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

COMMONWEALTH OF MASSACHUSETTS SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

META PLATFORMS, INC. and INSTAGRAM, LLC,
Defendants-Appellants.

Direct Appellate Review from an
Order of the Superior Court for Suffolk County,
Case No. 2384CV02397-BLS1

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

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IDENTITY AND INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit public-interest law firm and policy center with supporters nationwide. It defends free enterprise, limited government, and the rule of law. To that end, WLF often appears as amicus curiae in state courts of last resort, including this one. *Laramie v. Philip Morris USA, Inc.*, 488 Mass. 399 (2021); *Dunn v. Genzyme Corp.*, 486 Mass. 713 (2021). WLF also regularly appears as an amicus to urge courts to properly apply 47 U.S.C. § 230. *E.g.*, *In re Facebook, Inc.*, 625 S.W.3d 80 (Tex. 2021). It does so once again here.

INTRODUCTION AND SUMMARY OF ARGUMENT

Publication is not a public nuisance. The government cannot punish the distribution of information via the internet—Congress made sure of that by passing section 230 of the Communications Decency Act (CDA). 47 U.S.C. § 230(c)(1). Consequently, Massachusetts may not use its consumer protection and tort laws to "abridg[e] the freedom of speech, or

* No party, party's counsel, person, or entity other than WLF and its counsel authored this brief in whole or in part or contributed money to prepare or submit this brief. Neither WLF nor its counsel has represented a party to this appeal in another proceeding involving similar issues; nor has WLF or its counsel been a party or represented a party in any proceeding or transaction at issue here.

of the press," even if young people really like Instagram's endless feed and respond to the app's incessant notifications. U.S. Const., amend. I; *id*. amend. XIV.

Section 230 of the CDA was originally introduced as the "Internet Freedom and Family Empowerment Act." Jeff Kosseff 81, *The Twenty-Six Words that Created the Internet* (Kindle Ed. 2018). That title gets at 230's two immunities. The first is protection for an "interactive computer service" for publishing third-party content online. That's a guarantee of internet freedom. 47 U.S.C. § 230(c)(1). The second is immunity for a service disassociating itself from "objectionable" content. *Id*. § 230(c)(2)(A). Since that portion focuses on (but is not limited to) obscene or violent content, that's the family empowerment piece. *Id*. This case is about the internet-freedom half.

Section 230's internet-freedom provision explicitly provides immunity from suit for publishing third-party content. That covers both *what* the content is and *how* the content is delivered. So section 230(c)(1) imposes a maximalist reading of the Speech and Press Clauses—short-circuiting any prior caselaw—to preserve the free flow of information under the First Amendment. That's why section 230 immunizes

Instagram from the Commonwealth's complaint. While the government's pleadings use lots of high-tech verbiage about "never-ending feeds," "haptics," and "algorithms," Massachusetts's core dispute is about Meta's distribution of third-party content. That's publishing—and publishing is protected to the hilt by section 230's internet-freedom immunity.

Astonishingly, the Commonwealth begins its argument by claiming the right to continue this action even if all that's so. Mass. Br. at 24–28. The Commonwealth's theory hinges on the odd claim that section 230 merely bars "liability" and not "suit." *Id.* This specious play is defeated by the statutory text, which not only bars "liability," but any "cause of action." 47 U.S.C. § 230(e)(3). But even if the Commonwealth were right about the text, it would still be wrong on the law—higher constitutional considerations would kill this case.

Meaningless "costly, fact-dependent litigation" about First Amendment-protected activity is itself prohibited by the First Amendment, *Fed. Election Comm'n v. Wis. Right to Life*, 551 U.S. 449, 468 (2007) (Roberts, C.J., controlling) (internal quotation marks and citation omitted), because "the courts are not intended for performative litigation" aimed at speech. *Trump v. Clinton*, 640 F. Supp. 3d 1321, 1332

(S.D. Fla. 2022); *see also United States v. Goodwin*, 457 U.S. 368, 372 (1982) (noting the "basic—and itself uncontroversial—principle" that a person "may not be punished for exercising a protected statutory or constitutional right"). Such actions inevitably chill protected speech and association. If nothing else, the government's invitation for this Court to bless a trial to "send a message" rather than impose liability should be rebuffed.

ARGUMENT

I. SECTION 230'S INTERNET-FREEDOM PROVISION IMMUNIZES META.

Think of section 230's internet-freedom immunity as an analogue to the Free Exercise Clause's Religious Freedom Restoration Act (RFRA). 42 U.S.C. § 2000bb-1. It is Congress's instruction to the courts that, in online circumstances, they *must* apply a maximalist interpretation of the First Amendment. *See* Kosseff 253, *The Twenty-Six Words that Created the Internet* ("Section 230 is the First Amendment on steroids, for the Internet age"). Or consider section 230 as Congress's version of *New York Times v. Sullivan*, an uncompromising First Amendment reading that ousts state liability laws to bring about an "uninhibited, robust, and wide-open" internet. 376 U.S. 254, 270 (1964). Either way, unlike your garden-

variety statute, which must be read parsimoniously to avoid conflict with the Constitution, section 230 expands upon the First Amendment—at the bleeding edge of that provision's promise "that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"—especially by targeting a publisher. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

We don't need to do complicated guesswork or statutory exegesis to know this. Section 230 tells us that itself. The statute explains that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation," 47 U.S.C. § 230(a)(4), so "[i]t is the policy of the United States . . . 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." *Id.* § 230(b)(2). The CDA's internet-freedom immunity brings that policy to life, compelling courts to read its protection of publishing through a mandatory prism that state "[c]ensorship," even when brought with the best of intentions via tort law, "is the deadly enemy of freedom and progress." *Smith v. Cal.*, 361 U.S. 147, 160 (1959) (Black, J., concurring). That's why "*[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." 47 U.S.C. § 230(e)(3) (emphasis supplied).

To that end, section 230 grants expansive immunity from suit for providing "interactive computer service[s]" like Instagram, *id*. § 230(c)(1), that publish "any information provided by another information content provider," *id*., such as an Instagram user. *Id*. § (f)(3); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service"). So platforms may publish third-party content with nearly unqualified immunity. Even the act of a "'provider or user of an interactive computer service'" "republishing" material from one service to another has been found to enjoy section 230 immunity. *Monsarrat v. Newman*, 28 F.4th 314, 318 (1st Cir. 2022) (quoting 47 U.S.C. § 230(c)(1)).

So let's consider Instagram. We use a lot of modern words to describe social media platforms—"algorithms," "personalized content feeds," "data associated with [user] profiles," and "personalized websites" to name just a few. *NetChoice, LLC v. Bonta*, 152 F.4th 1002, 1009 (9th

Cir. 2025). This is just another way of saying that Instagram is entirely composed of speech (videos, messages) and association (comments, likes, followers). And Meta publishes that speech in a particular way, not by "develop[ing]" it, but by delivering it. 47 U.S.C. § 230(f)(3). What is the Instagram scroll, the push notifications, the Meta-curated feed that each Instagram user encounters when opening the app, if not the seriatim distribution of many works—a video, a post, a comment, a message—to a subscribing public? There's an English word for that—publishing. *Publish*, Black's Law Dictionary (12th ed. 2024) (To "publish" is "to distribute copies (of a work) to the public").

Massachusetts has decided that the way Meta curates Instagram for its users—how it publishes to its younger users especially—is simply too effective or too salient, so it brought this action. That can't oust section 230 internet-freedom immunity. That Instagram "resonates, generates interest and is" viewed "on the internet by individuals wanting to read" and watch published content cannot "somehow elevate[]" the Commonwealth's ability to sanction it. *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1182 (D. Colo. 2014), *aff'd sub nom. Williams v. Coal. for Secular Gov't*, 815 F.3d 1267 (10th Cir. 2016). "The more vibrant the

public discourse[,] the more justified the burdening of the speech is? Surely not." *Id.*; *cf. Kimzey v. Yelp!*, 836 F.3d 1263, 1271 (9th Cir. 2016) (Section 230 immunizes the "proliferation and dissemination of content").

The Commonwealth dresses up its claim in concern for society's most vulnerable. *E.g.*, Mass. Br. at 56–57. "But 'illegitimate and unconstitutional practices get their first footing in that way.'" *Smith*, 361 U.S. at 160 (Black, J., concurring) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)). It is 'obscenity and indecency'"—or concern for the welfare of children—"before us today, the experience of mankind—both ancient and modern—shows that this type of elastic phrase can, and most likely will, be synonymous with the political and maybe with the religious unorthodoxy of tomorrow." *Id.* Section 230 makes mandatory "'the duty of courts to be watchful for the constitutional rights of'" publishers "'against any stealthy encroachments thereon.'" *Id.*

The government insists that section 230 may be set aside because the Commonwealth is attacking "conduct," not 230-protected speech. Mass. Br. at 41. (internal quotation marks and citation omitted). But here, there's no difference in that distinction. The spending of money is "conduct"—but the First Amendment still protects making campaign

expenditures. *Buckley v. Valeo*, 424 U.S. 1, 16–17 (1976) (*per curiam*). Shaving is "conduct"—but the aggressive First Amendment scrutiny required by the 230-like RFRA's "sister statute," ensures that a prisoner may "grow a ½-inch beard in accordance with his religious beliefs." *Holt v. Hobbs*, 574 U.S. 352, 355–56 (2015); *id*. at 369.

In short, even where a law "may be described as directed at conduct," it still offends the First Amendment if some of "the conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). Under section 230—the "First Amendment on steroids," Kosseff 253, *The Twenty-Six Words that Created the Internet*—"it is impermissibl[e]" for the Commonwealth to stretch its consumer protection and tort laws to Meta's speech-intensive conduct. *Richwine v. Matuszak*, 148 F.4th 942, 953 (7th Cir. 2025). Even in federal cases where internet-freedom immunity has been set aside, the courts have been careful to ensure that a "website operator who edits user-created content—such as by correcting spelling, removing obscenity[,] or trimming for length—retains [its] immunity." *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1169 (9th Cir. 2008).

Even if the Commonwealth were right that it's not targeting "speech," that still wouldn't get it off the hook. If Meta's publishing isn't "speech," it's surely "press." The Press Clause is not a protection reserved for the institutional media as an industry—a sinecure for "the press." Rather, it refers to "the printing press" as a *technology* for distributing—publishing—words and images. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring) ("The very task of including some entities within the 'institutional press' [for constitutional protection] while excluding others . . . is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country"); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. Pa. L. Rev. 459, 540 (2012) ("An argument for a press-as-industry interpretation of the Free Press Clause must rely on something other than original meaning, text, purpose, tradition, or precedent").

Sure, this isn't the bog-standard 230 case—one where Meta is accused of carrying allegedly unlawful speech, such as defamatory statements. *Monsarrat*, 28 F.4th at 318. But that cuts in Meta's favor,

not against it. "This case pushes the envelope of creative pleading in an effort to work around § 230." *Kimzey*, 836 F.3d at 1265; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) (First Amendment scrutiny enhances "with the novelty" of the government's case). The Commonwealth is trying to use a novel legal theory to punish the company's distribution—how it publishes, whether through a user's feed or through notifications and recommendations, the content of other Instagram users. And that's precisely what section 230's internet-freedom immunity was built to prevent.

II. THE CONSTITUTION PRECLUDES THE COMMONWEALTH'S THEORY THAT META MAY BE IMMUNE FROM LIABILITY, BUT NOT SUIT.

The Commonwealth opens its argument by claiming that even if section 230 affords immunity from liability, it does not provide immunity from suit. Mass. Br. at 24–28. That cannot be squared with the statute's text, which heads off this very play by barring both "liability" and "cause[s] of action." 47 U.S.C. § 230(e)(3).

Even so, the Commonwealth claims that the text may be read as ambiguous, and therefore the tie goes to it. Mass. Br. at 28 ("If Meta is correct, then 'no liability may be imposed' is surplusage because immunity from suit necessarily precludes the imposition of liability").

Not so. Speech-based business models are "protected not only against heavy-handed frontal attack," *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960), but also against less-visible burdens, such as disproportionate regulation, *Richwine*, 148 F.4th at 958, or kabuki litigation. Meaningless "costly, fact-dependent litigation" against First Amendment-protected activity is itself prohibited by the First Amendment—precisely because being haled before a government tribunal inevitably chills First Amendment rights. *Wis. Right to Life*, 551 U.S. at 468 (Roberts, C.J., controlling) (internal quotation marks and citation omitted). In that context, the Supreme Court has found the unnecessary deposition of five people and "turn[ing] over many documents related to . . . operations, plans, and finances" imposed "a severe burden on [protected] speech." *Id.* n.5. It's no secret that Massachusetts wants far more than that for its case here—even if Section 230 ultimately precludes liability.

If the Commonwealth wants to oppose Instagram, it has far more narrowly tailored weapons at hand than bringing Meta before a state tribunal for a name-calling exercise. After all, the Attorney General has speech rights of her own—she is free to excoriate Meta for its publishing

decisions on her own time. As a public official, she may lobby the General Court for changes in the law. And her office may issue public service announcements about the harm she thinks Instagram causes.

Replacing liability with process just makes the process the punishment—and that's verboten. *Wis. Right to Life*, 551 U.S. at 468 (Roberts, C.J., controlling). It is a "basic, and itself uncontroversial, principle" that "to punish a person because [it] has done what the law plainly allows . . . is a due process violation 'of the most basic sort.'" *Goodwin*, 457 U.S. at 372 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)) (punctuation altered).

CONCLUSION

Section 230's internet-freedom immunity precludes the Commonwealth from converting Meta's publication into public nuisance or public harm. The Court should reverse the decision below and instruct the Suffolk County Superior Court to dismiss the Commonwealth's case.

Respectfully submitted,

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Dated: November 14, 2025

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Massachusetts Rules of Appellate Procedure 17(c)(9) and 20. The brief complies with the length limits of Rule 20(a)(A) because it contains 2,580 words, excluding those parts of the brief exempted by Rule 20(a)(2)(D). The brief complies with the typeface and type style requirements of Rule 20(a)(4)(B) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

Under Massachusetts Rule of Appellate Procedure 13(e), I certify that on November 14, 2025, I served via electronic mail a copy of the foregoing Brief of Washington Legal Foundation as Amicus Curiae in Support of Defendant-Appellant in the matter of *Commonwealth v. Meta*, SJC-13747, pending before the Commonwealth of Massachusetts Supreme Judicial Court, on the following:

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