SJC-13747

IN THE COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Commonwealth of Massachusetts,

Plaintiff-Appellee,

v.

Meta Platforms Inc. and Instagram, LLC,

Defendants-Appellants.

On direct appellate review from an Order of the Superior Court for Suffolk County, No. 2384CV02397

BRIEF OF THE ELECTRONIC PRIVACY INFORMATION CENTER, COMMON SENSE MEDIA, CYBERSECURITY FOR DEMOCRACY, THE TECH JUSTICE LAW PROJECT, AND LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, *amicus curiae* Electronic Privacy Information Center ("EPIC") is a District of Columbia corporation, Common Sense Media is a California corporation, and Tech Justice Law Project is a fiscally sponsored initiative of the Campaign for Accountability, which is incorporated in the District of Columbia. EPIC, Common Sense Media, and the Campaign for Accountability are non-profit, non-partisan corporations organized under section 501(c)(3) of the Internal Revenue Code with no parent corporations and no publicly held company has a 10 percent or greater ownership interest in them.

PREPARATION OF AMICUS BRIEF DECLARATION

Pursuant to Appellate Rule 17(c)(5), *amici* declare that:

(a) No party or party's counsel authored this brief in whole or in part;

(b) No party or party's counsel contributed money to fund preparing or submitting the brief;

(c) No person or entity other than the *amici* contributed money that was intended to fund preparing or submitting a brief; and

(d) None of the *amici* have represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy and civil liberties issues.[1]

Common Sense Media is a nonpartisan, nonprofit organization dedicated to improving the lives of kids and families by providing the trustworthy information, education, and independent voice they need to thrive.

Cybersecurity for Democracy ("C4D") is a research-based, nonpartisan, and independent multi-university center for problem-driven research and research-driven policy. C4D conducts cutting-edge cybersecurity research to better understand the effects of algorithms and AI tools on large online networks and works with platforms and regulators to help all parties understand the implications of our findings and develop solutions.

The Tech Justice Law Project ("TJLP") is a legal initiative of Campaign for Accountability, a 501(c)(3) nonpartisan, nonprofit organization. TJLP works to ensure that legal and policy frameworks are responsive to emergent technologies and their societal effects.

[1] EPIC attorneys Megan Iorio, Tom McBrien, and Hayden Davis participated in the drafting of this brief.

The legal scholars who join this brief are some of the foremost experts on digital rights, Section 230, and the First Amendment. Signatories list their affiliations for identification purposes only. The brief does not reflect the views of their institutions.

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SUMMARY OF THE ARGUMENT

Neither Section 230 nor the First Amendment bar Massachusetts' claims against Meta. These claims do not treat Meta as the publisher of user-generated content and do not otherwise interfere with Meta's enforcement of its content moderation policies.

Section 230 prohibits courts from "treat[ing]" internet companies as "the publisher[s]" of user-generated content. 47 U.S.C. §230(c). The purpose is to prevent the companies from facing the "moderator's dilemma," not to broadly immunize everything related to the publishing of user-generated content. Understanding what the moderator's dilemma is and how Section 230 prevents it is crucial for understanding the proper scope of Section 230's coverage and why it does not apply to Massachusetts' claims against Meta.

The moderator's dilemma occurs when an internet company's choice to moderate user-generated content on their platform leads to a duty to ensure that the platform contains no unlawful content. To mitigate their liability risk, companies must choose to either proactively monitor and remove all potentially offending content, forgo content moderation altogether, or stop hosting user-generated content. All options are bad for the online speech environment. Companies that choose not to moderate content leave platforms full of harmful and low-quality content they might otherwise have removed. Companies that decide to moderate

have to proactively monitor user speech and block or remove anything that could potentially carry liability, likely preventing users from discussing wide swaths of controversial but important topics. Further, the duty to proactively monitor for and remove all unlawful speech from an online forum is so onerous that many companies would find it impossible and be forced to shut down, drastically limiting the forums available for user speech.

Accordingly, a claim does not "treat" an internet company "as the publisher" of user-generated content unless it (1) would necessarily require them to monitor all user-generated content and remove any tortious or otherwise illegal materials to escape liability, and (2) is imposed simply because the company publishes or moderates user-generated content. Claims that involve publication activities, user-generated content, or neutral tools are not prohibited by Section 230 unless they meet both of these criteria. The claims in this case do not meet either criterion, and so Section 230 does not apply.

Massachusetts' claims are not barred by the First Amendment either, as none of the claims challenge Meta's exercise of protected editorial discretion. In *Moody v. NetChoice*, 603 U.S. 707 (2024), the Supreme Court indicated that platforms exercise protected editorial discretion when they enforce their content moderation policies. But the Court pointedly refused to recognize that *all* decisions companies make about what content to display and how to display it is expressive. The

conduct complained of in this case, rooted in Meta's deception of consumers and unfair design practices—completely separate from content—is decidedly outside the narrow class of activities covered by *Moody*, and does not implicate editorial discretion. Treating such design features as expressive conduct would be an unprecedented expansion of the First Amendment's scope that would hurt consumers and jeopardize many well-established regulatory schemes.

Denying Meta Section 230 and First Amendment protections in this case will not destroy speech and innovation on the internet. Instead, it will protect speech and innovation while incentivizing companies to design and run their services in ways that benefit users. Courts' refusal to expand Section 230's scope in various other cases has not resulted in the dire consequences industry forewarned. The real danger to the internet is in widely immunizing harmful, avoidable behavior from some of society's most powerful corporations.

ARGUMENT

I. Section 230 does not bar Massachusetts' claims.

Section 230 was enacted to prevent the moderator's dilemma, which forces internet companies to make a "grim choice": either remove all unlawful user-generated content, remove none, or stop hosting user-generated content. *HomeAway.com v. City of Santa Monica*, 918 F.3d 676, 684 (9th Cir. 2019). While Section 230 has broad reach to protect against this outcome, it should not be read

to go beyond this. "'[A]n interactive computer service remains liable for its own speech' and for its own unlawful conduct." *Mass. Port Auth. v. Turo*, 487 Mass. 235, 240 (2021) (quoting *Universal Commc'n Sys. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007)). Consequently, Section 230 only applies when a "cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another." *Doe v. Backpage.com*, 817 F.3d 12, 19 (1st Cir. 2016) (citing *Barnes v. Yahoo!*, 570 F.3d 1096, 1101 (9th Cir. 2009). As the trial court correctly recognized, this is not the case here.

A. Section 230 only prevents claims that would force internet companies into the moderator's dilemma.

Preventing the moderator's dilemma was Congress's "principal or perhaps the only purpose" in enacting Section 230. *Fair Hous. Council of San Fernando v. Roommates.com*, 521 F.3d 1157, 1163 n.12 (9th Cir. 2008) (en banc); *see also Backpage.com*, 817 F.3d at 18–19. A close focus on the moderator's dilemma can consequently help a court understand the proper application of the three-prong test adopted in *Turo*, and to successfully distinguish between claims barred by Section 230 and claims that are not.

Section 230 does not apply unless a claim alleges that an internet company had a duty to (1) monitor, edit, or remove user-generated content, (2) solely because of its decision to publish or moderate user-generated content. *See Calise v. Meta Platforms*, 103 F.4th 732, 742 (9th Cir. 2024). If a claim does not satisfy both

criteria, it is not blocked by Section 230. This means that Section 230 does not bar a claim simply because it relates to the publishing of user-generated content. *See id.*; *Lemmon v. Snap*, 995 F.3d 1085, 1092–93 (9th Cir. 2021); *HomeAway.com*, 918 F.3d at 682; *Doe v. Internet Brands*, 824 F.3d. 846, 853 (9th Cir. 2016); *Barnes*, 570 F.3d at 1108.

1. Congress enacted Section 230 to prevent the moderator's dilemma.

The "backdrop against which Congress enacted" Section 230 can help clarify terms of art, like the phrase "treat as a publisher," which could have multiple meanings. *See Stewart v. Dultra Constr.*, 543 U.S. 481, 487 (2005). Congress passed Section 230 in response to a defamation case that treated an internet service provider as the "publisher" and not the "distributor" of user-generated content. *Backpage.com*, 817 F.3d at 18 (discussing *Stratton Oakmont v. Prodigy Servs.*, No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995)). "Publisher" has an established meaning in tort law, and "it is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Universal Health Servs. v. United States ex rel. Escobar*, 579 U.S. 176, 187 (2016) (internal quotation marks omitted). In tort law, a publisher can be held liable "for anything it communicates, even negligently, to a third party." *Calise*, 103 F.4th at 739 (citing Restatement (Second) of Torts § 577 cmt. a (Am. L. Inst. 1938)); *see also Prodigy*,

1995 WL 323710, at *3. Publishers thus have a duty to monitor for tortious materials at common law. Distributors, on the other hand, can only be held liable if a plaintiff establishes that the defendant knew they were disseminating tortious material. *Calise*, 103 F.4th at 739 (citing Restatement (Second) of Torts § 581).

The key distinction between a publisher and a distributor is the level of editorial control the entity exerts over the content it disseminates. Newspapers are traditionally treated as publishers of their news articles and op-eds because they exert high levels of editorial control over those materials. *See Prodigy*, 1995 WL 323710, at *4. Newsstands and libraries, on the other hand, are typically treated as distributors because they are not involved in deciding the content of the publications they disseminate. *See id.* That means that distributors, unlike publishers, cannot reasonably vet the contents of every publication they distribute. Thus, if improperly subjected to the same strict liability as a publisher, a distributor's only option to avoid liability would be to steer away from disseminating anything involving controversial topics, publishers, or speakers. *See* Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, 72 Okla. L. Rev. 635, 643–49 (2020). In other words, they would be forced into the overly censorial choice in the moderator's dilemma.

In the early days of the internet, courts had to decide whether websites that hosted tortious user-generated content should be treated as the publishers or distributors of that content. One court recognized that websites that declined to alter or remove any user-generated content should be treated as distributors because they were not exercising editorial control. *See Cubby, Inc. v. CompuServe*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991). But in *Stratton Oakmont v. Prodigy Services*, the court treated an internet service provider, Prodigy, as a publisher because it promulgated and enforced content guidelines, such as bans on obscenity, on its online bulletin boards. *Prodigy*, 1995 WL 323710, at *2. The court found that Prodigy's decision to moderate content rendered it a publisher; the company thus had a duty to monitor for and remove tortious materials on its platform that it breached by hosting defamatory content. *Id.* at *4; *see also Calise*, 103 F.4th at 739 (discussing the *Prodigy* decision.)

The combination of the outcomes in *CompuServe* and *Prodigy* created the moderator's dilemma: to avoid massive tort liability, a website that wished to host user-generated content had to choose between forgoing content moderation altogether or adopting an onerous process of monitoring, editing, and removing any possibly unlawful user-generated content. This disincentivized content moderation and the hosting of user-generated content.

The *Prodigy* decision sent shockwaves through the ongoing Congressional debate over the Communications Decency Act ("CDA"), the law that would eventually include Section 230. Senators Exon and Coats recognized that, by imposing content moderation obligations on websites, the CDA could risk turning all websites into publishers with dangerously high liability risks. *See* 141 Cong. Rec. 16024–25 (June 14, 1995). They added several defenses to the CDA, such as section (f)(4), which would ensure that compliance with the CDA would not, alone, cause an internet company to be treated as a publisher. *See* S. 652, 104th Cong. § 402(a)(2) (adding § 223(f)(4)) (1995) (codified at 47 U.S.C.A. § 223(f)(1) (West)). The following exchange illustrates the Senators' intent and includes an example of a contemporaneous use of the phrase "treat" as a "publisher" of user-generated content to mean imposing a publisher's duty to remove all tortious content from a platform:

> Mr. COATS. I understand that in a recent N.Y. State decision, Stratton Oakmont versus Prodigy, the court held that an online provider who screened for obscenities was exerting editorial content control. This led the court to treat the online provider as a publisher, not simply a distributor, and to therefore hold the provider responsible for defamatory statements made by others on the system. I want to be sure that the intent of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not other-wise have been liable.

> Mr. EXON. Yes; that is the intent of the amendment.
>
> Mr. COATS. And am I further correct that the subsection (f)(4) defense is intended to protect companies from being put in such a catch-22 position? If they try to comply with this section by preventing or removing objectionable material, we don't intend that a court could hold that this is assertion of editorial content control, such that the company must be *treated under the high standard of a publisher* for the purposes of offenses such as libel.
>
> Mr. EXON. Yes; that is the intent of section (f)(4).

141 Cong. Rec. 16024–25 (June 14, 1995) (emphasis added).

Representatives Cox and Wyden were similarly concerned that *Prodigy* would disincentivize "Good Samaritan" companies from voluntarily moderating content and developing filtering technologies that would enable parents to control what their children saw online. They titled Section 230, their amendment to the CDA, "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material." *See* 47 U.S.C. §230(c). Rep. Cox explained that he sought to protect "computer Good Samaritans from taking on liability such as occurred in the *Prodigy* case in New York." 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995). The representatives were aware that *Prodigy*'s outcome—imposing a publisher's duty on websites because they moderated content—would be "a massive disincentive" to content moderation. 141 Cong. Rec. 22045 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). Thus, the purpose of Section 230 was "to help the internet grow" into a vibrant forum for user speech, *Calise*, 103 F.4th at 739, and to "encourage

websites to . . . screen content without fear" of "liability for such good-faith efforts." *Backpage.com*, 817 F.3d at 19, 18; *Calise*, 103 F.4th at 739.

2. Courts have cabined Section 230 to claims that would cause the moderator's dilemma.

To avoid turning Section 230 into a limitless immunity from liability, courts have cabined the law to claims that would lead to the moderator's dilemma. Section 230 only applies if a "claim would treat the defendant as the publisher or speaker" of user-generated content. *Turo*, 487 Mass. at 240 (quoting *Backpage.com*, 817 F. 3d at 19)). The Ninth Circuit, which has heard the bulk of Section 230 cases and has the most developed caselaw, routinely uses the moderator's dilemma as a lens to interpret what it means to "treat" an internet company "as the publisher" of user-generated content. The Court "looks to the legal duty" underlying the claim and "examine[s] two things," *Calise*, 103 F.4th at 742: first, whether satisfying the duty "necessarily require[s] an internet company to monitor user-generated content" and to edit or remove offending content. *HomeAway.com*, 918 F.3d at 682; *see also Calise*, 103 F.4th at 742; and second, whether the source of the duty—"the 'right' from which the duty springs"—is a company's decision to host or moderate user-generated content. *Calise*, 104 F.4th at 742. When the answer to both questions is "yes", the company faces the moderator's dilemma: it has no choice but to over-censor to ensure no unlawful content remains, abandon content moderation, or stop hosting user-generated

content. If, instead, the duty can be satisfied without monitoring, editing, or removing content, or if it springs from "something separate from the defendant's status as a publisher," like an agreement or their obligations as a product designer, *see id.* (citing *Barnes*, 570 F.3d at 1107; *Lemmon*, 995 F.3d at 1092), the duty does not force the company to choose between one of the options in the moderator's dilemma.

A claim whose underlying duty could be discharged without monitoring, removing, or editing user-generated content gives a company a compliance option outside the undesirable choices in the moderator's dilemma. For example, in *Internet Brands*, the defendant was alleged to have a duty to warn a user of a specific known threat to her safety, which the company learned of through outside sources. *Internet Brands*, 824 F.3d at 849. Discharging this duty would have required the defendant to issue a warning, not to monitor, edit, or remove any user-generated content, so Section 230 did not apply. *Id.* at 852–53. Issuing a warning is not one of the options in the moderator's dilemma and does not have the speech-stultifying effects that Section 230 was meant to prevent.

The same was true in this Court's decision in *Turo*, in which the Port Authority sought to restrict Turo's brokering of car rentals at Logan Airport. This Court upheld an injunction that prohibited Turo from "facilitating" transactions for airport rentals because it did not require Turo to remove any user-generated

content. *Turo*, 487 Mass. at 244, 248. Faced with a similar fact pattern in *HomeAway.com*, the Ninth Circuit came to the same conclusion: Section 230 did not apply because the rental booking companies could comply with an ordinance prohibiting the brokering of unlicensed rentals by disabling bookings for the rentals without monitoring or removing any listings. 918 F.3d at 682–83. Neither Turo nor the rental booking websites faced the moderator's dilemma because the basis for liability was brokering transactions, not hosting illicit user-generated content, and so the companies would not be forced to abandon content moderation, censor user-generated content, or stop publishing such content on their services.

The moderator's dilemma is also not implicated when a company is alleged to have a non-publishing duty—that is, a duty that does not spring from a company's choice to host or moderate user-generated content. *See* Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 Yale L.J. Forum 475, 497–500 (2021). For example, in *Barnes v. Yahoo!*, the court refused to apply Section 230 to a promissory estoppel claim that would have required Yahoo to remove a tortious post. *Barnes*, 570 F.3d at 1109. This was because the duty sprung from Yahoo's promise to remove the tortious post, not the mere fact that Yahoo published user-generated content. *Id.*; *see also Calise*, 103 F.4th at 742. When a company promises to remove user-generated content, it defines the scope of its duty to moderate and can limit the scope of its duty by limiting the scope of

its promise or by not making any promise at all. In Yahoo's case, it was "easy for Yahoo to avoid liability: it need only disclaim any intention to be bound." *Barnes*, 570 F.3d at 1108.

Contrasting the promissory estoppel claim in *Barnes* to the other claim at issue in the case—a negligent undertaking claim blocked by Section 230—demonstrates that the source of a duty is a separate criterion for Section 230 applicability. The negligent undertaking claim, like the promissory estoppel claim, alleged that Yahoo had a duty to remove offending profiles. *Id.* at 1102–03. But unlike the promissory estoppel claim, the negligent undertaking claim attached as soon as Yahoo "undertook" the service of moderating third-party content. *Id.* at 1107. That is, the source of the duty was Yahoo's decision to moderate content, and the duty required Yahoo to remove offending material—a quintessential publishing duty whose imposition leads to the moderator's dilemma.

Duties arising from a company's role as a product designer also generally do not trigger Section 230. The choices a company makes in designing a product, even a publishing-related product, are not always synonymous with moderating or hosting content. For instance, in *Lemmon v. Snap*, the Court held that Snap could face a negligent design claim for choosing to design and release a tool for users to alter the appearance of their photos and videos. Product designers "have a specific duty to refrain from designing a product that poses an unreasonable risk of injury

or harm to consumers." *Lemmon*, 995 F.3d at 1092. Those "acting solely as publishers . . . have no similar duty." *Id.* Thus, when a plaintiff brings a defective design claim against such a company, "[t]he duty underlying such a claim differs markedly from the duties of publishers as defined in the CDA" because it "'springs from' [the company's] distinct capacity as a product designer." *Id.* (quoting *Barnes*, 570 F.3d at 1107). Allowing for liability in such circumstances would not require companies to touch user-generated content at all—companies would have to refrain from releasing tools until they took "reasonable measures to design a product more useful than it was foreseeably dangerous." *Id.* This might delay the release of new tools, or result in fewer tools being released, but it does not lead to the dire speech consequences of the moderator's dilemma: companies engaging in censorship, abandoning content-moderation, or refusing to host user-generated content altogether.

B. Massachusetts' unfair and deceptive trade practice claims do not force Meta into the moderator's dilemma.

Massachusetts alleges that Meta violated duties that spring from its status and conduct as a business and as a product designer, not as a publisher. To discharge the duties alleged in these claims, Meta would need to accurately describe its product or make alternative design choices, not monitor, edit, or remove user-generated content. This is also true of Massachusetts' public nuisance

claim, which is based on Meta's unfair and deceptive conduct and thus implicates the same duties.

1. Section 230 does not bar Massachusetts' deceptive trade practice claims.

Section 230 does not bar Massachusetts' deceptive trade practice claims because they fault Meta for its own statements and omissions, not for users' harmful content. The State's deceptive trade practice claims allege that Meta had a duty not to mislead the public about the nature of its products and services. *See* RA1/113–117. The source of this duty is Meta's role as a consumer-facing company that issues statements about its products. Meta allegedly violated this duty by knowingly misrepresenting important aspects of its services' design and function. For example, the Commonwealth alleges that Meta told the public that its platforms were not designed to be addictive, put the well-being of young users over profit, and were safe. In reality, Meta designed its platforms to be habit-forming, and repeatedly chose not to implement measures it knew could reduce harms to youth. RA1/114–115. These claims are about Meta's own allegedly misleading speech and conduct, not harmful user-generated content, so Section 230 does not apply. *See Turo*, 487 Mass. at 240 (noting that platforms remain liable for their own speech).

Notably, none of these allegations would force Meta into the moderator's dilemma. Meta could discharge its alleged duties by truthfully describing its

services in public, not by monitoring, editing, or removing user-generated content. Being truthful is not one of the "grim" options that Section 230 protects against. The States' deception claims should not be barred.

2. Section 230 does not bar Massachusetts' unfair trade practice claims.

Massachusetts' unfair trade practice claims are also not barred by Section 230. The claims spring from Meta's role as a product designer, not from its publication or moderation of content. To discharge its alleged duties, Meta could remove certain product features or choose alternative designs for those features. Because the design choices at issue are not synonymous with content moderation and making alternative choices would not "necessarily require" Meta to monitor, edit, or remove any content, the claims do not trigger Section 230. *HomeAway.com*, 918 F.3d at 682. Indeed, most of these duties *cannot* be satisfied by monitoring, editing, or removing any content.

Examining each claim as applied to specific trade practices demonstrates that Meta could discharge its duty under each claim without being forced into the moderator's dilemma.

Infinite Scroll and Autoplay

Infinite scroll is a design feature that allows companies to provide a continuous content feed. According to Meta's patent for a continuous content feed, the company's platforms can deliver a never-ending stream of content to a user's

device in a way that feels seamless. U.S. Patent No. 10,783,157 (filed June 15, 2018) (issued Sep. 22, 2020).[2] The feed updates in real-time as the user scrolls, so there's always more content ready without noticeable loading delays. *Id.* Through the autoplay feature, Meta's platforms automatically play the next video or piece of content in users' feeds so they don't have time to decide whether to watch. *See* Common Sense Media & University of Michigan C.S. Mott's Children's Hospital, *Constant Companion: A Week in the Life of a Young Person's Smartphone Use* 29, 32 (2023).[3] Both design features reduce "friction" points that provide a user with a natural opportunity to decide to end their app session. *See id.*; *see also* Brett Frischmann & Susan Benesch, *Friction-In-Design Regulation as 21st Century Time, Place, and Manner Restriction* 25 Yale J.L. & Tech. 376, 394 (2023). This is similar to how casinos banish natural light and clocks from their interiors, incentivizing gamblers to lose track of time.

If implementing infinite scroll and autoplay in young users' feeds is an unfair trade practice, then Meta would discharge its duty by selecting alternative designs, not by monitoring or editing user-generated content. Instead of automatically loading new content at the end of a feed, Meta could load new content only when users give a clear affirmative signal that they want to see more.

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[2] image-ppubs.uspto.gov/dirsearch-public/print/downloadPdf/10783157.
[3] www.commonsensemedia.org/sites/default/files/research/report/2023-cs-smartphone-research-report_final-for-web.pdf.

And instead of automatically playing videos in a feed, Meta could play videos when users click the "play" button.

Both of these alternative designs have historically been the norm on platforms—even Meta's. Some feeds used to "run out" when users had viewed all new content from their social connections. Before companies introduced infinite scroll, companies paginated feeds, so users had to click on a "next page" button to view more posts. *See* Interaction Design Foundation, *What is Infinite Scrolling?* (last visited Nov. 12, 2025).[4] The norm for video playback has historically been to allow the user to decide whether and when to play a video.

Disruptive Notifications

According to Meta's patent governing notifications, Meta uses a system that figures out the best times to send notifications to users so they are more likely to respond to them. U.S. Patent No. 8,751,636 B2 (filed Dec. 22, 2010) (issued June 10, 2014). Clicking on a notification brings a user to the platform, which increases use and time spent on the platform. In determining when to send users notifications, Meta's system considers where the user is located, what they have clicked on before, and how often they engaged with previous notifications. *Id.* Then, the system ranks possible notifications and spaces them out, limiting how many notifications are sent in a given time window. *Id.* It also adjusts over time

[4] www.interaction-design.org/literature/topics/infinite-scrolling.

based on how the user responds—if they start ignoring alerts, the system holds back notifications. Internal company documents show that Meta designs and uses its notification system to induce a "fear of missing out" and to nudge users to spend more time on-platform. RA1/43. Research shows that teen users receive an average of 237 notifications per day on their phone. Common Sense Media & University of Michigan C.S. Mott's Children's Hospital, *supra* note 3.

Meta could alter how notifications are delivered without monitoring, editing, or removing any user-generated content. Notifications could be batched to be sent less frequently altogether, instead of batching to maximize for user response. Notifications could also be sent only during certain parts of the day. Several platforms have blackout periods when they will not send notifications to users they know are minors. For instance, TikTok has a blackout period between 9 PM or 10 PM (depending on age) and 8 AM for minor users. TikTok, *Notifications* (last visited Nov. 12, 2025).[5]

Ephemerality

Ephemerality design features delete user-generated content when a condition is met—for instance, when a certain amount of time has elapsed after the poster shares the content or immediately after the recipient views the content. Meta integrated ephemeral design into Instagram's "Live" and "Stories" features to copy

[5] support.tiktok.com/en/using-tiktok/messaging-and-notifications/notifications.

and compete with competitor Snapchat's disappearing story feature. Alex Kantrowitz, *Snapchat Was 'An Existential Threat' to Facebook—Until an 18-Year-Old Developer Convinced Mark Zuckerberg to Invest in Instagram Stories*, Business Insider (Apr. 7, 2020).[6] According to Snap's patent governing ephemerality, users can create and share temporary photo or video messages, which are grouped together into what the company calls an "ephemeral gallery." U.S. Patent No. 9,537,811 (filed October 2014) (issued January 2017). Each message in the gallery is only viewable for a limited time before it automatically disappears. *Id.* The gallery itself also has a time limit, so the whole collection eventually expires, even if some messages within the collection have not expired. Users can control who sees the gallery and for how long, and the system may show visual indicators—like countdowns—to let viewers know how much time is left before a message disappears. Ephemeral messages and galleries that disappear within a certain, short time period can create "fear of missing out." *See* Santhosh Chitraju, *Ephemeral Content and Attention Span: Psychological Effects of Instagram Stories on User Engagement* (Sep. 18, 2025).[7] This may encourage

[6] www.businessinsider.com/how-developer-mark-zuckerberg-invented-instagram-stories-copied-snapchat-2020-4.
[7] dx.doi.org/10.2139/ssrn.5528198.

users to engage with the platform more frequently than they might otherwise like and reinforce patterns of problematic use.

The unfair trade practice claim alleges that Meta had a duty to not use ephemerality to encourage problematic use. Meta could satisfy this duty by eliminating ephemerality or deploying an alternative design that would minimize problematic use. For example, instead of a user's post automatically disappearing after 24 hours, the same post could be visible to the user's friends or followers only one time when they next open Instagram or Facebook, whenever that happens to be, and then disappear. Discharging this duty would not require Meta to monitor, edit, or remove any content—in fact, turning off ephemerality would involve Meta *leaving up* content the ephemerality feature would have removed.

Algorithms Based on Intermittent Variable Reinforcement Schedules

Massachusetts claims that Meta engaged in an unfair trade practice by integrating intermittent variable reinforcement schedules (IVRSs) into its recommender algorithms. Pulling from a basic concept of operant conditioning popularized by the gambling industry, an IVRS is one of the most effective ways to condition human responses to a particular stimulus by injecting uncertainty over when the subject receives a reward based on a particular action. In Meta's case, the company deploys algorithms that crunch user-specific signals to create an IVRS tailored to that person. *See* Mattha Busby, *Social Media Copies Gambling Methods*

'To Create Psychological Cravings', Guardian (May 8, 2018).[8] As one Meta employee remarked, "Intermittent rewards are most effective (think slot machines), reinforcing behaviors that become especially hard to extinguish." Compl. ¶ 110, *Spence v. Meta Platforms*, No. 3:22-cv-03294, 2022 WL 3572368 (N.D. Cal. June 6, 2022).

Massachusetts alleges Meta has a duty to design its platforms' recommender algorithms in a way that does not manipulate users. This would require Meta to stop using IVRSs. Eliminating this harmful design would not require monitoring, editing, or removing any content, so Section 230 does not apply.

C. Denying Meta Section 230 protections will not destroy the internet.

Section 230 plays an important role in protecting online speech, but an overbroad interpretation of the law is harmful and unnecessary for the law's purposes. This Court's—and other courts'—experience proves that a properly tailored interpretation of Section 230 does not destroy the ability to speak or innovate online. Instead, a proper interpretation provides internet companies with protections from the moderator's dilemma while also nudging them to adopt more pro-social business practices.

[8] www.theguardian.com/technology/2018/may/08/social-media-copies-gambling-methods-to-create-psychological-cravings.

Perhaps the best evidence that denying Meta Section 230 protections will not destroy the internet is that the internet was not destroyed after this Court and other courts previously refused to expand Section 230 to immunize other companies' bad behavior. When this Court recognized that online car rental platforms may be prohibited from brokering transactions at airports when they do not abide by the airports' car rental rules, *Turo*, 487 Mass. at 248, these platforms did not fold or even stop operating at Logan Airport. *See* Turo, *Boston Logan International Airport* (last visited Nov. 12, 2025).[9] When courts said home rental companies had to comply with local regulations against brokering rentals for unregistered properties, *Homeaway.com*, 918 F.3d at 683; *Airbnb v. City of Boston*, 386 F. Supp. 3d 113, 119–23 (D. Mass. 2019), online rental platforms did not fold. When a court said that app developers can be held liable for designing unsafe products, *see Lemmon*, 995 F.3d at 1092–93, platforms did not adopt draconian measures to crack down on user-generated content. When a court found that websites have a duty to warn users about known dangers to their safety, *see Internet Brands*, 824 F.3d at 853, it did not destroy web forums. And when a court held that social media companies have a duty to abide by content moderation promises they make to users, *see Barnes*, 570 F.3d at 1109, it did not destroy social media.

[9] help.turo.com/en_us/boston-logan-international-airport-bos-hosts-B1U2OFQ9o.

Denying Meta Section 230 protection in this case will not stifle speech or destroy social media. The alternative design choices described in Section I.B would not force platforms to censor any topics or viewpoints, nor would they disincentivize content moderation or the hosting of user-generated content. Making different design choices is also very doable. A few social media platforms have already implemented some of the alternative designs described in Section I.B, with no reported negative impacts on speech, such as TikTok's notification "quiet hours." Some of the other alternative designs were the predominant models just a few years ago, such as pagination in feeds.

Refusing to apply Section 230 to platforms' harmful design decisions will incentivize companies to design their platforms in more pro-social ways. Courts' previous decisions denying Section 230 immunity promoted pro-social corporate behavior such as keeping promises to users, abiding by democratically enacted laws, warning users of known risks to their safety, and designing smartphone applications in ways that will avoid obvious harmful behavior. Similarly, denying Meta Section 230 protections here will push Meta and other platforms to make pro-social design choices instead of always choosing the design that maximizes their profits while creating negative externalities for users and society.

Far from benefiting society, granting Meta Section 230 protections here would help create "a lawless no-man's-land on the Internet." *Roommates.com*, 521

F.3d at 1164. Finding for Meta would require the Court to embrace the but-for test—a test that this Court rightly rejected in *Turo*, and that other courts like the Ninth Circuit have repeatedly repudiated because it gives internet companies almost blanket immunity from regulation, as "publishing content is 'a but-for cause of just about everything' [an internet company] is involved in." *Lemmon*, 995 F.3d at 1092–93 (citing *Internet Brands*, 824 F.3d at 853). Adopting the but-for test would make online consumer protection nearly impossible and would also immunize online behavior that would not be immunized offline. Indeed, courts that have used the but-for test have immunized otherwise unlawful corporate behavior like failing to protect their users from stalkers, *Herrick v. Grindr LLC*, 765 F. App'x 586, 590–91 (2d Cir. 2019), actively helping telemarketers to evade consumer laws, *United States v. Stratics Networks*, No. 23-CV-0313-BAS-KSC, 2024 WL 966380, at *14 (S.D. Cal. Mar. 6, 2024), helping drivers defeat emissions controls, *United States v. EZ Lynk SEZC*, No. 21-cv-1986 (MKV), 2024 WL 1349224, at *9–12 (S.D.N.Y. Mar. 28, 2024), *rev'd*, No. 24-2386-CV, 2025 WL 2405273 (2d Cir. Aug. 20, 2025), and violating credit reporting requirements, *Dennis v. MyLife.Com*, No. 20-cv-954, 2021 WL 6049830, at *6–7 (D.N.J. Dec. 20, 2021). Section 230 is not a get-out-of-jail-free card; it is a scalpel to be used on a specific type of speech-endangering claim that is not at issue in this case.

Forcing Meta to defend itself on the merits also does not mean that Meta will be found liable. If the claims against Meta are unmeritorious, the courts may ultimately dismiss them. For instance, last year, a Ninth Circuit panel reversed a district court's decision to dismiss a case on Section 230 grounds but affirmed its grant of a motion to dismiss for failure to state a claim. *See Quinteros v. InnoGames*, No. 22-35333, 2024 WL 132241, at *1–2 (9th Cir. Jan. 8, 2024). Indeed, courts often find it easier to dismiss unmeritorious claims than to determine whether Section 230 applies. The way the Supreme Court resolved *Gonzalez v. Google* and *Twitter v. Taamneh* exemplifies this. The Court "decline[d] to address the application of § 230" in *Gonzalez* because the complaint "appear[ed] to state little, if any, plausible claim for relief." *Gonzalez v. Google*, 598 U.S. 617, 622 (2023). Instead, it issued a merits decision in the factually identical *Twitter v. Taamneh*, finding that Twitter's (and likely Google's) algorithmic amplification of terrorist content did not meet the definition of associating or participating in a terrorist venture. *See Twitter v. Taamneh*, 598 U.S. 471, 498–99 (2023). It then remanded *Gonzalez* with instructions to issue a merits decision informed by *Taamneh*. *See Gonzalez*, 598 U.S. at 622.

Holding that Section 230 does not apply in this case also does not mean that Section 230 could never prohibit an unfair trade practice claim against a social media company. If Massachusetts had claimed that it is an unfair trade practice to

provide a communications service that contains harmful content, then Section 230 might apply. If the alleged "trade practice" is disseminating user-generated content, and the "unfairness" is defined as hosting harmful content, then the alleged duty would spring from Meta's decision to host user-generated information, and the only way to discharge that duty would be to ensure no tortious content is posted. Such a claim would recreate the moderator's dilemma and be barred by Section 230. But Massachusetts' claims in the present case do not fit this pattern because they seek to hold Meta liable for business conduct that does not spring from, and does not impact, Meta's hosting or moderating of user-generated content.

II. Massachusetts' claims do not implicate the First Amendment, and *Moody* does not change this.

As the trial court correctly determined, none of Massachusetts' claims against Meta are barred by the First Amendment. Massachusetts' deception claims are based not on Meta's failure to remove harmful content, but rather on its deceptive public statements about its priorities and the safety of its platforms. Such misrepresentations are not protected by the First Amendment. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976). The First Amendment also does not bar Massachusetts' unfairness claims. The court recognized that these claims, challenging Meta's addictive design and inadequate age-verification tools, do not challenge Meta's content moderation decisions, but

rather the *design* of the products themselves. This conclusion is completely consistent with the Supreme Court's recent decision in *Moody v. NetChoice*, 603 U.S. 707 (2024).

In *Moody*, the Court signaled that platforms exercise protected editorial discretion when they enforce their content moderation policies. *Id.* at 740 ("When the platforms *use their Standards and Guidelines to decide* which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices." (emphasis added)). A company's content moderation policies "list the subjects or messages the platform prohibits or discourages—say, pornography, hate speech, or misinformation on select topics." *Id.* at 719. When companies decide whether to remove or downrank content based on violation of these policies, they are choosing "whether—and, if so, how—to convey posts having a certain content or viewpoint," and "[t]hose choices rest on a set of beliefs about which messages are appropriate and which are not." *Id.* at 738. A company that proscribes pro-Nazi messages in its content moderation policies, say, acts expressively when excluding pro-Nazi media because the exclusion is based on the message expressed by the media. A law that "direct[s] a company to accommodate messages it would prefer to exclude," like pro-Nazi content, thus infringes on the company's protected editorial discretion. *Id.* at 731. Protecting internet companies' content moderation decisions under the First Amendment is a

straightforward application of decades of Supreme Court precedent recognizing the rights of speech compilers to exclude messages and viewpoints they do not wish to carry. *See id.* at 728–33 (discussing the Court's editorial discretion precedent).

What is most notable about the editorial discretion discussion in *Moody* is its narrowness. The Court carefully limited the scope of platform activities it recognized as exercises of protected editorial discretion and, in the process, pointedly refused to adopt NetChoice's preferred rule: that *all* decisions companies make to select and display content online are expressive. Indeed, the Court majority (and various concurrences) explicitly questioned whether selecting content based on user behavioral data, *id.* at 736 n.5; *id*. at 746 (Barrett, J., concurring), or making content selection decisions using machine learning algorithms, *id.* at 746 (Barrett, J., concurring); *id.* at 795 (Alito, J., concurring in the judgement), is expressive. The upshot is that, unless the conduct at issue in a case is the enforcement of content moderation rules, companies cannot rely on *Moody* to argue that their conduct is expressive—they must, instead, raise independent arguments about why their conduct is expressive.

The activity targeted by Massachusetts' claims decidedly does not fall within the narrow class of activities covered by *Moody*. Massachusetts does not complain about Meta's content moderation decisions, but rather specific design features of its platforms. None of these design features are used to enforce Meta's

content moderation policies. Meta could address the concerns raised in Massachusetts' complaint without making any alterations to its content moderation activity at all. As a result, Massachusetts' claims do not raise the same issues of editorial discretion discussed in *Moody*.

Treating the design features challenged here as expressive conduct would be a radical and unsupported expansion of the First Amendment's scope that would call into question the constitutionality of well-established regulatory schemes, like gambling laws. The design elements that Massachusetts targets have more in common with casino games than the exercise of protected editorial discretion. Indeed, some of the design elements are explicitly borrowed from the gambling industry. *See* Mattha Busby, *Social Media Copies Gambling Methods 'To Create Psychological Cravings'*, Guardian (May 8, 2018).[10] Courts have long recognized that states have the power to regulate gambling without butting up against First Amendment issues. Matthew B. Lawrence, *Public Health Law's Digital Frontier: Addictive Design, Section 230, and the Freedom of Speech*, 4 J. Free Speech L. 299, 348 (2024). If design elements like intermittent variable rewards or infinite scroll were held to be expressive and thus protected by the First Amendment, "it is hard to say why slot machines or increasingly digital and increasingly social forms

[10] www.theguardian.com/technology/2018/may/08/social-media-copies-gambling-methods-to-create-psychological-cravings.

of smartphone-enabled gambling that blur the lines between 'social media' and traditional gambling would not be similarly protected." *Id.*

In short, Meta has not shown that the design elements that are the subject of Massachusetts' complaint are exercises of protected editorial discretion. *Moody* described a very narrow class of platform activities as expressive—ones that enforce a company's content moderation policies. This kind of platform action is analogous to the exercise of protected editorial discretion in Court precedent, which recognizes that the decision to exclude information from a compilation based on the message expressed is itself a form of expression. Meta does not use any of the design elements at issue in this case to enforce its content moderation policies. All of the design elements are agnostic to the message expressed. Thus, *Moody* does not apply.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the Superior Court's order denying Meta's motion to dismiss.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the above brief complies with the rules of court that pertain to the filing of an amicus brief, including, but not limited to Rules 17 and 20. The brief complies with the type-volume limitation of Rule 20(a)(2)(C) because it contains 7,468 words, excluding the parts of the brief limited by the rule. The word count was ascertained using Microsoft Word's word count function. The brief complies with the type-style requirements of Rule 20 because it has been prepared in proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman style.

Dated: November 14, 2025 */s/ Caitriona Fitzgerald*

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I hereby certify that on November 14, 2025, the Brief of the Electronic Privacy Information Center, Common Sense Media, Cybersecurity for Democracy, Tech Justice Law Project, and Legal Scholars as *Amici Curiae* in Support of Plaintiff-Appellee and Affirmance in *Commonwealth of Massachusetts v. Meta Platforms, Inc., and Instagram, LLC*, No. SJC-13747, was electronically filed with the Clerk of the Court for the Supreme Judicial Court and served upon the following counsel of record through the Electronic Filing System:

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