Submitted by:
ISABELLA S. JANKOWSKI

New York Supreme Court

Appellate Division—Fourth Department

Index No. 805896/23

Docket Nos.:
CA 24-00513
CA 24-00515
CA 24-00524
CA 24-00527
CA 24-01447
CA 24-01448

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-Respondents,

– against –

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

Defendants-Appellants,

(For Continuation of Caption See Inside Cover)

BRIEF FOR *AMICI CURIAE* CENTER FOR DEMOCRACY AND TECHNOLOGY IN SUPPORT OF DEFENDANTS-APPELLANTS

CHELUS, HERDZIK, SPEYER & MONTE, P.C.
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Erie County Clerk's Index Nos. 805896/23, 808604/23, 810316/23 and 810317/23

CP COUNSEL PRESS (800) 4-APPEAL • (514572)

– and –

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 and PAMELA GENDRON,

Defendants.

Index No. 808604/23

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 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 RUTH E. WHITFIELD, 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, Individually and as Parent and Natural Guardian of A.S., a minor and KISHA DOUGLAS,

Plaintiffs-Respondents,

– 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-Appellants,

– 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.

Index No. 810316/23

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

Plaintiff-Respondent,

– 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 and REDDIT, INC.,

Defendants-Appellants.

Index No. 810317/23

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-Respondents,

– 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 and REDDIT, INC.,

Defendants-Appellants.

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STATEMENT OF INTEREST OF AMICUS

The Center for Democracy & Technology ("CDT") is a non-profit, non-partisan public interest organization. For thirty years, CDT has represented the public's interest in an open, decentralized Internet and worked to ensure that the constitutional and democratic values of free expression and privacy are protected in the digital age. CDT regularly advocates before legislatures, regulatory agencies, and courts in support of First Amendment rights on the Internet and other protections for online speech, including limits on intermediary liability for user-generated content.

INTRODUCTION

The internet is the most important place in society for the exchange of diverse views. *Packingham v. North Carolina,* 582 U.S. 98, 104 (2017). Section 230 of the Communications Decency Act is the scaffolding upon which that vibrant and diverse marketplace of ideas is built. Without it, the diversity of services we access through the internet – from messaging apps, to dating apps, to online video games, to crowd-sourced educational resources, to livestreaming platforms, journalistic resources, and more – would no longer provide the forums for speech that they currently do.

Section 230 immunizes providers and users of interactive computer services from liability as the publisher or speaker of content provided by others. (e.g., user-

generated content). *Shiamili v. The Real Estate Group of New York*, 17 N.Y.3d 281, 289 (N.Y. 2011) (holding that lawsuits seeking to impose liability on online service providers for performing publishers' traditional functions are preempted by Section 230). The provision enables the free expression of ideas and the exchange of information on the Internet by removing the incentive that providers of interactive computer services would otherwise have to block or take down controversial or other content that might give rise to the risk of litigation and liability. 47 U.S.C. §230(b)(2) ("It is the policy of the United States… to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"). At the same time, it allows providers to exercise their editorial discretion to restrict access to obscene, dangerous, or other content they deem objectionable, again without fear of liability. 47 U.S.C. §230(b)(3) ("It is the policy of the United States… 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").

The underlying facts of this case doubtlessly "evoke outrage." *Jane Doe No. 1 v. Backpage.com*, *LLC*, 817 F.3d 12, 15 (1st Cir. 2016). Payton Gendron committed a hate-fueled mass murder of innocent people. He is rightfully imprisoned for his crimes. The horror of these crimes, however, does not offer a

basis for the Erie County Supreme Court's and Plaintiffs' narrow interpretation of Section 230's liability protections, which is contrary to the statute and would harm the vibrant exchange of ideas online that Congress intended Section 230 to support.

The Erie County Supreme Court's decision denying dismissal in this case misinterpreted the scope of Section 230 protection for publishing activity in at least 3 ways. First, the court suggested that Section 230 does not apply to the use of ranking algorithms and other automated methods of ordering and displaying content. R. 30-39. This is contrary to Section 230, which protects use of "sophisticated algorithms" to rank and order content as part of traditional publishing activities. Second, the court implied that if a platform is a product under New York State's product liability law, it is not a publisher protected by Section 230. R. 35-36. However, the plain statutory text of Section 230 demonstrates that it bars product liability claims where, as in this case, those claims depend on content provided by other information content providers. Finally, the court failed to address livestreaming and whether claims based on third-party content published via livestreaming service providers are within the scope of Section 230. Livestreaming is a form of publishing, and Section 230 protects livestreaming service providers from liability for content published by third-parties in the same

way it protects providers of photo-sharing or text-based services from liability for user-generated content.

ARGUMENT

I. USE OF RANKING ALGORITHMS IS A PUBLISHING ACTIVITY PROTECTED BY SECTION 230 THAT BENEFITS USER EXPRESSION.

The use of "sophisticated algorithms" in content ranking, ordering, detection, display, and moderation is publishing activity that falls within the scope of Section 230's protections. Thus, claims based on such algorithms "seek[] to hold the defendant liable as a 'publisher or speaker'" in contravention of Section 230. *Shiamili*, 17 N.Y.3d at 290.

The Erie County Supreme Court intimated that the use of "sophisticated algorithms" might disqualify a provider from Section 230 protection. R. 35. Plaintiffs attempt to distinguish the "platform design" of using automated systems to rank, display, and recommend content from publishing activity, arguing that the tools used to display content are distinct from the content itself and that it is the design of the tools that give rise to liability. R. 241. This distinction does not exist: "sophisticated algorithms" are simply tools used to accomplish a traditional publishing function, made necessary by the scale at which providers operate. *See Gonzalez v. Google*, 2 F.4th 871, 892-97 (9th Cir. 2021) (claims involving YouTube recommendation of videos alleged to have inspired ISIS terrorist attack

preempted by Section 230), *vacated on other grounds*, 598 U.S. 617 (2023); *Force v. Facebook*, 934 F.3d 53, 66-67 (2d Cir. 2019). To hold otherwise would harm internet users' ability to engage in free expression online and would undermine the purpose of Congress in enacting Section 230.

A. The Use of Automated Systems to Rank and Order Content Are Publishing Activity Protected By Section 230.

Every publisher must select and order content for publication in some way. Newspapers use their editorial judgment to determine which articles to include in an edition and which articles to place on page A1 and which to place on A26. These choices are, essentially, recommendations regarding what a person should read and which articles to read first. *See, e.g.*, Suzanne Daley, *Making the Front Page: How All the News Fits in Print*, N.Y. Times (Dec. 23, 2019); Steven Clayman & Ann Reisner, *Gatekeeping in Action: Editorial Conferences and Assessments of Newsworthiness*, 63 Am. Soc. Rev. 178, 178–79 (1998) (explaining that "stories are chosen from the available pool, prioritized in terms of newsworthiness, and arranged within a newspaper or newscast").

Providers of interactive computer services engage in the same publishing activity when they rank and order user-generated content for display in user news feeds, and the U.S. Supreme Court recently reaffirmed that this activity is an exercise of editorial decision making protected by the First Amendment. *Moody v. NetChoice, LLC*, 603 U.S. 707, 728 (2024) (citing *Miami Herald Publishing*

Co. v. *Tornillo*, 418 U. S. 241, 258 (1974) for the proposition that the First Amendment prohibits the government from manipulating newspapers' and other publishers' editorial judgment). Every method of displaying content involves some kind of judgment regarding what to display and where, because there is far too much information for any one person to consume. This is true for a newspaper, but even more so for providers of interactive computer services. Such providers must select from and order millions of new pieces of content per second for display to thousands if not millions or billions of users. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (stating that the amount of information transmitted through providers is "staggering"). The scale of both content-supply and user-base means that online services must often turn to automated processes to effectuate their editorial judgment regarding what content to promote, demote, display, or remove. Zhenhua Dong et al., *A Brief History of Recommender Systems*, arXiv (Sept. 5, 2022), https://tinyurl.com/yx7syn23.

The goal of these automated systems is to produce a ranked list of content for display. *See Gonzalez v. Google*, No. 21-1333, Brief of amicus curiae of Integrity Institute & AlgoTransparency at 7 (Dec. 9, 2022), https://tinyurl.com/ms4kz75t. Typically, this is done by ranking all candidate items according to some rubric and then displaying to the user only the top scoring items (e.g., search results in response to a query). Ranking is also the core method of

selecting items for display for many providers, something explicitly contemplated in Section 230. 47 U.S.C. §230(f)(defining "interactive computer service" to include "access software provider" of tools that, inter alia, "pick," "choose," "analyze," or "organize" content). It is impossible to display content without ranking it in some way. This ranking reflects an editorial judgment of what a user might wish to see first. Even systems that display content chronologically still reflect a choice of which content to place first for a user's consideration.[1]

Many of these automated systems rank content based on its likelihood of a particular user reaction or interaction (e.g., liking, resharing, commenting). These activities are commonly called "engagement," which is correlated with content users find valuable or interesting. Priyanjana Bengani et al., *What's Right and What's Wrong with Optimizing for Engagement*, Understanding Recommenders (Apr. 27, 2022), https://tinyurl.com/ynk2kmw2. Engagement is not the only goal these systems are designed to achieve, however. Most providers will incorporate other goals into their ranking algorithm, including presenting a diversity of views or information, prioritizing reliable sources, featuring smaller creators, or selecting advertiser-friendly content. Luke Thorburn et al., *How Platform Recommenders*

[1] Some regulatory proposals suggest pure chronological ordering is preferable to other ranking methods. However, that incorrectly assumes that ordering feeds chronologically will not impact the quality of content posted. Chronological delivery gives priority to users that post frequently, which incentivizes both spammy and sensationalist content that may not be of the kind many users want to see. *See* Daphne Keller, *Amplification and Its Discontents*, Knight First Amend. Inst. at Colum. Univ. (June 8, 2021), https://tinyurl.com/4965a4bt.

Work, Understanding Recommenders (Jan. 20, 2022) https://tinyurl.com/34kd7c9a. Regardless of the mix of goals served by a ranking system, each system is an inextricable part of publishing content and a reflection of the provider's editorial choices as to the criteria for determining what content to display and in what order.

Automated ranking systems are used across the internet and existed since before Section 230 was enacted. They are not some new phenomenon that was not contemplated at the time Congress considered Section 230. For example, they were available in Usenet discussion forum readers with the creation of GroupLens in 1994. Paul Resnick et al., *GroupLens: An Open Architecture for Collaborative Filtering of Netnews*, CSCW '94: Proc. of the 1994 ACM Conf. on Computer Supported Cooperative Work 175 (Oct. 1994), https://tinyurl.com/5xjr8m7z. Search results, news services, and online shopping have always displayed recommended content, and may do so based on different inputs that form the basis of the recommendations. Reddit, for example, uses several different voting-based systems to rank and order content. *See, e.g.*, Amir Salihefendic, *How Reddit Ranking Algorithms Work*, Hacking & Gonzo (Dec. 8, 2015), https://tinyurl.com/29w8k9az. This requires the use of complex algorithms in order to work well. Google Search provides, and has long provided, users results optimized on the basis of past signals of interest. *See, e.g.*, Danny Sullivan, *Google Now Personalizes Everyone's Search Results*, Search Engine Land (Dec. 4, 2009),

https://tinyurl.com/47fau86t. Early web portals like Yahoo displayed customized content on the basis of the city from which the user logged on. *See* Dan Tynan, *The History of Yahoo, and How It Went From Phenom to Has-Been*, Fast Company (Mar. 21, 2018), https://tinyurl.com/2s3cm7bm.

If the court were to conclude that claims based on these "product designs" that facilitate the recommendation and display of third-party content to users fall outside of Section 230, that would eviscerate the statute. The effects would be felt far beyond the services offered by providers currently before the court in this case. Small providers like All Trails, an app that provides guides and maps for camping and hiking, would be affected disproportionately because the sheer volume of user-generated content it processes means that some ranking and ordering of that content is necessary to make the services useful (e.g., filtering based on location to ensure recommending trails a user can reasonably access). *See* All Trails, alltrails.com. Automating the recommendation process ensures that many small providers can sort and display content quickly with minimal staff. The ripple effects of a potential loss of immunity for content ranking system product design would impact many services, including, but not limited to, media streaming platforms, online marketplaces, search engines, news services, and gaming platforms.

Such a holding would also conflict with a number of established precedents. *See, e.g.*, *Force*, 934 F.3d at 66-67 (noting that Section 230 protects "editorial choices regarding the display of third-party content," including "where… content should reside and to whom it should be shown"); *Jane Doe No. 1*, 817 F.3d at 20-21 (finding the "structure and operation" of a website "reflect[s] choices about what content can appear on the website and in what form [and are] editorial choices that fall within the purview of traditional publisher functions").

At the same time, a finding that product designs that facilitate the recommendation of third party content treat Defendants as publishers and are within the scope of Section 230 would not place all product design features within Section 230's ambit or amount to a license for online services to behave with impunity. In *Lemmon v. Snap*, for example, the Ninth Circuit held that Section 230 did not protect Snap from liability based on a "Speed Filter" feature, which displayed the speed at which a user was traveling when it was in use. 995 F.3d 1085 (9th Cir. 2021). The *Lemmon* court held that Section 230 did not apply to a negligent design claim "because the … claim neither treats Snap as a 'publisher or speaker' nor relies on 'information provided by another information content provider.'" *Id*. at 1087. The court explained that the claim "does not depend on what messages, if any, a Snapchat user employing the Speed Filter actually sends" and therefore did not seek to treat Snap as a publisher of another's content. *Id.* at

1094. Liability for other design features could fall outside Section 230 for similar reasons.

B. Holding That Section 230 Does Not Apply to "Product Designs" That Rank and Display User Content Would Harm Users' Expressive Rights.

If this court were to hold that product features and designs that rank, order, display, and recommend content to users fall outside of Section 230's scope, those most harmed would be the users of services that publish their content and users who are seeking information online. The increased risk of liability for recommended content would incentivize service providers to engage in content ranking practices that were less useful to their user-base and would also incentivize the censorship of broad ranges of content that providers worry could become subject to a lawsuit, regardless of whether the content was constitutionally protected or served the public interest.

Users benefit from a variety of content moderation practices. The diversity of services available means that users can vote with their feet, engaging on the platforms and services most useful to them rather than those that are not. One way that providers compete is through their ranking algorithms. *See, e.g.*, Yahoo! Inc., *Yahoo Announces Acquisition of The Factual, Expanding its Commitment to Trusted News and Information* (Sept. 6 2022), https://tinyurl.com/4cr6xnvs (explaining that Yahoo acquired The Factual based on its novel news ranking

algorithm); Ben Smith, *How TikTok Reads Your Mind*, NYTimes (Dec. 5, 2021), https://tinyurl.com/4hv2scct (explaining the operation of TikTok's recommendation algorithm which many credit for the service's popularity). They also offer different approaches to content moderation: some use a top-down approach, while others may use a community-led approach, and still others may offer a federated and inter-operable approach. *See* Yoel Roth & Samatha Lai, *Securing Federated Platforms: Collective Risks and Responses. Journal of Online Trust and Safety*, 2(2) (2024), https://tinyurl.com/vkckztty; Nicole Buckley & Joseph S. Schafer, *"Censorship-Free" Platforms: Evaluating Content Moderation Policies and Practices of Alternative Social Media*, For(e)dialogue, Jan. 2022, https://tinyurl.com/3jjrhhc7; David A.M. Goldberg, et. al*, How Content Moderation and Anti-Vandalism Works on Wikipedia*, Wikimedia Design Blog (Jul. 30, 2020), https://tinyurl.com/yeaw6t8h.

When Elon Musk purchased Twitter in 2022, he made significant changes to the systems that rank and display content, prioritizing new categories, significantly changing the user-verification (blue check) program, and allowing more content that had previously been disfavored. *See* Sheila Dang, *Musk-owned X's content moderation shift complicated effort to win back brands*, Reuters (Sept. 7, 2023), https://tinyurl.com/32ktpb2s; Kate Conger, *Twitter Begins Removing Check Marks from Accounts*, NYTimes (Apr. 20, 2023), https://tinyurl.com/xebbcjks. This

delighted some users of Twitter, since renamed X. Other users sought alternatives, which include legacy platforms like Facebook, new Meta-owned product Threads, and new market-entrant Bluesky. Kat Tenbarge and Kevin Collier, *X sees largest user exodus since Elon Musk takeover*, NBC News (Nov. 13, 2024), https://tinyurl.com/mpwnsx78.

This differentiation in content moderation creates a diversity of spaces users can join or migrate to when they become dissatisfied with other services. Bluesky looks and works like Twitter in many ways, but, from a content-moderation perspective, is very different because it seeks to provide its users maximum control over content moderation, allowing them to build their own newsfeeds and to take their data anywhere, even to the point of building competitor services using Bluesky's open protocol. Bluesky, bsky.social/about. Meta's Threads also prioritizes user-control, operating within the "fediverse" and allowing interoperability with other platforms. Threads, *Introducing Threads: A New Way to Share With Text*, https://tinyurl.com/78eh8y9n. In the realm of video-first platforms, TikTok's content delivery algorithm is famous for how much its users enjoy it and find it to be useful. Drew Harwell, *How TikTok ate the internet*, Wash. Post (Oct. 14, 2022), https://tinyurl.com/mssrs74k. Providers like Reddit, Discord, and Wikimedia, on the other hand, devolve the power to moderate content to the communities that form on the platform, allowing users to write some - or even the

majority - of the content rules and to enforce them, at times with the help of automated tools for both ranking and detection. *See* Reddit, *Content Moderation, Enforcement, and Appeals*, https://tinyurl.com/sh7c5fj3; Discord, *Developing Server Rules*, https://tinyurl.com/2vcu595s; Wikipedia, *Wikipedia: Policies and Guidelines*, https://tinyurl.com/4damem7p. No two methods for choosing and ordering content are precisely alike and these differences matter and create value for users.

No one could possibly consume or sort through all of the information available online. Ranking systems help people find signals in the noise, guiding them toward information they may find most useful. *See* supra Section I. The ability to find and consume information online is critical to self-actualization and to democratic self-governance, as more and more of our learning, news consumption, and communicative activities are accomplished online. *See* Natali Hellberger, *On the Democratic Role of News Recommenders*, 7 Digital Journalism 993 (2019), https://tinyurl.com/2p8e5e5h. Users do not always know what to look for or from which source to seek it. Ranking systems can assist in identifying and delivering useful information users may not even be aware would interest them. *See* Jonathan Stray, *Who Should See What When? Three Principles for Personalized News*, NiemanLab (July 25, 2012), https://tinyurl.com/3nt3ukee.

These systems have also become increasingly important to the enforcement of content policies. Providers may deprioritize or "downrank" undesirable content to reduce its visibility or reach. Emma Llansó et al., *Artificial Intelligence, Content Moderation, and Freedom of Expression*, Transatlantic Working Group on Content Moderation Online & Freedom of Expression (Feb. 26, 2020), https://tinyurl.com/49purumm; Tarleton Gillespie, *Do Not Recommend? Reduction as a Form of Content Moderation*, Soc. Media + Soc'y, July-Sept. 2022, https://tinyurl.com/d82m3j4d. Downranking can be used to reduce the amplification of "borderline" content that nearly violates their rules but does not actually do so. Gillespie, supra. Downranking allows providers to moderate such content without removing it entirely, meaning it remains available for a user to find directly, preserving a measure of freedom of expression by keeping content accessible to those who wish to engage with it, but not amplifying it to new audiences.

These systems are not perfect, however. They have an error rate which leads to some content that should be removed remaining online and even being amplified by an automated system, and content that should not have been removed getting taken down or downranked inappropriately. This error rate is a fact of life when attempting to do content moderation at scale and applies even when moderation is done entirely by human reviewers. *See* Jillian C. York and Corynne McSherry,

Content Moderation is Broken. Let Us Count the Ways, EFF (Apr. 29, 2019), https://tinyurl.com/ycax4tsp. Because content moderation systems are inherently fallible, a holding that Section 230 does not apply to providers that use product designs that include algorithmic ranking and recommendation would create a perverse incentive to filter even more content out of the potential pool of items for display in order to mitigate legal risk– even if that led to filtering some content that did not create a risk of liability.

The incentive to block and remove more content would apply most directly to content that providers believe would create the largest actual risk for liability. A restaurant review site, therefore, might think twice about allowing negative reviews that could lead to a defamation lawsuit. It would not have the same incentive to remove positive reviews, creating an imbalanced environment where only one category of views may be freely expressed.

Harms to free expression and information integrity would not stop there, however. Assessments of content that could give rise to liability are inherently imperfect. *See* Evelyn Douek, *Governing Online Speech: From "Posts-AsTrumps" to Proportionality and Probability*, 121 Colum. L. Rev. 759, 792 (2021), https://tinyurl.com/hmek3k2k. Online posts often lack necessary context for reviewers to determine whether the speech at issue violates any applicable law at the state or federal level. The limitations of automated systems used to evaluate

content's compliance with applicable laws and provider terms of service exacerbate the difficulty with making these determinations.

Automated systems particularly struggle to discern context, which is a critical limitation considering the necessity of context to determine legality. Natasha Duarte et al., *Mixed Messages? The Limits of Automated Social Media Content Analysis*, Ctr. for Democracy & Tech. 9, 19 (Nov. 2017), https://tinyurl.com/2p829azn. Some automated tools rely on matching previously identified violative content with content newly uploaded by users. These tools simply cannot accurately moderate content that may be objectionable in one context but acceptable in another. For example, a matching-based tool could not determine whether an image of known terrorist propaganda was posted to recruit new adherents or to be debunked or analyzed. *See, e.g.*, *Countering Daesh Propaganda: Action-Oriented Research for Practical Policy Outcomes*, The Carter Ctr. (Feb. 2016), https://tinyurl.com/msjaf6f2 (including images created by ISIS or Daesh in an interdisciplinary guide to "counter Daesh propaganda"). Meta's Instagram censored posts containing the word "Aqsa," referring to one of the holiest mosques in Islam, because "Al-Aqsa" is also associated with or part of the names of certain foreign terrorist organizations, and the use of the word triggered Meta's "dangerous individuals and organizations policies." Michael Levenson,

Instagram blocked posts about the Aqsa Mosque in a terrorism screening error, NYTimes (May 13, 2021), https://tinyurl.com/mr3m2dum.

Other automated tools that, rather than matching content, try to make predictions about whether novel content violates a service's rules may also struggle with context. Duarte, *supra*, at 12–13. For example, even sophisticated large language models struggle to parse reclaimed slurs from their harmful uses and have been found to disproportionately misinterpret the use of reclaimed slurs by the very people doing the reclaiming. *See* Rebecca Dorn, Lee Kezar, Fred Morstatter, and Kristina Lerman, *Harmful Speech Detection by Language Models Exhibits Gender-Queer Dialect Bias*, In Preprint, ACM, New York, NY, USA, (2024) https://tinyurl.com/25j4envp (finding a tendency for large language models to inaccurately flag as harmful texts authored by gender-queer individuals employing reclaimed slurs). Similarly, an image classifier "may be able to identify nudity, but not make a judgment about whether that nudity is occurring in the context of artistic expression or abuse." Carey Shenkman et al., *Do You See What I See? Capabilities and Limits of Automated Multimedia Content Analysis*, Ctr. for Democracy & Tech. (May 2021), https://tinyurl.com/47m2nbyd.

Given the difficulty both human reviewers and automated tools have in parsing or understanding context necessary to make distinctions between content that may give rise to liability or to provider rule violations and those that do not,

providers seeking to avoid legal risk may employ categorical topic bans as a mitigation tactic. These topic bans have been used in the past when providers were faced with the threat of liability for third party content. After the enactment of Allow States and Victims to Fight Online Sex Trafficking Act/Stop Enabling Sex Traffickers Act, Pub. L. 115-164, 132 Stat. 1253 (2018), which eliminated Section 230's protections for speech related to federal and state sex trafficking laws, some providers decided to simply eliminate content related to sex altogether, a decision that disproportionately harmed sex workers seeking to maintain their own health and safety and the LGBTQ community. *See, e.g.*, Shannon Liao, *Tumblr Will Ban All Adult Content on December 17th*, The Verge (Dec. 3, 2018), https://bit.ly/2SmoC5A.

Categorical bans likely will sweep in content that seeks to help people that have fallen victim to crime or illness. For example, a categorical ban on content related to eating disorders, in addition to censoring content that advocates eating disorders, also may censor content that attempts to help people heal and recover from eating disorders. The same will be true of addiction recovery related content and other categories of content related to illegal or harmful activities. In a quest to prohibit content that provides instructions on how to commit suicide or content that instructs people to engage in risky activities, providers risk downranking or censoring suicide prevention and mental health related content.

If this court were to hold that recommendation algorithms are "design features" that were not a publishing activity, placing them outside of Section 230's scope, all content recommended by those systems would also be outside of Section 230's scope. Given the inability of those systems to make nuanced judgments, providers would have a strong incentive to design those algorithms to recommend only the most anodyne content so as to minimize the risk of liability. The harms to free expression on topics essential to public discourse and even to democracy itself would be astronomical. Moreover, such a holding would be contrary to the purpose, text, and intent of Congress when it enacted Section 230, which states that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. §230(b)(2). "Both state and federal courts around the country," as the Court of Appeals for the State of New York acknowledged, have "'generally interpreted Section 230 immunity broadly, so as to effectuate Congress's 'policy choice . . . not to deter harmful on-line speech through the . . . route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.'" *Shiamili*, 17 N.Y.3d at 288 (quoting *Universal Communication Sys. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007), quoting *Zeran*, 129 F.3d at 330-331).

II. PLAINTIFFS' PRODUCT LIABILTY CLAIMS ARE COVERED BY SECTION 230.

The district court erred when it implied that if Defendants' services were products under New York State law, they could not be publishers with Section 230 protections. R. 35-36. Section 230 contains no exception for product liability claims. 47 U.S.C. §230(e). Styling a lawsuit against an interactive computer service for its publishing activity as a product liability claim, therefore, does not circumvent Section 230's shield.

Section 230(c)(1) states that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. §230(c)(1). Section 230(e) enumerates the exceptions to Section 230(c), which include federal criminal law, intellectual property claims, certain sex trafficking claims, and claims under the Electronic Communications Privacy Act and other similar state laws. 47 U.S.C. §230(e). None of these exceptions encompasses claims of product liability. This conclusion is supported by *Shiamili*, where the Court of Appeals of the State of New York wrote that Section 230 preempts any state law inconsistent with its protections. *Shiamili*, 17 N.Y.3d at 286. As a result, if a claim for product liability seeks to treat an interactive computer service provider or user as a publisher or speaker of information provided by others, Section 230 applies.

As in other similar cases, the product liability claims at issue seek to hold the Defendants legally responsible for publishing third-party content. Multiple circuit courts of appeals have held that where a product liability claim is based upon a provider's publication of user-generated content, Section 230 preempts that claim. *See, e.g.*, *Herrick v. Grindr LLC*, 765 F. App'x 586 (2d Cir. 2019); *Doe v. Grindr Inc.*, 128 F.4th 1148 (9th Cir. 2025); *Gonzalez*, 2 F.4th at 896; *Dyroff v. Ultimate Software Grp.*, 934 F.3d 1093, 1098 (9th Cir. 2019); *V.V. v. Meta Platforms*, 2024 WL 678248, at *29 (Conn. Super. Ct. Feb. 16, 2024). For example, the Second Circuit barred product liability claims against Grindr where the allegations related to someone using a Grindr account in order to harass his ex-romantic partner. *Herrick*, 765 Fed. Appx. at 588. The court noted that the claims arose from features that allowed the creation of profiles, sending of messages, and sharing of geolocation information provided by Grindr users and these features were "only relevant to [the plaintiff's] injury to the extent that [changes to] such features would make it more difficult" for the underlying content to be shared. *Id*. at 590. Similarly, the Ninth Circuit, in *Doe v. Grindr*, held that Section 230 barred product liability claims against Grindr for product features that matched users based on geographic location and accepted self-attestation of age, noting that the features at issue were "meant to facilitate the communications and content of others."128 F.4th at 1153 (quoting *Dryoff*, 934 F.3d at 1098).

These claims are distinguishable from situations in which the product liability claim is not based upon user-generated content. As discussed above, this was the case in *Lemmon* where the Ninth Circuit held that a product feature that incentivized users to drive at high speeds, regardless of whether the content was ever posted, was not protected by Section 230. 995 F.3d at 1093.

In this case, the claims are specifically based upon the publication of content provided entirely by users of the services: vile third-party content that was recommended to Gendron and content that Gendron posted himself. If not for the harmful nature of the third-party content - for instance, had the content at issue been pictures of butterflies, rather than advocacy of the Great Replacement Theory - the Plaintiffs would not have brought such a claim. Unlike the design feature at issue in *Lemmon*, which were not dependent on the publication of third-party content, Plaintiffs' claims are premised on the publication and content of information provided by users and not the platforms themselves. As a result, the Plaintiffs' claims for product liability seek to treat Defendants as the publisher or speaker of content provided by other information content providers and Section 230 must apply to them.

III. LIVESTREAMING AND DECISIONS RELATED TO HOW AND WHEN TO DISPLAY SUCH USER-PROVIDED CONTENT ARE PUBLISHING DECISIONS PROTECTED BY SECTION 230.

Livestreaming services publish user-generated video and audio content in real time. Livestreaming is an expressive act protected by the First Amendment. *See, e.g.*, *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 681 (4th Cir. 2023) (holding that livestreaming a police stop is speech protected by the First Amendment); *Knight v. Montgomery Cty.*, 470 F. Supp. 3d 760, 767-68 (M.D. Tenn. 2020) (treating livestreaming as expressive conduct). Plaintiffs claim that a livestreaming service is an inherently dangerous product that "encourage[s] and facilitate[s]" "individuals with a propensity [for] violence" to commit crime. R.2814 ¶ 661. Livestreaming, however, is simply a method of publishing content, and services that allow users to livestream content provide fora for publishing in the same vein as any other social media service, even if the specific medium of communication is somewhat different.

The New York Court of Appeals has held that "[c]reating an open forum for third parties to post content is … at the core of what section 230 protects." *Shiamili*, 17 N.Y.3d at 290–91. Twitch and other livestreaming services do just that. The Court of Appeals also rejected an argument that an allegation that a platform's design "implicitly encourage[s]" illegal behavior would place plaintiff's

claims outside the scope of Section 230. *Id*. That logic extends to livestreaming and the Plaintiffs' allegations against Twitch's livestreaming services here.

Arguments that Twitch or any other service failed to remove the stream of Gendron's crime or failed to prevent its publication (e.g., because Twitch does not implement a time delay) are preempted by Section 230 because, as above, they are based upon traditional publishing decisions and seek to hold the Defendants liable as the publisher of content provided by other information content providers. *See, e.g.*, *Force*, 934 F.3d at 65-66 (dismissing claims against Facebook for displaying material posted by Hamas that allegedly inspired terrorist violence). In order to comply with Plaintiffs' demands, the providers would have to alter, remove, or change the display of third-party content by removing it faster or delaying its publication pending review, or some other content-altering process, a tell-tale sign that Section 230's protections apply to the claims.

CONCLUSION

Accordingly, this court should reverse the court's orders denying the Defendants' motion to dismiss.

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