
United States Court of Appeals
for the
Third Circuit

Case No. 22-3061

TAWAINNA ANDERSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF
THE ESTATE OF N.A., A DECEASED MINOR,

Appellant,

– v. –

TIKTOK, INC.; BYTEDANCE, INC.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 2-22-CV-01849,
HONORABLE PAUL S. DIAMOND, U.S. DISTRICT JUDGE

APPELLANT’S BRIEF AND APPENDIX
VOLUME I OF II (Pages A1 to A11)

ROBERT J. MONGELUZZI
JEFFREY P. GOODMAN
SALTZ MONGELUZZI & BENDESKY P.C.
Attorneys for Appellant
One Liberty Place, 52nd Floor
1650 Market Street
Philadelphia, Pennsylvania 19103
(215) 496-8282

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JURISDICTIONAL STATEMENT

This appeal arises from a final judgment of the United States District Court for the Eastern District of Pennsylvania entered on October 25, 2022. The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a). Plaintiff-Appellant (“Plaintiff”) timely filed a Notice of Appeal on October 31, 2022. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in ruling that Section 230 of the Communications Decency Act is so broad that it immunizes a social media company which, through its product’s defective design and automated algorithms, sent a 10-year-old an instructional video encouraging to her choke herself, resulting in the child’s death?

2. Whether the use of automated algorithms to recommend certain content to users strips social media companies of potential protections under Section 230 of the Communications Decency Act.

3. Whether the district court erred in granting Defendants-Appellees’ (“Defendants” or “TikTok”) motion to dismiss. *See* Appendix (“App.”) A1–9.

STATEMENT OF RELATED CASES

Neither this case nor any case related to Plaintiffs’ claims has been before this Court or any other state or federal court or agency.

STATEMENT OF THE CASE

I. The Parties

Plaintiff is the mother and Administratrix of the Estate of Nylah Anderson, a 10-year-old girl who was killed in December 2021 when she attempted to perform a TikTok challenge known as the “Blackout Challenge.”

Defendants are TikTok, Inc. (“TikTok”) and ByteDance, Inc. (“ByteDance”). Defendant TikTok is a California corporation with a principal place of business in California. Defendant ByteDance is TikTok’s ultimate parent company and is a Delaware corporation with a principal place of business in California. Defendants are collectively the designers, programmers, and operators of the popular social media smartphone app, TikTok.

II. Theories of Liability Against Defendants

In the days leading up to Nylah Anderson’s death, TikTok sent Nylah a series of dangerous videos, including content known as the “Blackout Challenge” which showed users how to asphyxiate themselves and encouraged users like Nylah to repeat the trend. On December 7, 2021, 10-year-old Nylah Anderson was asphyxiated when she attempted to perform the Blackout Challenge. *See* App. A18–63 at ¶ 1. Nylah suffered in the pediatric intensive care unit and eventually succumbed to her injuries and died on December 12, 2021. *Id.* at ¶ 2. Defendants sent the dangerous Blackout Challenge directly to 10-year-old Nylah through her

For You Page on the TikTok app. Defendants’ product—the TikTok app—utilizes sophisticated algorithms which act as a “system that delivers content to each user that is likely to be of interest to that particular user” and “each person’s feed [also known as the For You Page] is unique and tailored to that specific individual.” App. A18–63 at ¶ 3; *see also* App. A163–174. The algorithms then place content on a user’s For You Page so that it is immediately seen by the user.

Defendants’ app and algorithms utilize massive amounts of data collected from each user which informs Defendants of a particular user’s demographics, interests, likes and dislikes, characteristics, biometric data (such as faceprints and voiceprints), and much more. App. A163–174. Using the data collected, TikTok targets users with content that is “tailored to that specific individual.” TikTok thus knew that Nylah Anderson was an impressionable 10-year-old minority female living in a working-class neighborhood who tended to watch challenge videos that were put in front of her and that she would then attempt to mimic the challenges and record it. Rather than employ this knowledge to screen this 10-year-old from dangerous content, TikTok harnessed this knowledge against Nylah with the intention of keeping her engaged on the app. Indeed, Defendants’ algorithm (1) determined that the dangerous and deadly Blackout Challenge was likely to be of interest to 10-year-old Nylah Anderson, and (2) sent her the challenge by directly putting it on her For You Page.

On May 12, 2022, Plaintiff filed suit against Defendants. *See generally* App. A18–63. Plaintiff’s claims against Defendants are founded on Defendants’ own independent conduct as designers, manufacturers, sellers, and/or distributors of their dangerously defective products—the TikTok app and its algorithms. Plaintiff’s claims seek to hold Defendants responsible for taking the affirmative step of recommending the Blackout Challenge directly to Nylah. Plaintiff alleged that Defendants’ products were defectively designed and resulted in 10-year-old Nylah Anderson being sent the dangerous and deadly Blackout Challenge, essentially a How-To-Guide on self-asphyxiation. Plaintiff’s claims do not seek to treat Defendants as publishers of the Blackout Challenge video(s) sent to Nylah. Instead, Plaintiff’s claims are premised on Defendants’ acts, through their defectively designed product, of affirmatively recommending the Blackout Challenge to Nylah and putting it on her For You Page.

III. Factual Background

TikTok is a social media product that enables users to create, view, and share short videos. TikTok is one of the world’s fastest-growing social media platforms and it boasts more than one billion active users worldwide. App. A18–63 at ¶¶ 43, 47. Critical to TikTok’s success is the For You Page, which Defendants describe as the “defining feature” of its product and which is intended to provide an endless stream of curated videos and content to a user without requiring a prompt or a search

input from the user. *Id.* at ¶ 51. According to Defendants, the For You Page is “central to the TikTok experience and where most of our users spend their time.” *Id.* at ¶ 52. The videos and content the app recommends to users through the For You Page are carefully and deliberately selected by algorithms designed by Defendants based on the user’s particular and unique demographics and characteristic profile. *Id.* at ¶ 53. TikTok’s algorithms act as a “system that delivers content to each user that is likely to be of interest to that particular user” and “each person’s [For You Page] is unique and tailored to that specific individual.” *Id.* at ¶ 3.

TikTok’s algorithms are specifically designed to keep users engaged with the app and maximize the amount of time users spend on the app. Keeping users on the app and engaged is the lifeblood of Defendants’ immense commercial success. As Judge Gould of the Ninth Circuit Court of Appeals observed, “algorithms [are] devised by these companies to keep eyes focused on their websites.... ‘[T]hey have been designed to keep you online’....” *Gonzalez v. Google, LLC*, 2 F.4th 871, 920 n. 3 (9th Cir. 2021) (Gould, J., dissenting) *cert. granted* 143 S.Ct. 80 (Oct. 3, 2022).

Defendants’ app and algorithms have created an environment in which TikTok “challenges” are widely promoted and result in maximum user engagement and participation on the app, thus financially benefiting Defendants. *Id.* at ¶ 60. TikTok challenges involve users filming themselves engaging in behavior that

mimics and often times “one-ups” other users posting videos performing the same or similar conduct. *Id.* at ¶ 61. These TikTok challenges often involve dangerous or risky conduct. App. A18–63 at ¶¶ 61–63. TikTok affirmatively recommends these often-dangerous challenges to users through their respective For You Pages and encourages users to create, share, and participate in the challenge. *Id.* at ¶ 62. One of the deadliest challenges to make its rounds on TikTok and be promoted or recommended to users by TikTok is the Blackout Challenge, which encourages users to choke themselves with belts, purse strings, or anything similar until passing out. *Id.* at ¶ 64. By promoting this challenge and populating it on the For Your Pages of children all around America, TikTok is placing children in harm’s way—and in many cases killing them¹—in the name of corporate greed.

Defendants’ Privacy Policy reveals that as soon as Nylah Anderson downloaded the TikTok app and agreed to the Terms of Service, Defendants began a systematic collection and utilization of a *massive* amount of her personal data. Defendants harvested data from Nylah’s mobile device including contacts, search history, photographs, and videos; her IP address and network activity; from her body, image, and characteristics, including “biometric identifiers and biometric

¹ Olivia Carville, TikTok’s Viral Challenges Keep Luring Young Kids to Their Deaths, Bloomberg, November 30, 2022, available at <https://www.bloomberg.com/news/features/2022-11-30/is-tiktok-responsible-if-kids-die-doing-dangerous-viral-challenges>.

information” such as faceprints and voiceprints; her app usage history; her use of other social media apps like Facebook or Instagram; and numerous other sources of data. *See* App. A121; A164–168. Defendants harvest this data from users, like Nylah Anderson, to develop a thorough understanding of what content is likely to keep a particular user engaged with the app.

After collecting this data from Nylah, Defendants’ app and its algorithms knew that Nylah Anderson was an impressionable 10-year-old minority female living in a working-class neighborhood who tended to watch challenge videos that were put in front of her and that she would then attempt to mimic the challenges and record it. Despite this, Defendants product (1) determined that the dangerous and deadly Blackout Challenge was likely to be of interest to 10-year-old Nylah Anderson, and (2) sent her the challenge by directly putting it on her For You Page. App. A18–63 at ¶¶ 3–5, 81–83.

On December 7, 2021, Nylah Anderson attempted the Blackout Challenge recommended to her through her For You Page. *Id.* at ¶ 85. Nylah attempted to participate in the challenge by hanging a purse from a hanger in her closet and position her head between the bag and shoulders trap and then hanging herself until blacking out, just as she had seen in the challenge video Defendants thrust upon her. *Id.* at ¶¶ 84–85. Tragically, after hanging herself with the purse, Nylah was unable to free herself and she slowly asphyxiated until near the point of death. *Id.* at ¶ 86.

Plaintiff, Tawainna Anderson, found her daughter unconscious and hanging in her bedroom closet. *Id.* at ¶ 87.

IV. Procedural History

On May 12, 2022, Plaintiff filed an action against Defendants in the Eastern District of Pennsylvania, asserting claims for strict products liability including failure to warn, negligence, violation of relevant consumer protection laws, wrongful death and survival, and punitive damages. *See generally* App. A18–63.

On July 18, 2022, Defendants filed a motion to dismiss Plaintiff’s Complaint pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6) and supporting memorandum of law. App. A71–73; A74–104. Relevant to this appeal, Defendants argued that Plaintiff’s claims were barred by Section 230 of the federal Communications Decency Act (“CDA”), 47 U.S.C. § 230(e)(c). On August 1, 2022, Plaintiff filed a memorandum of law in opposition to Defendants’ motion to dismiss. App. A111–195. On August 11, 2022, Defendants filed a reply in support of their motion, and on August 18, 2022, Plaintiff filed a sur-reply in opposition to Defendants’ motion to dismiss. App. A196–210; A211–225.

On October 25, 2022, the district court granted Defendants’ motion to dismiss. App. A1–8; A9. Plaintiff timely filed her Notice of Appeal on October 31, 2022. App. A10.

On December 7, 2022, Plaintiff filed a brief as *Amicus Curiae* in support of petitioners in *Gonzalez v. Google LLC*, Case No. 21-1333, which is currently pending before the United States Supreme Court and set for argument on February 21, 2023. Respondent Google LLC’s brief on the merits is due no later than January 12, 2023 and while any *amici* in support of respondent are not due to be filed until, at the latest, January 19, 2023 it is anticipated that TikTok may file an *amicus* in support of respondent. One *amici* brief filed in support of petitioners by seventeen members of the United States Senate and House of Representatives² specifically discusses the instant *Anderson* case and the harm that would flow from “misguided decisions” which “have conferred near-absolute immunity on Big Tech companies” allowing them to “push harmful content” to children throughout America if Section 230 of the CDA was read as broadly as the district court has read it here.

SUMMARY OF THE ARGUMENT

Section 230 of the CDA provides, in pertinent part, “[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. §

² Senators Ted Cruz, Mike Brau, Joni Ernst, Lindsey O. Graham, Charles E. Grassley, Bill Hagerty, James Lankford, Mike Lee, Cynthia M. Lummis, Marco Rubio, and Roger F. Wicker, as well as Representatives Mike Johnson, Jodey C. Arrington, Scott Fitzgerald, Doug Lamborn, Victoria Spartz, and Tom Tiffany, available at https://www.supremecourt.gov/DocketPDF/21/21-1333/249351/20221207133438524_Gonzalez%20Amicus%2020221207%20FINAL.pdf.

230(c)(1). By its terms, Section 230 of the CDA “provides immunity to [an interactive computer service provider] as a publisher or speaker of information originating from another information content provider.” *Green v. AOL*, 318 F.3d 465, 471 (3d Cir. 2003). The district court held that Section 230 of the CDA immunized Defendants from Plaintiff’s claims because, according to the district court, Plaintiff’s claims seek to hold Defendants liable as “publishers” of third-party content. The district court erred in reaching this ruling.

Plaintiff’s claims do not treat Defendants as “publishers” as that term is used in Section 230 of the CDA. Instead, Plaintiff’s claims arise from Defendants’ duty to design and produce a safe, non-defective product under Pennsylvania law. *See e.g., Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 384-94 (PA. 2014) (holding product designers, manufacturers, and sellers have a duty to design, manufacture, and produce non-defective products). Additionally, Plaintiff’s claims are premised on Defendants’ act of recommending the Blackout Challenge video(s) to Nylah through its defective product. Thus, it was Defendants’ recommendation *itself*, and not the third-party content, which Plaintiff alleges caused her daughter’s death. Plaintiff’s claims have nothing to do with Defendants’ “traditional editorial functions” and are thus not barred. The district court, however, applied an improper and nearly all-encompassing definition of “publisher” that would include almost anything

Defendants do (or don't do) with respect to content. Such a broad and all-encompassing reading of Section 230 of the CDA cannot be permitted to stand.

Further, Defendants' recommendation of the Blackout Challenge to Nylah Anderson itself carried an implicit message that the content being provided should be viewed, engaged with, or mimicked because it was likely to be of interest to Nylah. Indeed, this is the quintessential function of the For You Page. By placing carefully selected content on a user's For You Page, TikTok is telling the user "Click here. This is cool. Try this. You will like this." Defendants' affirmative step of targeting Nylah Anderson and recommending the Blackout Challenge was therefore not "information provided by another information content provider" as used by Section 230(c)(1), but rather information provided by Defendants themselves, which is not shielded by Section 230.

The inapplicability of the CDA's immunity provisions to Defendants' targeted recommendation of the Blackout Challenge to Nylah Anderson is confirmed by the CDA's own stated findings and policies. *See* 47 U.S.C. § 230(b)(3) (stating that it is the policy of the United States "to encourage the development of technologies which maximize *user control* over what information is received by individuals, families, and schools[.]") (emphasis added). Defendants' product—the TikTok app and its associated algorithms—are the exact opposite of the type of technology Congress sought to protect and foster through the CDA. Defendants' product

removes any control by the user over what information is received and thus thwarts, rather than satisfies, the underlying policy goal of the CDA.

In *Force v. Facebook, Inc.*, Chief Judge Katzmann noted that Senator James J. Exon described that “[t]he heart and the soul” of the CDA was “its protection for families and children.” 934 F.3d 53, 78 (2d Cir. 2016) (Katzmann, C.J., dissenting). Contorting the CDA into a shield protecting dangerous content recommendations TikTok thrusts upon users like Nylah Anderson through the For You Page has the opposite effect. Instead of providing protection *for* families and children, the CDA has tragically been applied to protect goliaths of the technology industry *from* families and children. Affirming the district court’s overly broad reading of Section 230 of the CDA and immunization of TikTok from Plaintiff’s claims would thwart the “heart and soul” of the CDA, and Plaintiff respectfully requests that this Court reverse the district court and remand for further proceedings.

STANDARD OF REVIEW

A district court’s grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6) is reviewed *de novo*. *Klotz v. Celentano Stadtmauer and Walentowicz LLP*, 991 F.3d 458, 462 (3d Cir. 2021) (citing *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n. 1 (3d Cir. 2014)).

ARGUMENT

“In 1996, when the internet was young and few of us understood how it would transform American society, Congress passed the CDA.” *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1090 (9th Cir. 2021) (citing 47 U.S.C. § 230). The CDA itself is clear that a paramount goal Congress intended to achieve with its passing was to protect families and children by “encourag[ing] the development of technologies which maximize user control” over content received by families and children and to “remove disincentives for the development and utilization of...technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” 47 U.S.C. § 230(b)(3), (4). This case is one in which the CDA has been contorted to shield Defendants from liability for causing the death of Plaintiff’s 10-year-old daughter, despite its actions falling well outside the scope of what Congress intended to immunize; actions which, in fact, accomplish the exact opposite of what Congress sought to achieve.

Plaintiff’s claims against Defendants are not barred by the CDA because: (1) they treat Defendants as product designers, manufacturers, and sellers subject to strict products liability under well-established Pennsylvania law; (2) they seek to impose liability for Defendants’ recommendation *itself* and are thus not premised on the third-party content; and (3) Defendants’ recommendation algorithms are not the technology Congress intended to protect and foster through the CDA. Despite this,

the district court applied an impermissibly broad reading of the CDA and held that Plaintiff's claims are barred. *See* App. A1–9. Affirming the district court's overly broad reading of Section 230 of the CDA and immunization of TikTok from Plaintiff's claims would thwart the “heart and soul” of the CDA and its stated policy goals, and Plaintiff respectfully requests that this Court reverse the district court and remand for further proceedings.

I. Plaintiff's Claims Do Not Treat Defendants as “Publishers” or “Speakers” and are Thus Not Barred.

A. The CDA bars only claims which allege violation of a defendant's duties as a “publisher” or “speaker.”

Section 230(c)(1) 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). Accordingly, to enjoy the protections of Section 230, the interactive computer service provider must show “the duty that the plaintiff alleges the [service provider] violated derives from the [service provider's] status or conduct as a ‘publisher or speaker.’” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).

This Court has previously described a “publisher's traditional editorial functions” as including “deciding whether to publish, withdraw, postpone, or alter content.” *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

Similarly, the Ninth Circuit Court of Appeals defines “publication” as “reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.” *Barnes*, 570 F.3d at 1102 (citing *Fair Housing Council of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157, 1170–71 (9th Cir. 2008) (en banc) (“[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is performance immune under section 230.”)).

In the context of the CDA, “[a] clear illustration of a cause of action that treats a website proprietor as a publisher is a defamation action founded on the hosting of defamatory third-party content.” *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016) (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003)). However, where a plaintiff’s claim is not founded on the defendant’s quintessential publisher actions the CDA is inapplicable. *Internet Brands*, 824 F.3d at 851. There is a distinction between the act of “simply distributing the content to anyone who chooses to engage with it[.]” and sites that “user their algorithms to connect users to specific content and highlight it as recommended[.]” *Gonzalez v. Google, LLC*, 2 F.4th 871, 914 (9th Cir. 2021) (Berzon, J., concurring). The types of “targeted recommendations and affirmative promotion” of third-party content “are well outside the scope of traditional publication.” *Id.* Accordingly, claims alleging harm caused by “targeted recommendations and affirmative promotion” of third-party content should fall outside the scope of immunity conferred by the CDA.

Plaintiff respectfully submits that this Court should adopt the distinction made by Judge Berzon in her concurring opinion. *Id.*

B. Plaintiff’s claims treat defendants as product designers and manufacturers, not “publishers” or “speakers.”

Courts have routinely held that where a plaintiff’s claims do not arise from the defendant’s traditional publisher duties and instead hinge on an alleged violation of a distinct duty, the claims do not treat the defendant as a “publisher” or “speaker.” *See Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016); *Lemmon*, 995 F.3d 1085; *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019); *A.M. v. Omegle.com, LLC*, No. 3:21-cv-01674, 2022 WL 2713721, *4 (D. Or. July 13, 2022). Here, Plaintiff is not seeking to hold Defendants liable as publishers or speakers. Instead, Plaintiff’s claims arise from Defendants’ wholly unrelated duty to design and produce a safe, non-defective product and to provide adequate warnings under Pennsylvania law. *See, e.g., Tincher*, 104 A.3d at 384–94 (holding product designers, manufacturers, and sellers have a duty to design, manufacture, and produce non-defective products). Indeed, Plaintiff’s product liability and failure to warn claims have “‘nothing to do with’ [defendants’] editing, monitoring, or removing of the content that its users generate.” *Lemmon*, 995 F.3d at 1092. The CDA thus does not bar Plaintiff’s claims.

In *Internet Brands*, the plaintiff was a model who posted information about herself to the Model Mayhem website. 824 F.3d at 848. Two rapists used the Model

Mayhem website to lure plaintiff to a fake audition, where they drugged her, raped her, and recorded her for a pornographic video. *Id.* Plaintiff filed suit against Internet Brands as the operator of the website, alleging that it knew about the rapists but failed to warn her, and asserting negligence under California law based on that failure to warn. *Id.* The district court dismissed the action believing the claim was barred by the CDA, and plaintiff appealed. *Id.*

The Ninth Circuit framed the essential question as “whether Plaintiff’s failure to warn cause of action ‘inherently requires the court to treat’ Internet Brands ‘as a publisher or speaker’ ‘of information provided by another information content provider.’” *Id.* at 850 (quoting *Barnes*, 570 F.3d at 1100–02 (9th Cir. 2009)). The *Internet Brands* court held that the plaintiff’s claims were fundamentally different, and that “[t]he duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes or monitors such content.” *Id.* at 851. Indeed, “[a]ny obligation to warn could have been satisfied without changes to the content posted by the website’s users[.]” *Internet Brands*, 824 F.3d at 851. The plaintiff was thus not seeking to treat Internet Brands as a publisher or speaker and the CDA was inapplicable. *Id.*

The Ninth Circuit reached a similar finding in *Lemmon*. 995 F.3 at 1088. In *Lemmon*, teenagers were killed in a car accident while traveling at excessive speeds. *Id.* Plaintiffs, parents of the deceased teenagers, alleged that the popular social

media app, Snapchat, encouraged such reckless driving through the “Speed Filter” which enabled users to record and share their real-life speed. *Id.* The parents brought wrongful death actions against Snap, Inc. alleging negligent product design of the Snapchat app. *Id.* at 1087. The district court dismissed the plaintiffs’ complaint on the grounds that the claims were barred by the CDA, and plaintiffs appealed. *Id.* at 1090. On appeal, the Ninth Circuit engaged in a thorough analysis of whether the plaintiffs’ product design claims sought to treat defendant Snap, Inc. as a “publisher or speaker.” *Id.* at 1091–93. The *Lemmon* court made clear that the focus of its CDA inquiry was on whether “the duty the plaintiff alleges” stems “from the defendant’s status or conduct as a publisher or speaker[.]” or if the duty stems from elsewhere. *Lemmon*, 995 F.3d at 1091 (citation omitted). The court held that the plaintiffs’ product design claims did *not* seek to treat Snap, Inc. as a publisher or speaker:

The duty underlying such a claim differs markedly from the duties of publishers as defined in the CDA. Manufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury to consumers. Meanwhile, entities acting solely as publishers—*i.e.*, those that review material submitted for publication, perhaps edit it for style or technical fluency, and then decide whether to publish it—generally have no similar duty.

It is thus apparent that the Parents’ amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker. Their negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat’s reward system and the Speed Filter). Thus, the duty that Snap allegedly violated “springs from” its distinct

capacity as a product designer.... Snap’s alleged duty in this case thus “has nothing to do with” its editing, monitoring, or removing of the content that its users generate through Snapchat.

Id. at 1092 (emphasis added) (internal quotations and citations omitted). The *Lemmon* court fundamentally held that the plaintiff’s claims did not seek to treat the defendant as a publisher or speaker because the defendant “could have satisfied” its duty “to design a product more useful than it was foreseeably dangerous—without altering the content that [defendant’s] users generate.” *Id.* at 1092.

Other courts have similarly held that where a plaintiff’s claim hinges on allegations that the defendant violated its duties as a product designer, manufacturer, and/or distributor the CDA is inapplicable. *See Erie Ins. Co.*, 925 F.3d at 139 (“While the [CDA] protects interactive computer service providers from liability as a publisher of speech, it does not protect them from liability as the seller of a defective product.”); *see also Omegle*, 2022 WL 2713721, at *4.

In *Omegle*, an 11-year-old user of an online chat room, called Omegle, was paired with a man in his late thirties who forced her to send him pornographic images and videos of herself. *Id.* at *1. After the man was apprehended by his local authorities, the minor brought a product liability action against Omegle alleging that the online chat room was defectively designed because it paired vulnerable minors, such as plaintiff, with adults. *Id.* at *1. Relying on *Lemmon*, the *Omegle* court held that the plaintiff’s product liability claims were not subject to the CDA’s immunity

provisions because “Omegle could have satisfied its obligation to Plaintiff by designing its product differently” and because the plaintiff was “not claiming that Omegle needed to review, edit, or withdraw any third-party content to meet this obligation.” *Id.* at *3. Omegle could have satisfied its obligations by simply not pairing an 11-year-old user with this adult for chatting purposes.

Plaintiff’s claims here, like those in *Internet Brands*, *Lemmon*, and *Omegle* have “nothing to do with” Defendants’ traditional publisher functions, i.e., editing, monitoring, or removing third-party user content. *See Green*, 318 F.3d at 471 (describing a “publisher’s traditional editorial functions” as including “deciding whether to publish, withdraw, postpone, or alter content.”). Instead, just like in *Lemmon* and *Omegle*, Plaintiff’s claims “spring[] from” Defendants’ duty to design a safe, non-defective product and, like in *Internet Brands*, Plaintiff alleges Defendants are liable for failure to warn. Defendants could have satisfied their duty (to design and supply safe, non-defective products) without altering the content generated by third parties. Under *Lemmon*, *Omegle*, and *Internet Brands*, this confirms that Plaintiff’s claims do not treat Defendants as “publishers” but instead as product designers.

In the court below, Plaintiff emphasized that she was not treating Defendants as “publishers” or “speakers” because she did not allege that Defendants were liable for generally publishing the Blackout Challenge videos on the TikTok app. *See App.*

A133 (“Indeed, the Blackout Challenge can exist on TikTok without necessarily exposing TikTok to liability. However, Defendants’ product functioning to send that challenge to a 10-year-old is an affirmative step (not a publisher action) which is not afforded any protections by the CDA.”). Defendants’ initial action in publishing the Blackout Challenge generally on the TikTok app may very well fall within the protections of the CDA. However, this is not the basis of Plaintiff’s claims. Defendants’ product functioning to perform the second action—knowingly targeting Nylah Anderson and recommending the Blackout Challenge directly to her through the For You Page—was well outside the scope of a “publisher’s traditional editorial functions.” *Green*, 318 F.3d at 471; *see also Gonzalez*, 2 F.4th at 914 (stating that “targeted recommendations and affirmative promotion” of third-party content “are well outside the scope of traditional publication.”) (Berzon, J., concurring). *This* is the basis of Plaintiff’s claims, and Defendants’ defectively designed product functioning to knowingly target Nylah and recommend the Blackout Challenge should not be afforded protections under the CDA. Fundamentally, Plaintiff seeks to impose liability for Defendants designing a defective product. Without question, product design and manufacture are not publisher functions.

C. The district court erred by holding that Plaintiff’s claims treat Defendants as “publishers.”

In its decision below, the district court dramatically expanded what constitutes a publisher’s traditional editorial functions. As stated, in *Green* this Court held that a “publisher’s traditional editorial functions” included “deciding whether to publish, withdraw, postpone, or alter content.” 318 F.3d at 471. The district court, however, held that publishing “involves decisions related to the monitoring, screening, arrangement, promotion, and distribution of” third-party content. App. A7. This is an overly expansive and seemingly all-encompassing definition of publisher functions. Indeed, it is difficult to envision a scenario in which the district court’s definition of a publisher’s functions would not cover every conceivable aspect of Defendants’ TikTok app. The district court’s broad definition of publisher functions essentially provides blanket immunity to Defendants and similar social media conglomerates. At bottom, the district court held that Defendants’ publisher functions include product design and manufacture. This is an expansion of the CDA that has never been endorsed by any court.

Defendants’ affirmative step of making targeted recommendations through their defectively designed product are not “publisher” functions. The New York Times is a quintessential publisher and it publishes thousands of articles each year, but The New York Times doesn’t tell its readers which articles to read. The New York Times doesn’t send one reader a different newspaper than another reader

because it thinks certain articles are more likely to be of interest to one particular reader and not the other. When Defendants strayed from merely deciding whether or not to display and make available certain third-party content and affirmatively tell its users *which* third-party content to consume or engage with, Defendants were not acting as “publishers” of that third-party content. The district court’s holding eviscerates the distinction between the act of “simply distributing the content to anyone who chooses to engage with it[]” and Defendants’ conduct in targeting specific users with specific recommendations. *Gonzalez*, 2 F.4th at 914 (Berzon, J., concurring).

The district court also ignored the fundamental holdings in *Internet Brands* and *Lemmon*—claims premised on product design and failure to warn allegations do not treat the defendant as a “publisher.” The district court attempted to distinguish both cases by noting that in neither were the plaintiff’s claims linked to third-party content on the defendant’s respective platforms. *See* App. A6 (distinguishing *Internet Brands* by stating that “the plaintiff’s claims had nothing to do with the site’s content”); A7 (distinguishing *Lemmon* by noting that “the plaintiff’s claims were ‘independent[] of the content’”). Based on this, the district court found that the CDA’s immunity provisions applied because Plaintiff’s claims “implicitly require recourse to that content [posted by a third party] to establish liability.” App. A7

(quoting *Herrick v. Grindr, LLC*, 305 F.Supp.3d 579 (2018), *aff'd*, 765 F.App'x 586 (2d Cir. 2019)).

In so holding, the district court improperly applied a “but-for” test that hinged on whether a cause of action would not otherwise have accrued but for the third-party content. This was improper and courts have explicitly cautioned against applying such a but-for test for the very reason that it would provide blanket immunity to almost everything a service provider does. In *Internet Brands*, the Ninth Circuit stated that “[p]ublishing activity is a but-for cause of just about everything [defendant] is involved in. Without publishing user content, it would not exist.” 824 F.3d at 853. In *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019), the Ninth Circuit reiterated that *Internet Brands* rejected a but-for test and held that CDA immunity does not attach “any time a legal duty might lead a company to respond with monitoring or other publication activities.” “It is not enough that third-party content is involved[.]” *Id.* Courts should “look instead to what the duty at issue actually requires[.]” *Id.* Here, the duty Plaintiff alleges Defendants violated was their duty to design a safe and non-defective product and to provide adequate warnings, duties which are wholly unrelated to Defendants’ traditional publisher functions.

The district court relied on *Zeran*, 129 F.3d 327, however Justice Clarence Thomas heavily criticized *Zeran* in his dissent in *Malwarebytes, Inc. v. Enigma*

Software Grp. USA, LLC, 141 S. Ct. 13 (2020) (Thomas, J., dissenting). Justice Thomas explained that Section 230(c) is “most naturally read” to protect companies when they (1) “unknowingly *decline* to exercise editorial functions [over objectionable] third-party content,” 47 U.S.C. § 230(c)(1), or (2) “when they decide to exercise those editorial functions in good faith, § 230(c)(2)(A). *Malwarebytes*, 141 S. Ct. at 17 (Thomas, J., dissenting). Justice Thomas strongly disagreed with *Zeran*, explaining that, “[a]lthough the text of § 230(c)(1) grants immunity only from ‘publisher’ or ‘speaker’ liability, the first appellate court to consider the statute held that it eliminates distributor liability too.” *Id.* at 15. (Thomas, J., statement respecting the denial of certiorari) (citing *Zeran*, 129 F.3d at 331-334)). “Extending § 230 immunity beyond the natural reading of the text,” Justice Thomas warned, could have “serious consequences.” *Id.* at 18. The district court’s reliance on *Zeran* has resulted in Nylah Anderson and her family suffering the “serious consequences” predicted by Justice Thomas.

Respectfully, the district court erred by dramatically expanding the scope of what constitutes “publisher” functions and applying this expanded reading to Plaintiff’s product liability and failure to warn claims.

II. Defendants’ Affirmative Targeted Recommendations to Nylah Anderson Are Not “Information Provided by Another Information Content Provider” and Defendants Are Thus Not Immune From Liability Premised on Their Recommendations

It is axiomatic that Section 230(c)(1) immunity is not available for material that the service provider itself creates. *See* 47 U.S.C. 230(c)(1) (stating that an interactive computer service is immune when it is treated as a publisher or speaker of “information provided by another information content provider.”). If TikTok were to supply a video created by a third-party to another user, such as a Blackout Challenge video, and overlay text on the video which read, “Click here. This is cool. Try this. You will like this.” there is little doubt that this overlaid text is not “information provided by another information content provider.” However, even where TikTok recommends a video, like the Blackout Challenge, to a user without *any* added text or information, the recommendation itself carries an inherent message to the user that was not created or derived from “another information content provider.” The very function of the TikTok For You Page is the technological equivalent of overlaying text on a video that says, “Click here. This is cool. Try this. You will like this.”

In *Force*, Chief Judge Katzmann correctly observed that Facebook uses recommendation algorithms “to create and communicate its own message: that it thinks you, the reader—you, specifically—will like this content.” *Force*, 934 F.3d at 82 (Katzmann, J., dissenting). The exact same is true of TikTok when it

recommends any video to a user, including the Blackout Challenge it recommended to Nylah Anderson. TikTok boasts that its recommendation algorithms act as a “system that delivers content to each user” that TikTok determines “is likely to be of interest to that particular user.” App. A18–63 at ¶ 3. TikTok represents that “each person’s [For You Page] is unique and tailored to that specific individual.” *Id.* Thus, when TikTok unilaterally sends specific content to a user it carries with it the message that the video “is likely to be of interest” to that user and that the video is “unique and tailored” to that user. This is a message created and pushed *by TikTok*, not by the third-party creator of the video recommended by TikTok.

Accordingly, the recommendation itself does not fall within the scope of Section 230(c)(1) because the fundamental message communicated—that the particular user should watch the video because it will be interesting for that user—is not “information provided by another information content provider.” 47 U.S.C. § 230(c)(1).

In his dissent in *Force*, Chief Judge Katzmann also opined that Facebook should not be shielded from the consequences of its recommendations because the recommendations “contribute to the creation of real-world social networks.” 934 F.3d at 82 (Katzmann, J., dissenting). According to Chief Judge Katzmann,

the result of at least some suggestions is not just that the user consumes a third party’s content. Sometimes, Facebook’s suggestions allegedly lead the user to become part of a unique global community, the creation and

maintenance of which goes far beyond and differs in kind from traditional editorial functions.

Id. The same is true of TikTok’s “challenge” culture. There are dozens, if not hundreds, of “challenges” that have been circulated on TikTok and gone “viral” and many of them are dangerous. App. A18–63 at ¶ 63. TikTok “challenges” involve users filming themselves engaging in behavior that mimics and often times “one-ups” other users posting videos performing the same or similar conduct.

By recommending a “challenge” video TikTok, like Facebook in *Force*, “lead[s] the user to become part of a unique global community” of users performing the activity involved in the challenge. *Force*, 934 F.3d at 82 (Katzmann, J., dissenting). Recommending challenge videos to users which encourage and entice users to engage in the conduct that is the subject of the challenge “goes far beyond and differs in kind from traditional editorial functions.” *Id.* After TikTok made the initial decision to publish the Blackout Challenge generally on the app, it took a second, affirmative step to target Nylah Anderson and recommend the Blackout Challenge, thereby encouraging her participation in the behavior that ultimately caused her death.

The inherent message carried with even an otherwise bare recommendation is unquestionably a message created by the service provider making the recommendation, and not from the third-party which created the underlying content. Accordingly, claims premised on the Defendants’ recommendation itself are not

barred as *no* recommendations made by interactive computer service providers are “information provided by another information content provider.”

III. The CDA Was Never Intended to Immunize Interactive Computer Service Providers From Harm Caused by Targeted Recommendations

Defendants’ defectively designed product functioned to knowingly target 10-year-old Nylah Anderson and recommend the Blackout Challenge video to her. Immunizing Defendants against Plaintiff’s claims premised on this design defect was never Congress’ intention. The CDA itself explicitly lays out the policies which Congress sought to further in enacting the CDA. Section 230(b)(3) states that it is the policy of the United States “to encourage the development of technologies which maximize *user control* over what information is received by individuals, families, and schools who use the Internet and other interactive computer services[.]” 47 U.S.C. § 230(b)(3) (emphasis added). Section 230(b)(4) makes clear that Congress sought to “remove disincentives for the development and utilization of...technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” 47 U.S.C. § 230(b)(4).

Defendants’ product, which utilizes sophisticated recommendation algorithms to target specific users, like Nylah, with specific content, is the antithesis of the type of technology Congress intended to promote. The purpose behind Defendants’ product and its associated recommendation algorithms is to strip users of the need (and ability) to decide for themselves what content to consume.

Defendants' product collected and analyzed copious amounts of data and information from Nylah Anderson in an attempt to predict or guess what content "is likely to be of interest" to her and then unilaterally sent specific content to her. Defendants' technology deprived Nylah of control over what content she consumed, not maximized it.

Further, a third-party content creator has no control over where their video is sent or which user's For You Page it lands upon. That control is maintained exclusively by Defendants. This exclusive control over to whom videos are shown and what content each user is provided highlights that Defendants' product eviscerates user control. Had TikTok warned individuals that posted Blackout Challenge inspired content that "this video will likely be shown to young children who will mimic the challenge and may die," most users likely would have declined to post such content. However, just as the users are ignorant as to how specific content appeared on their For Your Page, content creators lack any control of where the content is sent once posted. There is no aspect of TikTok which "maximize[s]" or even promotes "user control."

It is simply not possible to square Defendants' product and its associated recommendation algorithms with the "technologies which maximize *user control*" that the United States Congress sought to encourage the development of. Defendants' product is intended to feed users limitless videos that are predicted to

keep users engaged and glued to their screens for the purpose of maximizing corporate profits, at the direct expense of “user control.” Defendants’ defectively designed product does not “maximize user control[,]” it eliminates it. Immunizing Defendants from Plaintiff’s product liability claims here thwarts, rather than promotes, the stated policy goals of the CDA.

Further, immunizing social media goliaths like Defendants from claims attacking their recommendation technologies and practices violates the United States’ policy to “remove disincentives for the development and utilization of...technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” 47 U.S.C. § 230(b)(4). Reading the CDA to grant immunity to Defendants here will actively disincentivize Defendants and other social media companies from developing technologies that grant parents greater control over the content provided to their children. If Defendants’ product can freely push “objectionable or inappropriate” content to children without legal consequences, there is no incentive for change.

Misreading the CDA as the district court did has empowered social media companies to develop increasingly predatory and manipulative technologies designed to addict users and control their actions. Children, more than anyone, are paying the price. Indeed, the Joint Panel on Multidistrict Litigation has recently created an MDL focused solely on children who have been harmed by social media

companies' detrimental and profit-driven actions. *See In Re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, --F.Supp.3d--, MDL No. 3047, 2022 WL 5409144 (Oct. 6, J.P.M.L.). Congress has also repeatedly emphasized the dire need to protect our country's children. *See, e.g.*, Children's Online Privacy Protection Act, 15 U.S.C.A. § 6501, *et seq.* (prohibiting the collection of children's personal information without satisfying certain protective measures). Reading the CDA to immunize Defendants from Plaintiff's claims here incentivizes social media companies to continue preying upon children for the sake of ever increasing corporate profits. This is not what Congress intended.

IV. The Supreme Court's Forthcoming Ruling in *Gonzalez v. Google, LLC*

On October 3, 2022, the Supreme Court of the United States granted certiorari in *Gonzalez*, 2 F.4th 871, *cert. granted* 143 S.Ct. 80. The question presented to the Supreme Court is as follows:

Does section 230(c)(1) immunize interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limit the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information?

See Question Presented in *Gonzalez v. Google LLC*, Case No. 21-1333.³ Argument in *Gonzalez* is scheduled for February 21, 2023.

³ Available at <https://www.supremecourt.gov/qp/21-01333qp.pdf>.

On December 7, 2022, Plaintiff filed a brief as *Amicus Curiae* in support of petitioners in *Gonzalez*. Respondent Google LLC’s brief on the merits is due no later than January 12, 2023 and while any *amici* in support of respondent are not due to be filed until January 19, 2023, at the latest, it is anticipated that TikTok may file an *amicus* in support of respondent.

In addition to Plaintiff’s *amicus* brief, there were thirty other briefs filed in support of petitioners in *Gonzalez*. *Amici* ranged from the National Police Association, Inc. and the Anti-Defamation League to CHILD USA. CHILD USA’s *amicus* brief underscores that “the immunity afforded to online platforms is now so broad that it undermines fundamental public interests including child protection.” Another *amici* brief filed in support of petitioners by seventeen members of the United States Senate and House of Representatives⁴ specifically discusses the instant *Anderson* case and the harm that would flow from “misguided decisions” which “have conferred near-absolute immunity on Big Tech companies” allowing them to “push harmful content” to children throughout America if Section 230 of the CDA was read as broadly as the district court has read it here.

⁴ Senators Ted Cruz, Mike Brau, Joni Ernst, Lindsey O. Graham, Charles E. Grassley, Bill Hagerty, James Lankford, Mike Lee, Cynthia M. Lummis, Marco Rubio, and Roger F. Wicker, as well as Representatives Mike Johnson, Jodey C. Arrington, Scott Fitzgerald, Doug Lamborn, Victoria Spartz, and Tom Tiffany.

Should the Supreme Court answer the question presented in the negative and hold that targeted recommendations are not immunized by Section 230(c)(1), the district court's grant of Defendants' motion to dismiss must be reversed.

CONCLUSION

For all of the foregoing reasons, the district court's dismissal of Plaintiff's claims should be reversed.

/s/ Jeffrey P. Goodman

Robert J. Mongeluzzi

Jeffrey P. Goodman

SALTZ MONGELUZZI &

BENDESKY P.C.

One Liberty Place

1650 Market Street,

52nd Floor

Philadelphia, Pennsylvania 19103

(215) 496-8282

January 9, 2023

Counsel for Plaintiff-Appellant

CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member of the bar for the United States Court of Appeals
for the Third Circuit.

/s/ Jeffrey P. Goodman
Jeffrey P. Goodman
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 7,751 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2008 version of Microsoft Word in 14 point times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

/s/ Jeffrey P. Goodman
Jeffrey P. Goodman
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that, on January 9, 2023, I electronically filed Plaintiff-Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I also caused a copy of this brief to be served electronically on the following counsel for Defendants-Appellees:

Joseph E. O'Neil
Katherine A. Wang
CAMPBELL CONROY & O'NEIL, PC
1205 Westlakes Drive, Suite 330
Berwyn, PA 19312
Telephone: (610) 964-1900
Facsimile: (610) 964-1981
joneil@campbelltriallawyers.com
kwang@campbelltriallawyers.com

Albert Giang
KING & SPALDING LLP
633 West Fifth Street, Suite 1600
Los Angeles, CA 90071
Telephone: (213) 443-4355
Facsimile: (213) 443-4310
agiang@kslaw.com

Geoffrey M. Drake
TaCara D. Harris
KING & SPALDING LLP
1180 Peachtree Street, NE, Suite 1600
Atlanta, GA 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100
gdrake@kslaw.com
tharris@kslaw.com
Counsel for Defendants-Appellants

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TAWAINNA ANDERSON,	:	
Plaintiff,	:	
	:	
v.	:	Civ. No. 22-1849
	:	
TIKTOK, INC., <i>et al.</i> ,	:	
Defendants.	:	

Diamond, J.

October 25, 2022

MEMORANDUM

Plaintiff Tawainna Anderson accuses Defendants TikTok, Inc. and ByteDance, Inc. (operators of the social media application “TikTok”) of causing the death of her daughter. (Compl. (Doc. No. 1).) Although the circumstances here are tragic, I am compelled to rule that because Plaintiff seeks to hold Defendants liable as “publishers” of third-party content, they are immune under the Communications Decency Act. Accordingly, I will grant Defendants’ Motion to Dismiss. (Doc. No. 12); see 47 U.S.C. § 230(c)(1) and (e)(3).

I. BACKGROUND

a. Factual Allegations

TikTok is a social media platform enabling users to create short videos and view any shared videos created by third parties. (Compl. ¶ 50.) As “one of the world’s fastest-growing social media platforms,” TikTok boasts more than one billion active users worldwide. (Id. ¶¶ 43, 47.) Some twenty-eight percent of these users are younger than eighteen. (Id. ¶ 48.) Essential to TikTok’s widespread appeal is its “For You Page.” (Id. ¶ 52.) When a user opens TikTok, her FYP offers a stream of third-party videos curated through an algorithm developed to find that user’s particular interests. (Id. ¶ 51.) The algorithm learns her age, location, and her previous application use. (Id. ¶ 53.) Defendants thus seek to provide FYP content that is “unique and

tailored to that specific individual.” (Id. ¶ 54.)

In December 2021, ten-year-old Nylah Anderson’s FYP included the “Blackout Challenge”: videos in which users strangle themselves with household items and then encourage others to record themselves doing the same. (Id. ¶¶ 82-83.) As alleged, the Blackout Challenge is of a piece with many other “challenges” published on TikTok “which promote dangerous behavior.” (Id. ¶ 46.) Hiding in a bedroom closet, Nylah attempted the “Challenge.” Her mother, Plaintiff Taiwana Anderson, found Nylah unconscious, hanging from a purse strap. (Id. ¶ 87.) Ms. Anderson unsuccessfully attempted CPR. (Id. ¶ 88.) Three deep ligature marks on Nylah’s neck confirmed that she had suffered while struggling to free herself. (Id. ¶¶ 86, 89.) After several days in intensive care, Nylah died. (Id. ¶ 91.)

As alleged, during 2021, other children died attempting the Blackout Challenge. (Id. ¶¶ 67-70.) As further alleged, Defendants knew that TikTok’s algorithm was promoting the Blackout Challenge to children. (Id. ¶ 71.)

b. Procedural History

Anderson charges that TikTok caused Nylah’s death. (Compl.) She brings design defect and failure to warn claims under strict products liability and negligence theories, as well as wrongful death and survival actions. (Id. ¶¶ 101-34, 156-86.) She also brings claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law and the California Consumer Legal Remedies Act. (Id. ¶¶ 135-55); 73 P.S. §§ 201-1, *et seq.*; Cal. Civ. § 1750, *et seq.*

Defendants move to dismiss all Counts, urging: a lack of personal jurisdiction, that Section 230 of the Communications Decency Act bars Anderson’s products liability and negligence claims, and that Anderson has failed to state a claim for relief. (Doc. No. 12.)

In response, Anderson defends only her products liability, negligence, wrongful death, and

survival claims, abandoning her claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law and the California Consumer Legal Remedies Act. I will thus dismiss those latter claims. See Levy-Tatum v. Navient Sols., Inc., 183 F. Supp. 3d 701, 712 (E.D. Pa. 2016) (dismissing claims the plaintiff failed to defend in opposing the defendant’s motion to dismiss). The matter has otherwise been fully briefed. (Doc. Nos. 12, 17, 21, 22.)

Because I conclude that Section 230 precludes Anderson’s products liability and negligence claims—on which her wrongful death and survival claims depend—I will grant Defendants’ Motion.

II. LEGAL STANDARDS

I must accept as true Anderson’s well-pled factual allegations and make all reasonable inferences in her favor. See Fed. R. Civ. P. 12(b)(6); In re Rockefeller Ctr. Props., Inc., 311 F.3d 198, 215 (3d Cir. 2002). I may consider Defendants’ affirmative defense—that Section 230 bars Anderson’s suit—at the motion-to-dismiss stage. Putt v. TripAdvisor, Inc., No. 20-3836, 2021 WL 242470, at *3 (E.D. Pa. Jan. 25, 2021). Anderson is “not required to anticipate and plead around an affirmative defense,” however. Id.; see also Schmidt v. Skolas, 770 F.3d 241, 248 (3d Cir. 2014). Dismissal is thus permissible only if Section 230 immunity is “evident from the face of the complaint.” Brody v. Hankin, 145 F. App’x 768, 771 (3d Cir. 2005) (quoting Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 n. 10 (3d Cir.1978)) (emphasis omitted).

III. DISCUSSION

In pertinent part, CDA Section 230 provides as follows:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

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(c)(1) and (e)(3).

In thus precluding interactive service providers from being “treated as the publisher[s]” of third-party content, Congress immunized the providers’ “decisions relating to the monitoring, screening, and deletion of content from [their] network[s]—actions quintessentially related to a publisher’s role.” Green v. Am. Online (AOL), 318 F.3d 465, 471 (3d Cir. 2003).

Congress conferred this immunity “to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.” Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997); 47 U.S.C. § 230(b)(1)-(2). It recognized that because of the “staggering” amount of information communicated through interactive computer services, providers cannot prescreen each message they republish. Zeran, 129 F.3d at 331. Accordingly, Congress conferred immunity on providers to encourage them not to restrict unduly the number and nature of their postings. Id.

Section 230 provides immunity when: (1) the defendant is an interactive computer service provider; (2) the plaintiff seeks to treat the defendant as a publisher or speaker of information; and (3) that information is provided by another content provider. 47 U.S.C. § 230(c)(1). Here, the Parties agree that Defendants are interactive computer service providers, and that the Blackout Challenge videos came from “another information content provider” (third-party users). (See Doc. Nos. 12, 17.) They dispute only whether Anderson, by her design defect and failure to warn claims, impermissibly seeks to treat Defendants as the “publishers” of those videos. It is evident from the face of Anderson’s Complaint that she does.

Anderson urges that she seeks to hold Defendants directly liable for their own acts and omissions as designers, manufacturers, and sellers of a defective product, not for their conduct as publishers. See Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 139-40 (4th Cir. 2019); (Doc.

No. 17 at 10.) She cannot defeat Section 230 immunity, however, by creatively labeling her claims:

[W]hat matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress—what matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.

Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009). I must look past how Anderson characterizes a claim and “ask whether the duty that [Anderson] alleges that [Defendants] violated derives from [Defendants’] status or conduct as a ‘publisher or speaker.’” Id.

Anderson bases her allegations entirely on Defendants’ presentation of “dangerous and deadly videos” created by third parties and uploaded by TikTok users. She thus alleges that TikTok and its algorithm “recommend inappropriate, *dangerous, and deadly videos* to users”; are designed “to addict users and manipulate them into participating in *dangerous and deadly challenges*”; are “not equipped, programmed with, or developed with the necessary safeguards required to prevent circulation of *dangerous and deadly videos*”; and “[f]ail[] to warn users of the risks associated *with dangerous and deadly videos and challenges*.” (Compl. ¶¶ 107, 127 (emphasis added).) Anderson thus premises her claims on the “defective” manner in which Defendants *published* a third party’s dangerous content.

Although Anderson recasts her content claims by attacking Defendants’ “deliberate action” taken through their algorithm, those “actions,” however “deliberate,” are the actions of a publisher. Courts have repeatedly held that such algorithms are “not content in and of themselves.” Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1098 (9th Cir. 2019). The Second Circuit has explained that the use of “tools such as algorithms that are designed to match [] information with a consumer’s interests” is well within the range of publisher functions covered by Section 230. Force v. Facebook, Inc., 934 F.3d 53, 66 (2d Cir. 2019), cert. denied, 140 S. Ct. 2761 (2020) (No.

19-859); cf. Obado v. Magedson, 612 F. App'x 90, 94 (3d Cir. 2015) (“[A]llegation that the defendants manipulated search engines to maximize search results relating to the alleged defamatory content does not affect their immunity from suit.”).

Anderson relies heavily on two inapposite Ninth Circuit decisions. Doe v. Internet Brands, Inc., 824 F.3d 846 (9th Cir. 2016); Lemmon v. Snap, Inc., 995 F.3d 1085 (9th Cir. 2021).

In Internet Brands, the plaintiff was a member of “Model Mayhem,” a networking website for “aspiring models.” 824 F.3d at 848. The plaintiff “posted information about herself on the website.” Id. at 848. Posing as talent scouts, two men contacted the plaintiff and lured her to a fake audition, where they assaulted her. Id. The plaintiff alleged that the failure of the website’s operator to post a warning of the risks associated with using the website caused her to fall victim to the scheme. Id. at 849. Significantly, the plaintiff’s claims had nothing to do with the site’s content: she did not allege that the two men had posted anything to the site or that she was lured by any website posting. Id. at 851. The Court thus deemed Section 230 immunity inapplicable because the defendant’s purported duty to warn “[did] not arise from an alleged failure to adequately regulate access to user content,” and would not “affect how [the defendant] publishes or monitors such content.” Id. at 851, 853.

As I have discussed, however, the duty Anderson invokes directly implicates the manner in which Defendants have chosen to publish third-party content. (Compl. ¶ 107.) Anderson’s claims thus are plainly barred by Section 230 immunity. Cf. Doe v. MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008) (considering claims “predicated solely on [service provider’s] failure to implement basic safety measures to protect minors” as “merely another way of claiming that [service provider] was liable for publishing the communications”).

The plaintiffs in Lemmon alleged that a speed filter on Snap’s smartphone application,

“Snapchat,” helped cause the high-speed car accident in which the plaintiffs’ two sons were killed. 995 F.3d at 1087-90. As alleged, the speed filter enabled users to record their real-life speed, and users believed that Snapchat would reward them for recording a speed over 100 miles per hour. Id. at 1093. The Court ruled that Section 230 did not apply because the plaintiff’s claims were “independent[] of the content” created by Snapchat’s users. Id. at 1093. Rather, the defect alleged was the way in which the site was designed, highlighting “the interplay between Snapchat’s reward system and the Speed Filter.” Id. at 1092.

Selectively quoting from Internet Brands and Lemmon, Anderson insists that she is not attacking Defendants’ actions as publishers because her claims do not require Defendants to *remove* or *alter* the content generated by third parties. (Doc. No. 17 at 12, 14.) Publishing involves more than just these two actions, however. As I have discussed, it also involves decisions related to the monitoring, screening, arrangement, promotion, and distribution of that content—actions that Anderson’s claims all implicate. See Force, 934 F.3d at 66. Indeed, “[c]ourts have interpreted ‘publication’ capaciously to reach claims that, although pleaded to avoid the CDA, ‘implicitly require recourse to that content [posted by a third party] to establish liability.’” Herrick v. Grindr, LLC, 305 F. Supp. 3d 579 (2018), aff’d, 765 F. App’x 586 (2d Cir. 2019); see also Force, 934 F.3d at 64 (“The Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity.”).

In sum, because Anderson’s design defect and failure to warn claims are “inextricably linked” to the manner in which Defendants choose to publish third-party user content, Section 230 immunity applies. Herrick, 765 F. App’x at 591. Anderson’s wrongful death and survival claims cannot proceed in light of that tort immunity. See Valentino v. Phila. Triathlon, LLC, 150 A.3d 483, 493 (Pa. Super. Ct. 2016) (“Pennsylvania case law has long held that a wrongful death

claimant’s substantive right to recover is derivative of and dependent upon a tortious act that resulted in the decedent’s death.”); Tulewicz v. Se. Pa. Transp. Auth., 606 A.2d 427, 431 (Pa. 1992) (“A survival action ... ‘merely continues in [the decedent’s] personal representatives the right of action which accrued to the deceased at common law because of the tort.’”) (cleaned up).

IV. CONCLUSION

Nylah Anderson’s death was caused by her attempt to take up the “Blackout Challenge.” Defendants did not create the Challenge; rather, they made it readily available on their site. Defendants’ algorithm was a way to bring the Challenge to the attention of those likely to be most interested in it. In thus promoting the work of others, Defendants published that work—exactly the activity Section 230 shields from liability. The wisdom of conferring such immunity is something properly taken up with Congress, not the courts.

I will thus grant Defendants’ Motion on immunity grounds. In light of my decision, I need not address Defendants’ contentions respecting jurisdiction and failure to state a claim.

An appropriate Order follows.

October 25, 2022

/s/ Paul S. Diamond

Paul S. Diamond, J

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TAWAINNA ANDERSON,	:	
Plaintiff,	:	
	:	
v.	:	Civ. No. 22-1849
	:	
TIKTOK, INC., et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 25th day of October, 2022, upon consideration of Defendants’ Motion to Dismiss (Doc. No. 12), Plaintiff’s Response (Doc. No. 17), Defendants’ Reply (Doc. No. 21), Plaintiff’s Sur-Reply (Doc No. 22), and all related submissions, it is hereby **ORDERED** that Defendants’ Motion is **GRANTED**.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**TAWAINNA ANDERSON, Individually
and as Administratrix of the ESTATE
OF NYLAH ANDERSON, a deceased
minor**

Plaintiff,

v.

**TIKTOK, INC. AND BYTEDANCE,
INC.**

Defendants.

No. 2:22-cv-01849-PD

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given that Plaintiff, Tawainna Anderson, Individually and as Administratrix of the Estate of Nylah Anderson, a deceased minor ("Plaintiff"), hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered by this Court in favor of Defendants, TikTok, Inc. and ByteDance, Inc. ("Defendants") on October 25, 2022 (ECF 40) and all decisions subsumed in that judgment, including, but not limited to the Court's Memorandum and Order (ECF 39, 40).

Dated: October 31, 2022

/s/ Robert J. Mongeluzzi

Robert J. Mongeluzzi

Jeffrey P. Goodman

Samuel B. Dordick

Rayna McCarthy

**SALTZ MONGELUZZI &
BENDESKY P.C.**

One Liberty Place

1650 Market Street, 52nd Floor

Philadelphia, Pennsylvania 19103

Tel: (215) 496-8282

rmongeluzzi@smbb.com

jgoodman@smbb.com

sdordick@smbb.com

Mark A. DiCello
DiCELLO LEVITT GUTZLER LLC
Western Reserve Law Building
7556 Mentor Avenue
Mentor, Ohio 44060
Tel: (440) 953-8888
madicello@dicellolevitt.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2022, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Robert J. Mongeluzzi

Robert J. Mongeluzzi

Counsel for Plaintiff

No. 22-3061

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

TAWAINNA ANDERSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF N.A., A DECEASED MINOR,

Plaintiff-Appellant,

v.

TIKTOK INC.; BYTEDANCE INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania No. 2:22-cv-1849 (Diamond, J.)

**BRIEF FOR DEFENDANTS-APPELLEES
TIKTOK INC. AND BYTEDANCE INC.**

Benjamin D. Bright
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

Geoffrey M. Drake
TaCara D. Harris
KING & SPALDING LLP
1180 Peachtree Street NE,
Suite 1600
Atlanta, GA 30309
(404) 572-4726

Albert Giang
KING & SPALDING LLP
633 West 5th Street, Suite 1600
Los Angeles, CA 90071
(213) 443-4335

David Mattern
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 626-2946

Andrew J. Pincus
Nicole A. Saharsky
Minh Nguyen-Dang
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Mark J. Winebrenner
FAEGRE DRINKER BIDDLE & REATH LLP
90 South Seventh Street
2200 Wells Fargo Center
Minneapolis, MN 55402
(612) 766-1600

Joseph O'Neil
Katherine A. Wang
CAMPBELL CONROY & O'NEIL
1205 Westlakes Drive, Suite 330
Berwyn, PA 19312
(610) 964-1900

Counsel for Defendants-Appellees TikTok Inc. and ByteDance Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Rule 26.1, Defendant-Appellees state as follows:

ByteDance Inc. is a wholly owned subsidiary of ByteDance Ltd. ByteDance Ltd. is a privately held corporation, and no publicly held company owns 10% or more of ByteDance Ltd.'s stock.

TikTok Inc. is a wholly owned subsidiary of TikTok LLC. TikTok LLC is a wholly owned subsidiary of TikTok Ltd., which in turn is wholly owned by ByteDance Ltd.

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INTRODUCTION

This lawsuit arises from the tragic death of Plaintiff Tawainna Anderson’s daughter, Nylah, who passed away after purportedly watching and attempting to recreate a user video depicting an alleged “blackout challenge,” a type of choking game where participants choke themselves until they pass out. Defendants TikTok Inc. and ByteDance Inc. take the safety of TikTok users seriously and extend their deepest condolences to Nylah’s family.

Anderson seeks to hold Defendants—not the creators of the video—liable for her daughter’s death. Her core theory of liability is that Defendants’ entertainment and communication service—TikTok—is defectively designed because it permitted circulation and viewing of this third-party video.

Anderson’s claims are foreclosed by Section 230 of the Communications Decency Act (CDA), 47 U.S.C. § 230. Section 230 immunizes internet-based services from claims that treat them as a “publisher or speaker” of “information” provided by a third party. The district court correctly applied Section 230 to dismiss Anderson’s claims because they are premised on TikTok Inc.’s actions as a “publisher” with respect to

third-party content posted on the TikTok service. Anderson proffers three arguments; none has any merit.

First, Anderson argues that common-law product-liability claims fall outside the scope of Section 230. But Section 230 by its terms applies to any claim that would hold the defendant liable for actions taken as a publisher or speaker with respect to third-party content. Further, Section 230 expressly excludes certain specified causes of action from immunity—but product-liability or similar tort claims are not on that list. Given those clear statutory directives, unanimous precedent applies Section 230 to a wide variety of causes of action, including product-liability claims.

Second, Anderson argued below that Section 230 does not apply to Defendants' actions allegedly allowing the posting of, or failing to remove, harmful third-party content. She does not appear to press that claim on appeal, and for good reason: This Court has long held that Section 230 bars claims seeking to hold a defendant liable for “promulgating harmful content and [for] failing to address certain harmful content on its network.” *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003). That reasoning squarely precludes Anderson's claims, which allege that the

TikTok platform is defectively designed both because it allowed the posting of and failed to delete a user video depicting a “blackout challenge” that Nylah allegedly watched.

Third, Anderson argues that an internet-based service such as TikTok does not act as a “publisher or speaker” when it uses algorithms to recommend particular content to users. But the core meaning of “publish[ing]” includes decisions about how to organize, recommend, and display content, and it is irrelevant whether those decisions are made manually or through use of an algorithm. Every court of appeals to have considered the question—including this Court in an unpublished opinion—has concluded that Section 230 immunizes internet websites from liability for making algorithmic recommendations to users. *See Obado v. Magedson*, 612 F. App’x 90, 93 (3d Cir. 2015).

Relatedly, Anderson argues that her claims seek to hold Defendants liable not for third parties’ posting of the challenge video, but for the algorithmic recommendation’s implicit message that this video is “cool.” Anderson forfeited that argument because she failed to assert it in the district court. The argument is also wrong: Every publisher implicitly conveys that the content it publishes is worth reading or viewing when it

engages in the act of publishing third-party content, yet Section 230 immunizes publishing third-party content. Anderson’s argument would render Section 230 a nullity by allowing plaintiffs to circumvent its protections by invoking a claimed implicit message—a “message” that would apply to all publishers of third-party content—rather than focusing on the third-party content. In addition, if the supposed implicit message were considered TikTok Inc.’s own content, Anderson’s claims would be barred because they would infringe on its First Amendment right to exercise editorial judgment.

In sum, Anderson’s claims rest directly on TikTok Inc.’s methods for selecting, presenting, recommending, aggregating, and monitoring third-party content on the TikTok platform—quintessential publishing functions that are squarely protected under Section 230. Her claims are therefore barred as a matter of law. This Court should affirm the district court’s decision granting Defendants’ motion to dismiss.

STATEMENT OF THE ISSUE

Whether the district court correctly held that Section 230 of the Communications Decency Act, 47 U.S.C. § 230, bars Anderson’s claims,

which seek to hold Defendants-Appellees liable for content posted by third parties. *See* A1-A9.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously, nor has any other related case or proceeding.

STATEMENT OF THE CASE

These facts are drawn from Anderson’s complaint, which is taken as true at the pleadings stage. *See Bruni v. City of Pittsburgh*, 824 F.3d 353, 360 (3d Cir. 2016).

A. Factual Background

TikTok is an internet-based platform on which users can create, share, and view short-form video clips. A27 (Compl. ¶ 50).¹ In 2021, TikTok had 1 billion active global users. *Id.* (Compl. ¶ 47).

TikTok’s third-party users upload a vast number of videos onto the platform; to make that data usable, TikTok employs “a recommendation

¹ The TikTok platform is made available in the United States by Defendant TikTok Inc., and the complaint pleads no facts specific to Defendant ByteDance Inc. Accordingly, although both TikTok Inc. and ByteDance Inc. are protected by Section 230, TikTok Inc. is the only defendant that took any action allegedly relevant to this litigation. In the discussion below, we use “TikTok” to refer to the platform and “TTI” to refer to TikTok Inc.

system that delivers content to each user that is likely to be of interest to that particular user. [E]ach person’s feed is unique and tailored to that specific individual.” A19 (Compl. ¶ 3). This “proprietary algorithm” is alleged to “select[] which videos are shown to each user based on the user’s demographics, including age [and] user interactions such as the videos viewed and shared.” A28 (Compl. ¶¶ 51, 53) (emphasis omitted). TikTok users may view this “stream of curated videos” on the “For You” page in their TikTok app. A28 (Compl. ¶ 51).

According to the complaint, “challenge” videos have become a popular category of user-generated content on TikTok. A29 (Compl. ¶ 60). The complaint alleges that these videos “involve users filming themselves engaging in behavior that mimics and often times ‘one-ups’ other users posting videos performing the same or similar conduct.” *Id.* (Compl. ¶ 61). At issue in this appeal is a so-called “blackout challenge” video, which allegedly “encourages users to choke themselves with belts, purse strings, or anything similar until passing out.” A31 (Compl. ¶ 64). The complaint does not allege that Defendants created or otherwise contributed to these user-generated challenge videos. A8 (“Defendants did not

create the Challenge; rather, they made it readily available on their site.”).²

Anderson asserts that her daughter Nylah viewed a blackout challenge video created by a third party on the TikTok platform. A33-34 (Compl. ¶ 82). Nylah died after allegedly attempting to perform the challenge. A31 (Compl. ¶ 65).

B. Procedural History

Anderson brought this personal-injury case on behalf of herself and as the administrator of her daughter’s estate. A18. She asserts claims for strict product liability, negligence, and wrongful death, as well as survival claims. A36-62 (Compl. ¶¶ 101-86). The gravamen of each claim is that the TikTok platform is defectively designed because its algorithm recommended the blackout challenge video to her daughter and that Defendants failed to warn her daughter that the video was dangerous. *See id.*³ She further contends that Defendants are liable for failing to remove

² *Cf.* A83 (citing CDC and academic studies noting that “Unintentional strangulation deaths of youth from participation in ‘choking games’ date back to at least 1995, including online versions of blackout challenges on websites such as YouTube dating back to 2007 or earlier”).

³ Anderson also brought claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law and the California Consumer Legal Remedies Act. A50-56 (Compl. ¶¶ 135-55). Anderson abandoned

third-party content, particularly videos depicting dangerous activity like choking or blacking out. For example, she alleges that Defendants “took no and/or completely inadequate action to extinguish and prevent the spread of the Blackout Challenge”; “failed to change, update, and/or correct their algorithm to prevent it from presenting users, specifically children, with the dangerous and deadly Blackout Challenge”; and “fail[ed] to timely remove all dangerous and deadly videos.” A32-33 (Compl. ¶¶ 75-76, 127).

The district court dismissed Anderson’s claims, holding them barred by Section 230 of the CDA. A3-A8. The court explained that Section 230 provides a defense to liability when three conditions are met: (1) “the defendant is an interactive computer service provider”; (2) “the plaintiff seeks to treat the defendant as a publisher or speaker of information”; and (3) “the information is provided by another content provider.” A4 (citing 47 U.S.C. § 230(c)(1)). Anderson did not dispute that the first and third conditions are met—*i.e.*, that TikTok is an interactive computer service and that the challenge video was created by a third

those claims below, and the district court accordingly dismissed them. A2-A3.

party. *Id.* Thus, the only question before the district court was whether Anderson sought to hold Defendants liable as a “publisher” of the video. *Id.*

The district court answered that question “yes.” A1. The court explained: “Anderson bases her allegations entirely on Defendants’ presentation of ‘dangerous and deadly videos’ created by third parties and uploaded by TikTok users.” A5. In other words, the court explained, the claims are premised “on the ‘defective’ manner in which Defendants *published* a third party’s dangerous content.” A5.

The district court also rejected Anderson’s argument that Section 230 does not apply because TikTok uses an algorithm to recommend content: “Courts have repeatedly held that such algorithms are ‘not content in and of themselves,’” and that “the use of ‘tools such as algorithms that match information with a consumer’s interests’ is well within the range of publisher functions covered by Section 230.” A5 (quoting *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) and *Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019) (alterations omitted)). That is “exactly the activity Section 230 shields from liability.” A8. The court held that because Anderson’s claims “are inextricably linked to the

manner in which Defendants choose to publish third-party user content, Section 230 immunity applies.” A7 (internal quotation marks omitted).

Anderson appeals those determinations. *See* Dkt. 1.

SUMMARY OF ARGUMENT

The district court correctly held that Section 230 forecloses Anderson’s claims as a matter of law. Section 230 bars any cause of action (1) against a provider of an “interactive computer service”; (2) that seeks to treat that service provider as the “publisher or speaker” of any “information”; (3) where that information was provided by a third party. 47 U.S.C. § 230(c)(1). Anderson makes three arguments about why Section 230 does not apply to her claims. Each is incorrect.

First, she contends that product-liability claims fall outside of Section 230’s protections. But Section 230’s application turns on whether the plaintiff’s claims seek to hold the defendant liable as a “publisher or speaker,” regardless of the specific cause of action asserted. And far from excluding state-law claims, Section 230 expressly preempts state law by providing that “no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3). Section 230 also expressly exempts several causes of action from immunity; product-

liability and negligence claims are *not* among those exemptions. *See id.* § 230(e)(1)-(2) & (4)-(5). It therefore is not surprising that the courts of appeals have unanimously held that Section 230’s protections do not depend on a cause of action’s “name,” but rather apply whenever any claim treats the defendant as a publisher or speaker. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009) (collecting cases).

Second, Anderson asserted, but now appears to have abandoned, an argument based on Defendants’ failure to remove third-party content. Section 230 immunizes defendants from claims seeking to hold them liable for “monitoring, screening, and deletion of [third-party] content,” which are “actions quintessentially related to a publisher’s role.” *Green*, 318 F.3d at 471. In the complaint, Anderson attempts to hold Defendants liable for purportedly failing to remove a blackout challenge video. *See, e.g.*, A45 (Compl. ¶¶ 127(i) & (l)). That failure-to-remove theory is plainly barred by Section 230.

Third, Anderson argues that Section 230 does not apply to the use of automated algorithms to recommend third-party content to users. Opening Br. 15-16, 29-32. But the plain meaning of “publishing” includes selecting and organizing information for display in order to make that

information useful for an audience. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995) (publishing encompasses “the presentation of an edited compilation of speech generated by other persons.”). The statute does not distinguish between publishing functions that are performed manually and those that use an algorithm, and there is no principled basis for doing so. To the contrary, the text of Section 230 specifically reflects Congress’s aim to protect tools that “filter,” “pick,” “choose,” “digest,” and “organize” content. 47 U.S.C. § 230(f)(4)(A)-(C). Every court of appeals to have considered the issue (including this Court) has held that Section 230 applies to algorithmic recommendations. *See, e.g., Force*, 934 F.3d at 67; *Dyroff*, 934 F.3d at 1098; *Obado*, 612 F. App’x at 93.

Anderson relies on selective quotes from Section 230’s policy findings, asserting that Congress intended only to maximize user control and incentivize the development of blocking and filtering technologies that protect children. *See* 47 U.S.C. § 230(b)(3)-(4). But in addition to distorting these goals, she ignores the statute’s other policy goals, which include promoting the development of the internet and preserving a competitive free market. *Id.* § 230(b)(1)-(2). Algorithms are indispensable

tools for organizing the vast quantities of data available on the internet and publishing that data in a user-friendly format; without them, the modern internet could not function. Section 230 should not be construed to be self-defeating.

Anderson also contends that algorithmic recommendations convey an implicit message to the user that “this video is cool.” She argues that she seeks to hold Defendants liable for that message rather than for publishing the blackout challenge video uploaded by third parties. Opening Br. 26-29. Anderson did not make this argument in the district court and therefore has forfeited it. *In re Niaspan Antitrust Litig.*, 67 F.4th 118, 136 (3d Cir. 2023).

She also is wrong. Section 230 would be a dead letter if plaintiffs could evade it merely by relying on an implicit message that is inherent to organizing and displaying all third-party content. Further, if this supposed message could be considered TTI’s own content that is unprotected by Section 230, Anderson’s claims would fail for the separate reason that they would infringe on TTI’s First Amendment rights. Specifically, TTI has a First Amendment right to determine “whether, to what extent, and in what manner to disseminate third-party-created content to the

public.” *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1212 (11th Cir. 2022).

STANDARD OF REVIEW

The Court reviews *de novo* the dismissal of a complaint for failure to state a claim. *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n.1 (3d Cir. 2014). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

ARGUMENT

SECTION 230 BARS ANDERSON’S CLAIMS

Section 230 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). Section 230 also expressly preempts liability under “any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3). Together, these sections “provide[] immunity to [an interactive computer

service provider] as a publisher or speaker of information originating from another information content provider.” *Green*, 318 F.3d at 471.

Accordingly, this Court has held that Section 230 “bars ‘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.’” *Green*, 318 F.3d at 471 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). Section 230 also precludes liability for an interactive computer service’s “decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher’s role.” *Id.*

Section 230 serves important policy goals. In particular, it “promote[s] the free exchange of information and ideas over the Internet and [it] encourage[s] voluntary monitoring for offensive or obscene material.” *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003). Section 230 achieves these goals both by eliminating “the threat that tort-based lawsuits pose to freedom of speech” and by “forbid[ding] the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.” *Zeran*, 129 F.3d at 330-31.

To determine whether Section 230 bars a cause of action, a court asks whether (1) the defendant is a “provider . . . of an interactive computer service”; (2) the plaintiff seeks to hold the defendant liable as the “publisher or speaker” of content; and (3) the allegedly harmful content was “provided by another information content provider,” not by the defendant. 47 U.S.C. § 230(c)(1). Anderson did not contest the first element in the district court, and does not do so on appeal. Her arguments contesting the second and third elements lack merit.

A. Section 230 Applies Regardless Of A Cause Of Action’s Label, And There Is No Exception For Product-Liability Claims

Anderson argues (Br. 16) that her product-liability and failure-to-warn claims fall outside of Section 230’s protections. But when Congress drafted Section 230, it focused on the conduct for which the provision bars liability and did not limit that protection to particular causes of action. Congress instead expressly identified the specific legal actions to which the defense does not apply. Because those exclusions do not include product-liability and similar common-law claims, there is no basis for categorically precluding assertion of the Section 230 defense with respect to

those causes of action. In fact, this Court has already applied Section 230 to bar negligence claims. *Green*, 318 F.3d at 470.

This Court interprets statutory language based on its ordinary meaning. *Panzarella v. Navient Sols., Inc.*, 37 F.4th 867, 872 (3d Cir. 2022). Words in a statute also “must be read and interpreted in their context, not in isolation.” *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022) (internal quotation marks omitted). Here, the plain meaning of Section 230(c) and its surrounding context confirm that the statute applies to product-liability claims.

To begin with, Section 230 is framed broadly, focusing on whether the plaintiff seeks to hold the defendant liable for its role as a “publisher or speaker” of third-party content. 47 U.S.C. § 230(c)(1). The statute’s protection is not tied to any particular cause of action. The statute also has broad preemptive effect: Section 230(e)(3) states that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3). Even a “State[s]” enforcement authority is limited to actions that are “[c]onsistent with this section.” *Id.* Congress thus made clear that Section

230(c) applies to state-law claims, without any carveout for product-liability or other common-law causes of action.

That conclusion is confirmed by the absence of product liability claims from Section 230's express list of excluded causes of action. In particular, the statute excludes:

- specified federal statutory provisions relating to obscenity and sexual exploitation of children, and “any . . . Federal criminal statute”;
- “any law pertaining to intellectual property”;
- “the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law”; and
- specified federal and state laws relating to sex trafficking.

47 U.S.C. § 230(e)(1)-(2) & (4)-(5). Product-liability and negligence claims are not on this list.

These exclusions confirm that Congress intended Section 230 to apply to all claims other than those expressly excluded. And Congress's failure to include common-law torts on its list of excluded actions makes clear that it intended Section 230(c) to apply to such claims. *See Gaglia v. First Fed. Sav. & Loan Ass'n*, 889 F.2d 1304, 1311 (3d Cir. 1989) (declining to read additional exemptions into a statute because the language

“demonstrate[d] that Congress knew how to exempt certain creditors from the operation of [the statute], and could do so with precision”).

Accordingly, “what matters” for purposes of Section 230 immunity “is not the name of the cause of action,” *Barnes*, 570 F.3d at 1101-02, but rather whether the plaintiff seeks to hold the defendant liable for “promulgating harmful content and [for] failing to address certain harmful content on its network,” *Green*, 318 F.3d at 471. “As courts uniformly recognize, § 230 immunizes internet services for third-party content that they publish, . . . against causes of action of all kinds.” *Marshall’s Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019); *see Force*, 934 F.3d at 64 n.18 (noting that courts have applied Section 230 to housing-discrimination, negligence, securities-fraud, and cyberstalking claims).

Other courts of appeals also have applied Section 230 immunity to product-liability claims that seek to hold the defendant liable for harms resulting from third-party content. *See, e.g., Doe v. Snap, Inc.*, No. H-22-00590, 2022 WL 2528615, at *14 (S.D. Tex. July 7, 2022) (negligent design claims—including “alleged lack of safety features”—barred by Section 230), *aff’d*, No. 22-20543, 2023 WL 4174061 (5th Cir. June 26, 2023);

Doe v. Twitter, Inc., 555 F. Supp. 3d 889, 930 (N.D. Cal. 2021), *aff'd in part, rev'd in part on other grounds sub nom., Doe #1 v. Twitter, Inc.*, Nos. 22-15103, 22-15104, 2023 WL 3220912 (9th Cir. May 3, 2023) (barring claims under Section 230 where “the nature of the alleged design flaw in this case—and the harm that is alleged to flow from that flaw—is directly related to the posting of third-party content”); *Herrick v. Grindr LLC*, 765 F. App'x 586, 590 (2d Cir. 2019) (barring claims under Section 230 where “manufacturing and design defect claims seek to hold [defendant] liable for its failure to combat or remove offensive third-party content”). And this Court has specifically applied Section 230 to bar tort-law claims. *Green*, 318 F.3d at 470.

In sum, there is no support for Anderson’s argument that product-liability claims are per se excluded from Section 230 immunity. Regardless of the cause of action, Section 230 applies if the claim treats the defendant as a publisher or speaker of third-party content.

B. Section 230 Bars Anderson’s Claims Relating To The Alleged Publication Of Or Failure To Remove The Black-out Challenge Video

The district court correctly held that Anderson’s claims treat Defendants as the “publisher” of third-party content. On appeal, Anderson

appears to have abandoned her claim that online platforms are not protected when they merely post or fail to remove third-party content—and for good reason. This Court has long held that the decision to post or remove third-party content is in the heartland of conduct protected by Section 230 immunity.

The Court has explained that Section 230 “precludes courts from entertaining claims that would place a computer service provider in a publisher’s role, and therefore bars lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions.” *Green*, 318 F.3d at 471 (cleaned up). In applying this element, courts “ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant’s status or conduct as a ‘publisher or speaker.’ If it does, section 230(c)(1) precludes liability.” *Barnes*, 570 F.3d at 1102.

As this Court has held, traditional publication functions include deciding whether to “publish, withdraw, postpone, or alter content.” *Green*, 318 F.3d at 471; see *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (“[T]he very essence of publishing is making the decision whether to print or retract a given piece of content.”).

Here, the allegations in the complaint make clear that Anderson seeks to hold Defendants liable for the display of certain user-generated content on the TikTok platform. *E.g.*, A28 (Compl. ¶ 56) (“show users videos and content”). And as the district court recognized, Anderson also seeks to hold Defendants liable on the theory that they failed to remove “‘dangerous and deadly videos’ created by third parties and uploaded by TikTok users.” A5. For example, Anderson alleges that Defendants are liable for:

- “[f]ailing to timely remove all dangerous and deadly videos and challenges from its app, including but not limited to the Blackout Challenge,” A45 (Compl. ¶ 127(i), (l));
- “[f]ailing to prevent dangerous and deadly videos and challenges, including but not limited to the Blackout Challenge, from being posted, shared, and/or circulated to users on the TikTok app,” A45 (Compl. ¶ 127(d));
- “[f]ailing to prevent videos of the Blackout Challenge from being posted, shared, circulated, and/or recommended to users, including Nylah Anderson, through their FYP,” A46 (Compl. ¶ 127(r));
- failing to “extinguish and prevent the spread” of videos, A32 (Compl. ¶ 75); and
- breaching its “duty to monitor the videos and challenges shared, posted, and/or circulated on their app,” A43 (Compl. ¶ 119).

These claims, at bottom, seek to hold Defendants liable in connection with decisions regarding the “monitoring, screening, and deletion of

[third-party] content”—“actions quintessentially related to a publisher’s role” that are immune under Section 230. *Green*, 318 F.3d at 471; *see, e.g., Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (“[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.”). Put another way, her claims seek to hold Defendants liable for “promulgating” and “failing to address” harmful third-party content. *Green*, 318 F.3d at 471. By its plain terms, Section 230 bars those claims.

C. Section 230 Applies To Algorithmic Recommendations

Trying to escape this straightforward result, Anderson argues that Defendants were not acting as a publisher under Section 230 because they use algorithms to determine which third-party content is recommended to a particular user. Opening Br. 15-16, 29-32. As alleged in the complaint, the TikTok algorithm is “a recommendation system that delivers content to each user that is likely to be of interest to that particular user. . . . [E]ach person’s feed is unique and tailored to that specific individual.” A19 (Compl. ¶ 3).

Anderson appears to advance two contentions—first, that imposing liability based upon such recommendations does not treat the service provider as a “publisher”; and, second, that it does not impose liability based on third-party content. Those arguments are inconsistent with the statutory text and have been rejected by every court of appeals that has considered them.

1. Claims Based On Algorithmic Recommendations Treat The Service Provider As A Publisher

The statutory text, precedent, and congressional declaration of policy set forth in Section 230 all demonstrate that a service provider acts as a publisher when it organizes third-party content, including when it uses an algorithm to do so. Moreover, because virtually all websites and search engines use algorithms to organize third-party content, a decision excluding that activity from Section 230 protection would render Section 230 self-defeating. It would impose liability for actions that are necessary for any website that hosts third-party content.

a. Text. Section 230(c)(1) protects websites from claims that “treat[]” them as the “publisher or speaker” of third-party content. This Court interprets statutory language based on its ordinary meaning.

Panzarella, 37 F.4th at 872. Here, the plain meaning of the terms “publisher” and “speaker” include recommending third-party content.

A “publisher” is “one that publishes.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2019). To “publish” is “to place before the public.” WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED (3d ed. 2002). Publishing thus includes more than randomly transmitting information; rather, publishers necessarily select and organize content as part of how they “place” information before their readers. *Id.*; *see, e.g., Green*, 318 F.3d at 471 (“deciding whether to publish, withdraw, postpone, or alter content” is “a publisher’s traditional editorial function[]”).

Similarly, a “speaker” is “one who speaks.” MERRIAM WEBSTER’S COLLEGIATE. “Speak” means to give “expression to thoughts, opinions, or feelings.” WEBSTER’S THIRD 2185. One whose role is to “express[]” the views of numerous third parties necessarily must decide the order in which she will state them and which views will be “express[ed]” to particular audiences.

Consistent with these definitions, the Supreme Court has explained that publishers such as broadcasters “select programming originally produced by others” and “present[] an edited compilation of speech.”

Hurley, 515 U.S. at 570. The same is true of cable television operators, who exercise “editorial discretion over which stations or programs to include.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). And newspapers exercise “editorial judgment” on “content,” “layout,” “stories,” “columnists,” and “contributors.” *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 255 (1974). Indeed, “the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers’ opinion pages.” *Hurley*, 512 U.S. at 570. In sum, publishers publish by selecting and organizing information in order to make that information useful for an audience.

Algorithms are the means by which a website organizes the third-party content it contains for presentation to users. *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1227 (2023) (“[R]ecommendation’ algorithms are merely part of th[e] infrastructure” through which “[a]ll the content on [websites] is filtered.”). Imposing liability for those recommendations therefore would base liability on the website’s publishing activity—precisely what Section 230 prohibits.

Other portions of Section 230 confirm that conclusion. Section 230’s definition of “interactive computer service” includes an “access software

provider,” 47 U.S.C. § 230(f)(2), which the statute defines as a provider of “software” or “enabling tools” that “filter, screen, allow, or disallow content,” “pick, choose, analyze, or digest content,” or “transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content,” *id.* § 230(f)(4)(A), (B), (C).

By specifically protecting under Section 230 entities providing “enabling tools” that “choose,” “organize,” and “reorganize” content, Congress made clear that those activities qualify as “publish[ing]” conduct protected against liability. The express inclusion of those activities otherwise would make no sense.

Here, Anderson’s claims treat Defendants as “the publisher or speaker” by seeking to hold them liable for organizing and displaying a third-party video depicting a blackout challenge. As the district court observed, Anderson claims that “Defendants’ algorithm was a way to bring the Challenge to the attention of those likely to be most interested in it.” A8. That alleged compilation of videos is no different from the layout of a newspaper or the primetime lineup of a cable news operator.

Publishers organize content to make it useful for an audience and to drive audience engagement. Traditional media do so via editors and

producers; communications services such as TikTok accomplish the same goals via algorithms. Both are engaged in traditional publishing functions of selecting, organizing, and recommending content. There is no principled basis in the statutory text for distinguishing publishing functions performed manually from those performed using an algorithm.

Anderson nonetheless asserts (Br. 22-24) that personalized targeted recommendations are somehow different from what she calls traditional publisher functions. In support of this argument, she contends (*id.* at 22-23) that when the editors of the *New York Times* publish articles, they do not recommend specific articles. That is incorrect: The *New York Times* has always arranged stories, opinion pieces, and letters to the editor to focus the reader's attention on some more than others.

Further, a publisher of multiple magazines like Condé Nast, for example, chooses which articles to run in which magazines based on the expected audience for each magazine. The same is true of television stations, which make editorial choices about which programs to run at what time. Personalized recommendations are merely an evolution of this principle—instead of a dozen print magazine titles for a dozen different

audiences or a lineup of television programs, TTI publishes a compilation of videos for each user. That qualifies as “publishing” under Section 230.

Anderson also cites (Br. 24-25) Justice Thomas’ dissent respecting the denial of certiorari in *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020), in which Justice Thomas suggested that “publisher” or “speaker” immunity does not extend to “distributors.” *Id.* at 15. According to that theory, which has not been adopted by any court, Section 230 does not apply to claims alleging that a website distributed third-party content that it knew or had reason to know was unlawful. *See id.* at 14.

But there is nothing in the statutory text of Section 230 that distinguishes publisher from distributor liability. Moreover, by the time Section 230 was enacted, any distinction between publishers and subsequent distributors had eroded and leading authorities referred to both as “publishers.” PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 799-800, 803-04 (5th ed. 1984); Dan B. Dobbs *et al.*, HORNBOOK ON TORTS § 37.4, at 940 (2d ed. 2016).

Finally, the distinction between publisher and distributor liability traditionally recognized at common law makes no sense in the context of

the internet, where initial publication and general distribution happen simultaneously. When a user posts a video on TikTok, TTI both publishes the video by releasing it and distributes the video by making it available to users. If Section 230 did not immunize the distribution of third-party content, the statute's protections would be meaningless.

b. Precedent. Every court of appeals to consider the question has held that Section 230 immunity applies when a platform uses algorithms to recommend third-party content, including this Court in an unpublished opinion. *See Obado*, 612 F. App'x at 93 (“[A]n allegation that the defendants manipulated search engines to maximize search results relating to the alleged defamatory content does not affect their immunity from suit.”).

For example, in *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), the plaintiffs alleged that Facebook unlawfully provided the terrorist organization Hamas with a communications platform that enabled the terrorist attacks that injured them. *Id.* at 57. The Second Circuit concluded that the ordinary meaning of “publisher” defeated the plaintiffs’ argument that “Facebook’s use of algorithms renders it a non-publisher.” *Id.* at 66 (collecting cases). The court held that it makes no difference *how* a

publisher selects the third-party content to provide to users—whether curating manually or automating curation through an algorithm—because “so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific edit[orial] or selection process.” *Id.* at 67 (quoting *Carafano*, 339 F.3d at 1124); see *Marshall’s Locksmith Serv. Inc.*, 925 F.3d at 1271 (holding that “automated editorial act[s]” are protected by Section 230) (quoting *O’Kroley v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016)).

The Ninth Circuit reached the same conclusion in *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093 (9th Cir. 2019). There, a website user posted an inquiry on an online messaging board to purchase heroin, and a drug dealer responded. *Id.* at 1095. The user later died because the heroin he purchased had been laced with fentanyl. *Id.* The user’s mother sued the website operator, and she argued that the website was not protected under Section 230 as a publisher because it “used features and functions, including algorithms, to analyze user posts . . . and recommend other user groups.” *Id.* at 1098.

The Ninth Circuit rejected that argument. It concluded that Section 230 immunity applied to claims attacking a service’s “algorithms” used to “analyze user posts” and “recommend[]” third-party content to users. *Dyroff*, 934 F.3d at 1098. “These functions—recommendations and notifications—[were] tools meant to facilitate the communication and content of others,” and “not content in and of themselves.” *Id.* They therefore fell within the scope of “publish[ing]” for purposes of Section 230. *Id.*

That reasoning applies directly to TikTok’s algorithm. Anderson alleges that the algorithm “recommended the Blackout Challenge” video based on factors such as “user[] demographics” and “user interactions such as the videos viewed and shared.” A28, A31 (Compl. ¶¶ 53, 67). Thus, a user’s voluntary actions on the platform inform TikTok about that user’s preferences, and TikTok’s algorithm selects content to display based on that input. Accordingly, TikTok’s use of an algorithm to recommend third-party content does not deprive it of Section 230 immunity. *Accord Taamneh*, 143 S. Ct. at 1226-27 (“Viewed properly, defendants’ ‘recommendation’ algorithms are merely part of that infrastructure. All the content on their platforms is filtered through these algorithms, which

allegedly sort the content by information and inputs provided by users and found in the content itself.”).

Anderson cites (Br. 15-16) Judge Berzon’s concurrence in *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021), *vacated on other grounds*, 143 S. Ct. 1191 (2023), in which she argued that targeted recommendations “are well outside the scope of traditional publication.” *Id.* at 914. But as explained above, *see pp. 27-29, supra*, recommending content is in reality a core function of publishing. And as the Second Circuit has explained, website operators have long targeted third-party content to specific users “based on, among other things, users’ geolocation, language of choice, and registration information.” *Force*, 934 F.3d at 66-67. “[I]t would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized from civil liability.” *Id.* at 67.⁴

⁴ Anderson also points (Br. 32-34) to the Supreme Court’s grant of review in *Gonzalez*. But the Court’s decision did not address the scope of Section 230, instead resolving the case on other grounds. *Gonzalez v. Google LLC*, 143 S. Ct. 1191, 1192 (2023) (per curiam).

Anderson also cites (Br. 27-28) Judge Katzmann’s dissent in *Force*, which argued that Facebook’s recommendations “contribute to the creation of real-world social networks,” which “goes far beyond and differs in kind from traditional editorial functions.” 934 F.3d at 82 (Katzmann, J., dissenting). But this is far afield from Anderson’s allegations, which only target the “consum[ption] [of] a third party’s content.” *Id.* She does not allege that TikTok facilitated arranging connections or matches with other users.

In any event, the majority opinion squarely rejected Judge Katzmann’s argument. The court reasoned that “arranging and distributing third-party information inherently forms ‘connections’ and ‘matches’ among speakers, content, and viewers of content . . . That is an essential result of publishing.” *Force*, 934 F.4th at 66 (majority opinion); *accord Snap, Inc.*, 2022 WL 2528615, at *14 (holding that claims seeking to hold Snap liable for “content and messages sent between parties on its platform” are barred by Section 230). Anderson’s contrary argument would “eviscerate” Section 230. *Force*, 934 F.4th at 66.

In sum, the courts of appeals are unanimous in holding that Section 230 applies when a website uses algorithms to recommend third-party

content to users. Because Anderson’s claims seek to hold Defendants liable for performing quintessential publisher functions, they are barred by Section 230.

Anderson contends that several Ninth Circuit cases support her contention that Section 230 does not apply to her claims. Opening Br. 16-20. But as the district court held, in none of these cases did the plaintiff seek to hold the internet platform liable for determining what content was displayed to users. A6-A7. And as just discussed, the Ninth Circuit expressly held in *Dyroff* that Section 230 *does* encompass algorithmic recommendations—which means that the Ninth Circuit itself necessarily found algorithmic recommendations distinguishable from the conduct at issue in the cases invoked by Anderson.

First, Anderson cites *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), in which the plaintiff alleged that a talent-scout website was defective because it had failed to warn her that she had matched with two known criminals. *Id.* at 848-49. Critically, the plaintiff did not allege that the two criminals had “posted anything to the website,” or that she had been “lured by any posting that [the defendant] failed to remove.” *Id.* at 851. In that context, the court held that Section 230 immunity did not

apply because the duty to warn “[did] not arise from an alleged failure to adequately regulate access to user content” and would not “affect how [the defendant] publishes or monitors such content.” *Id.* at 851, 853; see *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) (noting that although the defendant in *Internet Brands* “did, in its business, act as a publisher of third-party content, the underlying legal duty at issue did not seek to hold the defendant liable as a ‘publisher or speaker’ of third-party content”). *Internet Brands* is therefore entirely unlike this case, because Anderson’s claims rest on third-party content, and imposing liability here would directly affect how TTI regulates and publishes third-party content.

Anderson also argues (Br. 24) that the district court applied a “but-for” test rejected by *Internet Brands*, which explained that “[p]ublishing activity is a but-for cause of just about everything [an internet publishing business] is involved in.” 824 F.3d at 853.

But Anderson recognizes that, rather than relying solely on a but-for relationship, courts must look “to what the duty at issue actually requires” to determine whether the claim relates to the defendant’s actions as a publisher. Opening Br. 24 (quoting *HomeAway.com, Inc.*, 918 F.3d

at 682). That is precisely the analysis that the district court performed. The court first asked “whether the duty that Anderson alleges that Defendants violated derives from Defendants’ status or conduct as a ‘publisher or speaker.’” A5 (quoting *Barnes*, 570 F.3d at 1101 (alterations omitted)). The court then correctly concluded that it did, because Anderson’s claims are premised entirely “on the ‘defective’ manner in which Defendants *published* a third party’s dangerous content.” A5. Accordingly, there is no support for Anderson’s argument that the district court applied a but-for test; rather, the court correctly held that “the duty Anderson invokes directly implicates the manner in which Defendants have chosen to publish third-party content.” A6.

Moreover, that conclusion is confirmed by the Ninth Circuit’s own decision in *Dyroff* holding that determining which of the myriad pieces of third-party content will be presented to a user falls squarely within the “publishing” activities protected by Section 230. *See Gonzalez*, 2 F.4th at 894-95 (applying *Dyroff* to uphold dismissal of claim based on algorithmic recommendations). Those cases would have come out differently if, as Anderson claims, applying Section 230 to algorithmic recommendations were precluded by *Internet Brands*.

Second, Anderson cites *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021), for its holding that the plaintiffs’ negligent-design claim was premised on a “duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public,” which “differs markedly from the duties of publishers as defined in the CDA.” *Id.* at 1092. But that case concerned a claim that the “Speed Filter” provided by Snap caused a fatal car accident by “superimpos[ing]” driving speed onto the user’s photo or video, which users believed would reward them for driving faster than 100 miles per hour. *Id.* at 1088-89. Accordingly, Snap’s alleged duty was “fully independent of [its] role in monitoring or publishing third-party content,” and the plaintiffs’ claim “st[ood] independently of the content that Snapchat’s users create with the Speed Filter” because it rested on content provided by Snap itself. *Id.* at 1093. The court expressly distinguished the *Lemmon* plaintiffs’ negligent-design claim from cases—like this one—that “depend[] on a third party’s content, without which no liability could have existed.” *Id.* at 1094.

Courts have repeatedly recognized that *Lemmon* in no way precludes applying Section 230 to bar product-liability claims—including

claims based on algorithmic “features”—where (as here) the “alleged design flaw” is “directly related to the posting of third-party content.” *Twitter, Inc.*, 555 F. Supp. 3d at 929-30; *see, e.g., Snap, Inc.*, 2022 WL 2528615, at *14 (same); *L.W. v. Snap Inc.*, No. 22cv619-LAB-MDD, 2023 WL 3830365, at *5 (S.D. Cal. June 5, 2023) (distinguishing *Lemmon* and dismissing product-liability claim as barred by Section 230); *Jackson v. Airbnb, Inc.*, No. CV 22-3084 DSF (JCx), 2022 WL 16753197, at *2 (C.D. Cal. Nov. 4, 2022) (same).

Finally, Anderson cites *A.M. v. Omegle.com, LLC*, 614 F. Supp. 3d 814 (D. Or. 2022), in which the district court held that a product-liability claim was not subject to Section 230 because the defendant could have “design[ed] its product differently” without “review[ing], edit[ing], or withdraw[ing] any third party content.” *Id.* at 819. But in that case, the plaintiff was a minor who alleged that a chat room website was defectively designed because it paired her with an adult who sexually abused her. *Id.* at 817. The alleged design flaw therefore bore no “relat[ion] to the posting of third-party content.” *Id.* at 820.

Here, by contrast, Anderson’s claims directly implicate the manner in which Defendants publish third-party content, *see* A38-41 (Compl.

¶ 107), and seek to hold Defendants liable for “promulgating harmful content and [for] failing to address certain harmful content,” *Green*, 318 F.3d at 471; *cf. Doe v. MySpace, Inc.*, 528 F.3d 413, 419-20 (5th Cir. 2008) (holding claims “predicated solely on [service provider’s] failure to implement basic safety measures to protect minors” barred by Section 230 as “merely another way of claiming that [service provider] was liable for publishing the communications”).

c. Congressional findings. Attempting to sidestep the plain meaning of Section 230’s operative provisions and the decisions of other courts of appeals, Anderson selectively quotes (Br. 29-32) from the statutory findings to argue that Congress did not intend Section 230 to immunize service providers’ use of algorithmic recommendations. In particular, she cites Sections 230(b)(3) and (b)(4), which state that two of the policies behind Section 230 are to “maximize user control” of information received over the internet and to “remove disincentives” to developing “blocking and filtering technologies” that empower parents’ supervision of their children’s internet consumption. 47 U.S.C. § 230(b)(3)-(4).

Anderson’s argument that the TikTok algorithm deprives users of control over the content they view is flatly contradicted by her own

allegations. As noted above, the algorithm delivers content “likely to be of interest” to each user based on factors such as “user[] demographics” and “user interactions such as the videos viewed and shared.” A28 (Compl. ¶¶ 53, 54). “[E]ach person’s feed is unique and tailored to that specific individual.” *Id.* (Compl. ¶ 54). The allegations in the complaint thus confirm that the essential purpose of TikTok’s algorithm is to maximize user control.

Moreover, Anderson ignores Congress’s other statutory purposes: “(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(1)-(2). As the Fourth Circuit explained in its seminal decision interpreting Section 230:

It would be impossible for service providers to screen each of their millions of postings for possible problems. 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). Section 230 thus was intended to incentivize the continued development of the internet and maximize the proliferation of speech, while at the same time encouraging online service providers to develop technologies that better enable user control.

Targeted recommendations serve each of those policy goals. Given the “staggering” amount of information on the internet, *Zeran*, 129 F.3d at 331, algorithmic tools are indispensable to a functional internet. Online service providers use algorithms to sift through billions of pieces of content and publish information in a form most useful to individual users. *Cf. Taamneh*, 143 S. Ct. at 1216. Without algorithmic sorting, users would have to sort through that vast content themselves—making the internet functionally useless. That result would frustrate Congress’ goal of promoting the development of the internet with tools to search, filter, and organize third-party content. *See* 47 U.S.C. § 230(b)(1), (f)(4).

Anderson is therefore wrong to suggest that Congress did not intend Section 230 to immunize targeted recommendations. To the contrary, algorithmic sorting is precisely the kind of technology that Congress intended to encourage when it enacted Section 230.

d. Practical consequences. The *amicus* filings before the Supreme Court in *Gonzalez v. Google* explained that, if Section 230 permitted liability for algorithmic recommendations, the provision would be rendered meaningless, because the use of algorithms is essential to manage third-party content.

Dozens of *amicus* briefs addressed this issue. For example, Microsoft explained:

[I]f you type a query into Microsoft’s search engine Bing, the results that it selects are based on algorithmic recommendations. And the way it does so is fundamentally the same way that Microsoft’s professional networking site LinkedIn uses algorithms to suggest jobs or contacts to users. And that is, at heart, no different from how another Microsoft service, Microsoft Start, aggregates news and other content that it then presents to its users. All of these services use sophisticated algorithms to determine what content to display to users, based on information about those users.⁵

The Center for Democracy and Technology, joined by six technologists:

Every interactive computer service provider that displays content must choose what to display from an overwhelming number of available possibilities and order it in some way. Those choices are

⁵ Microsoft Corp. *Amicus Br.* at 3, *Gonzalez v. Google LLC*, U.S. No. 21-1333 (Jan. 19, 2023).

inherently the provider’s “recommendations” as to what content a user should view, typically made using algorithms that rank all possible content according to a set of criteria chosen by the provider, with the highest-ranked items displayed to the user. . . . Recommendation is functionally indistinguishable from selecting and ordering or ranking items for display, something every provider must do.

. . . .

[A] holding excluding “recommendations” made using ranking algorithms from Section 230’s liability shield will create strong incentives for providers to limit speech. Because content moderation inevitably results in errors, a provider cannot perfectly remove or block only content that exposes it to liability. Instead, a provider would rationally seek to minimize the risk of liability by taking steps such as imposing categorical limits on the type of content it ranked and displayed or increasing its reliance on automated content moderation tools, the inherent limitations of which will exacerbate the tendency to over-remove innocuous or even beneficial content. As a result, Internet users will be less able to speak freely and everyone will have less access to information.⁶

The Cato Institute, R Street Institute, and Americans for Tax Reform:

[P]erfectly policing unlawful content is impossible. Any system that caught every piece of illegal content would also block an unacceptable number of

⁶ Center for Democracy & Technology and 6 Technologists *Amicus Br.* at 3-5, *Gonzalez v. Google LLC*, U.S. No. 21-1333 (Jan. 18, 2023).

false positives, ultimately quashing valuable speech. . . .

If algorithmic recommendations were held to be outside Section 230’s protections, the false positive problem would immediately become very real, with the potential for enormous harm to lawful speakers and listeners. If [a website] could not rely on Section 230 to shield it from suits over its recommendation of allegedly illegal, tortious, or harmful videos, it would have to either engage in continual litigation or ensure that such videos were not recommended by its algorithms. . . .

In order to ensure that potentially actionable videos were not recommended by its algorithm, [a website] would have two options. First, it could train its algorithm to exclude anything resembling the unwanted content, eliminating false negatives by embracing false positives. Alternatively, it could recommend only content pre-screened by . . . employees. In either case, much lawful, valuable expression would be excluded from [the website’s] speech discovery algorithms along with the bad.

Crucially, controversial but lawful speech about religion, politics, and health would likely face the most exclusion.⁷

As the Supreme Court explained in *Taamneh*, algorithmic recommendations are the ubiquitous and essential “infrastructure” through which “[a]ll the content on [internet] platforms is filtered.” 143 S. Ct. at

⁷ Cato Institute, R Street Institute, and Americans for Tax Reform *Amicus* Br. at 24-25, *Gonzalez v. Google LLC*, U.S. No. 21-1333 (Jan. 19, 2023).

1226-27. If the Court were to hold that Section 230 does not apply to algorithmic recommendations, as Anderson urges in this appeal, the consequences for the functioning of the modern internet, and its continued availability as a forum for third-party speech, would be devastating. The Court should reject that interpretation—because the text, precedent, and congressional findings definitely preclude it.

2. Anderson’s Claims Would Impermissibly Impose Liability Based On Third-Party Content

Anderson’s claims satisfy the third requirement for Section 230 immunity because the allegedly harmful “information [was] provided by another information content provider.” 47 U.S.C. § 230(c)(1). Anderson did not contest this element in the district court, *see* A4, but she now argues that the TikTok algorithm contains a subliminal message that the user will like the recommended content, Opening Br. 26. That argument is forfeited on appeal, and in any event is wrong.

Under Section 230, an “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3). “[A] website does not create or develop content when it merely provides a neutral means

by which third parties can post information of their own independent choosing online.” *Bennett v. Google, LLC*, 882 F.3d 1163, 1167 (D.C. Cir. 2018).

The allegations in the complaint easily satisfy this third-party content requirement. TikTok is described as “a video sharing social media app and product which allows and encourages *users* to create, share, and view short video clips.” A27 (Compl. ¶ 50) (emphasis added). These clips allegedly include “challenge[]” videos, in which “users film[] themselves engaging in behavior that mimics and often times ‘one-ups’ other users posting videos performing the same or similar conduct.” A29 (Compl. ¶ 61). The “blackout challenge,” which is the type of challenge video that allegedly resulted in Nylah Anderson’s death, “encourages users to choke themselves with belts, purse strings, or anything similar until passing out” and post videos of themselves to the platform. A31 (Compl. ¶ 64). Anderson does not allege that Defendants created or developed any of this content.

On appeal, Anderson argues that TikTok’s algorithmic recommendation contains an implicit message overlaying each third-party video that says: “Click here. This is cool. Try this. You will like this.” Opening

Br. 26 (citing *Force*, 934 F.3d at 82 (Katzmann, J., dissenting)). Anderson's argument is forfeited in this appeal because she did not raise it in the district court. "To preserve a matter for appellate review, a party must unequivocally put its position before the trial court at a point and in a manner that permits the court to consider its merits." *Garza v. Citigroup Inc.*, 881 F.3d 277, 284 (3d Cir. 2018) (internal quotation marks omitted). "It is well established that arguments not raised before the District Court are forfeited on appeal." *In re Niaspan Antitrust Litig.*, 67 F.4th 118, 136 (3d Cir. 2023) (alterations omitted).

Anderson's argument also fails on the merits for two main reasons. First, it would render Section 230 a dead letter: *Every* publisher implicitly sends the message that the content it publishes is worth reading or watching. A newspaper implicitly telegraphs to readers that articles "above the fold" are the ones most worth reading; that the opinion pieces at the top of the op-ed page are the most interesting; and that the most important letters to the editor are published most prominently. Likewise for television stations, which implicitly convey that primetime programs are the most worth watching.

The same is true of interactive computer services like TikTok. The TikTok app delivers a “stream of curated videos” to each user “that is likely to be of interest to that particular user.” A19, A28 (Compl. ¶¶ 3, 51). If Anderson’s argument were correct, no publisher of third-party content could be immunized under Section 230—because every website that hosts third-party content chooses which content to deliver to each of its users and uses techniques, almost always algorithms, designed to deliver content that will interest the user.

Because it would impose liability for a “message” that is integral to acting as a publisher, Anderson’s argument is precluded by Section 230.

Second, even if those supposed implicit messages could be considered content attributable to TTI that falls outside Section 230, Anderson’s claims would still fail because they would infringe on TTI’s First Amendment right to free speech. As noted above, *see pp. 25-26, supra*, the Supreme Court has held that “the presentation of an edited compilation of speech generated by other persons . . . fall[s] squarely within the core of First Amendment security.” *Hurley*, 515 U.S. at 570. The Supreme Court has applied this bedrock principle in many contexts,

including newspapers, *see Tornillo*, 418 U.S. at 258; cable operators, *see Turner Broad. Sys.*, 512 U.S. at 636; and parades, *Hurley*, 515 U.S. at 570.

Most recently, the Eleventh Circuit extended First Amendment protection to “social-media platforms’ content-moderation decisions” on the ground that they “constitute the same sort of editorial judgments.” *NetChoice, LLC v. Att’y Gen’l, Fla.*, 34 F.4th 1196, 1212 (11th Cir. 2022); *but see NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 463-65 (5th Cir. 2022). That decision would apply equally to TikTok’s algorithmic recommendations. As the Eleventh Circuit explained, “a private entity’s decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First Amendment.” *NetChoice, LLC*, 34 F.4th at 1210.

TTI is in “the business of delivering curated compilations of speech created, in the first instance, by others”; and just like a newspaper, cable operator, or parade organizer, it “employ[s] editorial judgment to convey some messages but not others and thereby cultivate different types of communities that appeal to different groups.” *NetChoice, LLC*, 34 F.4th at 1213. Accordingly, TTI’s “decisions about what speech to permit,

disseminate, prohibit, and deprioritize—decisions based on platforms’ own particular values and views—fit comfortably within the Supreme Court’s editorial-judgment precedents.” *Id.* at 1214.

This Court has also applied First Amendment scrutiny to a case involving product liability. In *In re Asbestos School Litigation*, 46 F.3d 1284 (3d Cir. 1994) (Alito, J.), the plaintiffs brought conspiracy and concert-of-action claims against Pfizer, a product manufacturer, for allegedly conspiring with asbestos manufacturers to disseminate false information about asbestos hazards to the public and Congress. *Id.* at 1286. Pfizer sought a writ of mandamus on the ground that the plaintiffs’ claims implicated Pfizer’s First Amendment-protected activities, including “[j]oining organizations that participate in public debate, making contributions to them, and attending their meetings.” *Id.* at 1294. This Court agreed: “[T]he district court’s holding, if generally accepted, would make these activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them. For these reasons, we are convinced that Pfizer has shown that its right to the issuance of the writ is ‘clear and indisputable.’” *Id.*

The same reasoning applies here. Anderson seeks to hold Defendants liable for TikTok’s conveying an implicit “this video is cool” message through its algorithmic recommendations. But under long-established Supreme Court precedent, those recommendations boil down to constitutionally protected editorial decisions about “what speech to permit, disseminate, prohibit, and deprioritize.” *NetChoice, LLC*, 34 F.4th at 1214. And Anderson’s claims, in turn, would have an “unwarranted” chilling effect on that editorial judgment. *In re Asbestos Sch. Litig.*, 46 F.3d at 1294. Anderson’s claims thus fail for the additional reason that they would unconstitutionally infringe on TTI’s freedom of speech.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Andrew J. Pincus

Benjamin D. Bright
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

Geoffrey M. Drake
TaCara D. Harris
KING & SPALDING LLP
1180 Peachtree Street NE,
Suite 1600
Atlanta, GA 30309
(404) 572-4726

Albert Giang
KING & SPALDING LLP
633 West 5th Street, Suite 1600
Los Angeles, CA 90071
(213) 443-4335

David Mattern
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 626-2946

Andrew J. Pincus
Nicole A. Saharsky
Minh Nguyen-Dang
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
nsaharsky@mayerbrown.com

Mark J. Winebrenner
FAEGRE DRINKER BIDDLE & REATH
LLP
90 South Seventh Street
2200 Wells Fargo Center
Minneapolis, MN 55402
(612) 766-1600

Joseph O'Neil
Katherine A. Wang
CAMPBELL CONROY & O'NEIL
1205 Westlakes Drive, Suite 330
Berwyn, PA 19312
(610) 964-1900

Counsel for Defendants-Appellees TikTok Inc. and ByteDance Inc.

Dated: July 12, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and Circuit Rules 28.3(d) and 31.1(c), the undersigned counsel certifies that:

(i) undersigned counsel is a member of the bar of this Court;

(ii) this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 9,839 words, including footnotes and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f);

(iii) this brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it was prepared using Microsoft Office Word 2016 and is set in 14-point Century Schoolbook font;

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/s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that, on July 12, 2023, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the Court's CM/ECF system.

/s/ Andrew J. Pincus
Andrew J. Pincus

United States Court of Appeals
for the
Third Circuit

Case No. 22-3061

TAWAINNA ANDERSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF
THE ESTATE OF N.A., A DECEASED MINOR,

Appellant,

– v. –

TIKTOK, INC.; BYTEDANCE, INC.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 2-22-CV-01849,
HONORABLE PAUL S. DIAMOND, U.S. DISTRICT JUDGE

APPELLANT’S REPLY BRIEF

ROBERT J. MONGELUZZI
JEFFREY P. GOODMAN
SALTZ MONGELUZZI & BENDESKY P.C.
Attorneys for Appellant
One Liberty Place, 52nd Floor
1650 Market Street
Philadelphia, Pennsylvania 19103
(215) 496-8282

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INTRODUCTION

The district court held that Plaintiff’s claims are barred by Section 230 of the Communications Decency Act (CDA), 47 U.S.C. § 230, because, according to the district court, Plaintiff’s claims treated Defendants TikTok Inc. and ByteDance Inc. (collectively “Defendants” or “TikTok”) as “publishers.” A5-A7. But Plaintiff’s claims treat Defendants as designers and producers of a defective product, not publishers. In any event, Defendants’ predatory practice of targeting specific users like 10-year-old Nylah Anderson with specific content through sophisticated recommendation algorithms is not a traditional publisher function and deserves no protections under Section 230. In holding that Plaintiff’s claims treat Defendants as publishers, the district court impermissibly applied a “but-for” test and effectively granted Defendants blanket immunity from all conceivable tort claims given that *everything* the TikTok app does hinges on third-party content.

To align with the district court’s incorrect decision, Defendants have continued to mischaracterize Plaintiff’s claims and core theory of liability as being premised upon the mere existence of the Blackout Challenge video on the TikTok app and Defendants’ allegedly passive role in allowing it to be available on the app. *See* Response Br. 1 (“Her core theory of liability is that Defendants’ entertainment and communication service—TikTok—is defectively designed because it permitted circulation and viewing of this third-party video.”). To the contrary, Plaintiff’s

claims are narrowly premised on Defendants specifically targeting the 10-year-old decedent with a highly dangerous video through its algorithms and Defendants' attendant duties as product designers. When viewed properly, it is apparent that the duty Plaintiff alleges Defendants violated is distinct from Defendants' traditional publisher actions and should not be barred by Section 230 of the CDA. The district court's ruling is a significant overexpansion of the immunities afforded by Section 230 and strays far afield of the original objectives of Section 230.

Defendants respond by attempting characterize TikTok's actions in targeting specific users with specific and tailored content as traditional publisher functions like those of cable television operators and newspaper publishers. According to Defendants, TikTok's recommendation algorithms are indistinguishable from a typical publisher's decisions related to content selection, organization, and presentation to the public for consumption. But those quintessential publisher functions present the same body of content that is organized and presented in the same way to all who choose to engage with it. TikTok's recommendation algorithm, on the other hand, targets a specific user, like Nylah Anderson, with specific content with the objective of maximizing the amount of time the user spends on the TikTok app. Defendants are nothing like cable television operators and newspaper publishers; they are product designers (not publishers) whose defective product killed a 10-year-old child.

TikTok and its associated algorithms are not the type of technology Section 230 of the CDA sought to protect. This is clear from the Congressional policy statements codified in Section 230. 47 U.S.C. § 230(b)(3), (4) and as discussed in Plaintiff's Opening Brief. Opening Br. 29-32. Moreover, statements made by the drafters of Section 230 during congressional hearings confirm that the fundamental goal underlying Section 230 **was to provide parents and families with the tools necessary to achieve greater control over what content is received and viewed by children.** See 141 Cong. Rec. H8468-72. Defendants' technology does exactly the opposite as it removes control over content received and viewed. Further, Section 230 was founded on the belief (in 1996) that no internet service provider could possibly review and potentially screen all third-party content. This, however, is precisely what TikTok does through its unbelievably sophisticated technology and algorithms—TikTok analyzes every conceivable aspect of third-party content and extracts every shred of data from it before deciding to target certain specific users with said content for profit-driven reasons. Far from protecting children and providing parents with the tools needed to control what content their children consume, TikTok preys upon children for monetary gain through utilization of recommendation algorithm technology. This is not the technology Congress sought to foster through Section 230.

Defendants argue that algorithms are essential tools without which the internet could not function and attempting to align themselves with other algorithm-based technologies, like search engines. This argument misses the point. Plaintiff's claims do not seek to condemn the use of all algorithms, just ones where the risks associated with a specific algorithm outweigh the utility of that algorithm and is thus defective under black letter Pennsylvania products liability law. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 387-94 (Pa. 2014). Defendants' technology is distinct from a search engine, which requires a voluntary input from the user who thus controls what information or content will be presented to them. Regardless, Defendants' fearmongering that permitting Plaintiff's claims here to proceed will lead to the downfall of the internet as we know it is overblown and meritless. Plaintiff's claims in this case are narrow and would require only that Defendants, and other technology behemoths, better design their defective products so as to not intentionally feed highly dangerous content to impressionable children for the purpose of financial gain; a result the drafters of Section 230 would undoubtedly endorse.

I. REPLY IN SUPPORT OF PLAINTIFF'S APPEAL

A. Plaintiff's product liability claims are narrow and treat Defendants as product designers not publishers.

As thoroughly explained in Plaintiff's Opening Brief and in Defendants' Response, Section 230 of the CDA only bars claims which allege a violation of a defendant's duties as a "publisher" or "speaker." Opening Br. 14-16; Response Br.

14-15. Accordingly, in order to enjoy the protections of Section 230, the defendant interactive service provider must show “the duty that the plaintiff alleges the [service provider] violated derives from the [service provider’s] status or conduct as a ‘publisher or speaker.’” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). In determining whether the defendant is alleged to have violated a duty derived from its status or conduct as a publisher or speaker, courts look to “whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” *Id.* at 1101.

This Court has previously described a “publisher’s traditional editorial functions” as including “deciding whether to publish, withdraw, postpone, or alter content.” *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). As Plaintiff detailed in her Opening Brief, courts have routinely held that where a plaintiff’s claims do not arise from the defendant’s traditional publisher duties and instead hinge on an alleged violation of a distinct duty, the claims do not treat the defendant as a “publisher” or “speaker” and are thus not barred by Section 230. *See* Opening Br. 16 (citing *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016); *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019); *A.M. v. Omegle.com, LLC*, No. 3:21-cv-01674, 2022 WL 2713721, *4 (D. Or. July 13, 2022)).

Pennsylvania law confirms that the duties Plaintiff alleges were violated here are rooted in Defendants' status as product designers and "have nothing to do with" Defendants' traditional publisher duties. *Lemmon*, 995 F.3d at 1092. The Pennsylvania Supreme Court has held that the nature of the "non-delegable duty" owed by product designers and sellers is "to make and/or market the product...free from 'a defective condition unreasonably dangerous to the consumer or [the consumer's] property.'" *Tincher*, 104 A.3d at 383 (quoting Restatement (Second) of Torts § 402A). To satisfy that duty, a product designer and seller must meet either the risk-utility standard or the consumer expectations standard. *Id.* at 387-94. Defendants could unquestionably satisfy this duty as it relates to Plaintiff's claims without implicating its traditional publisher functions.

At their core, Plaintiff's claims are that Defendants' product—the TikTok app and its associated algorithms—is defectively designed because it knowingly targeted 10-year-old Nylah Anderson with specific content and did so without the appropriate and necessary warnings. A36-42. Defendants could satisfy their duties under Pennsylvania product liability law without "deciding whether to publish, withdraw, postpone, or alter" the third-party content at issue. *Green*, 318 F.3d at 471. Defendants' product just needs to not function by targeting a child with the content. Defendants could satisfy their duties rooted in product liability law without triggering their traditional publisher functions because Plaintiff's claims are *not*

based on Defendants allowing the third-party content at issue to generally exist on the TikTok app—a function arguably protected by Section 230. Nor does Plaintiff’s claims seek to preclude such content from being locatable through the TikTok app in the circumstance that a user knowingly searches for specific content. Instead, Plaintiff has been consistent and clear that her product liability claim is premised on Defendants’ defective product taking the affirmative action to target Nylah Anderson with this dangerous content and targeting her in a surreptitious manner that didn’t allow her to even know she was being targeted.

To satisfy their duties, Defendants need only design the product to not target children, like Nylah Anderson, with specific already-published content known to be inappropriate. *Lemmon*, 995 F.3d at 1092 (holding defendant “could have satisfied” its product liability duty “to design a product more useful than it was foreseeably dangerous—without altering the content that [defendant’s] users generate” and plaintiff’s claims therefore did not treat defendant as publishers but rather as product designers).

Defendants could also satisfy their product liability duties by including adequate warnings which likewise does not trigger Defendants’ traditional publisher functions. *See Internet Brands*, 824 F.3d at 851 (“The duty to warn...would not require Internet Brands to remove any user content or otherwise affect how it publishes or monitors such content.”). None of the duties imposed on Defendants

by Pennsylvania product liability law would require Defendants to alter the third-party content on its platform in any way and accordingly do not treat Defendants as publishers. Warnings could exist which accompany the dangerous content itself or even through the use of parental alerts that notify a parent if their child views content promoting dangerous behavior or self-harm. There are myriad ways Defendant could satisfy its duty to warn without triggering publisher functions.

Defendants confront the clearly distinct nature of their product liability duties from their publisher duties by constructing a straw man—asserting that Plaintiff’s argument is that “product-liability claims fall outside of Section 230’s protections.” Response Br. 10; *see also* Response Br. 23 (“Put another way, her claims seek to hold Defendants liable for ‘promulgating’ and ‘failing to address’ harmful third-party content.”). This is wrong. Defendants attack their fabricated straw man by pointing out that nothing in the statute exempts product liability claims, and precedent holds that the court should examine the duty that was allegedly violated. Response Br. 16-19. Tellingly, however, Defendants never address how satisfaction of their product liability duties and duties to warn would actually implicate traditional publisher functions. Defendants avoid this because satisfaction of these product liability duties has “nothing to do with” its publisher functions. *Lemmon*, 995 F.3d at 1092.

To be clear, Plaintiff is not and has not argued that all product liability claims fall outside Section 230's protections, just that Plaintiff's claims here do. Plaintiff readily agrees that there are certain product liability claims that would inherently require the court to treat a defendant as a publisher and that these types of product liability claims would not be viable. For example, if a product liability claim were brought which was premised on an allegation that the product was defective for allowing the third-party content at issue to generally exist on the platform, this claim would likely be barred by Section 230 because the duty allegedly violated (deciding whether or not to publish to the public in the first instance) is a traditional publisher duty. Similarly, if a plaintiff alleged that the product were defective for failing to remove third-party content from the platform, this would also trigger the defendant's traditional publisher duties and thus be barred.¹ These are not Plaintiff's claims here and Defendants' traditional publisher duties are not implicated.

Defendants' straw man highlights the important distinction of Plaintiff's legal theory—that the product is defective under Pennsylvania product liability law for

¹ Plaintiff acknowledges that there are certain allegations in her Complaint which are most likely barred by the CDA, such as any allegation that the Blackout Challenge video at issue should have been removed or Defendants should have prevented the initial publication in the first place. Plaintiff was clear in her briefing before the district court, however, that her legal theories “are not based on whether Defendants should have removed the Blackout Challenge videos and are instead premised on their roles as product designers, programmers, manufacturers, and distributors.” A127 n. 3. Not every allegation in a Complaint is a theory of liability and the inclusion of such dicta in the Complaint does not compel the dismissal of an action premised on a completely distinct and viable theory.

taking the additional affirmative step to target Nylah Anderson specifically with certain content. TikTok is equivalent to a defectively designed handgun loaded with bullets, where the handgun is TikTok's platform and the bullets are third-party content. No legitimate argument could be made that the designer and manufacturer of the handgun could be found liable under product liability law for producing a handgun that contained and ultimately fired bullets. Handguns are meant to hold bullets which are meant to be fired by intentional decision of the user. However, if the handgun's defective design results in a malfunction and the gun fires off a bullet while holstered and without the user pulling the trigger, killing the user, there is no legitimate claim that the designer and manufacturer of the handgun would *not* be found liable under Pennsylvania product liability law. Like a deadly bullet fired from a defectively designed gun without the trigger being pulled, TikTok's defectively designed product targeted Nylah Anderson and delivered the deadly content to her.

Defendants attack their overly broad mischaracterization of Plaintiff's claims by relying on inapposite cases. *See e.g., Doe v. Snap, Inc.*, No. H-22-00590, 2022 WL 2528615, at *14 (S.D. Tex. July 7, 2022) (stating that the "crux of [plaintiff's] negligent design claim...is that Snapchat designed its product with features that allegedly created the opportunity for [defendant] to send illicit messages to [plaintiff]" whereas Plaintiff's claims here do not seek to hold TikTok liable for

merely “creat[ing] the opportunity” for the third-party content creator to send Nylah Anderson messages especially considering this is not what happened as TikTok itself sent Nylah the video, not the third-party content creator); *Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889, 930 (N.D. Cal. 2021), *aff’d in part, rev’d in part on other grounds sub nom., Doe #1 v. Twitter, Inc.*, Nos. 22-15103, 22-15104, 2023 WL 3220912 (9th Cir. May 3, 2023) (barring product liability claims that would have required Twitter “to alter the content posted by its users” whereas Plaintiff’s claims here would not require altering any aspect of the content at issue); *Herrick v. Grindr LLC*, 765 F. App’x 586, 590 (2d Cir. 2019) (barring product liability claims which sought to hold defendant liable for “its failure to combat or remove offensive third-party content” whereas Plaintiff’s claims here do no such thing and where Plaintiff even concedes here that Defendants are not subject to liability merely for allowing the Blackout Challenge video to exist on TikTok).

The district court erred in determining that Plaintiff’s claims treat Defendants as publishers of the third-party content and ignoring that the duty Plaintiff alleges was violated was entirely unrelated to Defendants’ publisher functions. As Plaintiff explained in her Opening Brief, the district court reached its holding by impermissibly relying on a “but-for” test that hinged on whether Plaintiff’s cause of action would not otherwise have accrued but for the third-party content. Opening Br. 24; *see also* A7 (holding the CDA barred Plaintiff’s claims because Plaintiff’s

claims “implicitly require recourse to that content [posted by a third party] to establish liability.”). Through the but-for lens applied by the district court, Defendants would be immune from all tort claims ever brought against them for the simple reason that every conceivable aspect of Defendants’ product hinges on third-party content. Without third-party content, Defendants’ TikTok app does not exist. The district court’s ruling has essentially provided Defendants with blanket immunity from claims brought by those they have harmed. Based on the district court’s reasoning, known pedophiles could be targeted with specific information about vulnerable children, including their whereabouts, when they will be without their parents, and how they could be lured into an unguarded situation. Then, when the pedophiles utilize this information to harm children, TikTok would be blanketly protected by the district court’s reading of Section 230.

As the *Barnes* decision directs, the district court was required to examine whether the duty Plaintiff alleges was violated here derives from Defendants’ status or conduct as a publisher or speaker. 570 F.3d at 1102. It doesn’t. Instead, Plaintiff alleges a violation of Defendants’ product liability duties under Pennsylvania law which “have nothing to do with” Defendants’ traditional publisher duties. The Ninth Circuit aptly explained in *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1172 n. 32 (9th Cir. 2008), that Section 230 bars “any claim that can be boiled down to the failure of an interactive computer

service to edit or block user-generated content that it believes was tendered for posting online...as that is the very activity Congress sought to immunize by passing the section.” Plaintiff’s claims here cannot be boiled down to Defendants’ failure to edit or prevent posting of the Blackout Challenge on the TikTok app, generally. Plaintiff’s claims are not barred.

The district court did not examine or address the unique nature of the duty Defendants owed under product liability law or how that duty can be satisfied without implicating Defendants’ traditional publisher duties or functions. The district court thus erred.

B. Making targeted recommendations of third-party content is not a traditional publisher function.

Defendants attempt to align themselves with cable television operators who exercise “editorial discretion over which stations or programs to include[,]” Response Br. 26 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994)), and newspaper publishers who exercises “editorial judgment” on “content,” “layout,” stories,” “columnists,” and “contributors[,]” *Id.* (quoting *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 255 (1974)). Defendants assert that “publishers publish by selecting and organizing information in order to make that information useful for an audience.” *Id.*

Defendants’ targeted recommendations of the third-party content, including the third-party content at issue in this case, go far beyond the traditional publisher

functions Defendants reference. Those publishers all exert editorial discretion to determine what third-party content to display and how to best organize and arrange that content for presentation to the public as one body of content that is indistinguishable as to how it is presented to different members of the public. The third-party content and the organization of the content are the exact same for every consumer thereof. Whether it's NBC Nightly News or a Sunday Edition of the *New York Times*, all consumers receive the same exact presentation of the third-party content. The content is the same for any and all who choose to engage with it. The targeted recommendations made by TikTok go far beyond the selection, organization, and presentation of content by traditional publishers and Defendants cannot be grouped with such unequivocal publishers.

If the *New York Times* publishes an article in its Sunday Edition that was written by a third party this would be a publisher function protected by Section 230. This is true regardless of whether the content at issue was on the front page, the last, or anywhere in between. All consumers of the *New York Times* are presented with the same exact publication with the various articles presented in the exact same order and fashion. What TikTok does, however, is equivalent to the *New York Times* spying on 10-year-old Nylah Anderson and determining that she likes farm animals and then clipping out an article on farm animals from the Sunday Edition and mailing that article, and *only* that article, directly to her doorstep. Instead of allowing the

consumer to decide which content to consume (like traditional publishers) TikTok affirmatively and unilaterally controls which content a specific user receives and consumes through the practice of making targeted recommendations.

Defendants represent that its recommendation algorithm functioning to target users like Nylah Anderson with specific videos “is no different from the layout of a newspaper or the primetime lineup of a cable news operator.” Response Br. 27. This is far from reality. As explained, the layout of a newspaper or the primetime lineup of a cable news operator are the same for all potential consumers. Defendants’ targeted recommendations merely organize and present content which is then published to the public. Indeed, Defendants themselves confirm that the definition of what it means to “publish” something does not apply to targeted recommendations. According to Defendants, to “publish” something means “to place before the public.” Response Br. 25 (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED (3d ed. 2002)). Defendants allowing the Blackout Challenge video to exist generally on its platform was to “publish” it. However, by targeting Nylah Anderson with the Blackout Challenge video, Defendants did not place that video “before the public” and instead placed it directly before Nylah to the exclusion of other content while simultaneously not placing that same content in front of other users. This targeted recommendation does not satisfy the definition of to “publish” endorsed by Defendants.

For this very reason, Judge Berzon’s concurring opinion in *Gonzalez v. Google, LLC*, 2 F.4th 871, 914 (9th Cir. 2021), *vacated on other grounds*, 143 S. Ct. 1191 (2023), rightfully distinguished between the act of “simply distributing the content to anyone who chooses to engage with it[]” and sites, like TikTok, that “use their algorithms to connect users to specific content and highlight it as recommended[.]” *Gonzalez*, 2 F.4th at 914 (Berzon, J., concurring). The types of “targeted recommendations and affirmative promotion” of third-party content “are well outside the scope of traditional publication.” *Id.* Plaintiff respectfully urges this Court to adopt the distinction drawn by Judge Berzon in *Gonzalez*, 2 F.4th at 914. This distinction will protect traditional publishers who engage in traditional publisher functions and will continue to satisfy the objectives of Section 230.

Defendants repeatedly cite *Obado v. Magedson*, 612 F. App’x 90, 93 (3d Cir. 2015) and claim that this Court concluded that Section 230 immunized internet websites from liability for making algorithmic recommendations to users. Response Br. 3. This is a stretch, at best. In *Obado*, a pro-se plaintiff brought claims for defamation, intentional and negligent infliction of emotional distress, and invasion of privacy based on an allegation that defendants republished defamatory comments authored by another individual. *Obado*, 612 F. App’x at 91. *Obado* is the very type of case that clearly illustrates proper CDA immunity because it involved “a defamation action founded on the hosting of defamatory third-party content[]” and

is thus a “clear illustration of a cause of action that treats a website proprietor as a publisher[.]” *Internet Brands*, 824 F.3d at 851 (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003)). Defendants rely on *Obado* because this Court held that the district court “correctly determined that Obado’s allegation that the defendants manipulated search engines to maximize search results relating to the alleged defamatory content does not affect their immunity from suit.” *Obado*, 612 F. App’x at 93. There is no such allegation in this case. Maximization of search engine results, which inherently require a user search input, are nothing like the targeted recommendations made by TikTok which require no user search input. No legitimate parallels can be drawn between the instant case and *Obado* and Plaintiff respectfully submits that *Obado* did not in any way hold that targeted recommendations like those made by TikTok are protected publisher functions.

Defendants also rely on *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093 (9th Cir. 2019). *Dyroff* is distinguishable. In *Dyroff*, the plaintiff’s son overdosed on drugs after a social networking website allowed the decedent to connect and communicate directly with the drug dealer who sold the fatal narcotics. *Id.* at 1094-95. The alleged connection was made as a result of the defendant website recommending a particular online group which the decedent then joined and chose to interact with. *Id.* at 1095. The *Dyroff* plaintiff did not argue that Section 230 of the CDA was inapplicable to recommendations but instead argued that the

defendant's actions transformed it into an "information content provider" which was not immune under the CDA. *Id.* at 1096. The *Dyroff* plaintiff did not allege a violation of product liability duties as Plaintiff does here and the *Dyroff* court's analysis of Section 230 was limited to whether making a recommendation transformed the defendant into an information content provider.

Moreover, the recommendation made by the defendant in *Dyroff* was simply that there was a group or community that the decedent may be interested in. It was still up to the decedent to enter into that group and engage with its members. Here, on the other hand, Nylah did not have a choice as to whether she was going to view and consume the recommended third-party content. Indeed, the defendant website in *Dyroff* made a true recommendation in that it could be followed or ignored. TikTok's practice can hardly be characterized as "recommending" content when the user has no choice whatsoever in whether the content will appear directly in front of them. TikTok's algorithm doesn't recommend content, it forces content.

Targeted recommendations of the type made by TikTok to Nylah Anderson are not traditional publisher functions that are deserving of protection under Section 230 of the CDA. Plaintiff therefore respectfully submits that the district court erred in granting Defendants' motion to dismiss.

C. TikTok’s targeted recommendation algorithms are not the type of technology Congress sought to protect through Section 230.

As Plaintiff explained in her Opening Brief, Congress sought to “encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools” and to “remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material[.]” 47 U.S.C. § 230(b)(3), (4). TikTok’s recommendation algorithms are the antithesis of the desired technology.

Defendants, however, preposterously claim that “the essential purpose of TikTok’s algorithm is to maximize user control.” Response Br. 41. While Defendants boast that each user’s For You Page is uniquely tailored to them, they omit the fact that it is *Defendants* who are deciding what is “unique and tailored to that specific individual[.]” *Id.*, and not the individual user themselves. The user does not enter a search input into TikTok or choose the categories of videos they want to see. Instead, TikTok unilaterally decides what content to force onto a user’s For You Page based on what TikTok has determined is most likely to keep the user engaged. TikTok does this by harvesting gargantuan amounts of data from individual users, including the user’s biometric data (such as faceprints and voiceprints) and much more. A163-A174. There is no legitimate and honest way to characterize TikTok as a technology which maximizes user control.

The reason TikTok unilaterally controls what content appears on a user's For You Page is insidious—by controlling the content viewed TikTok can better ensure that it is able to hook users and keep them glued to their screens in order to maximize advertising revenues. Unbeknownst to users, the never-ending stream of recommended content is designed to trigger miniature dopamine hits in the pleasure center of users' brains, “[s]o you want to keep scrolling.”² Scientists and researchers have found that platforms like TikTok rely on “random reinforcement” and are “exactly like a slot machine.” *Id.* A user's interaction with TikTok changes the user's brain chemistry, and young, developing brains are particularly at risk. *Id.* This addiction-driving nature of TikTok's recommendation practice fuels Defendants' ever-increasing corporate revenues. The purpose of Defendants' recommendation algorithms is far from maximization of user control. Instead, TikTok manipulates its users and deprives them of any autonomy in the process.

The reasons underlying the drafting and enactment of Section 230 of the CDA confirm that TikTok's recommendation algorithms are not the technology Congress intended to protect. During congressional hearings on Section 230, author and co-sponsor, Rep. Chris Cox, explained:

We want to encourage people like Prodigy, like CompuServe, like America Online, like the new

² John Koestier, Digital Crack Cocaine: The Science Behind TikTok's Success, Forbes, January 18, 2020, available at <https://www.forbes.com/sites/johnkoestier/2020/01/18/digital-crackcocaine-the-science-behind-tiktoks-success/?sh=169d112378be>.

Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. This technology is very quickly becoming available, and in fact every one of us will be able to tailor what we see to our own tastes.

We can go much further, Mr. Chairman, than blocking obscenity or indecency, whatever that means in its loose interpretations. We can keep away from our children things not only prohibited by law, but prohibited by parents. ***That is where we should be headed, and that is what the gentleman from Oregon [Mr. Wyden] and I are doing.***

141 Cong. Rec. H8468-72 at H8470 (emphasis added).

A technology that removes the ability to control what is seen and instead places one hundred percent of that decision making power in the hands of the defendant is not one that Section 230 was designed to foster. Yet, that is exactly what TikTok does. Defendants stripped Plaintiff, Nylah Anderson's mother, of any ability to control what content appeared on Nylah's For You Page. That ability rested exclusively with Defendants.

The impetus for Section 230 was the *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995) decision in which the defendant, Prodigy, was held liable for an allegedly defamatory bulletin board post on its web service by an unknown user. It was reasoned that given the immense amount of information posted online, it would be impossible for any defendant to adequately review and screen the postings on its website. In 1997, the Fourth Circuit explained

in *Zeran v. Am. Online, Inc.*, “[i]t would be impossible for service providers to screen each of their millions of postings for possible problems.” 129 F.3d 327, 331 (4th Cir. 1997). Modern technology has rendered those statements from over twenty-five years ago obsolete. The approach taken by the courts in the 1990s does not apply to TikTok which *does* actively review and screen every single post that is made on the platform through sophisticated automated functions and algorithms. The incredibly advanced technology utilized by TikTok’s algorithms analyze every conceivable aspect and characteristic of third-party content in order to deliver it to specific users that the recommendation algorithm determines should see it. Simply put, TikTok is not a defendant that is incapable of automatically reviewing every single shred of content posted on its platform (it does), and it is clearly not the type of technology Congress sought to protect under Section 230.

To combat TikTok’s clear frustration of the stated policy goals underlying Section 230, Defendants attempt to argue that TikTok helps achieve Congress’ goal of promoting the development of the internet with tools to search, filter, and organize third-party content. Response Br. 42 (citing 47 U.S.C. § 230(b)(1), (f)(4)). While this may be true for search engines like Google or Bing, which filter through massive amounts of data and information in order to organize responsive information as a result of a specific search input from a user, the same is not true of TikTok. The recommendation algorithms used by search engines inherently rely heavily on search

inputs from the user—an affirmative user action that controls what the user ultimately receives. The search engine recommendation algorithms thus achieve Congress’ stated goals by allowing users to exert significant control over the information and content presented to them. TikTok is not the same and provides users with little to no actual control over what content is received and consumed.

Section 230 of the CDA was passed in 1996. The advanced recommendation technologies and algorithms utilized by technology conglomerates like TikTok were nothing but inconceivable science fiction at that time. Congress could not have, and indeed did not, envision a technology like TikTok’s recommendation algorithms, which deliver an endless stream of unilaterally selected content to users for the self-serving purpose of keeping users engaged in the app and driving up corporate revenues and profits. The technology upon which TikTok relies is so effective because it *removes* user control, not maximizes it.

Defendants call for a world in which their technology is permitted to run rampant and infect the minds of America’s youth for sake of increased profits, but the families that Section 230 was designed to protect are left powerless because TikTok’s entire business and product is founded exclusively upon third-party content. Defendants want to continue using Section 230 as an impenetrable shield against any and all tort claims while its global reach expands and its revenues increase. In no other industry are behemoth corporations granted unfettered and total

immunity, but that is exactly what Defendants claim entitlement to here. Section 230 should not be read to provide unassailable immunity to Defendants' predatory recommendation algorithms.

The Seventh Amendment provides Plaintiff an absolute right to a trial by jury. Defendants repeatedly emphasize the importance of algorithms (although not Defendants' algorithm specifically) to the functioning of the internet and the alleged impracticalities of curtailing Defendants' defective algorithm. These are arguments that are most properly made to the jury in the context of the risk-utility standard under Pennsylvania product liability law. *Tincher*, 104 A.3d at 387-94. Plaintiff respectfully submits that her right to a jury trial should not be summarily foreclosed at such a preliminary stage and without the benefit of discovery that would confirm Defendants' product is defectively designed. At bottom, Defendants designed a dangerously defective product that resulted in Nylah Anderson's death, and the court should not close its doors to Plaintiff in order to protect TikTok.

CONCLUSION

For all of the foregoing reasons and those stated in Plaintiff's Opening Brief, the district court's dismissal of Plaintiff's claims should be reversed.

/s/ Jeffrey P. Goodman

Robert J. Mongeluzzi

Jeffrey P. Goodman

SALTZ MONGELUZZI &

BENDESKY P.C.

One Liberty Place

1650 Market Street,

52nd Floor

Philadelphia, Pennsylvania 19103

(215) 496-8282

August 2, 2023

Counsel for Plaintiff-Appellant

CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member of the bar for the United States Court of Appeals for the Third Circuit.

/s/ Jeffrey P. Goodman
Jeffrey P. Goodman
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman font. This brief also complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). This brief contains 5,736 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the electronic version of this brief was scanned for viruses with Vipre Virus Protection, version 3.1.

I further certify that the text of any hard copies of this brief filed or to be filed with this Court will be identical to the electronic version filed by ECF.

/s/ Jeffrey P. Goodman
Jeffrey P. Goodman
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that, on August 2, 2023, I electronically filed Plaintiff-Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I also caused a copy of this brief to be served electronically on the following counsel for Defendants-Appellees:

Joseph E. O'Neil
Katherine A. Wang
CAMPBELL CONROY & O'NEIL, PC
1205 Westlakes Drive, Suite 330
Berwyn, PA 19312
Telephone: (610) 964-1900
Facsimile: (610) 964-1981
joneil@campbelltriallawyers.com
kwang@campbelltriallawyers.com

Albert Giang
KING & SPALDING LLP
633 West Fifth Street, Suite 1600
Los Angeles, CA 90071
Telephone: (213) 443-4355
Facsimile: (213) 443-4310
agiang@kslaw.com

Geoffrey M. Drake
TaCara D. Harris
KING & SPALDING LLP
1180 Peachtree Street, NE, Suite 1600
Atlanta, GA 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100
gdrake@kslaw.com
tharris@kslaw.com

Andrew J. Pincus
Nicole A. Saharsky
Minh Nguyen-Dang
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Benjamin D. Bright
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

Mark J. Winebrenner
FAEGRE DRINKER BIDDLE & REATH LLP
90 South Seventh Street
2200 Wells Fargo Center
Minneapolis, MN 55402
(612) 766-1600

Counsel for Defendants-Appellants



JEFFREY P. GOODMAN
DIRECT DIAL 215-575-2970
JGOODMAN@SMBB.COM

ONE LIBERTY PLACE, 52ND FLOOR
1650 MARKET STREET
PHILADELPHIA, PA 19103

July 29, 2024

Patricia S. Dodszuweit, Clerk of the Court
United States Court of Appeals for the Third Circuit
Office of the Clerk
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Supplemental Letter Brief in *Anderson v. TikTok, Inc.*, Case No. 22-3061

Dear Ms. Dodszuweit:

Pursuant to this Court’s July 15, 2024, Order, this letter provides Appellant’s position concerning the impact of *Moody v. NetChoice, LLC*, 144 S.Ct. 2383 (2024) on the matter currently before the Court. In short, *Moody* conclusively establishes that TikTok is not entitled to immunity under §230 of the Communications Decency Act, 47 U.S.C. §230 (“CDA” or “§230”).

Throughout this case, TikTok, Inc. and ByteDance, Inc. (collectively, “TikTok”) have argued they are not first-party speakers of the content which they (through their algorithms) knowingly sent to 10-year-old Nylah Anderson, which led to her death. The content in question is a series of videos which demonstrate how to asphyxiate oneself and “challenge” others to mimic the behavior and post

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their videos. App. A18-63 at ¶¶ 1, 60-63. TikTok has argued that these videos were created by others and thus, §230 immunizes TikTok for any harm caused by these videos. *Moody* has conclusively determined TikTok’s argument no longer holds water.

Section 230 provides in pertinent part, “[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider.” §230(c)(1). Although *Moody* does not involve an application of the CDA, the opinion squarely addresses whether algorithmic compilation of third-party content into distinctive user feeds is itself a distinctive expressive product.

As Justice Thomas noted in dissenting from the denial of certiorari in *Doe v. Snap, Inc.*, 144 S.Ct. 2493 (Thomas, J., dissent), social media companies are trying to have it both ways when they seek both constitutional privileges and also protections under the CDA. “In the platforms’ world, they are fully responsible for their websites when it results in constitutional protections, but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit than nearly any other industry.” *Id.* at 2494.

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TikTok cannot have it both ways. They cannot be publishers/speakers of content entitled to First Amendment protections when it suits them and then merely passive receptacles for third-party content when convenient to escape liability. The Court in *Moody* determined the fate of social media companies that custom curate user feeds, noting that “[d]eciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own. **And that activity results in a distinctive expressive product.**” *Moody*, 144 S.Ct. at 2402 (emphasis added). In §230 terms, *Moody* establishes that custom curated feeds are not “information provided by another” but are instead information provided directly by the social media companies. The inescapable conclusion is that TikTok’s “For You Page” (“FYP”) at the heart of this lawsuit cannot enjoy §230 protections.

Moody does caution that social media companies are (in the context of the political speech addressed in *Moody*) entitled to claim protections under the First Amendment for these custom curated feeds. Given that no court could ever find that knowingly sending a self-harm video to a 10-year-old is protected by the First

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Amendment, this Court can dispose of any First Amendment issues without a developed record.

I. TikTok’s FYP is First-Party Content That is Not Protected by §230.

“An entity ‘exercis[ing] editorial discretion in the selection and presentation’ of content is ‘engage[d] in speech activity.’” *Moody*, 144 S.Ct. at 2402 (quoting *Arkansas Ed. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998)). The *Moody* Court explained this “is as true when the content comes from third parties as when it does not.” *Id.* Like other social-media platforms, TikTok is in the business “of combining ‘multifarious voices’ to create a distinctive expressive offering.” *Id.* at 2405 (citation omitted). As the *Moody* Court stated:

The individual messages may originate with third parties, but the larger offering is the platform’s. It is the product of a wealth of choices about whether – and, if so, how – to convey posts having certain content or viewpoint. Those choices rest on a set of beliefs about which messages are appropriate and which are not (or which are more appropriate and which are less so). And in the aggregate they give the feed a particular expressive quality.

Id. at 2405. TikTok has admitted that their FYP does precisely this. *See* Response Br. at 50 (TikTok “is in ‘the business of delivering curated compilations of speech

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created, in the first instance, by others[.]”). As a result, TikTok does “indeed ‘own’ the overall speech environment.” *Moody*, 144 S.Ct. at 2406.

TikTok’s FYP does not serve as a “passive receptacle” of third-party speech or as “dumb pipes” that merely emit what they are fed. *Moody*, 144 S.Ct. at 2431 (Alito, J., concurring) (quoting *American Broadcasting Cos. v. Aero, Inc.*, 573 U.S. 431, 458 (2014) (Scalia, J., dissenting)). The FYP and its amalgamation of third-party videos is an expressive product itself which communicates to users, such as 10-year-old Nylah, that the curated stream of videos will be interesting to them, and they should engage. This constitutes TikTok’s first-party speech. It also highlights the fundamental nature of Appellant’s claims, which seek to hold TikTok liable not for publishing the Blackout Challenge video generally, but instead for the targeted recommendation TikTok’s FYP made (i.e., TikTok’s own expressive product). “Challenge” videos thrust upon users by TikTok’s FYP take this a step further and communicate that the user should mimic the conduct and repost it. This is again TikTok’s first-party speech.

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Moody makes clear that custom curated feeds, such as the TikTok FYP cannot be considered the content “of another” and thus, TikTok cannot enjoy §230 protections.

II. The First Amendment Does Not Protect TikTok For Knowingly Recommending the Blackout Challenge to a 10-Year-Old.

Moody involved political speech and thus required an in-depth First Amendment analysis. TikTok knowingly sending the Blackout Challenge video (essentially a “how-to” on self-asphyxiation) to 10-year-old Nylah does not deserve the same airtime. TikTok’s content deserves no protection under the First Amendment.

The Supreme Court has recognized that certain speech is excluded from or entitled only to narrowed constitutional protection. Freedom of speech does not protect obscene materials, *Miller v. California*, 413 U.S. 15 (1973), child pornography, *New York v. Ferber*, 458 U.S. 747 (1982), fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), or incitement to imminent lawless activity, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Further, even speech that is generally protected by the first amendment may still be subject to regulation, and freedom of

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speech is not absolute. *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961). This is especially true when the speech is targeted at minors. Whether speech generally protected by the first amendment is susceptible to regulation is analyzed under varying levels of scrutiny depending on the details of such regulation, including neutrality thereof. *See generally, Turner*, 512 U.S. 622. Additionally, failure to warn cases are not viewed through the lens of the First Amendment. *See In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 25 F. Supp. 2d 837 (N.D. Ill. 1998) (First Amendment does not “provide[] immunity for defendants in failure to warn cases.”).

While the record in this matter is no doubt underdeveloped regarding these issues, Appellant submits there is no analysis which would grant TikTok First Amendment protections in this case. Nothing could be more clearly obscene than a video of a minor committing an act of self-harm and “challenging” others to do the same. Similarly, nothing can more clearly be said to incite than a “challenge” video which TikTok specifically targeted to this 10-year-old.

TikTok’s behavior is no different than a predatory adult texting the Blackout Challenge video directly to Nylah with a message that reads, “Nylah, we picked this

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video for you because we know you will like it. You should mimic it and repost!”
Such conduct could never be protected by the First Amendment.

III. Conclusion.

Moody confirms that TikTok’s FYP is first-party speech by TikTok. This removes any potential protections bestowed by §230. Accordingly, the district court’s ruling that TikTok is immune from Appellant’s claims pursuant to §230 should be reversed. Regarding any potential First Amendment claim, while the record is underdeveloped in this regard, the nature of TikTok’s speech in this case makes clear it is entitled to no protection.

Concurring in *Moody*, Justice Alito noted “some research suggests that social media are having a devastating effect on many young people, leading to depression, isolation, bullying, and intense pressure to endorse the trend or cause of the day.” *Moody*, 144 S.Ct. at 2423. Dissenting from the denial of certiorari in *Snap*, Justice Thomas stated social media platforms have increasingly used §230 as a get-out-of-jail free card and that if this balance is not corrected soon, “there is danger in delay.” 144 S.Ct. at 2494. The devastating effects of social media and inappropriate over-

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use of §230 are on full display in this case. This should be the case that proclaims with absolute clarity, §230 is no longer the get-out-of-jail free card for social media.

Respectfully submitted,

/s/ Jeffrey P. Goodman

Robert J. Mongeluzzi

Jeffrey P. Goodman

SALTZ MONGELUZZI &

BENDESKY P.C.

One Liberty Place

1650 Market Street,

52nd Floor

Philadelphia, Pennsylvania 19103

(215) 496-8282

July 29, 2024

Counsel for Plaintiff-Appellant

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CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member of the bar for the United States Court of Appeals for the Third Circuit.

/s/ Jeffrey P. Goodman
Jeffrey P. Goodman
Counsel for Plaintiff-Appellant

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CERTIFICATE OF COMPLIANCE

I certify that this letter brief complies with the requirements of Fed. R. App. P. 32(a) because it has been prepared in Microsoft Word using 14-point Times New Roman font. This letter brief complies with the Court's July 15, 2024, supplemental briefing order, because it contains 1,492 words.

I further certify that the text of any hard copies of this brief filed or to be filed with this Court will be identical to the electronic version filed by ECF.

/s/ Jeffrey P. Goodman
Jeffrey P. Goodman
Counsel for Plaintiff-Appellant

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CERTIFICATE OF SERVICE

I hereby certify that, on July 29, 2024, I electronically filed Plaintiff-Appellant's letter brief pursuant to the Court's July 15, 2024, Order with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I also caused a copy of this brief to be served electronically on the following counsel for Defendants-Appellees:

Joseph E. O'Neil
Katherine A. Wang
CAMPBELL CONROY & O'NEIL, PC
1205 Westlakes Drive, Suite 330
Berwyn, PA 19312
Telephone: (610) 964-1900
Facsimile: (610) 964-1981
joneil@campbelltriallawyers.com
kwang@campbelltriallawyers.com

Albert Giang
KING & SPALDING LLP
633 West Fifth Street, Suite 1600
Los Angeles, CA 90071
Telephone: (213) 443-4355
Facsimile: (213) 443-4310
agiang@kslaw.com

Geoffrey M. Drake
TaCara D. Harris
KING & SPALDING LLP
1180 Peachtree Street, NE, Suite 1600

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July 29, 2024

Atlanta, GA 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100
gdrake@kslaw.com
tharris@kslaw.com
Counsel for Defendants-Appellants



Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006-1101
United States of America

July 29, 2024

T: +1 202 263 3000
F: +1 202 263 3300

VIA ECF

mayerbrown.com

Patricia S. Dodszuweit
Clerk of Court
U.S. Court of Appeals for the Third Circuit
601 Market Street
Philadelphia, PA 19106

Andrew J. Pincus
Partner
T: +1 202 263 3220
F: +1 202 263 5220
APincus@mayerbrown.com

Re: *Anderson v. TikTok Inc.*, No. 22-3061

Dear Ms. Dodszuweit:

I write pursuant to the Court's order directing the parties to address *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024).

The principal issue in this appeal is whether 47 U.S.C. § 230 bars Plaintiff's claims because subjecting Defendants to liability based on the use of algorithms to select the third-party content delivered to consumers "treat[s]" Defendants "as the publisher or speaker" of that third-party content.

Defendants explain in their brief that text, precedent, and logic demonstrate that the use of algorithms to select the third-party content provided to users qualifies as "publish[ing]" activity within the meaning of Section 230. Resp. Br. 24-46. Plaintiff argues that user-specific algorithmic recommendations are not analogous to decisions made by, for example, newspaper publishers regarding which letters to the editor or opinion pieces to publish—and therefore are not protected by Section 230. Opening Br. 26-32; Reply Br. 13-32.

The Court's decision in *NetChoice* addresses the First Amendment, and not Section 230, but the Court's decision provides additional support for Defendants' position.

NetChoice involved constitutional challenges to state laws regulating criteria used by social-media companies in selecting the third-party content to deliver to their customers. 144 S. Ct. at 2393. The Supreme Court held that the lower courts applied the wrong standard in determining whether the plaintiffs demonstrated that the state laws were facially unconstitutional. *Id.* at 2394. It then went on to explain how First Amendment principles apply to laws regulating social-media platforms' use of algorithms to curate content delivered to users.

In that context, the Court squarely rejected the distinction that Plaintiff seeks to draw here. The Court explained that social-media platforms use algorithms to

“make choices about what third-party speech to display and how to display it. They include and exclude, organize and prioritize—and in making millions of those decisions each day, produce their own distinctive compilations of expression.” 144 S. Ct. at 2393. “[T]he essence of that project is something this Court has seen before. Traditional publishers and editors also select and shape other parties’ expression into their own curated speech products.” *Id.*

The Court thus made clear that the use of algorithms to curate the third-party content provided to users is equivalent to “[t]raditional publish[ing].” 144 S. Ct. at 2393. Because Anderson’s claims seek to hold Defendants liable for exercising that publishing function—compiling, organizing, and presenting third-party content to TikTok users—those claims are barred by Section 230.

Similarly, in its First Amendment analysis, the Court concluded that its precedents holding that the First Amendment protects edited compilations of third-party content in more traditional contexts—a printed document, a parade, and cable television—apply to platforms’ user-specific compilations of such content. 144 S. Ct. at 2399-406. As the Court put it, “[n]ew communications media differ from old ones in a host of ways,” but “analogies to old media” are appropriate in this context. *Id.* at 2403.

Plaintiff may attempt to distinguish *NetChoice* by citing the footnote reserving decision with respect to “feeds whose algorithms respond solely to how users act online—giving them the content they appear to want, without any regard to independent content standards.” 144 S. Ct. at 2404 n.5; *see id.* at 2410 (Barrett, J., concurring). TikTok’s algorithm, as described in the complaint, does not fall within that reservation.

First, the complaint’s allegations describe an algorithm indistinguishable from those addressed in *NetChoice*. The Supreme Court explained that Facebook’s News Feed and YouTube’s homepage operate by “present[ing] a user with a continually updating stream of other users’ posts” including news articles and videos. 144 S. Ct. at 2403. They “deliver[] a personalized collection of those stories” and “an individualized list of video recommendations.” *Id.* The algorithms’ “selection and ranking [of third party content] is most often based on a user’s expressed interests and past activities. But it may also be based on more general features of the communication or its creator.” *Id.*

The complaint here alleges that TikTok’s algorithm operates in precisely the same manner. The algorithm takes account of a user’s interests and activities but also excludes some categories of content. *See* A28 (Compl. ¶¶ 53-55) (alleging that the “algorithm ‘delivers content to each user that is likely to be of interest to that user’” and that third-party content “‘found to depict things like graphic medical procedures or legal consumption of regulated goods . . . may not be eligible for recommendation’” (quoting *How TikTok Recommends Videos #ForYou*, TikTok (June 18, 2020), <https://newsroom.tiktok.com/en-us/how-tiktok-recommends-videos-for-you/>) (TikTok, *For You*)).

The document quoted in the complaint explains additional features that operate independently of the user’s expressed interest. TikTok “works to intersperse diverse types of content along with those you already know you love” to give users “additional opportunities to stumble upon new content categories, discover new creators, and experience new perspectives and ideas”; and “videos that have just been uploaded or are under review, and spam content . . . may be ineligible for recommendation.” TikTok, *For You*.*

TikTok engages in the same activity that the Supreme Court found protected under the First Amendment. It “[d]ecide[s] on the third-party speech that will be included in or excluded from a compilation—and then organiz[es] and present[s] the included items”—which the Court held “is expressive activity of its own” that “results in a distinctive expressive product.” 144 S. Ct. at 2402.

Second, the Supreme Court’s reservation came in the context of First Amendment analysis; the Court put off deciding whether an algorithm that “respond[s] solely to how users act online” qualifies as protected expressive activity. 144 S. Ct. at 2404 n.5. But the question under Section 230 is different: whether the platform is acting as a “publisher.” And there can be no doubt that providing readers with the content they want is the quintessential activity of a publisher. After all, the role of a publisher is to take actions that promote sales of its publication, and giving readers what they want to read is an obvious way to achieve that goal.

Moreover, *NetChoice*’s First Amendment analysis leaves little doubt that when the Court does address the issue, it will conclude that algorithms focused on identifying content of interest to users are protected by the First Amendment. The Court explained that “[a]n entity ‘exercising editorial discretion in the selection and presentation’ of content is ‘engaged in speech activity,’” 144 S. Ct. at 2402 (citation and alterations omitted), and that social media platforms “are in the business, when curating their feeds, of combining ‘multifarious voices’ to create a distinctive expressive offering,” *id.* at 2405 (citation omitted).

There is no fixed method for selecting content likely to interest a user. The way that a particular platform designs its algorithm to achieve that goal creates a “distinctive expressive offering”—the platform’s unique method of selecting third-party content most likely to interest its users. 144 S. Ct. at 2402. And “[a] private party’s collection of third-party content into a single speech product . . . is itself expressive, and intrusion into that activity must be specially justified under the First Amendment.” *Id.* at 2400. The editorial choice to focus on providing content that will interest their users does not distinguish a platform from countless other for-profit

* The Court may consider the entire document cited in the complaint. See *OFI Asset Mgmt. v. Cooper Tire & Rubber*, 834 F.3d 481, 490 (3d Cir. 2016) (on a 12(b)(6) motion, the court considers “documents incorporated into the complaint by reference” (internal quotation marks omitted)).

entities—such as book and magazine publishers—whose editorial and curatorial choices are protected by the First Amendment.

Finally, Plaintiff may invoke *NetChoice*'s conclusion that a platform's curation of third-party content is "expressive" for First Amendment purposes to support her claim that curation produces first-party speech excluded from Section 230. That argument, raised for the first time on appeal, is wrong. Resp. Br. 46-52. Newspaper publishers select third-party content to interest their readers—nullifying Section 230 protection based on an implicit "message" integral to publishing would make the statute self-defeating, preserving liability whenever Section 230 applies. Congress did not enact a meaningless provision. Moreover, *NetChoice* confirms such a claim is barred by the First Amendment's protection of the use of algorithms to curate delivery of third-party content. 144 S. Ct. at 2406.

Plaintiff also could try to invoke Justice Barrett's statement that "a social-media platform's foreign ownership and control over its content-moderation decisions might affect whether laws overriding those decisions trigger First Amendment scrutiny." 144 S. Ct. at 2410. But Defendants here—TikTok Inc. and ByteDance Inc.—are both U.S. companies. A21 (Compl. ¶¶ 13, 17). Even so, Section 230 contains no exclusion for interactive computers services owned or controlled by foreign persons or corporations. Finally, the case cited by Justice Barrett—*Agency for International Development v. Alliance for Open Society International, Inc.*, 591 U.S. 430 (2020)—held only that "foreign organizations operating abroad have no First Amendment rights." *Id.* at 436. The Court did not address speech within the United States.

The Court should affirm the district court's judgment dismissing this action.

Respectfully submitted,

/s/ Andrew J. Pincus

Andrew J. Pincus

*Counsel for Defendants-Appellees
TikTok Inc. and ByteDance Inc.*

Enclosure

cc: Counsel of Record (via ECF)

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3061

TAWAINNA ANDERSON, INDIVIDUALLY
AND AS ADMINISTRATIX
OF THE ESTATE OF N.A., A DECEASED MINOR,
Appellant

v.

TIKTOK, INC.; BYTEDANCE, INC.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 2-22-cv-01849)
U.S. District Judge: Honorable Paul S. Diamond

Argued January 17, 2024

Before: SHWARTZ, MATEY, and PHIPPS, Circuit Judges.

(Filed: August 27, 2024)

Jeffrey P. Goodman [ARGUED]
Robert J. Mongeluzzi
Saltz Mongeluzzi & Bendesky
1650 Market Street
One Liberty Place, 52nd Floor
Philadelphia, PA 19103

Counsel for Appellant Tawainna Anderson

Geoffrey M. Drake
King & Spalding
1180 Peachtree Street NE
Suite 1600
Atlanta, GA 30309

Albert Giang
King & Spalding
633 W 5th Street
Suite 1600
Los Angeles, CA 90071

David Mattern
King & Spalding
1700 Pennsylvania Avenue NW
Suite 900
Washington, DC 20006

Joseph O'Neil
Katherine A. Wang
Campbell Conroy & O'Neil
1205 Westlakes Drive
Suite 330
Berwyn, PA 19312

Andrew J. Pincus [ARGUED]
Nicole A. Saharsky
Mayer Brown
1999 K Street NW
Washington, DC 20006

Mark J. Winebrenner
Faegre Drinker Biddle & Reath
90 S. Seventh Street
2200 Wells Fargo Center
Minneapolis, MN 55402

Counsel for Appellees TikTok, Inc. and ByteDance,
Inc.

OPINION OF THE COURT

SHWARTZ, Circuit Judge.

TikTok, Inc., via its algorithm, recommended and promoted videos posted by third parties to ten-year-old Nylah Anderson on her uniquely curated “For You Page.” One video depicted the “Blackout Challenge,” which encourages viewers to record themselves engaging in acts of self-asphyxiation. After watching the video, Nylah attempted the conduct depicted in the challenge and unintentionally hanged herself. Nylah’s mother, Tawainna Anderson, sued TikTok and its corporate relative ByteDance, Inc., (collectively, “TikTok”) for violations of state law. The District Court dismissed her

complaint, holding that the Communications Decency Act (“CDA”), 47 U.S.C. § 230, immunizes TikTok. For the following reasons, we will reverse in part, vacate in part, and remand.

I

A¹

TikTok is a video-sharing social media platform that allows users to create, post, and view content. TikTok users can search the platform for content or, without searching, view content that TikTok’s algorithm recommends by posting the content to a user’s “For You Page” (“FYP”).² TikTok’s algorithm is not based solely on a user’s online inputs. Rather, the algorithm curates and recommends a tailored compilation of videos for a user’s FYP based on a variety of factors, including the user’s age and other demographics, online interactions, and other metadata.

¹ We draw the facts from the complaint, accept them as true, Santiago v. Warminster Twp., 629 F.3d 121, 128 (3d Cir. 2010), and “view[] them in the light most favorable to [the] plaintiff,” In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997) (citation omitted). “[W]e disregard legal conclusions and ‘recitals of the elements of a cause of action, supported by mere conclusory statements.’” Santiago, 629 F.3d at 128 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

² An algorithm is a set of digital instructions that perform a task. See Force v. Facebook, Inc., 934 F.3d 53, 58 (2d Cir. 2019) (citation omitted).

Some videos that may appear on users' FYPs are known as "challenges," which urge users to post videos of themselves replicating the conduct depicted in the videos. The "Blackout Challenge . . . encourages users to choke themselves with belts, purse strings, or anything similar until passing out." App. 31 (Compl. ¶ 64). TikTok's FYP algorithm recommended a Blackout Challenge video to Nylah, and after watching it, Nylah attempted to replicate what she saw and died of asphyxiation.

B

Anderson, as the administratrix of Nylah's estate, sued TikTok in the United States District Court for the Eastern District of Pennsylvania, asserting claims for, among other things, strict products liability and negligence.³ She alleges that TikTok: (1) was aware of the Blackout Challenge; (2) allowed users to post videos of themselves participating in the

³ Anderson also brings claims for wrongful death and under Pennsylvania's Survival Act, 42 Pa. Cons. Stat. § 8302. Because those claims are derivative of her tort claims, her ability to pursue them depends on whether her tort claims survive the motion to dismiss. See Tulewicz v. Se. Pa. Transp. Auth., 606 A.2d 427, 431 (Pa. 1992) (survival action); Valentino v. Phila. Triathlon, LLC, 150 A.3d 483, 493 (Pa. Super. Ct. 2016) (wrongful death).

Anderson abandoned her claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. and Cons. Stat. § 201-1 et seq., and the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750 et seq. See Anderson v. TikTok, Inc., 637 F. Supp. 3d 276, 279 (E.D. Pa. 2022).

Blackout Challenge; and (3) recommended and promoted Blackout Challenge videos to minors' FYPs through its algorithm, including at least one such video to Nylah's FYP, which resulted in her death. The District Court dismissed the complaint, holding that TikTok was immune under § 230 of the CDA, 47 U.S.C. § 230. Anderson v. TikTok, Inc., 637 F. Supp. 3d 276, 282 (E.D. Pa. 2022).

Anderson appeals.⁴

II⁵

Congress enacted § 230 of the CDA to immunize interactive computer services ("ICSs")⁶ from liability based on content posted by third parties in certain circumstances. See

⁴ Anderson does not challenge the District Court's order denying her motion for leave to file an amended complaint.

⁵ The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(a). We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over a district court's order granting a motion to dismiss. Santiago, 629 F.3d at 128 (citation omitted). "To survive a motion to dismiss, a complaint must . . . plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citation omitted).

⁶ TikTok is an "interactive computer service," which is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet[.]" 47 U.S.C. § 230(f)(2).

F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1195 (10th Cir. 2009).⁷ Section 230 immunizes ICSs only to the extent that they are sued for “information provided by another information content provider.”⁸ 47 U.S.C. § 230(c)(1).⁹ In other words, ICSs are immunized only if they are sued for someone else’s expressive activity or content (i.e., third-party speech), but they are not immunized if they are sued for their own expressive activity or content (i.e., first-party speech).

Anderson asserts that TikTok’s algorithm “amalgamat[es] [] third-party videos,” which results in “an expressive product” that “communicates to users . . . that the curated stream of videos will be interesting to them[.]” ECF No. 50 at 5. The Supreme Court’s recent discussion about algorithms, albeit in the First Amendment context, supports

⁷ Specifically, “Congress enacted the CDA in response to a state-court decision which held that the provider of an online messaging board could be liable for defamatory statements posted by third-party users of the board.” Accusearch Inc., 570 F.3d at 1195 (citations omitted).

⁸ “The term ‘information content provider’ means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other [ICS].” 47 U.S.C. § 230(f)(3).

⁹ The immunity stems from the statutory language providing, with limited exceptions that do not apply here, that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent” with § 230(c)(1). 47 U.S.C. § 230(e).

this view.¹⁰ In Moody v. NetChoice, LLC, the Court considered whether state laws that “restrict the ability of social-

¹⁰ In Moody v. NetChoice, LLC, the Supreme Court considered social media platforms’ algorithms that construct feeds to relay content to users. 144 S. Ct. 2383, 2393 (2024). The Court described the platforms at issue in NetChoice as ones that “cull and organize uploaded posts in a variety of ways. A user does not see everything The platforms will have removed some content entirely; ranked or otherwise prioritized what remains; and sometimes added warnings or labels.” Id. at 2395. The Court explained that, by engaging in such activity, the platforms “shape other parties’ expression into their own curated speech products.” Id. at 2393. Although “[t]he selection and ranking is most often based on a user’s expressed interests and past activities,” the Court noted that “it may also be based on more general features of the communication or its creator[,]” particularly given that some platforms have guidelines that “detail the messages and videos that the platform[] disfavor[s.]” Id. at 2403.

In holding that “expressive activity includes presenting a curated compilation of speech originally created by others[,]” id. at 2400, the Court declined to address “algorithms [that] respond solely to how users act online[,]” id. at 2404 n.5. Accordingly, the presence or absence of a platform’s standards or preferences that govern an algorithm’s choices may dictate whether the algorithm is expressive speech, id. at 2410 (Barrett, J., concurring), as might whether the platform is a “passive receptacle[] of third-party speech . . . that emit[s] what [it is] fed” or whether it only responds to specific user inquiries, id. at 2431 (Alito, J., concurring in the judgment). See also id. at 2409-10 (Barrett, J., concurring) (distinguishing

media platforms to control whether and how third-party posts are presented to other users” run afoul of the First Amendment. 144 S. Ct. 2383, 2393 (2024). The Court held that a platform’s algorithm that reflects “editorial judgments” about “compiling the third-party speech it wants in the way it wants” is the platform’s own “expressive product” and is therefore protected by the First Amendment. Id. at 2394.

Given the Supreme Court’s observations that platforms engage in protected first-party speech under the First Amendment when they curate compilations of others’ content via their expressive algorithms, id. at 2409, it follows that doing so amounts to first-party speech under § 230, too. See Doe ex rel. Roe v. Snap, Inc., 144 S. Ct. 2493, 2494 (2024)

types of algorithms); id. at 2430-32 (Alito, J., concurring in the judgment) (same).

Because TikTok concedes that Anderson’s complaint “describe[s] an algorithm indistinguishable from those addressed in NetChoice[.]” ECF No. 51 at 2, which the Supreme Court described as one that results in expressive speech, NetChoice, 144 S. Ct. at 2405 (holding that “social-media platforms are in the business, when curating their feeds, of combining multifarious voices to create a distinctive expressive offering” (internal quotation marks and citation omitted)), we need not weigh in on whether other algorithms result in expressive speech. Moreover, because TikTok’s “algorithm, as described in the complaint, does not” “respond solely to how users act online,” ECF No. 51 at 2 (quoting NetChoice, 144 S. Ct. at 2404 n.5), TikTok makes choices about the content recommended and promoted to specific users, and by doing so, is engaged in its own first-party speech.

(Thomas, J., dissenting from denial of certiorari) (observing that “[i]n the platforms’ world, they are fully responsible for their websites when it results in constitutional protections, but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit than nearly any other industry.”).

Here, as alleged, TikTok’s FYP algorithm “[d]ecid[es] on the third-party speech that will be included in or excluded from a compilation—and then organiz[es] and present[s] the included items” on users’ FYPs. NetChoice, 144 S. Ct. at 2402. Accordingly, TikTok’s algorithm, which recommended the Blackout Challenge to Nylah on her FYP, was TikTok’s own “expressive activity,” id., and thus its first-party speech. Such first-party speech is the basis for Anderson’s claims. See App. 39 (Compl. ¶ 107(k), (o)) (alleging, among other things, that TikTok’s FYP algorithm was defectively designed because it “recommended” and “promoted” the Blackout Challenge).¹¹ Section 230 immunizes only information “provided by another[.]” 47 U.S.C. § 230(c)(1), and here, because the information that forms the basis of Anderson’s lawsuit—i.e., TikTok’s recommendations via its FYP

¹¹ We recognize that TikTok’s first-party speech captures certain third-party speech. However, “‘exercis[ing] editorial discretion in the selection and presentation’ of content” qualifies as “‘speech activity’ . . . [whether] the content comes from third parties [or] it does not.” NetChoice, 144 S. Ct. at 2402 (first alteration in original) (quoting Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 674 (1998)).

algorithm—is TikTok’s own expressive activity, § 230 does not bar Anderson’s claims.^{12, 13}

III

For the foregoing reasons, we will reverse in part, vacate in part, and remand.¹⁴

¹² We reach this conclusion specifically because TikTok’s promotion of a Blackout Challenge video on Nylah’s FYP was not contingent upon any specific user input. Had Nylah viewed a Blackout Challenge video through TikTok’s search function, rather than through her FYP, then TikTok may be viewed more like a repository of third-party content than an affirmative promoter of such content. Given the type of algorithm alleged here, we need not address whether § 230 immunizes any information that may be communicated by the results of a user’s search of a platform’s content.

We need not address in this case the publisher/distributor distinction our colleague describes, nor do we need to decide whether the word “publisher” as used in § 230 is limited to the act of allowing third-party content to be posted on a website an ICS hosts, as compared to third-party content an ICS promotes or distributes through some additional action, because, in this case, the only distribution at issue is that which occurred via TikTok’s algorithm, which as explained herein, is not immunized by § 230 because the algorithm is TikTok’s own expressive activity.

¹³ We recognize that this holding may be in tension with Green v. America Online (AOL), where we held that § 230 immunized an ICS from any liability for the platform’s failure

to prevent certain users from “transmit[ing] harmful online messages” to other users. 318 F.3d 465, 468 (3d Cir. 2003). We reached this conclusion on the grounds that § 230 “bar[red] ‘lawsuits seeking to hold a service provider liable for . . . deciding whether to publish, withdraw, postpone, or alter content.’” Id. at 471 (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)). Green, however, did not involve an ICS’s content recommendations via an algorithm and pre-dated NetChoice. Similarly, our holding may depart from the pre-NetChoice views of other circuits. See, e.g., Dyroff v. Ultimate Software Grp., 934 F.3d 1093, 1098 (9th Cir. 2019) (“[R]ecommendations and notifications . . . are not content in and of themselves.”); Force v. Facebook, Inc., 934 F.3d 53, 70 (2d Cir. 2019) (“Merely arranging and displaying others’ content to users . . . through [] algorithms—even if the content is not actively sought by those users—is not enough to hold [a defendant platform] responsible as the developer or creator of that content.” (internal quotation marks and citation omitted)); Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 21 (1st Cir. 2016) (concluding that § 230 immunity applied because the structure and operation of the website, notwithstanding that it effectively aided sex traffickers, reflected editorial choices related to traditional publisher functions); Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398, 407 (6th Cir. 2014) (adopting Zeran by noting that “traditional editorial functions” are immunized by § 230); Klayman v. Zuckerburg, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (immunizing a platform’s “decision whether to print or retract a given piece of content”); Johnson v. Arden, 614 F.3d 785, 791-92 (8th Cir. 2010) (adopting Zeran); Doe v. MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008) (rejecting an argument

that § 230 immunity was defeated where the allegations went to the platform’s traditional editorial functions).

¹⁴ To the extent that Anderson still pursues any claims not premised upon TikTok’s algorithm, we leave to the District Court to determine, among other things, whether, consistent with this Opinion, those claims are barred by § 230. See Appellant’s Br. at 21 (acknowledging that TikTok’s “initial action in publishing the Blackout Challenge generally on the TikTok app may very well fall within the protections of the CDA”); Reply Br. at 9 n.1 (acknowledging that certain allegations in Anderson’s complaint may be barred by the CDA).

MATEY, *Circuit Judge*, concurring in the judgment in part and dissenting in part.

TikTok reads § 230 of the Communications Decency Act, 47 U.S.C. § 230, to permit casual indifference to the death of a ten-year-old girl. It is a position that has become popular among a host of purveyors of pornography, self-mutilation, and exploitation, one that smuggles constitutional conceptions¹ of a “free trade in ideas” into a digital “cauldron of illicit loves” that leap and boil with no oversight, no accountability, no remedy.² And a view that has found support in a surprising number of judicial opinions dating from the early days of dial-up to the modern era of algorithms, advertising, and apps.

But it is not found in the words Congress wrote in § 230, in the context Congress acted, in the history of common carriage regulations, or in the centuries of tradition informing the limited immunity from liability enjoyed by publishers and distributors of “content.” As best understood, the ordinary meaning of § 230 provides TikTok immunity from suit for

¹ Assumptions that find no support in the First Amendment, which “was not designed or originally understood to provide a font of judicially crafted doctrines protecting expressive freedom.” Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 320 (2017). And “[t]he problem with Section 230 is that in a bout of free speech zeal, courts have interpreted the law to be far more extensive than it is written or should be.” Daniel Solove, *Restoring the CDA Section 230 to What It Actually Says*, TeachPrivacy (Feb. 4, 2021), <https://teachprivacy.com/restoring-the-cda-section-230-to-what-it-actually-says/>.

² Saint Augustine of Hippo, *The Confessions of Saint Augustine* 42 (Hackett Publishing Co. 2006).

hosting videos created and uploaded by third parties. But it does not shield more, and Anderson’s estate may seek relief for TikTok’s knowing distribution and targeted recommendation of videos it knew could be harmful. Accordingly, I concur in the judgment in part and dissent in part.

I.

A.

Ten-year-old Nylah Anderson died after attempting to recreate the “Blackout Challenge” she watched on TikTok. The Blackout Challenge—performed in videos widely circulated on TikTok—involved individuals “chok[ing] themselves with belts, purse strings, or anything similar until passing out.” App. 31.³ The videos “encourage[d]” viewers to record themselves doing the same and post their videos for other TikTok users to watch. App. 31. Nylah, still in the first year of her adolescence, likely had no idea what she was doing or that following along with the images on her screen would kill her. But TikTok knew that Nylah would watch because the company’s customized algorithm placed the videos on her “For You Page”⁴ after it “determined that the Blackout Challenge was ‘tailored’ and ‘likely to be of interest’ to Nylah.” App. 31.

No one claims the videos Nylah viewed were created by TikTok; all agree they were produced and posted by other

³ We must take the well-pleaded factual allegations drawn from the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

⁴ The For You Page displays a unique series of videos to each user based on TikTok’s algorithm, which “selects

TikTok subscribers. But by the time Nylah viewed these videos, TikTok knew that: 1) “the deadly Blackout Challenge was spreading through its app,” 2) “its algorithm was specifically feeding the Blackout Challenge to children,” and 3) several children had died while attempting the Blackout Challenge after viewing videos of the Challenge on their For You Pages. App. 31–32. Yet TikTok “took no and/or completely inadequate action to extinguish and prevent the spread of the Blackout Challenge and specifically to prevent the Blackout Challenge from being shown to children on their [For You Pages].” App. 32–33. Instead, TikTok continued to recommend these videos to children like Nylah.

B.

Following her daughter’s death, Tawainna Anderson sued TikTok and its parent company, ByteDance, Inc. Anderson seeks to hold TikTok liable for 1) hosting the Blackout Challenge videos on its platform, 2) continuing to distribute the videos after it learned about the videos and the deaths that followed, and 3) recommending the videos to Nylah after TikTok knew the videos were likely to cause harm. TikTok moved to dismiss, arguing that Anderson sought to hold TikTok liable for acts completely immunized by § 230(c)(1). The District Court agreed.

which videos are shown to each user based on the user’s demographics, including age, [and] user interactions such as the videos viewed and shared.” App. 28 (emphasis omitted).

II.

TikTok maintains that Anderson’s claims are foreclosed by a nearly-limitless interpretation of § 230 adopted by several courts. But the best reading of the statute suggests a far narrower understanding of § 230 immunity.

A.

Like any man-made law, § 230 did not appear in a vacuum, and “some context is key to understanding Congress’s aim” and the precise language it selected. *OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 73 F.4th 157, 166 (3d Cir. 2023), *cert. denied*, 144 S. Ct. 549 (2024); *see also* 1 William Blackstone, Commentaries *61, *87. Congress enacted § 230 following more than a century of state and federal law regulating the transmission of third-party information and against the backdrop of two widely discussed judicial decisions addressing the liability of online service providers. Those decisions tracked traditional liability regimes that shielded parties who merely sent along allegedly harmful information, while imposing duties on those who did so with specific knowledge of the harmful nature of the content.

1. Begin with the birth of long-distance communication. Like the chat rooms and bulletin boards provided by 1990s online service providers, telegraph companies long served as the conduit for communication for much of the late nineteenth and early twentieth centuries. Given the immense market power of the telegraph,⁵ the law regularly imposed access and nondiscrimination duties

⁵ *See* Matt Stoller, Goliath 5–7 (2019).

familiar to physical networks like railroads.⁶ That raised questions about liability, since state laws often held companies responsible for negligent deliveries. *See* Adam Candeub, *The Common Carrier Privacy Model*, 51 U.C. Davis L. Rev. 805, 810–15 (2018). Liability could also attach based on the content of third-party information. *See* Adam Candeub, *Reading Section 230 as Written*, 1 J. of Free Speech L. 139, 145–47 & 146 n.26 (2021). While telegraph operators were ordinarily not responsible for the materials they transmitted, *see O’Brien v. W. U. Tel. Co.*, 113 F.2d 539, 541–43 (1st Cir. 1940), liability could attach if the company knew the content was harmful, *see Von Meysenbug v. W. U. Tel. Co.*, 54 F. Supp. 100, 101 (S.D. Fla. 1944); *see also Biden v. Knight First Amend. Inst. at*

⁶ *See* Peter Huber, *Law and Disorder in Cyberspace* 26 (1997) (“Federal authorities had already been regulating railroads for decades. Congress figured that regulating phones would be much the same.”); *see also* James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 261–68 (2002); *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1223 & n.2 (2021) (Thomas, J., concurring); *Cellco P’ship v. FCC*, 700 F.3d 534, 545–46 (D.C. Cir. 2012). Common carriage arrangements pursued a regulatory bargain, with carriers receiving benefits (like immunities from suit and market control) in exchange for increased delivery obligations. *See* Adam Candeub, *Bargaining For Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 Yale J.L. & Tech. 391, 398–413 (2020).

Columbia Univ., 141 S. Ct. 1220, 1223 & n.3 (2021) (Thomas, J., concurring).⁷ But that was the rare exception.

This was the common-sense system throughout the twentieth century.⁸ Transmitters usually had little control over what rode their networks⁹ and rarely knew the circumstances that might make a statement harmful.¹⁰ Imposing liability for conduct that lacked culpability would unfairly punish beneficial industries and pin emerging networks under the weight of endless lawsuits. But the scale tipped in a different

⁷ Liability for telephone companies came to function much the same way. *See Candeub, Reading Section 230 as Written, supra*, at 146 n.26.

⁸ It also conformed with the regulation of other common carriers. A railroad, for example, was generally not liable for a passenger's unlawful acts facilitated by the train unless the operator knew its service was being used for an unlawful purpose. *See Bruce Wyman, Illegality as an Excuse for Refusal of Public Service*, 23 Harv. L. Rev. 577, 584 (1910). So too with telegraphs and telephones that had only a duty to "refuse to transmit messages which would implicate [the company] in illegality," such as communications these companies knew were libelous, obscene, fraudulent, or otherwise used to further some harmful act proscribed by law. *See id.* at 584–85, 587.

⁹ *See Ryan Gerdes, Scaling Back 230 Immunity: Why the Communications Decency Act Should Take a Page from the Digital Millennium Copyright Act's Service Provider Immunity Playbook*, 60 Drake L. Rev. 653, 656 (2012).

¹⁰ Take the telegraph operator transmitting the statement "John is a crook." If the operator does not know that John is scrupulously law-abiding, the context necessary to make the statement false and libelous is absent.

way when a transmitter of third-party information knew the content was harmful, a distinction that carried into the changes in communications technology during the back half of the twentieth century.

2. The internet began infiltrating daily life in the early 1990s through large commercial service providers like CompuServe, Prodigy, and AOL.¹¹ These emerging services “were born serving content of their own,”¹² but, facing competition, they expanded to allow “users to post comments on bulletin boards, open to other members, and to communicate in chat rooms.”¹³ Those added functions resurrected the old legal question familiar to common carriers: Should online service providers be liable for the actions of third parties on their networks? Understanding how courts answered this question is essential to understanding the legal context in which § 230 was enacted. Because a 1991 district court decision set the boundaries of liability law for the next three decades.

Believed to be the first case in the United States “to decide whether an online service . . . could be held liable for third-party content,”¹⁴ *Cubby, Inc. v. CompuServe, Inc.* involved a defamation claim arising out of an allegedly libelous statement appearing on one of CompuServe’s “special interest ‘forums.’” 776 F. Supp. 135, 137 (S.D.N.Y. 1991). These fora, “comprised of electronic bulletin boards, interactive online conferences, and topical databases,” allowed

¹¹ Lawrence Lessig, *The Future of Ideas* 147 (2001).

¹² *Id.* at 148.

¹³ Jeff Kasseff, *The Twenty-Six Words That Created The Internet* 37 (2019).

¹⁴ *Id.* at 42.

subscribers to post their own messages and interact with other users. *Id.* Pivoting from the closed curation of the old networks, CompuServe did not review subscriber postings. *Id.* Inevitably, disagreements arose among the users, and a lawsuit followed seeking to hold CompuServe liable for a posting on its system.

The district court sketched two paths for determining CompuServe's liability. Perhaps the company could be considered a "publisher," someone strictly liable for repeating defamatory statements no matter the company's knowledge of what was said and why it might be actionable. *Id.* at 139. Or the company might be a "distributor," like "news vendors, book stores, and libraries," and liable only if the company knew or had reason to know the statement was defamatory. *Id.* The district court decided CompuServe's forum was "in essence an electronic, for-profit library," with the company having "little or no editorial control over [the forum's] contents." *Id.* at 140. And because it was merely a distributor, liability could only attach if CompuServe knew the post was defamatory (which it did not). *Id.* at 140–41.

CompuServe both won praise and stoked worry because the opinion turned on the amount and kind of editorial control exercised by the internet forum, a test that could vary in application from service to service. *See, e.g.,* Jonathan M. Moses & Michael W. Miller, *CompuServe Is not Liable for Contents*, Wall St. J. (Oct. 31, 1991). Prodigy, for example, sold subscribers on the rigor of its screening and the promise that families could enjoy online entertainment without offensive messages. That suggested Prodigy could be subject to strict liability because it was "the only major commercial [bulletin board] operator that monitor[ed] all public messages by screening them before they [were] posted." David J. Conner, Note, *Cubby v. CompuServe*, *Defamation Law on the*

Electronic Frontier, 2 Geo. Mason Indep. L. Rev. 227, 240 (1993).

These predictions proved prescient. Three years later, in *Stratton Oakmont, Inc. v. Prodigy Services Company*, Prodigy was sued for hosting allegedly defamatory statements posted on one of its electronic bulletin boards. 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995). Following the reasoning of *CompuServe*, the *Stratton Oakmont* court found Prodigy “exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.” *Id.* at *3. That meant Prodigy was liable for any defamatory statements on its service. *Id.* at *3–5. Though it was a non-precedential opinion issued by a state trial court judge, *Stratton Oakmont* received significant attention, much of it negative.¹⁵ If *Stratton Oakmont*’s reasoning stood, online service providers acting to exclude offensive and obscene content would now risk liability for the rest of the material they hosted. See Adam Candeub, *Bargaining For Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 Yale J.L. & Tech. 391, 421 (2020).

¹⁵ See Kosseff, *supra*, at 55–71; R. Hayes Johnson Jr., *Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Services Co.*, 49 Ark. L. Rev. 589, 594 & n.10 (1996); Douglas B. Luftman, Note, *Defamation Liability for On-Line Services: The Sky Is Not Falling*, 65 Geo. Wash. L. Rev. 1071, 1072 (1997) (describing the “apocalyptic reactions in the legal and technical communities”).

B.

1. Congress responded vigorously, and a mere nine months after *Stratton Oakmont*, the President signed the Communications Decency Act of 1996 (CDA) into law as part of the Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56. A last-minute addition to the Telecommunications Act, the CDA was initially designed to regulate internet pornography and protect children from obscene and harmful material. See Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 Fed. Comm. L.J. 51, 52–58 (1996). But a month after *Stratton Oakmont*, lawmakers introduced the CDA amendment that ultimately became § 230. See Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995). Unlike other aspects of the CDA, § 230’s “proposal and passage flew under the radar” and “received virtually no opposition or media coverage.” Jeff Kosseff, *The Twenty-Six Words That Created The Internet* 3 (2019).

As enacted, § 230 created two complementary protections. Section 230(c)(1) directs 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.” And § 230(c)(2)(A) states that “[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” The statute expressly preempts any “cause of action” or “liability” “under any State or local law that is inconsistent with” those provisions. § 230(e)(3).

It is conventional wisdom that § 230 was passed to, at least in part, overrule *Stratton Oakmont*,¹⁶ a goal that fit within the purpose of the CDA’s statutory scheme. Most of the CDA’s provisions sought to protect minors from offensive online material. *See Force v. Facebook, Inc.*, 934 F.3d 53, 78–80 (2d Cir. 2019) (Katzmann, J., concurring in part & dissenting in part). But *Stratton Oakmont*’s reasoning undercut incentives for computer services to limit access to offensive material. After all, it was precisely Prodigy’s attempt to moderate its platform to provide a family-friendly environment that led to vast tort liability. *See Stratton Oakmont*, 1995 WL 323710, at *1–5. By overruling *Stratton Oakmont*, Congress encouraged private action to complement the CDA’s regulations and bolster efforts to reduce the spread of indecent material on the internet. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

2. But from the very start, courts held § 230 did much more than overrule *Stratton Oakmont*’s publisher-liability theory. And they almost all followed *Zeran v. America Online, Inc.*, which read § 230(c)(1) to immunize an interactive computer service provider’s “exercise of a publisher’s

¹⁶ *See* Kosseff, *supra*, at 48–82; Candeub, *Bargaining For Free Speech, supra*, at 419–21; *Force v. Facebook, Inc.*, 934 F.3d 53, 79–80 (2d Cir. 2019) (Katzmann, J., concurring in part & dissenting in part). Contemporary commentators, *see, e.g.*, Cannon, *supra*, at 61–63, 68, early courts, *see, e.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), and even modern proponents of broad § 230 immunity, *see, e.g.*, Tr. Oral Argument at 126, *Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (No. 21-1333) (Counsel for Google: “[O]ne lawsuit freaked out the Congress . . .”), all agree.

traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.” 129 F.3d at 330. This broad immunity was broadened even further when *Zeran* held that § 230(c)(1) barred both publisher *and* distributor liability. *Id.* at 331–34. Though *Zeran* has been criticized as inconsistent with the text, context, and purpose of § 230 (and was decided in an era where those traditional tools of construction were rarely consulted), the opinion was cut-and-paste copied by courts across the country in the first few years after the statute arrived. *See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15–18 (2020) (Thomas, J., statement respecting denial of certiorari); *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 746–47 (9th Cir. 2024) (Nelson, J., concurring); Candeub, *Bargaining For Free Speech*, *supra*, at 423–28.

Today, § 230 rides in to rescue corporations from virtually any claim loosely related to content posted by a third party, no matter the cause of action and whatever the provider’s actions. *See, e.g., Gonzalez v. Google LLC*, 2 F.4th 871, 892–98 (9th Cir. 2021), *vacated*, 598 U.S. 617 (2023); *Force*, 934 F.3d at 65–71. The result is a § 230 that immunizes platforms from the consequences of their own conduct and permits platforms to ignore the ordinary obligation that most businesses have to take reasonable steps to prevent their services from causing devastating harm.

C.

But this conception of § 230 immunity departs from the best ordinary meaning of the text and ignores the context of congressional action. Section 230 was passed to address an old problem arising in a then-unique context, not to “create a lawless no-man’s-land” of legal liability. *Fair Hous. Council*

of *San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc).

As with all cases involving the interpretation of statutes, our job in interpreting § 230’s text is to “give effect to the legislature’s charge,” “stated through the ‘ordinary meaning . . . at the time Congress enacted the statute.’” *OI Eur. Grp. B.V.*, 73 F.4th at 165 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Courts must take care to construe a statute’s terms in light of “background understandings and the structure and circumstances of the [legislative] utterance.” *Herrmann v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 982 (7th Cir. 1992). A task that necessarily includes consideration of the legal “backdrop against which Congress” acted. *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 487 (2005); *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (“[T]extualists, like all interpreters,” read “text in context Context is not found exclusively within the four corners of a statute. Background legal conventions, for instance, are part of the statute’s context.” (cleaned up)).¹⁷

1. Section 230(c)(1) directs that TikTok not be “treated as the publisher . . . of any information provided by another

¹⁷ A principle of interpretation with deep roots in the classical legal tradition. Blackstone understood the interpretation of statutes that sought to change the legal status quo to necessarily include consideration of 1) how the law “stood at the making of the act”; 2) “what the mischief was, for which the [then-existing] law did not provide”; 3) “and what remedy the [legislature] hath provided to cure this mischief.” 1 Blackstone, Commentaries *87. All contextual clues aiding the interpretation of the words the legislature enacted. *See OI Eur. Grp. B.V.*, 73 F.4th at 170.

information content provider.”¹⁸ Congress enacted § 230 mindful of the recent and widely discussed online service provider tort cases drawing the publisher-distributor distinction, as well as decades of state and federal law apportioning liability for electronic transmissions along the same line. That points to the best reading of § 230(c)(1) as adopting the meaning of “publisher” used by *Stratton Oakmont* and *CompuServe*. See *George v. McDonough*, 596 U.S. 740, 746 (2022) (“Where Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it.” (cleaned up)). So when § 230(c)(1) prohibits “treat[ing]” TikTok as the “publisher” of videos posted by third parties, that means TikTok cannot be liable for the mere act of hosting those videos. See *Malwarebytes*, 141 S. Ct. at 14–16 (Thomas, J., statement respecting denial of certiorari); *Doe ex rel. Roe v. Snap, Inc.*, 88 F.4th 1069, 1070–72 (5th Cir. 2023) (Elrod, J., dissenting from denial of rehearing en banc);

¹⁸ The reference to “speaker” in § 230(c)(1) does not change the meaning of the text. When § 230 was enacted, courts often referred to traditional publisher liability as treating the disseminator of a statement as the “original speaker” subject to the same strict liability. See Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-party Content Under Section 230 of the Communications Act*, 52 Fed. Comm. L.J. 647, 650 (2000). Consistent with common law tort theory, I refer to such claims as publisher liability rather than “third” versus “first-party speech.” Doing so also avoids the confusing commingling of statutory and constitutional language that can conflate the distinct legal meanings of “speech.”

Candeub, *Reading Section 230 as Written, supra*, at 146–51. It cannot, in short, be held liable as a publisher.

But § 230(c)(1) does not immunize more. It allows suits to proceed if the allegedly wrongful conduct is not based on the mere hosting of third-party content, but on the acts or omissions of the provider of the interactive computer service. This is where *Zeran* went astray, wrongly reasoning that distributor liability “is merely a subset, or a species, of publisher liability.” 129 F.3d at 332. It is true that “[s]ources sometimes use language that arguably blurs the distinction between publishers and distributors.” *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., statement respecting denial of certiorari). But understanding § 230(c)(1)’s use of “publisher” to subsume distributor liability conflicts with the context surrounding § 230’s enactment. Both *CompuServe* and *Stratton Oakmont* saw two distinct concepts. *See CompuServe*, 776 F. Supp. at 138–41; *Stratton Oakmont*, 1995 WL 323710, at *1–5. So did the common law of common carriers. It is implausible to conclude Congress decided to silently jettison both past and present to coin a new meaning of “publisher” in § 230(c)(1). *See Malwarebytes*, 141 S. Ct. at 14–16 (Thomas, J., statement respecting denial of certiorari); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1023–25 (Fla. 2001) (Lewis, J., dissenting).

2. Properly read, § 230(c)(1) says nothing about a provider’s own conduct beyond mere hosting.¹⁹ A conclusion

¹⁹ *See Doe v. Facebook, Inc.*, 142 S. Ct. 1087, 1088 (2022) (Thomas, J., statement respecting denial of certiorari) (“It is hard to see why the protection § 230(c)(1) grants publishers against being held strictly liable for third parties’ content should protect Facebook from liability for its *own* ‘acts

confirmed by § 230(c)(2), which enumerates acts that platforms can take without worrying about liability.²⁰ See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 942 (1992) (“[A]ll legislation occurs against a background of customs and understandings of the way things are done [A] speaker who is issuing an order or prohibition is likely to focus on what is being changed and to expect the listener to understand that, so far as this communication is concerned, all else remains the same.”).²¹

and omissions.” (emphasis in original)); cf. *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1204 (10th Cir. 2009) (Tymkovich, J., concurring) (“Section 230 only immunizes publishers or speakers for the *content* of the information from other providers that they make public. The CDA says nothing about immunizing publishers or speakers for their own conduct” (emphasis in original) (citation omitted)).

²⁰ See § 230(c)(2) (“No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in [§ 230(c)(2)(A)].”).

²¹ Invoking § 230(f)(4)(C)’s definition of “access software provider,” TikTok argues for a broader reading of § 230(c)(1) to include immunity for any actions taken to “organize” or “reorganize” content. In TikTok’s view, its

3. What does all this mean for Anderson's claims? Well, § 230(c)(1)'s preemption of traditional publisher liability precludes Anderson from holding TikTok liable for the Blackout Challenge videos' mere presence on TikTok's platform. A conclusion Anderson's counsel all but concedes. But § 230(c)(1) does not preempt distributor liability, so Anderson's claims seeking to hold TikTok liable for continuing to host the Blackout Challenge videos knowing they were causing the death of children can proceed. So too for her claims seeking to hold TikTok liable for its targeted recommendations of videos it knew were harmful. That is TikTok's own conduct, a subject outside of § 230(c)(1). Whether that conduct is actionable under state law is another question. But § 230 does not preempt liability on those bases.²²

targeted recommendations just organize the hosted content. But I do not read a definitional provision defining a different statutory term to expand the scope of § 230(c)(1)'s "publisher" immunity. Section 230(f)(4)(C), on its own, provides no immunity. It only states that a provider or user of an interactive computer service does not become an "information content provider"—and thereby fall outside the scope of § 230(c)(1)—just by organizing or reorganizing third-party content. One cannot conclude from § 230(f)(4) that because some providers or users of interactive computer services organize information, § 230(c)(1) necessarily immunizes that conduct. Section 230(f)(4) just loops the reader back to § 230(c)(1) to determine the meaning of "treat[] as the publisher . . . of any information provided by another information content provider."

²² A word on *Green v. America Online*, 318 F.3d 465 (3d Cir. 2003), a two-decade-old decision that decided very

little. *Green* involved a disgruntled former subscriber to AOL’s chat room service who filed a pro se complaint that was “not especially clear.” *Id.* at 468. By the time his case made it to this Court, Green’s main complaint seems to have been that AOL “negligently failed to live up to its contractual obligations” by failing to kick certain third-party users off AOL’s platform after they sent Green a virus through AOL and posted defamatory statements about him in a chat room. *See id.*; Brief for Appellant, *Green v. Am. Online*, 318 F.3d 465 (3d Cir. 2003) (No. 01-1120), 2002 WL 32397368, at *1–2, *4, *13–14. We explained that “[t]he only question” presented on appeal was “whether holding AOL liable for its alleged negligent failure to properly police its network for content transmitted by its users” was barred by § 230(c)(1). *Green*, 318 F.3d at 470. In a single, three-sentence paragraph of analysis, we answered that question in the affirmative, holding that Green’s claims were barred by § 230(c)(1) because they sought “to hold AOL liable for . . . actions quintessentially related to a publisher’s role.” *Id.* at 471.

Exactly what “failure to properly police its network” meant is also “not especially clear.” But in my view, it is best understood to refer to a provider of an interactive computer service failing to pre-screen third-party content before circulation and failing to actively monitor its service for allegedly harmful content. *See, e.g., id.* at 469 (describing Green’s complaint that AOL “did nothing to stop” the initial posting of additional defamatory statements); Brief for Appellee, *Green v. Am. Online*, 318 F.3d 465 (3d Cir. 2003) (No. 01-1120), 2002 WL 32397367, at *8 (explaining that Green’s complaint did not allege that he “suffer[ed] any damages at any time after” he notified AOL of the third-party

* * *

“It used to be said that there were three great influences on a child: home, school, and church. Today, there is a fourth great influence” Newton N. Minow, Speech Before the Nat’l Ass’n of Broads. (May 9, 1961), *reprinted in* Newton N. Minow, *Television and the Public Interest*, 55 Fed. Comm. L.J. 395, 399 (2003). When Commissioner Minow spoke of the perils and promise of television, the internet was still two decades from its earliest form. But his description of a “procession of game shows, . . . formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, . . . more violence, and cartoons” captures the dreary state of the modern internet. *Id.* at 398. The marketplace of ideas, such as it now is, may reward TikTok’s pursuit of profit above all other values. The company may decide to curate the content it serves up to children to emphasize the lowest virtues, the basest tastes. It may decline to use a common good to advance the common good.

But it cannot claim immunity that Congress did not provide. For these reasons, I would affirm the District Court’s judgment as it relates to any of Anderson’s claims that seek to hold TikTok liable for the Blackout Challenge videos’ mere existence on TikTok’s platform. But I would reverse the District Court’s judgment as it relates to any of Anderson’s

information). In other words, all *Green* held was that § 230 precluded publisher liability as that term was understood by *Stratton Oakmont* and *CompuServe*. *Green* said nothing about whether § 230 immunizes providers or users of interactive computer services for failing to take down harmful content once they receive notice of its presence on the platform (distributor liability).

claims that seek to hold TikTok liable for its knowing distribution and targeted recommendation of the Blackout Challenge videos. Accordingly, I concur in the judgment in part and dissent in part.