

No. SJC-13747  
Appeals Court No. 2024-J-0724

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**COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT**

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COMMONWEALTH OF MASSACHUSETTS,

*Plaintiff-Appellee,*

v.

META PLATFORMS, INC. AND INSTAGRAM, LLC,

*Defendants-Appellants.*

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On Direct Appellate Review from an Order of  
the Superior Court for Suffolk County, No. 2384CV02397

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**BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS  
AND EXPRESSION IN SUPPORT OF DEFENDANTS-APPELLANTS AND  
REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

*Amicus Curiae* Foundation for Individual Rights and Expression is a nonprofit, tax-exempt corporation organized under § 501(c)(3) of the Internal Revenue Code; it has no parent company, issues no stock, and no publicly held corporation owns a ten percent or greater interest in it.

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended individual rights without regard to speakers’ views through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights. FIRE’s work includes litigating to protect expressive rights in the digital realm—ensuring courts apply First Amendment protections consistently, and that they are not subverted or weakened based on misunderstandings or fears about emerging technologies. *See, e.g., NetChoice, LLC v. Bonta*, 113 F.4th 1101 (9th

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<sup>1</sup> FIRE submits this brief pursuant to Mass. R. App. P. 17(a) (permitting the filing of an *amicus* brief when solicited by the court) and this Court’s solicitation of *amicus* briefs, dated March 19, 2025. No counsel for a party authored this brief in whole or part. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. Neither FIRE nor its counsel represents, or has represented, any of the parties to this appeal in another proceeding involving similar issues or was a party or represented a party in a proceeding or legal transaction at issue in this appeal.

Cir. 2024); *Volokh v. James*, (2d Cir. 2025), *certification accepted*, No. 124, 2025 WL 2646981 (N.Y. Sept. 16, 2025); *Students Engaged in Advancing Texas v. Paxton*, 765 F. Supp. 3d 575 (W.D. Tex. 2025), *appeal docketed* No. 25-50096 (5th Cir. Feb. 11, 2025); *see also* Brief of FIRE et al. as *Amicus Curiae* in Support of Petitioners, *TikTok Inc. v. Garland*, 604 U.S. 56 (2025); Brief of FIRE as *Amicus Curiae* in Support of Respondents, *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

Particularly relevant here, FIRE opposes unconstitutional government efforts to restrict speech on social media. FIRE attorneys represented NetChoice in challenging California’s Age-Appropriate Design Code Act, *NetChoice v. Bonta*, No. 5:22-cv-08861-BLF (N.D. Cal.), and individual social media users in challenging Utah’s Minor Protection in Social Media Act, *Zoulek v. Hass*, No. 2:24-cv-00031-RJS-CMR (D. Utah). FIRE is especially concerned with attempts to disguise government intrusions into speech as mere conduct regulation subject to lesser scrutiny. *See, e.g.*, Br. *Amicus Curiae* FIRE Supp. Pls.-Appellants, *Alario v. Knudsen*, No. 24-34 (9th Cir. 2024). FIRE also has grave concerns about attempts to weaken or undermine Section 230,

which has allowed the Internet to fulfill its promise of democratizing and safeguarding online expression. *See, e.g., Aaron Terr, Why repealing or weakening Section 230 is a very bad idea, FIRE* (Feb. 20, 2023), <https://bit.ly/4nWT3hl>.

## INTRODUCTION

The Internet has changed dramatically—for better and for worse—in the decades since the “information superhighway” first captured the public’s attention and imagination with its promise to connect the world and usher in a golden age of communication. But as the saying goes, the more things change, the more they stay the same.

For as different as online communication and our relationship with it look compared to 30 years ago, the two legal pillars that enable the Internet’s unprecedented democratization of speech are as critical—and important to preserve—as ever. Of paramount importance, the First Amendment enshrines and protects “the basic principles of freedom of speech and the press ... [which] do not vary when a new and different medium for communication appears.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790

(2011) (cleaned up). And to ensure that the “vast democratic forums of the internet,” *Reno v. ACLU*, 521 U.S. 844, 868 (1997), remain open for speech across a diverse array of competitive offerings, Section 230 of the Communications Act of 1934, 47 U.S.C. § 230, establishes the nationwide rule that creators of content, not the online services that host it, are legally responsible for it.

But these bulwarks of online expression are challenged by another unyielding force: humanity’s fear of new media and communication technology, and its propensity to blame them for the perceived social ills of the day. *See generally* Amy Orben, *The Sisyphean Cycle of Technology Panics*, 15 *PERSPS. ON PSYCH. SCI.* 1143 (2020) (exploring similarities between moral panics about new media, from radio and film to comic books, to contemporary concerns about social media). Each previous panic has featured claims that new media is “addicting” youth, causing immeasurable harm. *See id.* at 1143, 1148 (radio and film crime dramas were described as a “habit-forming practice very difficult to overcome” leading to increased nervousness and fear, and the “chronic stimulation” of comic books were

thought to be “contributing factors to many children’s maladjustments”). The Commonwealth of Massachusetts continues that trend here.

## SUMMARY OF ARGUMENT

The Commonwealth sued Meta alleging that certain “design features” —notifications, infinite scrolls, auto-playing videos, and ephemeral content—“addict” young users, causing a litany of mental health harms stemming from compulsive usage. Its suit flouts the First Amendment’s protection of Meta’s choice of what speech to distribute and in what manner and format to do so. And it flouts the immunity Section 230 provides Meta against litigation that seeks to hold it liable for its publication of third-party content.

Nevertheless, the court below denied Meta’s motion to dismiss, holding Section 230 does not immunize Meta against the Commonwealth’s claims because they target only Meta’s “own injurious conduct” and not the third-party content it publishes. And it held the Commonwealth’s claims do not implicate the First Amendment because they target the “conduct” and

“product design” of Meta’s content delivery features, not expression. Both conclusions are error.

But first things first. This interlocutory appeal is properly before the Court under the present execution doctrine because forcing Meta to appeal after a final judgment will result in the complete, irremediable loss of the immunity from suit that Section 230 supplies, frustrating the law’s purpose. That Section 230 provides immunity from suit in this case is evident from its text, which states that “no cause of action” inconsistent with its provisions may be brought under any state law. And it is confirmed by the law’s objectives: continued development of new online services in a competitive marketplace, and the enablement of diverse communities and avenues for user-generated expression at scale. Neither objective can be achieved if online services must bear the burden of litigating—even victoriously—each of the unimaginably massive number of user posts and content decisions made every minute of every day.

The trial court’s attempt to carve out “design features” from Section 230 immunity is contrary to law and logically unsupportable. The design

features at issue represent decisions about how to display third-party content—quintessential publishing activity at the core of Section 230’s protection. And the harms alleged are entirely dependent on third-party content. While widespread claims of “addiction” are dubious in general,<sup>2</sup> in any event, Meta’s design features could not cause it in isolation. It’s not just that there must be *some* content; there must be content users want to see. Moreover, impacts like “social comparison” stem, by definition, from certain types of content that permit users to engage in comparison. The Commonwealth’s position contains no limiting principle that would prevent any claim about harmful content from being repackaged as claims about *how* that content was delivered—running afoul of established law and threatening to effectively nullify Section 230.

Because Meta also asserts First Amendment defenses, this Court should keep in mind that while the First Amendment and Section 230 serve

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<sup>2</sup> See Kevin Y. Xu et al., *Screen Use and Social Media “Addiction” in the Era of TikTok: What Generalists Should Know*, 120 MO. MED. 440 (2023) (explaining that the language of addiction and dependence is misapplied to social media use, often obfuscating real underlying mental health conditions and hindering their diagnosis and treatment).

complimentary goals, their analytical frameworks are separate and distinct. That the First Amendment protects a design feature (*e.g.*, how content is delivered) does not render that expression ineligible for immunity as first-party speech. To the contrary, Section 230 enhances a platform's ability to make constitutionally protected editorial decisions by immunizing services from lawsuits based on them.

The trial court also erred in holding the Commonwealth's claims implicate only "conduct" and "product design" rather than expression. The design features at issue reflect Meta's editorial decisions about the form, manner, and arrangement of content—no different than a newspaper's decision to use a broadsheet format and place attention-grabbing stories above the fold, a publisher's choice of color and other design elements of a book's binding, or a podcast's decision to use a narrative or interview style. Such decisions shape the overall communicative effect and receive First Amendment protection.

## ARGUMENT

### I. The Trial Court's Denial of Immunity Under Section 230(c)(1) Satisfies the Requirements of the Present Execution Doctrine

Denial of Section 230 immunity is immediately appealable under the present execution doctrine's narrow exception to the general rule that only final orders are appealable, allowing interlocutory review where an order "will interfere with rights in a way that cannot be remedied on appeal from a final judgment." *Benoit v. Frederickson*, 454 Mass. 148, 151–52 (2009). This exception does not extend to denials of immunity from ultimate liability, but it does apply in the situation presented here, where the law provides immunity from *suit*: "where protection from the burden of litigation and trial is precisely the right to which a party asserts an entitlement ... [and] [e]ven if the erroneous order were ultimately reversed after trial, the right to immunity from suit would still have been lost forever." *Lynch v. Crawford*, 483 Mass. 631, 634 (2019) (cleaned up).

Both the text and the underlying objectives of Section 230 demonstrate that it immunizes Meta from the burden of litigating the claims in this case, requiring immediate review.

**A. Section 230's Plain Language Confers Immunity from Suit**

Meta asserts immunity under Section 230's primary immunity, which provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). To give this rule nationwide effect, Section 230 further decrees: "*No cause of action may be brought* and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3) (emphasis added).

Meta's briefing capably explains that the prohibition against bringing causes of action creates immunity from suit on its face, and why any other reading would violate the canon against surplusage. *See* Meta Br. at 20–21; Meta Reply Br. at 7–9. The Commonwealth responds that because immunity from suit inherently precludes liability, "the paragraph contains surplusage either way ... [s]o the surplusage point is a wash." Commonwealth Br. at 28.

But this is not so. The Commonwealth’s reading fails to account for the practical operation of Section 230’s other immunity, which gives the preclusion of liability separate effect and permits a reading that does not contain surplusage.

Section 230(c)(1), at issue in this case, is absolute: if information is provided solely by another party, no other user or service provider may be treated as the publisher of that information—period. Accordingly, Section 230(c)(1)’s application is often apparent on the face of a complaint, allowing courts to dispose of *causes of action* at the earliest possible juncture. Because Section 230’s policy, as explained below, is to extend the broadest immunity possible, in such cases the immunity is properly classified as from suit.

In contrast, 47 U.S.C. § 230(c)(2)(A) provides a different immunity, protecting users and service providers from being *held liable* for “any action voluntarily taken in good faith to restrict access to or availability of material” —even if the content was not provided solely by a third party and therefore ineligible for Section 230(c)(1) immunity. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009). Section 230(c)(2)’s use of the phrase “held

liable” shows that this immunity is what “no liability may be imposed” refers to. 47 U.S.C. § 230(e)(3).

Moreover, because this immunity requires good faith, a properly pled allegation of bad faith can preclude courts from early-stage determination of its applicability in some cases. See Eric Goldman, *Online User Account Termination and 47 U.S.C. § 230(c)(2)*, 2 UC IRVINE L. REV. 659, 666 (2012) (“Deferential courts may refuse to grant § 230(c)(2) immunity on a motion to dismiss if the plaintiff alleges a lack of good faith, which gives plaintiffs the chance to hunt for evidence ... .”) (footnote omitted). Because, on its face, Section 230(c)(2)(A) contemplates potential factual issues resolvable only by summary judgment or trial, its immunity is more accurately classified as from liability rather than suit.

Properly construed, Section 230(e)(3) therefore does not contain inherent surplusage. “No cause of action may be brought” refers to the immediately ascertainable application of 230(c)(1)’s absolute bar to suit, whereas “no liability may be imposed” immunizes against liability where a defendant invokes 230(c)(2)(A) and—after discovery—ultimately proves

that they acted in good faith. In this case, Meta asserts 230(c)(1) immunity, which implicates Section 230's absolute bar on causes of action—*i.e.*, suit—and therefore this appeal is properly before the Court.

**B. The Underlying Objectives of Section 230 Confirm Its Intent to Provide Immunity from Suit**

The Commonwealth asserts that “nothing in the text, findings, policy statements, or legislative history of Section 230 indicates any intention to shield interactive computer services from the burden of litigation.” Commonwealth Br. at 28. To the contrary, Section 230's findings and policy statements demonstrate that the motivating purpose and objectives of the law can only be achieved with liability from suit.

**1. Section 230 Was Written to Foster Development of Diverse, Competing Online Services by Limiting Legal Exposure**

Section 230 was born out of concern about the impact of two trial court rulings in the early days of the World Wide Web. The first, *Cubby, Inc. v. CompuServe, Inc.*, ruled that an online service exercising no substantial editorial control over hosted material was a distributor, not a publisher, of

that material—and could therefore only be liable for it if the service knew or had reason to know of the tortious content. 776 F. Supp. 135 (S.D.N.Y. 1991). The second held that because another online service, Prodigy, marketed itself as “family-oriented” and made efforts to screen and remove offensive third-party content, it was more than a mere distributor—it became a publisher of *all* content it hosted. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

Taken together, these rulings disincentivized online services from engaging in any content moderation for fear of becoming liable for all the content it hosted. Even at the comparatively tiny scale of the Internet at that time, services would have found it impossible to enforce content rules perfectly for every piece of third-party content.

Senator Ron Wyden and then-Congressman Chris Cox wrote the bill that would ultimately be enacted as Section 230 to overturn those decisions and prevent expansive liability and intrusive government regulation from hindering development of the still-nascent Internet and stifling free speech in this new medium. *See generally* Jeff Koseff, *The Twenty-Six Words That*

*Created the Internet* 59–62 (2019). Their aim was to encourage the proliferation of online services, each of which could set and enforce their own rules and compete in a free and robust market without exposure to insurmountable liability.

This objective was speech-enabling twice over: it made the hosting of user-generated content economically feasible, providing the public with new communicative channels, and it enabled service providers to create a diverse array of communities aligned with their own (and their users’) interests, expressive preferences, and values.

These aims are reflected in Section 230’s text, which includes the finding that online services “offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,” 47 U.S.C. § 230(a)(3), as well as the policies of “promot[ing] the continued development of the Internet and other interactive computer services,” and “preserv[ing] 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)(1)–(2) .

Section 230 achieves this objective by protecting services not just from liability, but the costs and burden attendant with the voluminous litigation that would otherwise accompany hosting third-party content at scale.

## **2. Fostering Development and Proliferation of Diverse and Competitive Online Services Requires Protection from the Burden of Litigation**

Protecting against only ultimate liability would not just fail to advance Section 230’s goal of fostering a diverse and competitive marketplace of online services, it would have the opposite effect: consolidating market share in established, well-heeled incumbents and erecting high barriers to entry for competitors.

The cost of litigation, even to ultimate victory, can easily overwhelm the budget of small or nascent services. According to one survey, simply filing a motion to dismiss costs an online service at least \$15,000, and potentially up to \$80,000—an amount almost equal to an entire month’s

operating budget for a *well-funded* startup. See Engine, *Startups, Content Moderation, & Section 230* (Dec. 9, 2021), <https://bit.ly/3XkUriH>. If the lawsuit survives dismissal and proceeds to discovery, costs rapidly balloon to the hundreds of thousands of dollars. *Id.* An online service that hosts third-party content potentially faces this risk for each piece of content it hosts, creating a constant (and growing) existential threat from litigation costs alone. While large, established services may have resources to absorb this risk, smaller and startup competitors could easily face insolvency from just one or two lawsuits.

Section 230 had the express purpose of mitigating this threat to competition, as Senator Wyden recently explained:

Just look at Bluesky, which has gained millions of users in only a few months ... Without Section 230, anyone aggrieved by a decision from Bluesky's nascent moderation team could initiate a devastating lawsuit on any number of claims, smothering it in legal fees even if it won. The next upstart may never launch at all — leaving users with no alternatives to the government-favored Big Tech cartel.

Ron Wyden, *Why the internet still needs Section 230*, THE VERGE (Mar. 10, 2025), <https://bit.ly/4oEjCJl>.

Courts have long acknowledged that effectuating Section 230's intent requires protecting services from the crushing burden of litigation costs posed by hosting third-party content. *See, e.g., Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174–75 (9th Cir. 2008) (“[S]ection 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.”); *see also Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 206 (1st Dist. 2017) (noting that protection against litigation burden serves Section 230's policies of promoting “the continued development of the Internet” and preserving “the vibrant and competitive free market”); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1202 (N.D. Cal. July 30, 2009) (acknowledging the “special form of ‘prejudice’ to defendants who improperly are denied early dismissal of claims falling within the zone of [Section 230] immunity”); *Levitt v. Yelp! Inc.*, Nos. C-10-1321-EMC & C-10-2351-EMC, 2011 WL 5079526 at \*8 (N.D. Cal. Oct. 26, 2011) (“The Ninth Circuit has made it clear that the need to defend against a proliferation of lawsuits, regardless of whether the provider prevails, undermines the purpose of section 230.”).

And this Court has recognized “the importance of determining immunity issues early” to ensure immunities designed to “protect ... from harassing litigation” serve their intended purpose. *Brum v. Dartmouth*, 428 Mass. 684, 688 (1999) (cleaned up). That is precisely what Section 230 guards against: repetitive, voluminous litigation arising whenever someone is upset about a piece of content or a service’s content moderation decision. As the Ninth Circuit explained in *Roommates.com*, the ability to cleverly plead tenuous claims of malfeasance by an online platform requires broad application of Section 230 immunity, “lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties.” 521 F.3d at 1174.

### **3. Protecting Against Litigation Burden Accords with Section 230's Goal of Fostering Free Speech**

Section 230’s goal of fostering free speech online similarly requires protection from litigation burden. Courts have long noted that without

Section 230, tort liability “would have an obvious chilling effect” due to the impossibility of pre-screening content at scale:

Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

*Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

Without this protection, the cost of litigating over each complained-of piece of content would not be economically viable. As a result, platforms would likely remove content upon receiving a complaint as a matter of course, causing “collateral censorship: the proactive removal of legitimate content as a prophylactic way of reducing potential legal risk and the associated potential defense costs.” Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 41 (2019). Courts have thus explained that Section 230’s protections are “effectively lost if a case is permitted to go to trial [and we] thus aim to resolve the question of § 230 immunity at the earliest possible stage of the case.” *Nemet Chevrolet*,

*Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009); *cf. Maxwell v. AIG Domestic Claims, Inc.*, 460 Mass. 91, 98, 102 (2011) (interpreting as an immunity from suit an insurance law provision providing that “no insurer ... shall be subject to civil liability” arising from reports of potentially fraudulent conduct, because “reporting might be chilled if protection could be secured only after litigating a claim through to conclusion”).

**C. Present Execution Does Not Require Complete Resolution of the Litigation**

The Commonwealth claims Meta’s interest in protection from the burden of litigation is “weak” for two reasons: it has not sought a stay of the ongoing discovery, and its arguments on appeal would not resolve the entire litigation. Both arguments misplace the locus of analysis.<sup>3</sup>

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<sup>3</sup> The Commonwealth’s position is particularly troubling because while the defendant here is well-resourced and can absorb the expense of conducting discovery while pursuing its immunity, this Court’s decision will bind smaller online services that could not. Their rights must not be imperiled on the claim that a wealthier party in a different case would not have suffered significant fiscal harm.

Nothing in this Court's jurisprudence suggests the present execution doctrine's application varies based on the particular level of inconvenience or burden that any one appellant might suffer. Rather, the doctrine's purpose is to protect against interference with a right that cannot be remedied on appeal. The salient question is therefore what kind of protection the legislature intended to provide generally, not whether the effect on any one appellant is severe enough to be concerned about.

Nor does it matter, even assuming it to be true, that "Meta's Section 230 and First Amendment defenses cannot fully resolve the case." Commonwealth Br. at 32. This court has repeatedly refused to limit the present execution doctrine to circumstances where interlocutory appeal would resolve the entire litigation. See *Benoit v. Frederickson*, 454 Mass. 148, 152 (2009) ("Our holding in the *Fabre* case did not limit the right to interlocutory appeal from the denial of a special motion to dismiss to cases where no other claims or counterclaims remain pending."); *Kent v. Commonwealth*, 437 Mass. 312, 316 (2002) ("There is nothing in the *Brum* case

that supports limiting interlocutory review to cases where the immunity issue alone would resolve the entire case.”).

Because Section 230 immunizes Meta against suit for the types of claims brought by the Commonwealth, this appeal is properly before the Court.

## **II. The Trial Court Erred in Holding Section 230 Does Not Immunize Against the Commonwealth’s “Design Features” Claims**

The trial court erred in accepting the Commonwealth’s insistence that its claims only seek “to hold Meta liable for its own injurious conduct ... not that of any other party,” and “does not seek to hold Meta liable for its conduct as a publisher or speaker ... [but] in its distinct capacity as a product designer.” Memo. & Order on Mot. to Dismiss, Oct. 17, 2024, at 13, 16.

Section 230 protects online services and their users from being “treated as the publisher or speaker” of third-party content. 47 U.S.C. § 230(c)(1). Accordingly, “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding

whether to publish, withdraw, postpone or alter content—are barred.” *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016) (cleaned up).

The Commonwealth’s distinctions are illusory. Whether Section 230 immunizes Meta depends not on whether Meta’s own conduct may have contributed to injury; it is whether the liability sought rests on its role as a publisher of third-party content.

**A. The Commonwealth’s Claims Are Based on Meta’s Activities as a Publisher of Third-Party Content**

The editorial tools at issue are not meaningfully separable from Meta’s role as a publisher simply by labeling them “product design.” Features like notifications, infinite scroll, ephemeral content, and auto-play are, by definition, editorial choices about how, when, and where to display third-party content. The means by which a platform displays, arranges, and organizes content—like a newspaper’s decision to use a broadsheet format and its placement of stories—are quintessential publishing activities. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 716–17 (2024) (social media platform decisions about “how to display” content akin to how “[t]raditional

publishers and editors ... select and shape other parties' expression into their own curated speech products"). And courts routinely refuse to permit pleading around Section 230 by recasting publishing decisions as a platform's "own injurious conduct" as the Commonwealth here attempts.

The Second Circuit explained why such rhetorical maneuvers are inconsistent with Section 230 at length in *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019). In *Force*, the plaintiffs argued that Section 230 does not immunize against claims that a platform's "matchmaking" algorithms, which provided "friend suggestions" as well as content recommendations, caused injury. *Id.* at 65. The Second Circuit rejected arguments that a platform's "matchmaking" features are distinct from its publishing activities:

Indeed, arranging and distributing third-party information inherently forms "connections" and "matches" among speakers, content, and viewers of content, whether in interactive internet forums or in more traditional media. That is an essential result of publishing. Accepting plaintiffs' argument would eviscerate Section 230(c)(1) ...

And, of course, the services must also decide what type and format of third-party content they will display .... All of these

decisions, like the decision to host third-party content in the first place, result in “connections” or “matches” of information and individuals, which would have not occurred but for the internet services' particular editorial choices regarding the display of third-party content. We, again, are unaware of case law denying Section 230(c)(1) immunity because of the “matchmaking” results of such editorial decisions.

*Id.* at 66–67; *see also M.P. v. Meta Platforms*, 127 F.4th 516, 526 (4th Cir. 2025) (rejecting the argument that Facebook’s algorithm is a “product” not immunized by Section 230 and holding that “acts of arranging and sorting content” are protected by Section 230 regardless of whether they are done for the purpose of increasing user engagement); *Dyroff v. Ultimate Software Grp, Inc.*, 934 F.3d 1093 (9th Cir. 2019) (rejecting attempt to plead around Section 230 by claiming anonymity features, rather than content, caused the alleged harm); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007) (rejecting attempt to evade Section 230 by claiming that the “construction and operation” of a website constituted “culpable assistance” to subscribers committing tortious acts).

The trial court and Commonwealth fail in attempting to distinguish *Force* and similar precedents by asserting that in those cases, claims were

“closely tied” to third-party conduct, whereas “third-party content is not an essential component of the Commonwealth’s claims” here because the alleged harms come from “Instagram’s design features *themselves*, which purportedly cause addictive use, and not from the viewing of any specific third-party content.” Memo. & Order on Mot. to Dismiss, Oct. 17, 2024, at 13, 17.

To the contrary, the *Force* plaintiffs *did* assert a claim based on a design feature—friend suggestions—that did not depend on specific content. The Second Circuit still expressly ruled Section 230 precluded the claim. As Meta explains, nothing in Section 230 limits its protection to claims alleging injury from a specific, identifiable piece of third-party conduct. Meta Br. 26–27; Meta Reply Br. 12–14.

**B. The Alleged Harms in This Case Depend on Third-Party Content**

The harms alleged by the Commonwealth, more importantly, are not isolable from third-party content. The Commonwealth asserts Instagram’s design features “addict” young users, causing them to spend unhealthy

amounts of time using the platform. But it fails to grapple with the question that inescapably follows: using the platform to do *what*? The answer, of course, is *to view third-party content*. No matter, the Commonwealth argues, because nothing about that content—whether “porn or puppies”—causes the harm; the “compulsive usage” itself injures young users. Commonwealth Br. at 34.

But far from proving that its claims do not rely on third-party content, the Commonwealth’s “porn or puppies” argument instead illustrates why its claims are inextricably linked to the content users encounter. The Commonwealth’s argument presupposes the presence of third-party content *that users find appealing or attractive*. Were the only content on Instagram videos of beige paint drying, nobody would become addicted simply because Instagram notified users that another one posted then auto-played it in an infinitely scrolling feed. And, importantly, there would be no harm from the boring feed.

Similarly, if Instagram contained only the most deeply enriching, educational material, it is doubtful that—even if some youth engaged in

compulsive use—the Commonwealth would file suit claiming that young users were spending an unhealthy amount of time learning on the platform. The alleged harms are thus in fact closely dependent on the nature of the content the platform serves.

As if to prove the point, the Commonwealth asserts that addiction to Instagram harms youth by, among other things, inducing “negative social comparison.” Compl. ¶ 201. But “social comparison” is the result of *specific types of content* users post and encounter. It requires content—such as pictures of activities, vacations, parties, or “selfies”—that allows a user to compare themselves with others. The trial court, too, implicitly acknowledged that the harms from “addiction” are inextricably linked with third-party content:

It is consistent with the purpose of Section 230 to recognize a common law duty that providers refrain from actions that injure minor users by inducing frequency and length of use of a social media platform to the point where a minor is addicted and *can no longer control the information they receive* from the platform.

Memo. & Order on Mot. to Dismiss, Oct. 17, 2024, at 18 (emphasis added). A duty that ultimately seeks to ensure users can “control the

information they receive” inherently ties the harm to the impact of content consumed.

The trial court’s reliance on *Lemmon* to support its conclusion that the liability sought is for Meta’s own, non-publishing conduct evinces a similar failure to “look under the hood” of the claims. *Lemmon* held that Section 230 did not protect Snapchat for creating a filter that allowed users to communicate their speed with others, which allegedly encouraged users to drive unsafely. *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021). But the harm alleged in *Lemmon* was divorced from content in a way that the Commonwealth’s claims are not. The speed filter could cause harm without the existence of any third-party content at all.

While a user’s actions may have been motivated by a desire to share content with others, they could be encouraged by the filter’s design to drive unsafely, use the speed filter in doing so, and still end up injured even if they did not send (or encounter) any content on the platform at all. In contrast, as explained above, the harms from platform “addiction” only arise when a user spends too much time viewing third-party content—and certain *kinds*

of content at that. Claims alleging these kinds of harms are within the heartland of Section 230's protection,<sup>4</sup> and the trial court's decision to the contrary was error.

### **C. The Commonwealth's Position Would Broadly Undermine Section 230**

The Commonwealth's "design feature" claims boil down to liability for Meta's choices about how, when, and where to display third-party content, with no coherent limiting principle. The rules it proposes would effectively swallow Section 230 whole by permitting any claim attacking the mechanism of delivering content that ultimately results in harm.

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<sup>4</sup> See, e.g., *M.P.*, 127 F.4th 516 (design feature claims barred because they could not be proven without reference to particular types of content); *Estate of Bride v. Yolo Technologies, Inc.*, 112 F.4th 1168 (9th Cir. 2024) (negligent design claims against service barred because the unreasonable risk of harm was that users would encounter certain content); *Backpage.com, LLC*, 817 F.3d 12 (claim that website was designed to enable prostitution was based on harm from offending content); *Angelilli v. Activision Blizzard, Inc.*, 781 F. Supp. 3d 691 (N.D. Ill. 2025) (addiction claims against video game platform based on its "socializing effects" barred because they implicate the effect of content on users); *Patterson v. Meta Platforms, Inc.*, 239 N.Y.S.3d 726 (App. Div. 4th Dep't 2025) (claims that defective platform design addicted user to racist content, leading him to commit a racist murder barred by Section 230).

The Supreme Court recently grappled with the impossibility of separating a platform’s choices about content delivery from other acts of publishing—such as how a platform arranges and organizes content. In *Gonzalez v. Google*, plaintiffs argued that YouTube’s suggestions for related videos, and the thumbnails accompanying them, were the platform’s own conduct and thus not immunized by Section 230. Br. for Pet. 43–47, *Gonzalez v. Google*, No. 21-1333 (U.S. Nov. 30, 2022). At oral argument, the justices spent considerable time questioning how they could draw a line that would not eviscerate Section 230 and make platforms liable for every decision regarding the organization and display of third-party content.

As Justice Kagan concisely summarized:

Every time anybody looks at anything on the internet, there is an algorithm involved, whether it’s a Google search engine or whether it’s this YouTube site ... or countless other things, that everything involves ways of organizing and prioritizing material ... and I guess what I’m asking is ... does your position send us down the road such that 230 really can’t mean anything at all?

*Gonzalez v. Google*, No. 21-1333, OA Tr. 9–10 (U.S. Feb. 21, 2023). Justice Kagan later illustrated this concern by noting that search results are the

result of a platform's own prioritization choices and questioning whether the petitioner's position would gut Section 230: "there is a lot of uncertainty about going the way you would have us go, in part, just because of the fact that, once we go with you, all of a sudden we're finding out that Google isn't protected." *Id.* at 45–46; *see also id.* at 75–76 (Justice Kagan explaining that "you can't present [] content without making choices").

Other justices similarly questioned whether they could draw a workable line. Ultimately, the justices were left wondering whether they were being asked to rewrite the statute: "And maybe Congress should want that [outcome], but isn't that something for Congress to do, not the Court?" *Id.* at 46.

Despite taking the case to decide whether Section 230 immunizes a platform for its choices in prioritization, organization, and display of content, the Court ultimately went a different way. In a brief opinion, the Court noted the plaintiffs' underlying causes of action were unlikely to survive in any event and remanded the case, leaving Section 230's broad reach intact. *Gonzalez v. Google*, 598 U.S. 617, 622 (2023).

Section 230 does not make the distinctions the Commonwealth seeks, and neither should this Court.

### **III. Meta's First Amendment Defense Is Not at Odds with Section 230 Immunity**

Meta correctly asserts that its design features are expressive and therefore protected by the First Amendment. This Court must take care not to conflate the constitutional and statutory analyses by entertaining the deceptive notion that Meta's status as a speaker for First Amendment purposes transforms any such protected speech into first-party speech not entitled to immunity under Section 230. In fact, it is Meta's expressive activity as a publisher that necessitates and triggers the immunity in the first instance.

Section 230 exists precisely to support the exercise of an online platform's First Amendment right to exercise editorial control—including how content is arranged and displayed—by shielding them from liability for those decisions. If platforms exercising their First Amendment rights to curate third-party speech inherently constituted the type of first-party

speech unprotected by Section 230, the First Amendment would swallow Section 230 entirely; a platform’s content and display choices receiving First Amendment protection under *Moody* are coextensive with the activities that Section 230 protects, namely “reviewing, editing, and deciding whether to publish or withdraw” content.

That Section 230 does not exclude exercises of a platform’s First Amendment rights from protection is self-evident from its purpose. If parties protected by Section 230 were not engaged in publishing—a quintessential First Amendment activity that ordinarily carries a risk of liability—they would not need protection from being *treated as* a publisher.

The decision of Congress to protect certain activity for *liability purposes* does not (and could not) alter its status as expression for *First Amendment* purposes. Put simply: whether activity is protected by the First Amendment and whether that activity is immunized by Section 230 are entirely separate questions—and neither answer impacts the other.

#### **IV. The Design Features at Issue Are Expressive and Protected by the First Amendment**

The trial court erred in summarily rejecting Meta’s First Amendment defense without substantive analysis beyond the bare assertion that the Commonwealth’s claims are “principally based on conduct and product design, not on expressive content.” Memo. & Order on Mot. to Dismiss, Oct. 17, 2024, at 19. As the Supreme Court noted in *Moody*, the expressiveness of a social media platform’s offering is “the product of a wealth of choices about whether—and, if so, how—to convey posts having a certain content or viewpoint. *Moody*, 603 U.S. at 738 (emphasis added); *see also id.* at 716 (“[P]latforms ... are indeed engaged in expression. ... [They] make choices about what third-party speech to display and how to display it.”). Because they are part of the constellation of editorial choices that shape a platform’s expressive offering, changing the form, manner, or timing of a platform’s content delivery necessarily alters its speech. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper, and the *decisions made as to limitations on the size and content of*

the paper ... constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees.” (emphasis added)); *see also M.P.*, 127 F.4th at 526 (newspaper company’s placement of stories “above the fold” for the purpose of helping it sell more newspapers is a traditional editorial function).

Other courts have found that the types of features at issue here are expressive and protected by the First Amendment. Most notably, in a case cited heavily by the trial court in its Section 230 analysis, one judge explained that a design feature is protected by the First Amendment if remedying the alleged defect would “require that defendants change how or what speech they disseminate.” *In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 836 (N.D. Cal. Nov. 14, 2023). Analyzing allegations regarding the “timing and clustering of notifications” to “increase addictive use,”<sup>5</sup> the court held there is “no way to interpret

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<sup>5</sup> Though the court was writing about notifications of the defendants’ own content, that is because the court separately held claims targeting notifications pertaining to third-party content were barred by Section 230.

plaintiffs' claim with respect to the frequency of the notifications that would not require defendants to change when and how much they publish speech. This is barred by the First Amendment." *Id.* at 837.

Other courts confronting "addiction" claims against expressive online services have noted that the alleged "addiction" is typically a reflection of the service's success in crafting expression that users find enjoyable. One court recently explained:

The Court ... rejects Plaintiffs' argument that the First Amendment is not implicated because 'Defendants could have prevented [Plaintiffs'] injuries by fixing the defective features without changing any content at all.' This is about as persuasive as saying the First Amendment would not be implicated by a mandate that authors not end chapters on cliffhangers because moving a chapter heading does not affect a book's content. The reason video games allegedly injured Plaintiffs is because they were so engaging D.G. could not stop playing. If Plaintiffs' allegations are accepted as true, to remove the engaging elements of the game would be to fundamentally alter a user's playing experience.

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702 F. Supp. 3d at 833. The First Amendment would demand the same outcome for notifications pertaining to third party-content.

*Angelilli*, 781 F. Supp. 3d at 702; *see also Courtright v. Epic Games, Inc.*, No. 2:24-CV-04055-BCW, 2025 WL 2319148, at \*6 (W.D. Mo. Aug. 11, 2025) (claims alleging that design elements made video games addictive by being “too entertaining” barred by the First Amendment); *cf. Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578 (2011) (“That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.”).

The trial court’s oblique invocation of products liability is at odds with the limited scope of such claims. Courts have universally distinguished the tangible properties of a product from its expressive properties, the latter of which cannot support a products liability suit. “A magazine article is easily distinguishable from items such as gunpowder, fireworks, gasoline and poison which have an obvious physical effect. It is not, for example, like a slingshot with physical properties which cause harm ....” *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803 (S.D. Tex. 1983) (cleaned up); *see also Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977) (defects in a book’s binding or printing may support a products liability claim, but claims

targeting the intangible communicative content of a product are precluded by the First Amendment).

As explained above, Meta's design features are expressive, and they cannot themselves cause harm without accompanying expression, unlike a slingshot or fireworks. While the complexities of modern technology can make direct comparisons to other products conceptually difficult, the underlying principle is unyielding: the First Amendment's prohibition against imposing liability for harms allegedly caused by protected expression cannot be circumvented by calling the expression a "product."

As one court presciently wrote in dismissing a lawsuit alleging that a video game publisher caused a teen's murder by designing its violent game to be "addictive":

Wilson essentially claims that the ideas and expressions in the game are wrapped into a technology so sophisticated that the line drawn in the cases between, for example, the ink and paper upon which Shakespeare's sonnets were penned and the ideas expressed in the sonnets themselves, simply collapses, because there is no longer any way to distinguish between the physical "container" of the ideas and the ideas themselves. This is reminiscent of Marshall McLuhan's famous maxim that "the medium is the message," which posits that "the sociological and

psychological impact of a medium lies as much in the way it delivers content as it does in the content itself.”

*Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 173–74 (D. Conn. 2002) (cleaned up). Rather than exposing words and ideas to liability as the plaintiff there suggested, inability to separate the “container” from the ideas it contains in fact demonstrates the container is expressive—and therefore entitled to First Amendment protection. Whether or not one believes that a social media platform’s design features fit neatly into the “tangible vs. intangible” paradigm, one thing is certain: the technological means, manner, and form that a platform uses to deliver and organize content shapes the overall expressive output and communicative impact of its service. Accordingly, the First Amendment bars the liability sought by the Commonwealth.

## CONCLUSION

For the reasons stated above, this Court should reverse the trial court’s denial of Meta’s motion to dismiss.

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## CERTIFICATE OF COMPLIANCE

I, John G. Mateus, certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Rules 17 and 20. This brief contains 7,499 non-excluded words, which I ascertained using Microsoft Word's word count function. Except on its cover, the brief uses Palatino Linotype 14-point font and was composed in Microsoft Word.

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## CERTIFICATE OF SERVICE

I, John G. Mateus, certify that on November 14, 2025, on behalf of amicus Foundation for Individual Rights and Expression, I electronically filed the foregoing Brief of Amicus Curiae Foundation for Individual Rights and Expression in Support of Defendants-Appellants and Reversal in Commonwealth of Massachusetts v. Meta Platforms, Inc., and Instagram, LLC, No. SJC-13747, via efileMA, with which counsel for Appellee, Christina Chan, Jared Rinehimer and David Kravitz, are registered and will receive automatic service. I also served counsel for Appellants, Paul William Schmidt and Felicia H. Ellsworth, who have consented to electronic service, via email at the email addresses noted below. The contact information of the aforementioned counsel is:

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