

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court
FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-13747

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
META PLATFORMS, INC., AND INSTAGRAM, LLC,
Defendants-Appellants.

ON DIRECT APPELLATE REVIEW FROM AN ORDER
OF THE SUPERIOR COURT FOR SUFFOLK COUNTY

**BRIEF OF *PRO SE* AMICUS CURIAE BLAKE C. STACEY
IN SUPPORT OF APPELLANTS AND REVERSAL**

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Interest of Amicus Curiae¹

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Introduction and Summary of Argument

The Commonwealth makes an argument in a good cause, but not one that is consistent with the law or cognizant of its consequences. The distinction that the Commonwealth tries to draw, between “harm caused by improper content provided by third parties” and harm “chargeable to the defendant’s own injurious actions”, dissolves upon closer study of statute and precedent. The Commonwealth’s

1 Dr. Stacey submits this brief *pro se* under Mass. R. App. P. 17(a) (allowing the filing of amicus briefs when solicited by an appellate court) and the Court’s March 19, 2025 amicus solicitation in this case. Pursuant to Mass. R. App. P. 17(c)(5), Dr. Stacey declares that no party or party’s counsel authored the brief in whole or in part, no one other than Dr. Stacey contributed money intended to fund the brief’s preparation or submission, and Dr. Stacey neither represents or has represented any of the parties to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

narrative of youth psychology is self-contradictory, leading to a “heads I win, tails you lose” situation for Meta, and more importantly, for any other social-media platform, nearly all of which are less financially equipped to defend themselves against litigation, however frivolous.

Argument

I. THE COMMONWEALTH’S ATTEMPTED DISTINCTION IS LOGICALLY AND LEGALLY UNTENABLE

“We must hold Facebook accountable!” is an easy sentiment to share. But not every court case is a proper forum for doing so, and not every legal theory advanced with that goal is tenable.

The Commonwealth's brief attempts to draw a distinction between “harm caused by improper content provided by third parties” and harm “chargeable to the defendant’s own injurious actions”. This distinction is not grounded in the statute, since Section 230 was written expressly to cover “actions” taken by an information content provider, and provides no exception if the “actions” in question are accused of being “injurious” (47 U.S.C. § 230(c)(2)). Moreover, the distinction is not grounded in case law, as the Commonwealth misconstrues precedent on both sides of this dividing line.

In *Lemmon v. Snap*, the information content provider Snap was found to be liable for the creation of a “speed filter” that allegedly induced unsafe driving. *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021). This decision did not turn upon Snap making any content available to a third party, but rather on Snap allegedly eliciting dangerous behavior; once one user had made a video of

themselves driving recklessly, the reckless act was done, regardless of whether or not any other user saw that video. By analogy, it was as though Snap had offered a sweepstake whose condition for entry was a video of an individual driving far above the speed limit. Snap was deemed liable, not as a publisher, distributor, curator or moderator of third-party content, but as a first-person instigator, a co-creator in a situation where the creative act was itself the physical risk. This only falls under the umbrella of Snap's "own injurious actions" because the word "action" is a very big umbrella.

Likewise, in *Roommates.com*, the information content provider was found to be liable for actively co-creating allegedly illegal content, material claimed to be illegal under the Fair Housing Act. Again, this is not merely a "defendant's own injurious action", but a defendant's first-person co-creation. *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc). An analogy here would be if Instagram presented each user with a drop-down list of illegal drugs and required the user to select which one the user took before capturing the photo that the user wishes to share. In short, an information content provider who designs their "website to require users to input illegal content" (*id.* at 3745) opens themselves to liability; but "requir[ing] users to input illegal content" is far more specific than a vague "injurious action". It is worth

noting that on further proceeding, Roommates.com was found not to have violated the FHA after all. The statute did not cover the situation in question, and so the content required of users had never been illegal in the first place. *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012). The *Roommates.com* precedent is thus ultimately based on a faulty premise, a factual predicate revealed to be untrue.

Both *Lemmon* and *Roommates.com* indicate that an information content provider's liability is cabined to a much narrower set of circumstances than "injurious actions". This is as it should be, since anything done by a provider is tautologically their "action", and a matter would not come to court if a plaintiff did not regard it as "injurious". Liability does not turn upon whether a provider took "actions", but rather upon whether the content at the heart of the dispute was, in itself, produced by another.

M.P. v. Meta, which the Commonwealth mentions in passing in a footnote to justify the other side of their dividing line, also indicates the illogicality of that dividing line. Because the situation addressed there is quite apposite to the present circumstances, it is worth considering in depth. Meta was alleged to have implemented recommendation algorithms that radicalized an individual to

violence. *M.P. by & through Pinckney v. Meta Platforms Inc.*, 127 F.4th 516 (4th Cir. 2025), cert. denied, No. 24-1133 (U.S. Oct. 6, 2025). The Fourth Circuit ruled,

M.P.’s state tort claims are inextricably intertwined with Facebook’s role as a publisher of third-party content. M.P. seeks to hold Facebook liable for disseminating “improper content” on its website. Crucially, M.P. cannot show that Facebook’s algorithm was designed in a manner that was unreasonably dangerous for viewers’ use without also demonstrating that the algorithm prioritizes the dissemination of one type of content over another. Indeed, without directing third-party content to users, Facebook would have little, if any, substantive content. Simply stated, M.P. takes issue with the fact that Facebook allows racist, harmful content to appear on its platform and directs that content to likely receptive users to maximize Facebook’s profits.

Id. at 12–13, internal citations omitted.

A “product design” or an “algorithm” is not a website as experienced by a user, any more than a rhyme scheme is a sonnet. A social-media platform with no user-generated information is an empty room.² Just as in *M.P.*, the Commonwealth cannot show that Meta designed software features “in a manner that was unreasonably dangerous for viewers’ use without also demonstrating” that those software features provide an advantage for “one type of content over another”. In

2 In the words of the Massachusetts Superior Court decision here being appealed, the alleged harm is due “to Instagram’s design features *themselves*, which purportedly cause addictive use, and not from the viewing of any specific third-party content”. But the content has to be there for any young person to become addicted to it. No teenager is “addicted”, if that emotionally-charged word is appropriate, to a design philosophy articulated in a Meta boardroom or code sitting on a Meta server. And “specific third-party content” is being implicated, i.e., the totality of the specific content actually being propagated by Instagram’s system.

blunt terms, the Commonwealth is trying to blame Meta for prioritizing *appealing content over dull*, as Meta sees it (or, more precisely, as Meta codifies those concepts into algorithmic measures). For example, in order to show that Meta’s “Intermittent Variable Rewards” such as notifications that a user’s post was “liked” are “unreasonably dangerous”, the Commonwealth can only do so by demonstrating that those notifications prioritize “one type of content over another”, that is, content which is “liked”.

Crucially, Meta in *M.P.* took “actions” on its own part, allegedly “injurious” ones. But these actions—the implementation of a recommendation system that encourages engagement above all else, notifying a user of content relevant to his interests—are, however injurious, venal or profit-driven they might be, the actions of a publisher curating and propagating information created by others. As the Fourth Circuit observed,

While there is widespread concern about Facebook’s use of its algorithm to arrange and sort racist and hate-driven content, acts of arranging and sorting content are integral to the function of publishing. See *Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019) (“[A]rranging and distributing third-party information inherently forms ‘connections’ and ‘matches’ among speakers, content, and viewers of content, whether in interactive internet forums or in more traditional media. That is an essential result of publishing.”). For instance, newspaper editors choose what articles merit inclusion on their front page and what opinion pieces to place opposite the editorial page. These decisions, like Facebook’s decision to recommend certain third-party content to specific users, have as a goal increasing consumer engagement. See, e.g., *Above the Fold*, Cambridge Business English Dictionary (2011) (explaining that newspaper editors place the stories they think

“will sell the newspaper ... above the fold”). But a newspaper company does not cease to be a publisher simply because it prioritizes engagement in sorting its content. And the fact that Facebook uses an algorithm to achieve the same result of engagement does not change the underlying nature of the act that it is performing. Decisions about whether and how to display certain information provided by third parties are traditional editorial functions of publishers, notwithstanding the various methods they use in performing that task.

Id. at 13.

Meta took actions, allegedly and even plausibly “injurious”. They are in essence the same type of actions that the Commonwealth alleges here. As a private individual, I condemn the profit motive that drove these actions. But I recognize that the law protects even a venal publisher. When a social-media platform implements a tool like a recommendation system, it is engaged in creative expression. It is choosing the atmosphere that it wishes its users to experience: the rate of information flow, the relative proportions of content types, the balance between content from a user’s personal acquaintances and from more generalized sources. A platform that relies upon “likes” to judge the “virality” of content and chooses to implement an algorithm that preferentially propagates highly-“liked” content is not materially different from a magazine that puts a particular actor’s photo on the cover based on box-office receipts. It may be a more ruthless implementation of the same logic, but it is the same logic, and the same type of curatorial expression. An information content provider that makes some content

ephemeral to boost its perceived salience is making the same decision that Disney does when teasing a film's limited-time only release from the "Disney vault". A platform engages in expression when it decides whether to be personal or impersonal, sedate or frenzied. Indeed, a platform may choose to provide a strictly chronological stream, with no overt recommendation system or injected advertisements, based on a deep emotional conviction of its operators, a vision of how the Internet ought to be. I do not speak hypothetically here. My primary social-media environment since 2017 has been a platform running the Mastodon software, a program designed for individuals and communities to establish their own social-media platforms, which can then exchange information with one another in a decentralized, or "federated" network. Mastodon provides each user a chronological feed of the posts made by the other users they follow, and also a chronological feed of the posts on the user's home platform. These choices derive from a design philosophy—in blunt terms, a vision of a better Internet. (See, *e.g.*, "What Is Mastodon?" Mastodon. <https://docs.joinmastodon.org> (viewed November 10, 2025).) The makers and operators of Mastodon and similar software are making in many ways the opposite philosophical case to Meta, but both visions are, under the law, creative expressions.

As an individual, I do not like what Meta sells, any more than I liked fashion magazines putting anorexic models on their covers. I find no satisfaction in saying that a behemoth corporation is on the right side of the law and my home Commonwealth is making a hash of it. But reading the statute and the precedents, I can come to no other conclusion.

II. META DOES NOT NEED SECTION 230, BUT BETTER PARTS OF THE INTERNET DO

Meta does not need Section 230. CEO Mark Zuckerberg's net worth presently exceeds \$200 billion. The company's net income last year was \$62.4 billion, and it held \$276.1 billion in total assets. It can afford to fight litigation through cycles of appeals and remands. Meta has employed as many as 2,000 lawyers. If Meta fails to get a case dismissed under Section 230, it has more than enough resources to argue the next stages, until they prevail on other grounds, be that First Amendment law or state tort legislation. It can afford to settle for amounts in the millions or even billions.³ If Section 230 were erased tomorrow, or if the courts narrowed its

3 This overall picture is drawn upon multiple sources. Forbes, "The Real-Time Billionaires List," <https://www.forbes.com/real-time-billionaires/> (viewed November 10, 2025). Hugo Guzman, *Meta Cuts Hit Legal Department, Slamming Brakes on Its Explosive Growth*, Law.com (November 10, 2022). <https://www.law.com/corpocounsel/2022/11/10/meta-cuts-hit-legal-department-slamming-brakes-on-its-explosive-growth/>. *Meta Platforms, Inc. 2024 Annual Report (Form 10-K)*. U.S. Securities and Exchange Commission (January 30, 2025).

applicability into nothingness, Meta and a few other giants of its ilk could trundle on. Those who offer a competing vision for the Internet would be in much more trouble. Brief for Reddit, Inc. and Reddit Moderators, *Gonzalez v. Google*, No. 21-1333 (U.S. Jan. 19, 2023); brief of Wikimedia Foundation, *Gonzalez v. Google*, No. 21-1333 (U.S. Jan. 19, 2023).⁴ As the New York Appellate Division, Fourth Department recently observed, “Dismissal after years of discovery and litigation (with ever mounting legal fees) would thwart the purpose of section 230.”

Patterson v. Meta Platforms, Inc. 2025 NY Slip Op 04447. Under the Commonwealth’s theory, any attempt to create a recommendation system, or even an automated filter against hateful content, would open a platform to liability. If that hate-speech filter failed, it would be a “defective design”, after all, and the

<https://www.sec.gov/ix?doc=/Archives/edgar/data/1326801/000132680125000017/meta-20241231.htm>. Dante Motley, *Meta to pay Texas \$1.4 billion for using facial recognition technology without users' permission*. The Texas Tribune (July 30, 2024). <https://www.texastribune.org/2024/07/30/texas-meta-facebook-biometric-data-settlement/>

- 4 Indeed, while Meta invokes Section 230 here, it has lobbied to “reform” the law too. This has been seen as an effort to create a regulatory regime that Meta could survive but smaller competitors could not. Aaron Mackey, *Facebook’s Pitch to Congress: Section 230 for Me, but not for Thee*. Electronic Frontier Foundation (March 24, 2021). <https://www.eff.org/deeplinks/2021/03/facebooks-pitch-congress-section-230-me-not-thee>; Mike Masnick, *Zuckerberg And Facebook Throw The Open Internet Under The Bus; Support Section 230 Reform*. Techdirt (October 27, 2020). <https://www.techdirt.com/2020/10/27/zuckerberg-facebook-throw-open-internet-under-bus-support-section-230-reform/>.

platform would be on the hook for allowing that general type of content to be visible. Any attempt to make a platform more engaging or more personalized could be portrayed as an attempt to make it “addictive”, forcing exactly the protracted battles that the New York Appellate Division foresaw.⁵

III. THE “AGE VERIFICATION” DEMANDS ARE CONSTITUTIONALLY DUBIOUS

The Superior Court judgment here being appealed pushes the question of age verification in a problematic direction. It describes Meta as using “an ineffective age verification process” (Superior Ct. Memo. & Order on Mo. to Dismiss, Oct. 17, 2024 at 4), and agrees with the Commonwealth that Meta’s “engaging in ineffective age verification” is part of the company’s “injurious conduct” (*id.* at 13). In order for a social-media platform to tailor the content it provides based on a user’s age, it must know that user’s age. Thus, all methods of age verification, age estimation or age assurance are ultimately invasive of privacy. Any requirement that an online service discover a user’s age before deciding how much to protect that user has an element of destroying freedom in order to save it. Goldman, *The “Segregate-and-Suppress” Approach to Regulating Child Safety Online*, 28

5 This is why the Massachusetts Superior Court’s assurance that “Discovery may reveal that the line the Commonwealth seeks to draw cannot be maintained” (Superior Ct. Memo. & Order on Mo. to Dismiss, Oct. 17, 2024 at 18) rings hollow.

Stanford Technology Law Review 173 (2025). But there is a more specific problem here: The Commonwealth does not allege that young persons are “addicted” to content that is obscene to minors. Requiring a heightened regime of age-monitoring, in order to curtail young persons from accessing information that is constitutionally open to them, is constitutionally problematic. (This is the dividing line established by most recent Supreme Court precedent; see *Free Speech Coalition, Inc., et al. v. Paxton, Attorney General of Texas*, 606 U. S. ____ (2025), and for confirmation that access to information *not* obscene for minors is constitutionally protected, *Netchoice, LLC v. Lynn Fitch, Attorney General of Mississippi*, 606 U. S. ____ (2025), Kavanaugh, J., concurring in denial of application to vacate stay (August 14, 2025).) This Court should be wary of all arguments to the effect that such a regime must be imposed.

IV. THE COMMONWEALTH’S THEORY OF PSYCHOLOGY IS SELF-CONTRADICTIONARY

The Commonwealth is playing a “heads we win, tails you lose” game with youth psychology. For example, they criticize Meta’s “Intermittent Variable Rewards” (IVRs) for providing “positive stimuli ... at random, unpredictable intervals” (Superior Ct. Memo. & Order on Mo. to Dismiss, Oct. 17, 2024 at 3). The randomness is deemed essential for this manipulative ploy to work. Yet the

Commonwealth also criticizes Meta for providing “autoplay”, which makes one item of content follow another “without the user needing to take any further action” (*id.* at 3). Which is it: Is a feature bad because it is random, or because it is perfectly regular? If Instagram did *not* autoplay content, but instead required the user to press a play button each time, the Commonwealth could argue that Instagram posts work like slot machines, trapping young people into clicking a button over and over again in the hope that the next video will be a dopamine jackpot. Likewise, Meta is castigated for how the “infinite scroll” format means there is “no natural end point for the user” (*id.* at 3), while simultaneously being blamed for creating a “Live” feature with a sharply time-limited window of interaction (*id.* at 3–4). Are natural end points good or bad? Both autoplay and infinite scroll are criticized for “encouraging passive consumption”, yet the Live feature is deemed toxically appealing because users know they can only *interact* with Live content in the moment (*id.* at 3–4). And what about all those “likes”, the notifications of which constitute problematic stimuli? *They each must come from other users.* Sending a “like” is *active*, not passive, and presenting users with content that an algorithm predicts they will “like” is deliberately seeking active consumption. The Commonwealth is accusing Meta of encouraging passivity and

activity in the same breath. In the Commonwealth’s narrative of youth psychology, they’ll get Meta either coming or going.

The Superior Court writes, “If the Commonwealth were successful, Meta would not have to alter or monitor Instagram’s third-party content” (*id.* at 16). Given the reasons for which the Commonwealth criticizes Instagram’s features, Meta would have to do something much more drastic: refuse to make certain types of content available at all. By the Commonwealth’s account of addiction, a platform can implement no feature that makes content visible for a limited duration or restricts the time window in which a user can interact with a content item (*id.* at 3–4).

According to the Superior Court, “the gravamen of the allegations have nothing to do with the type of content editing, monitoring, or removal that could trigger immunity under Section 230” (*id.* at 16). But if the Commonwealth were successful, Meta would be forced to adopt particular standards for content removal: Meta would be forbidden to remove content in a way that creates a sensation of scarcity or “fear of missing out” (*id.* at 2). Moreover, Meta would be required to edit the stream of content received by each young user, parceling it out in small portions (*id.* at 3). This would in turn require monitoring third-party content to judge how substantial each item is, in order to determine whether it fits within a given parcel. The Superior Court opinion perhaps underappreciates how

“likes” themselves are user-generated content, specifically feedback that one user provides another. A “like” is no less expressive in character than a written reply; it is merely more succinct.⁶ The Commonwealth’s allegations about IVRs are entirely about how Meta curates this user-generated content. Meta is rebuked for adjusting the timing with which this content is delivered (editing) and for withholding it for dramatic effect (content removal). In short, the gravamen of the Commonwealth’s allegations lie squarely within the issue of how Meta chooses to edit, monitor and remove user-generated content.⁷

Information can arrive at irregular, stochastic intervals, and feedback such as “likes” can arrive in bunches, entirely naturally. Consider, for example, following a major sporting event or the vote-counting on an election night. Even a purely chronological feed will present the user with dramatic emotional highs and lows. Rushes of “likes” will occur with each pivotal update. The organic social dynamics

6 Cf. the 9th Circuit recently finding that “the regulation of like counts” is “content based”, and that a law regulating how they are conveyed to users is subject to strict scrutiny. *NetChoice, LLC, v. Bonta* 152 F.4th 1002 (9th Cir 2025) at 22–23.

7 The Nevada Supreme Court recently allowed a lawsuit to proceed against TikTok, Inc., distinguishing the case from *Moody* on the basis that “the State, as the plaintiff, explicitly does not seek to curtail or alter the mix of third-party content that TikTok publishes”. *TikTok, Inc. v. District Court (ex rel State of Nevada)*, 141 Nev. Adv. Op. 51 (Nev. Supreme Ct. Nov. 6, 2025), at 20. Whether or not that distinction makes sense in Nevada, it does not work in Massachusetts, because here, the Commonwealth is seeking “to curtail or alter the mix of third-party content” that Instagram publishes.

will produce the same patterns as Meta is accused of inducing. If the Commonwealth succeeds, any platform that allows this natural and unforced behavior could be forced into a prolonged and costly discovery process to demonstrate that the behavior is indeed natural and unforced. Again, Meta would take its lumps in this case, but it can afford to; whereas every small, independent, nonprofit, volunteer-run or community-based service will in the long term be worse off.

Conclusion

I trust Meta as far as I could throw it. Nevertheless, the Court should reverse.

Respectfully submitted,

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Certification Under Mass. R. App. P. 17(c)(9)

I, Blake C. Stacey, certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Rules 17 and 20. This brief contains 3300 non-excluded words, which I ascertained using LibreOffice 7.3.7.2's word count function. Except on its cover, the brief uses Liberation Serif 14-point font and was composed in LibreOffice 7.3.7.2.

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Certificate Of Service Under Mass. R. App. P. 13(e)

I, Blake C. Stacey, certify that on November 12, 2025, I electronically filed *pro se* the foregoing Brief of Amicus Curiae in Support of Appellants and Reversal in Commonwealth of Massachusetts v. Meta Platforms, Inc., and Instagram, LLC, No. SJC-13747, via e-fileMA, with which counsel for Appellee, Christina Chan, Jared Rinehimer and David Kravitz, are registered and will receive automatic service. I also served counsel for Appellants, Paul William Schmidt and Felicia H. Ellsworth, via email at the email addresses noted below and via certified mail to their postal addresses. The contact information of the aforementioned counsel is:

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