 53 F.4th at 127; *Accusearch*, 570 F.3d at 1200.

That rule accords with the purpose of Section 230 and Congress's choice—reflected in the statute's text—to provide a defense solely to claims that treat an internet company as a publisher. The statute bars imposing liability on companies just because they "serve as intermediaries for other parties' potentially injurious messages." *Henderson*, 53 F.4th at 127. But "where a company materially contributes" to the alleged illegality, it "stops being a mere intermediary for another party's message." *Id.* And it is the company's own conduct that causes harm. *Id.*

That's what the complaints allege here. The plaintiffs do not claim that the racist, violent content that the social media companies published is itself illegal. *Cf.* R.2795–2832 ¶¶ 551–779; R.5133–47 ¶¶ 434–522; R.6239–56 ¶¶ 547–649. The unlawfulness is intentionally creating a highly addictive platform, force-feeding users posts to fuel their addiction based on their demographic profiles and behavioral data, sending them notifications day and night, and trapping them in a "psychological rabbit hole[]" they can't escape from. *See, e.g.*, R.2664, 2749, 2751–52, 2756–58, 2779, 2796–97 ¶¶ 2, 373, 380–81, 391–95, 469, 562; R.5095–96, 5105–06 ¶¶ 258–62, 296; R.6200–01, 6210 ¶¶ 342–46, 379.

Contrary to the Fourth Department majority's suggestion (at R.6639–40), the complaints do not seek to hold the social media companies liable merely because

they "organiz[ed] or distribut[ed] third-party content." Rather, the plaintiffs allege that the companies intentionally designed platforms that would addict children and teens, offered those platforms to young users knowing that they cause harm, and failed to warn them and their families. *See supra* Statement II.A. In doing so, the social media companies did not just contribute to the alleged illegality; they are its sole source. Section 230 does not provide any defense to claims based on the companies' own conduct. *See, e.g.*, *Roommates.Com*, 521 F.3d at 1168.

B. The U.S. Supreme Court's decision in *Moody* does not hold that the First Amendment categorically shields social media companies from liability for their non-expressive algorithms.

The majority held that even if the social media companies materially contributed to the alleged illegality, any contribution they made would be protected by the First Amendment under the U.S. Supreme Court's decision in *Moody v. NetChoice*. R.6641. But *Moody* expressly *declined* to hold that the First Amendment protects the kind of algorithms alleged here. 603 U.S. at 736 & n.5. *Moody* held that where an entity chooses not to publish content, the First Amendment protects it from being forced to do so by the government—even if the entity uses an algorithm to execute its choice. *Id.* at 736. But it was unwilling to conclude that the First Amendment bars imposing liability on social media platforms "whose algorithms respond solely to how users act online," rather than disseminating content according to "independent content standards" provided by the companies. *See Moody*, 603 U.S.

at 736 & n.5; *see also TikTok, Inc. v. Eighth Jud. Dist. Ct.*, 578 P.3d 640, 652 (Nev. 2025) (explaining that *Moody* did not resolve "how the First Amendment would apply to algorithms and other design features that employ user-interaction data to shape an addictive user experience").

The complaints here allege engagement-driven algorithms of the kind that *Moody* declined to address. The plaintiffs assert that the social media platforms rely on the data they harvest to deliver users posts that will maximize screentime—not based on the content of those underlying posts, but on each user's demographic profile and behavioral data. *See, e.g.*, R.2751–52 ¶¶ 379–81; R.5096, 5105–06 ¶¶ 260–62, 296; R.6201, 6210 ¶¶ 344–46, 379. As Justice Barrett recognized in her concurrence, those types of algorithms don't implement a human's "inherently expressive choice to exclude a message they did not like from their speech compilation." *Moody*, 603 U.S. at 746 (Barrett, J., concurring). They just present content "automatically to each user" to achieve the highest possible levels of engagement. *Id.*; *see, e.g.*, R.2704–05, 2716, 2718–19, 2751–52 ¶¶ 171, 178, 214, 217–18, 380–81. Far from implicating the "exercise of editorial judgment," then, these algorithms pose "different" First Amendment considerations. *Moody*, 603 U.S. at 746 (Barrett, J., concurring). And they are "probably … not expressive." *NetChoice, LLC v. Bonta*, 152 F.4th 1002, 1014 (9th Cir. 2025) (citing *Moody*, 603 U.S. at 746 (Barrett, J., concurring)).

In any case, resolving whether and how the First Amendment applies to these types of engagement-driven algorithms is a fact-intensive inquiry that can't be resolved at the pleading stage. That's because, to determine whether the First Amendment applies, "a court needs a massive amount of information about the internet—which cannot be based solely on its own experience." *Id.* (citing *Moody*, 603 U.S. at 725). That analysis "is bound to be fact intensive, and it will surely vary from function to function and platform to platform." *Moody*, 603 U.S. at 747 (Barrett, J., concurring); *see also id.* at 749 (Jackson, J., concurring in part and in judgment) ("Even when evaluating a broad facial challenge, courts must make sure they carefully parse not only what entities are regulated, but how the regulated activities actually function."); *id.* at 769 (Alito, J., concurring in judgment) ("[I]t is impossible to determine whether [statutes] are unconstitutional in all their applications without surveying those applications.").

Determining where *each* social media company's platform "falls on that spectrum," therefore, "reasonably requires some individual platforms' participation." *Bonta*, 152 F.4th at 1014. It also requires the claims to progress to the evidentiary stage, so that each social media defendant can prove, through evidence produced at discovery rather than bare assertions in briefs, how their individual platform works, and why the First Amendment might shield them from liability.

In short, "[w]hile the governing constitutional principles are straightforward, applying them in one fell swoop to the entire social-media universe is not." *Moody*, 603 U.S. at 748 (Barrett, J., concurring). In handing the social media companies a "Heads I Win, Tails You Lose" categorical shield anyway, the three-justice majority undermined the Supreme Court's careful examination of those challenging legal and fact-intensive issues. This Court should correct that mistake and permit the plaintiffs' claims to proceed.

IV. The majority's decision would undermine the text and purpose of Section 230.

Ultimately, the Fourth Department majority's decision seemed to rest largely on policy. In its view, applying Section 230 as written would render all "social media companies that sort and display content" liable "for all tort cases of action," including "every untruthful statement made on their platforms." R.6644. As the dissent recognized (at R.6650–51), however, that just isn't true. Adhering to the plain text of the statute would subject a company to liability only where the company *itself* engaged in misconduct—because it knew of the unlawfulness, contributed to it, or violated a duty separate and apart from not disseminating unlawful content.

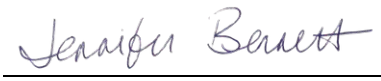
Allowing the majority's ruling to stand, on the other hand, would "create a lawless no-man's-land on the Internet." *Roommates.Com*, 521 F.3d at 1164. It would allow companies, like the social media defendants here, to intentionally design products that addict children and teenagers, choose not to warn their families, and

reap billions in profits. That's not what Section 230 was designed to do. Congress enacted Section 230 to protect children, not to immunize them for intentionally or recklessly harming them. *See* 47 U.S.C. § 230(b)(4) (explaining the provision's policy to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material"). This Court should adhere to Congress's intent by enforcing Section 230 according to its text and history, not the Fourth Department majority's policy concerns.

CONCLUSION

This Court should reverse the Fourth Department majority's order granting the social media defendants' motions to dismiss.

Respectfully submitted,



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