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Court of Appeals
of the
State of New York

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

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents.

(For Continuation of Caption See Inside Cover)

AMICI CURIAE BRIEF OF THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION AND THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF DEFENDANTS-RESPONDENTS AND AFFIRMANCE

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

Defendants.

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rules 500.1(f) and 500.13(a), the Software & Information Industry Association ("SIIA") discloses that it does not have any corporate parents, subsidiaries or affiliates.

Pursuant to Court of Appeals Rules 500.1(f) and 500.13(a), the Computer & Communications Industry Association ("CCIA") discloses that it does not have any corporate parents, subsidiaries or affiliates.

STATEMENT OF RELATED LITIGATION

There are no actions or proceedings pending in any court of this State related to this appeal at the time of filing this brief.

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INTEREST OF AMICI CURIAE

SIIA is the principal trade association for those in the business of information. SIIA's membership includes nearly 400 software companies, platforms, data and analytics firms, and digital publishers that serve nearly every segment of society, including business, education, government, healthcare, and consumers. It is dedicated to creating a healthy environment for the creation, dissemination, and productive use of information. SIIA and its members also have a particular interest in the full and predictable application of the First Amendment. A list of SIIA members is here: https://www.siia.net/about-us/member-companies.

CCIA is a nonprofit trade association whose members include online services that host, organize, and present speech created by their users. CCIA and its members have a direct interest in the laws governing or limiting their own speech and the speech of their users. In particular, CCIA and its members have an interest in ensuring the robust application of First Amendment protections against content-based regulation and preventing the development of laws based on incorrect understandings of the interactions of human judgments and decision-making and algorithms in the course of editing and curating speech online. A list of CCIA members is available here: https://ccianet.org/about/members.

SIIA and CCIA ("the Associations") have direct interests in the question this appeal presents: whether the use of software to implement editorial and curatorial

judgments forfeits the First Amendment and Section 230 protections for those judgments. The Associations submit this brief to help the Court understand how that software works, and why it is a tool for carrying out protected editorial judgments rather than a substitute for the human judgment behind them.[1]

QUESTION PRESENTED & PRELIMINARY STATEMENT

This appeal asks whether online service providers lose the protections of the First Amendment and Section 230 of the Communications Decency Act if they rely on software—namely algorithms, which increasingly involve machine learning—to implement the operators' and providers' editorial and curatorial judgments at the scale the modern Internet demands. They do not, as the Appellate Division correctly held.

Amici SIIA and CCIA submit this brief to explain how that software actually works, and why using it to organize, prioritize, and recommend the immense volume of third-party content online is quintessentially protected editorial discretion.

Algorithms are tools for expression. When providers of online services—such as operators of social media platforms, online marketplaces, or video-sharing platforms—decide what content to feature and what to demote or remove, the

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

providers' software developers translate those human judgments into code that can be applied to the potentially billions of posts uploaded each day. The "key to" that process "is prioritization of content, achieved through the use of algorithms." *Moody v. NetChoice, LLC*, 603 U.S. 707, 734 (2024). Some algorithms involve simple rule-based programs, and others depend on machine-learning models such as large language models that produce outputs influenced by parameters that developers establish. Either way, the choices a website makes about which signals to weigh and how to rank what its users see are as varied—and as expressive—as the websites themselves.

Those expressive choices are protected by the First Amendment. The First Amendment has long protected the "exercise of editorial control and judgment" over the speech of others, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), and its "basic principles ... do not vary" when a new medium—or a new tool—emerges to carry out a speaker's expressive choices, *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011) (quotation omitted). Predicting what a reader will find worthwhile is the essence of a recommendation, and recommendations—like the reviews, ratings, and references that courts routinely treat as protected opinion—are expression. That a website curates with an eye toward engagement, and ultimately advertising revenue, changes nothing, for speech with "an economic motive" is no less constitutionally protected. *Sorrell*

v. IMS Health Inc., 564 U.S. 552, 567 (2011). The protection extends to a website's decision to rank content based on a user's own actions and demographics: the First Amendment protects "the use of algorithms" that "select[] and rank[]" content "based on a user's expressed interests and past activities." *NetChoice*, 603 U.S. at 734-735.

Section 230 supplies an independent and overlapping protection. Because deciding whether, how, and to whom to publish content created by others is a traditional editorial function, Section 230 forecloses claims that would hold an online service liable as the publisher of that content. And performing that function through algorithms—the only means feasible at the scale of the modern Internet—changes nothing.

Plaintiffs cannot evade these protections by relabeling Defendants' curation software a defective "product." The defect they allege is inseparable from the user-generated content the Defendants disseminate: the theory of the complaints is that the Defendants' services are dangerous because of the third-party content allegedly recommended and amplified by Defendants' algorithms. Plaintiffs variously label that content as racist, violent, "discordant," or "stimulative," but, no matter the label, their theory turns on concerns about the user-generated content. Their claims can be remedied only by changing what speech is disseminated and to whom—exactly what the First Amendment and Section 230 forbid.

Finally, the First Amendment and Section 230 work in tandem to protect websites' ability to curate third-party content. Curation is expressive and so protected by the First Amendment, but that does not mean curation is itself first-party speech beyond Section 230's ambit. The First Amendment protects a curated feed because of the message communicated by the compilation as a whole, not because each underlying post becomes the website's own speech. Properly understood, the two protections are complementary: the First Amendment safeguards a website's discretion to shape the expressive character of its service as a whole, while Section 230 ensures that exercising that discretion over third-party content does not expose the website to liability as a publisher. This Court should affirm.

ARGUMENT

I. SOFTWARE DEVELOPERS DESIGN AND USE ALGORITHMS AS TOOLS TO EXECUTE AND AMPLIFY A WEBSITE'S EXPRESSION BY CURATING AND MODERATING THIRD-PARTY CONTENT AT SCALE

A. Algorithms Are Tools That Humans Use To Implement Editorial Judgments

Recent years have seen extraordinary growth in the number, diversity, and reach of online communications services. Each service has its own personality, defined by the content- and subject-matter policies set by its leaders, operators, and employees and by their judgments about which third-party content to prioritize—the newest, the most local, the most popular, the most provocative, and so on.

Given the volume of content posted daily online, automated moderation and curation are the only feasible ways for service providers to implement these editorial judgments. Approximately 456,000 X posts are shared *every minute*, and more than 300 million photographs are uploaded to Facebook and over 20 million videos are uploaded to YouTube *every day*.[2] Human moderators alone cannot review, assess, and curate the "huge surge of user-generated content" that the modern Internet has facilitated.[3]

Accordingly, when a website's operators decide what kinds of content to promote, demote, or remove, they turn to their software developers to make it happen. The developers' task is to translate the operator's editorial judgments into code by designing algorithms that pre-program methods of moderation and curation according to the operator's policies and preferences. *See NetChoice*, 603 U.S. at 735 (recognizing that "platforms write algorithms to implement [their content-moderation] standards"). An algorithm, at bottom, is "a step-by-step procedure for solving a problem or accomplishing some end."[4] Developers create

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[2] Marr, *How Much Data Do We Create Every Day?*, https://bernardmarr.com/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/; *Official Blog*, YouTube, https://blog.youtube/press/.

[3] Darbinyan, *The Growing Role of AI in Content Moderation*, Forbes (June 14, 2022), https://www.forbes.com/councils/forbestechcouncil/2022/06/14/the-growing-role-of-ai-in-content-moderation/?streamIndex=0.

[4] *Algorithm*, Merriam-Webster, https://www.merriam-webster.com/dictionary/algorithm.

"automated algorithms, which include heuristic-based and rule-based techniques."[5] These algorithms operate on inputs that are selected by developers and assigned relative weights—degrees of influence on the result—depending on the context and the human judgments they are designed to implement.[6] Rule-based algorithms must be exact, telling a computer precisely what to do, in what order, and in response to precisely defined inputs; every action taken, including every response to any given input, is built into the algorithm during programming.[7] Algorithms may be used to implement a website's decisions about which content to feature prominently and for whom; which content to demote, whether across the board or among certain users; which content to flag for further human review; and which content to remove altogether.[8] Algorithms may do this, for example, by promoting, demoting, flagging, or removing content that contains certain predefined keywords.

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[5] Singhal et al., *SoK: Content Moderation in Social Media, from Guidelines to Enforcement, and Research to Practice* 2 (2023), https://arxiv.org/pdf/2206.14855.

[6] *Automatically Generating and Ranking Results*, Google, https://www.google.com/search/howsearchworks/how-search-works/ranking-results (last visited June 19, 2026).

[7] *Inputs and Outputs*, BBC, https://www.bbc.co.uk/bitesize/articles/z7wckty.

[8] *Our Approach to Facebook Feed Ranking*, Meta, https://transparency.meta.com/features/ranking-and-content/ 2026); *Types of Content We Demote*, Meta, https://transparency.meta.com/features/approach-to-ranking/types-of-content-we-demote/ (2025).

Algorithms may also incorporate machine learning, including large language models. Machine-learning tools can process language contextually by recognizing patterns.[9] Developers create the machine-learning tools and assemble annotated datasets to train those tools to identify particular content characteristics. This training is iterative and shaped by the developers at every step.[10] Machine learning can identify nuanced similarities between pieces of content along predefined parameters—for instance, content like what a user has previously engaged with. These tools can also be supplied with a website's policies and examples of violative and non-violative content, and directed to identify similar material. To that end, developers design "precise, task-specific instructions" that "guide models toward accurate" outputs, including through step-by-step decision-making processes.[11] Thus, website operators can use machine learning to implement content-moderation policies and curatorial objectives at the scale required.

B. Prioritizing And Ranking Third-Party Content Are Expressive

Newspapers and magazines exercise editorial judgment in deciding which stories to feature on the front page, which advertisements to run in which markets,

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9 *LLM*, Stan. Univ. Info. Techs., https://uit.stanford.edu/service/techtraining/ai-demystified/llm.

10 Palla et al., *Policy-as-Prompt: Rethinking Content Moderation in the Age of Large Language Models*, in Proceedings of the 2025 ACM Conference on Fairness, Accountability, and Transparency 840 (2025), https://dl.acm.org/doi/10.1145/3715275.3732054.

11 *Id.*

and which news to carry only in a local edition. Online service providers make the same fundamental editorial decisions, deploying algorithms to carry them out at scale. Just as a print publication prioritizes particular stories, online services' operators "use ... algorithms" to "prioritiz[e]" and "rank[]" the "billions of posts or videos ... that could wind up on a user's customized feed or recommendations list," including on the basis of "a user's expressed interests and past activities," "features of the communication or its creator," and a provider's "Standards and Guidelines." *NetChoice*, 603 U.S. at 734-740. These decisions reflect human judgments about what kind of content to prioritize—whether content that is new, from particular communities, popular, and so on. *See id.* at 738 (explaining that "curating ... feeds ... create[s] a distinctive expressive offering" resting on "a wealth of choices" about "which messages are appropriate and which are not (or which are more appropriate and which less so)").

In general, online services' operators recommend, prioritize, and rank content to users through a series of steps. First, they may identify the relevant universe of content that might be shown to a particular user. The operator may decide to narrow that universe based on a set of rules and policies; the user's own actions (such as whom the user follows); and predictions about the user's likely

interests.[12] Second, the provider's developers may identify potentially thousands of "signals" that they deem relevant to predicting what content a given user most wants to see.[13] Those signals can include, for example, the user's past activities, the user's social networks and relationship to the content's creator, as well as information about the creator, the content itself, and how other users have interacted with it.[14] Third, the provider's developers may use algorithms to predict, based on those signals, what content the user is most likely to want to see or to engage with, and rank and display it accordingly.[15]

At each step, online services' operators and employees exercise their own subjective value judgments by deciding, among other things, which inputs or signals to feed into their algorithms, how much weight to give each, and how, where, and to whom to display the resulting content. Because these are expressive judgments, the way content is prioritized and ranked looks very different from one provider to the next.

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12 *Instagram Ranking Explained*, Instagram (May 31, 2023), https://about.instagram.com/blog/announcements/instagram-ranking-explained; *Our Approach to Facebook Feed Ranking*, *supra* note 8; *Facebook Help Center*, Facebook, https://www.facebook.com/help/1257205004624246; Goodrow, *On YouTube's Recommendation System*, YouTube Blog (Sept. 15, 2021), https://blog.youtube/inside-youtube/on-youtubes-recommendation-system.

13 *Id.*

14 *Id.*

15 *Id.*

YouTube's policymakers and developers, for example, design its recommendations to "connect billions of people around the world to content that uniquely inspires, teaches, and entertains."[16] "Unlike other platforms," YouTube focuses its recommendations on content rather than on a user's "social network."[17] Although YouTube once recommended content based on site-wide popularity, creating "one big 'Trending' page," it has shifted to models that recommend content based on each user's expressed or predicted interests.[18] And for topics "where accuracy and high quality are key—like news, personal finance and medical and scientific information—[it] elevate[s] high-quality voices" using signals of quality and reliability.[19] YouTube's curatorial algorithms thus prioritize viewer interest and reliability.

Facebook's designers built a social-networking service that sorts content based on, among other things, how likely a user is to comment on a post and "how likely the post is to spark a conversation."[20] Facebook first identifies the posts shared by a user's connected "friends," and filters and sorts them based on signals about the user, the content, and whether the content—though not itself violative of

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16 Goodrow, *supra* note 12.
17 *Id.*
18 *Id.*
19 *Recommendations*, YouTube, https://www.youtube.com/howyoutubeworks/recommendations/.
20 *Our Approach to Facebook Feed Ranking*, *supra* note 8.

any policy—may nonetheless be problematic, such as content that discusses self-harm or is sexually suggestive.[21] Facebook also sorts content based on what content is more likely to spark conversation. For example, Facebook may prioritize live videos over ordinary videos because live videos "tend to lead to more discussions."[22] And to help users build new connections, a personalized Facebook Feed displays a mix of content from people the user is friends with or follows together with content Facebook thinks the user will "be interested in from those ... [the user] may want to know."[23] Facebook's curation is thus designed to foster connection and conversation.

Instagram's operators, for their part, have expressly tuned its ranking algorithms to reflect the value they place on originality. Because "[o]riginal creators are the heart of Instagram," the service has updated its algorithms to recommend only original content, not content from "aggregators who primarily re-upload others' work"—regardless of how likely Instagram predicts a user would be to engage with it.[24] Under its originality policy, Instagram prioritizes images a

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21 *Id.*; *Facebook Help Center*, *supra* note 12.

22 *No, Your News Feed Is Not Limited to Posts From 26 Friends*, Meta (Feb. 6, 2019), https://about.fb.com/news/2019/02/inside-feed-facebook-26-friends-algorithm-myth/.

23 *Our Approach to Facebook Feed Ranking*, *supra* note 8.

24 *Rewarding Original Creators on Instagram*, Instagram for Creators (Apr. 30, 2026), https://creators.instagram.com/blog/rewarding-original-creators-on-instagram.

user took, content a user designed, or content a user "materially edited" in a way that makes the user's "additions meaningfully enhance the content."[25] Instagram has, in its words, "invest[ed] in tools and systems to ensure original content gets the credit and distribution it deserves."[26] Instagram likewise wants to "reduce the possibility of [users] seeing something offensive" from an account they "haven't yet chosen to follow," and so declines to recommend content that, while permitted, "some people may consider ... sensitive or offensive."[27] In these ways, Instagram has honed its algorithms to prioritize originality while respecting users' preferences.

The differences between these services are not incidental. The choices carried out through algorithms—about which signals matter and how much they should count—reflect the mission and values chosen by company leaders, which is why no two services curate alike. Across these services, the same basic editorial work is performed through tools that allow the people who run websites to apply their curatorial judgments to billions of items of third-party content each day.

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25 *Id.*

26 *Id.*

27 *Instagram Ranking Explained*, *supra* note 12.

II. THE FIRST AMENDMENT PROTECTS THE USE OF ALGORITHMS TO DISSEMINATE CONTENT AND MAKE EDITORIAL AND CURATORIAL DECISIONS

The First Amendment analysis rests on settled principles. For more than half a century, courts have protected the editorial judgments of those who gather and present the speech of others—newspaper editors deciding which stories to print, cable operators deciding which channels to carry, parade organizers deciding which contingents may march. Online service providers exercise that same judgment when they choose which third-party content to display and how to organize and prioritize it. As the Supreme Court confirmed in *NetChoice*, those curatorial choices are protected expression. *See infra* Part II.A. That protection attaches to the provider's expressive compilation, and operates independently of Section 230's statutory shield against liability for the third-party content itself. *See infra* Part III.

Plaintiffs' contrary arguments reduce to the claim that this protection evaporates when software does the work. Not so: algorithms are tools that embed editorial judgments their human designers made in advance, and the First Amendment's protections do not diminish when a speaker adopts new tools to implement its expressive choices. *See infra* Part II.B. Nor does curation lose protection when content is ranked based on a user's own actions and demographics, or in pursuit of engagement and advertising revenue: predicting

what a reader will value is the essence of a recommendation, and recommendations, like other expressions of opinion, are protected regardless of any economic motive. *See infra* Part II.C.

A. The First Amendment Protects Editorial And Curatorial Decision-Making

The First Amendment's protection here begins with a basic proposition: "[T]he creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). As the Supreme Court has put it, "if the acts of disclosing and publishing information do not constitute speech, it is hard to imagine what does fall within that category." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (cleaned up).

The choices that shape a compilation of others' speech—what to include, what to exclude, and what to emphasize—are themselves expressive. For more than half a century, the Supreme Court has recognized that the First Amendment protects the "exercise of editorial control and judgment" over third-party speech. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). In *Tornillo*, that meant a newspaper was free to prioritize certain viewpoints regarding political candidates over others and could not be forced to publish a candidate's response to criticism it published. *Id.*; *accord New York Times Co. v. Sullivan*, 376 U.S. 254, 265-266 (1964) (the First Amendment protects the selection of paid, non-commercial advertisements for inclusion in a newspaper). The Court extended the

same principle to cable operators in *Turner Broadcasting System, Inc. v. FCC*, which "are entitled to the protection ... of the First Amendment" because they "exercis[e] editorial discretion over which stations or programs to include in [their] repertoire[s]." 512 U.S. 622, 636 (1994) (quotation omitted). And in *Manhattan Community Access Corporation v. Halleck*, the Court reaffirmed that private parties who open their property to the speech of others may "exercis[e] editorial discretion over" that speech. 587 U.S. 802, 813 (2019). In exercising that discretion, "a narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569-570 (1995).

Consistent with these precedents, the Supreme Court explained in *NetChoice* that online service providers' curation of third-party content is protected under the First Amendment because it "combin[es] 'multifarious voices' to create a distinctive expressive offering" based on judgments about "which messages are appropriate and which are not (or which are more appropriate and which less so)." 603 U.S. at 738. Those are "expressive choices" that "receive First Amendment protection." *Id.* at 740.

B. The Same Protections Apply To The Use Of Algorithms Designed To Curate And Organize Content Created By Others

"[T]he basic principles of freedom of speech and the press … do not vary" when "a new and different medium for communication appears." *Brown v. Entm't*

Merchants Ass'n, 564 U.S. 786, 790 (2011) (quotation omitted). Nor do the First Amendment's protections diminish when a new medium calls for new tools to carry out a speaker's expressive choices.

Given the volume of content online, "the use of algorithms"—including those that "select[] and rank[]" content "based on a user's expressed interests and past activities" as well as "features of the communication or its creator"—is "[t]he key to" how websites operate. *NetChoice*, 603 U.S. at 734-735. Indeed, without the ability to pre-program curatorial decisions through sophisticated algorithms, service providers would lack any feasible means of filtering the flood of daily content into a digestible set of content reflecting each provider's unique values and mission.

Plaintiffs echo Justice Barrett's *NetChoice* concurrence to argue that "AI-driven algorithms" do not reflect a human's "communicative intent." Patterson Br. 50; *see also NetChoice*, 603 U.S. at 746. But Justice Barrett merely observed that "if a platform's owners hand the reins to an AI tool and ask it simply to remove 'hateful' content," with no training on what qualifies, that "might" require a different constitutional analysis. 603 U.S. at 746. She did not suggest that use of such algorithms would receive no constitutional protection, as Plaintiffs ask this Court to rule. More importantly, there is no allegation that the algorithms at issue here have free rein over Defendants' moderation actions. As explained above,

algorithms are tools that implement the content-moderation and curatorial policies and preferences of the individuals in charge of online services. Algorithms that use machine-learning methods are shaped by the parameters set by their programmers—through, for example, model design, training, fine-tuning, and more. Plaintiffs are therefore wrong to suggest (Patterson Br. 50) that "Respondents' AI outputs" cannot embody protected editorial judgments. "[T]he algorithms themselves were written by human beings," and they "inherently incorporate the [website] engineers' judgments" about what content to surface. *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 438-439 (S.D.N.Y. 2014) (quotations omitted). The relevant human judgments are simply made in advance: a service provider decides what content is valuable, relevant, or violative, and developers then build those judgments into algorithms through their model architecture, training data, and fine-tuning. The algorithms thus apply the provider's policies to new content guided by predefined parameters.[28] That an algorithm rather than a person implements those judgments no more forfeits their First Amendment protection than an editor forfeits editorial freedom by using software to select and arrange a page's content rather than pasting it up by hand.

In short, editorial curation at the scale of the modern Internet cannot be separated from the tools that carry it out. To deny First Amendment protection

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[28] Palla et al., *supra* note 10.

based on the use of tools that make such curation possible would thus be to deny protection to the curation itself. The Supreme Court has repeatedly emphasized that those curation decisions must be protected. *E.g., NetChoice*, 603 U.S. at 740; *Tornillo*, 418 U.S. at 258; *Hurley*, 515 U.S. at 569-570.

C. Algorithmic Curation Is No Less Protected Where It Ranks Content Based On User Actions And Demographics

Plaintiffs also invoke Justice Barrett's musing in her *NetChoice* concurrence about whether or how the First Amendment would apply to algorithmic recommendations based on predictions about what a "user will like." 603 U.S. at 746. The unstated premise is that an algorithm keyed to a user's own activity does not convey the judgment of the people who built it. That is wrong. Such algorithms carry out website operators' recommendations based on expressive judgments about what qualities make content likely to appeal to users. Courts across the country consistently recognize that recommendations—which are "subjective evaluation[s]" of quality or appeal—are a protected form of opinion. *See, e.g.*, *Perfect Choice Exteriors, LLC v. Better Bus. Bureau of Cent. Ill., Inc.*, 99 N.E.3d 541, 549-552 (Ill. App. Ct. 2018) (a "D-" rating assigned to a business is a "subjective evaluation" and a constitutionally protected "expression[] of opinion"); *Marcus v. Swanson*, 539 P.3d 605, 611 (Kan. 2023) (a one-star customer rating "was an opinion" and not actionable); *Trahanas v. Northwestern Univ.*, 64 F.4th

842, 859 (7th Cir. 2023) (a letter withdrawing a recommendation for medical school contained "constitutionally protected statements of opinion").

Courts have thus held that recommendations reflected in algorithmically generated rankings are protected expression. In *Search King, Inc. v. Google Technology, Inc.*, for example, the court held that a search engine's rankings are "opinions" entitled to "full constitutional protection," precisely because the ranking a given algorithm produces is a "fundamentally subjective" assessment of a website's "significance" to a "search query"—that is, an assessment of which websites a user is interested in seeing. 2003 WL 21464568, at *3-*4 (W.D. Okla. May 27, 2003); *see also Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-631 (D. Del. 2007) (dismissing, on First Amendment grounds, claims that sought to dictate how search engines rank and present their results). The algorithmic rankings challenged here are no different.

A recommendation does not lose its expressive character just because it takes account of the recipient's known preferences. Consider an academic reference for a clerkship. A letter stating "I recommend this student for a clerkship in your chambers" would be no less expressive if it rested on the recommender's assessment that the student had similar qualities to others the judge had hired than if it rested solely on the recommender's own view of the student's writing. In

either case, the recommendation conveys the recommender's judgment and subjective assessment of the student's suitability.

Nor does it matter that filtering and ranking content may be designed to maximize user engagement and, in turn, advertising revenue. "[T]he First Amendment extends to all persons engaged in expressive conduct, including those who seek profit (such as … website designers)." *303 Creative LLC v. Elenis*, 600 U.S. 570, 600 (2023). Prioritizing a social-media post based on a prediction that a user will engage with the post (and thereby drive advertising revenue) is no different from a magazine placing its most sensational story on the cover to attract buyers at the newsstand. Similarly, studies confirm that newspaper editors devote follow-up coverage to online stories that attract more clicks.[29] That choice may be profit driven, but no one would dispute it merits First Amendment protection.

Finally, curating content based on the information a service provider has about its users is independently protected because it reflects a decision about how to use information the provider possesses. The "right to speak" encompasses the right to decide how "the information" one "possesses" "might be used or disseminated." *Sorrell*, 564 U.S. at 568 (quotation omitted).

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[29] Sen & Yildirim, *Click Bias in Editorial Decisions: How Does Popularity Shape Online News Coverage?* (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619440.

III. SECTION 230 PROTECTS THE USE OF ALGORITHMS TO RECOMMEND CONTENT

Section 230 of the Communications Decency Act provides an independent and overlapping bar to Plaintiffs' claims. Whereas the First Amendment safeguards a provider's own expressive judgments about how to assemble and present its service, Section 230 bars claims that would treat the provider as the publisher of the third-party content it hosts—whatever tools it uses to publish it. As Plaintiffs acknowledge, Section 230 bars claims that "'seek[] to hold a service provider liable for its exercise of a publisher's traditional editorial functions.'" Patterson Br. 41 (quoting *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 289 (2011)). Section 230's bar extends to claims seeking to hold a provider liable for "deciding whether" or how "to publish, withdraw, postpone or alter content," *Shiamili*, 17 N.Y.3d at 289, that is, any claim seeking to impose a duty that would require a provider to change how it "moderate[s] content," *Estate of Bride ex rel. Bride v. Yolo Technologies, Inc.*, 112 F.4th 1168, 1177 (9th Cir. 2024). Claims, like Plaintiffs', challenging how providers recommend content are therefore barred, as they would require providers to change whether, how, and where they display third-party content. That remains true for "algorithmic content delivery and recommend[ations]," which are "a form of publisher conduct." *Doe 1*, 174 F.4th at 1169 (quotation omitted).

A. Recommending Content Is A Traditional Editorial Function

The editorial functions protected by Section 230 include not only disseminating content, but also filtering, ranking, and recommending content. *Shiamili*, 17 N.Y.3d at 289. Section 230, moreover, "does not differentiate between 'neutral' and selective publishers," equally protecting those who selectively "choose among proffered material" or otherwise play "an active, even aggressive role in making available content prepared by others." *Id.* (quotation omitted). Courts across the country have held that publishing functions include "promot[ing] or downplay[ing] third-party posts." *Doe 1*, 174 F.4th at 1167; *accord, e.g.*, *M.P. ex rel. Pinckney v. Meta Platforms Inc.*, 127 F.4th 516, 526 (4th Cir. 2025) ("arranging and sorting content"); *Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019) ("arranging and distributing third-party information"); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1096 (9th Cir. 2019) ("recommendations").

These decisions are right. Just as newspaper publishers exercise editorial discretion when deciding what stories to feature above the fold, or what to highlight in a regional or national edition, so too do online service providers when determining what content to feature prominently in a user's feed. "[S]ince the early days of the Internet," online service providers have "'match[ed]' … information and individuals" by deciding "where on their sites … particular third-

party content should reside and to whom it should be shown." *Force*, 934 F.3d at 66. In that way, they "form[] 'connections' and 'matches' among speakers, content, and viewers of content," which "is an essential result of publishing." *Id.*; *accord In re Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 832 (N.D. Cal. 2023) ("[R]ecommend[ing]" content is "indistinguishable from publishing, it is the means through which defendants publish third-party content to users."). Recommending or "matching" content to users is thus a traditional editorial function.

B. Section 230's Protections Do Not Change Where Recommendations Are Implemented By Algorithms

That conclusion does not change where websites use algorithms to "automate [their] editorial decision-making." *Force*, 934 F.3d at 67. That is unsurprising: Congress extended Section 230's protections to providers of software and tools that filter, pick, choose, and organize third-party content, *see* 47 U.S.C. § 230(f)(4), and today's content-moderation algorithms differ from their enactment-era predecessors only in scale and sophistication, not kind. As explained above, such algorithms reflect editorial decision-making: they are human-designed tools used to implement at scale a provider's content-related policies and preferences. And Section 230's protections turn on "the duty that [a] plaintiff alleges the defendant violated"—specifically, whether that duty "derives from the defendant's status or conduct as a 'publisher or speaker,'" *Barnes v. Yahoo!, Inc.*, 570 F.3d

1096, 1102 (9th Cir. 2009)—rather than on the "specific editing or selection process" used, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003). Accordingly, "automated editorial acts" still "come[] within a publisher's traditional editorial functions" because they are still "editorial acts," *i.e.*, actions regarding what third-party content is shown to whom, *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016). "[A]lgorithmic content delivery and 'recommending' content," which is "meant to facilitate the communication and content of others," is therefore "a form of publisher conduct." *Doe 1*, 174 F.4th at 1169; *accord Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1271 (D.C. Cir. 2019) (the "use [of] automated algorithms" to edit third-party content "come[s] within the protection of § 230").

"Accepting plaintiffs' argument would eviscerate Section 230(c)(1)." *Force*, 934 F.3d at 66. "The amount of information communicated via interactive computer services is … staggering," *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), and only getting more so. *See supra* p.3. In the face of that deluge, automated tools are the only practicable way to filter, sort, and organize content so that online services are manageable and relevant to users. Stripping websites of Section 230's protections based on their use of content-moderation algorithms would open them up to liability for developing technological solutions to exercise editorial functions in the only feasible way—exactly contrary to Section

230's purpose. "[I]t would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized from civil liability." *Force*, 934 F.3d at 67.

IV. ATTACKING ALGORITHMS AS DEFECTIVE PRODUCTS CANNOT EVADE THE FIRST AMENDMENT OR SECTION 230 WHEN THE ALGORITHMS IMPLEMENT CONTENT-MODERATION DECISIONS

Plaintiffs cannot evade the First Amendment or Section 230 by casting their claims in terms of product liability. Courts have long refused to treat ideas and expressions as "products" subject to liability for the harm they allegedly cause. *See, e.g.*, *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991). Product-liability claims are accordingly barred by the First Amendment and Section 230 where "[a]ddressing the[] [alleged] defects would … require that defendants change how or what speech they disseminate." *In re Social Media Adolescent Addiction*, 702 F. Supp. 3d at 836 (regarding the First Amendment); *accord id.* at 831 (similar, regarding Section 230). That includes defects regarding "when and to whom [a defendant] publish[es] content." *Id.* at 837. That is because any claim, including a product-defect claim, that alleges harm from the "effects of [third-party] content" seeks to hold the defendant liable "for not moderating [that] content" in a different way, *Bride*, 112 F.4th at 1180—which is what the First Amendment and Section 230 preclude.

In re Social Media Adolescent Addiction is illustrative. There, the plaintiffs alleged, among other things, that the "timing and clustering" of online services' notifications were defective because they "increase[d] addictive use." 702 F. Supp. 3d at 837. The Northern District of California held that claim was barred by both Section 230 and the First Amendment because it sought to hold the defendants liable for their "choices about when and to whom to publish content notifications," imposing a duty that could not be addressed "other than by changing the way defendants[] publish" content. *Id.* at 831, 837. It was immaterial there that the plaintiffs framed their claim in terms of "the process through which" content was disseminated "to increase the quantity of user interaction," rather than its content. *Id.* at 833-834. That is because "[r]egardless of defendants' intent" or motivations, the relevant "conduct" is "identical to publishing." *Id.* at 834.

The same conclusion follows here. Plaintiffs' claims would require Defendants to change how they publish third-party content in at least two respects. First, satisfying the duty Plaintiffs seek to impose would require Defendants to stop recommending content that could be deemed to promote violence or racism and thus cannot be squared with the First Amendment or Section 230. As the decision below observed, "Plaintiffs do not allege, and could not plausibly allege, that the shooter would have murdered Black people had he become addicted to anodyne content, such as cooking tutorials or cat videos." *Patterson v. Meta Platforms Inc.*,

239 N.Y.S.3d 726, 735 (App. Div. 2025). Rather, the complaints tie Plaintiffs' harms not to Defendants' recommendation of content in an addictive way, but to their allegedly recommending "progressively more extreme" content that "promoted racism, antisemitism, and gun violence." R.173 (¶¶ 171-176). According to Plaintiffs' theory, it was the subject matter of the recommended content—not the mere fact that the shooter was spending time on social media—that allegedly radicalized him and motivated the shooting. *E.g.,* R.129-131 (¶¶ 3-4, 11); R.175 (¶ 180).

Second, even setting aside the content's subject matter, remedying the alleged defect would require Defendants to change how they publish third-party content. Plaintiffs argue that Defendants' services are defective because their algorithms are designed to increase user screen time by recommending "discordant material" (Patterson Br. 43) and content that is "progressively more stimulative" (Salter Br. 32). Even if the "discordant" or "stimulative" character of the content could be separated from its violent or racist character, the result would not change. Just as with a tabloid's choice of a cover story, promoting content likely to grab and keep a user's attention is quintessential publishing conduct. As explained above, recommendations are a form of "publishing … third-party content," *In re Social Media Adolescent Addiction*, 702 F. Supp. 3d at 831, and recommendation algorithms "are tools meant to facilitate the communication and content of others,"

Dyroff, 934 F.3d at 1098. Seeking to hold Defendants liable for how their algorithms recommend content thus challenges their exercise of traditional publishing functions. Even under Plaintiffs' framing, to address the alleged product defect, Defendants "would have to alter" how they recommend content—specifically, whether and how they prioritize content that could be deemed "discordant" or "stimulative." Indeed, because the alleged defect lies in how third-party content is recommended, there is nothing Defendants could do to remedy it "that would not impact their publication of third-party content." *In re Social Media Adolescent Addiction*, 702 F. Supp. 3d at 830. The claims therefore treat Defendants as publishers of third-party content, which Section 230 forbids, while simultaneously attacking the editorial decisions Defendants make in selecting and displaying content, which the First Amendment forbids. *Id.*

V. SECTION 230 AND THE FIRST AMENDMENT WORK TOGETHER TO PROTECT WEBSITES' EDITORIAL DECISIONS REGARDING THIRD-PARTY CONTENT

Section 230 and the First Amendment each protect service providers' ability to moderate and curate content, though in slightly different ways. The First Amendment protects service providers' rights to shape the cumulative expression of the service by determining what third-party content to include or reject and how to organize and prioritize it. As discussed above, this cumulative expression distinguishes online platforms and attracts their unique audiences. *See supra* I.B.

Like the parade organizer in *Hurley*, a service provider's choices—regarding what third-party content to display and how—are "expressive" in that they shape the "messages … communicated by [users'] feeds as a whole." *NetChoice*, 603 U.S. at 739-740. That is true even if the cumulative message is not "'narrow'" or "'succinctly articulable,'" *id.* at 732, and even though no one would "wrongly attribute to [the service provider] the views in an[y] individual post," *id.* at 739.

Section 230, in turn, ensures that service providers can exercise the same editorial discretion over the third-party content they disseminate by protecting them from liability for either the substance of that content or their decisions whether and how to publish it. *E.g., Zeran*, 129 F.3d at 330. Section 230 thus allows providers to engage in active content moderation—including filtering and recommending content—without assuming liability for its substance, while simultaneously safeguarding the ability of individual users to express themselves freely online without providers aggressively moderating to fend off tort liability. *See id.*

This two-fold protection has fostered the growth of the modern Internet. The number and diversity of online service providers and users continue to grow, and service providers have developed and implemented the tools necessary for

moderation to keep pace.[30] Thus, Internet users today, whatever their interests or viewpoints, can share or quickly find relevant information among the billions of posts on Facebook or through emerging niche sites.

Plaintiffs seize on the Appellate Division's purported "conclu[sion]" 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.'" Patterson Br. 47 (quoting *Patterson*, 239 N.Y.S.3d at 734). That reading confuses an aside, offered for the sake of argument, for the court's holding. The Appellate Division ventured the observation only after assuming that the Third Circuit's reasoning in *Anderson v. TikTok, Inc.*, 116 F.4th 180 (3d Cir. 2024), was correct—an assumption it had already rejected. *See Patterson*, 239 N.Y.S.3d at 732 ("We do not find *Anderson* to be persuasive authority."). And for good reason. In *Anderson*, the Third Circuit wrongly held that because content-moderation algorithms are expressive, a service provider's use of those algorithms transforms the content they disseminate into the provider's own first-party speech. *Anderson*, 116 F.4th at 184. That reasoning fatally misunderstands the First Amendment's role in protecting content moderation. As the Supreme Court explained, the First Amendment protects compilations of third-party speech

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30 *Section 230*, Electronic Frontier Foundation, https://www.eff.org/issues/cda230.

because of the messages "communicated by the [compilations] as a whole," "*in toto*," not because any individual post somehow becomes the provider's own speech once selected for dissemination or prioritization. *NetChoice*, 603 U.S. at 739. Indeed, as explained, *NetChoice* made clear that compilations of third-party speech are protected even though "no one w[ould] *wrongly attribute* to [the compiler] the views in an individual post," *id.* (emphasis added), recognizing that compilational speech is protected despite the component-third-party speech *not* being attributed to the compiler.

In sum, Section 230 and the First Amendment do not create blanket protection for all acts a service provider may take. They instead provide overlapping protection for providers' exercise of editorial discretion.

"Given that 'First Amendment values ... drive [Section 230],' it should be no surprise if the two protections overlap." *Computer & Comm'ns Indus. Ass'n v. Paxton*, 2026 WL 2130729, at *14 (5th Cir. July 24, 2026) (citation omitted). The overlap reflects Congress's recognition of the vital role editorial decisions play in the Internet age. Without the ability to filter and sort content free from threat of liability—doable at the scale required only with algorithms—there could not be the breadth or depth of online fora available today, and the sheer volume of content in any forum would overwhelm users' ability to find anything of relevance. The

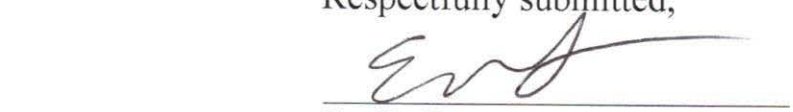
decision below rightly found the use of those essential tools to be protected by Section 230 and the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Date: August 27, 2026

Respectfully submitted,



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AFFIRMATION OF COMPLIANCE

Pursuant to 22 N.Y.C.R.R. §§ 500.1(j) and 500.13(c)(1) & (3), the undersigned, as attorney for amici, hereby certifies and affirms the foregoing was prepared using the Microsoft Word for Office word-processing system in a proportionally spaced typeface, Times New Roman, and in 14-point type, including footnotes. The undersigned further certifies that according to the word-count feature of Microsoft Word for Office, the brief contains 6,994 words, which complies with the limitations stated in § 500.13(c)(1).

Emily Barnet

APL-2025-00158
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Court of Appeals
of the
State of New York

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

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents.

(For Continuation of Caption See Inside Cover)

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August 27, 2026

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Defendants.

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

AFFIDAVIT OF SERVICE

Emily Barnet hereby affirms the following to be true under the penalties of perjury, pursuant to CPLR 2106(a):

1. On August 27, 2026, I caused a copy of the Software & Information Industry Association and the Computer & Communications Industry Association's Motion for Leave to File Amici Curiae Brief In Support of Defendants-Respondents and Affirmance to be served electronically via email to the email addresses designated by the following attorneys and upon consent of all parties to receive electronic service:

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2. I affirm this 27th day of August 2026, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Affirmed: August 27, 2026

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