COMMONWEALTH OF MASSACHUSETTS

# Supreme Judicial Court

SUFFOLK, SS. 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, NO. 2384CV02397-BLS1

**BRIEF OF PLAINTIFF-APPELLEE COMMONWEALTH OF MASSACHUSETTS**

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## STATEMENT OF THE ISSUES

1. Whether, under the doctrine of present execution, Section 230 of the Communications Decency Act, 47 U.S.C. §230 ("Section 230" or "CDA") entitles Meta to an interlocutory appeal of an order denying its motion to dismiss, where nothing indicates congressional intent to confer immunity from suit.

2. If this appeal is proper, whether Section 230 bars the Commonwealth's unfair and deceptive claims under G.L. c. 93A, and its public nuisance claim, which allege Meta's own product design causes harm irrespective of third-party content displayed on the Instagram platform.

3. If this appeal is proper, whether the First Amendment bars the Commonwealth's claims where the harm alleged flows from Meta's product design decisions and false and misleading statements, not from expressive speech.

4. If this appeal is proper, whether the Commonwealth has plausibly alleged claims for unfair and deceptive conduct under Chapter 93A and for public nuisance.

## STATEMENT OF THE CASE

This purported interlocutory appeal is from an order of the Superior Court (Krupp, J.) denying Meta's motion to dismiss the Commonwealth's Complaint. The Complaint alleges that Meta's business practices were unfair under G.L. c. 93A, § 2 (Counts I and III, "unfairness claims"); deceptive under G.L. c. 93A, § 2 (Counts II and III, "deception claims"); and created a public nuisance as a result of those acts (Count IV). *See* RA1/109-121. In its unfairness claims, the Commonwealth alleges that Meta unfairly maximizes its advertising revenue through psychologically manipulative design features that it knows override young users' ability to regulate their time on the platform, and results in problematic use and mental and physical harm. RA1/42-62, 100-106. In its deception claims, the Commonwealth alleges that despite knowing such harm, Meta has serially mispresented to the public the safety of its platform and its efforts to invest in and prioritize youth well-being and safety. RA1/62-100. In its public nuisance claim, the Commonwealth alleges that Meta's unfair and deceptive conduct has substantially and unreasonably interfered with the well-being of thousands of Massachusetts youth, giving rise to a youth mental health crisis that the Commonwealth must address. RA1/106-109, 118-121.

Meta moved to dismiss the Commonwealth's claims, arguing they are barred by Section 230 and the First Amendment, and the Commonwealth failed to

plausibly allege Chapter 93A or public nuisance claims. In a thorough and well-reasoned opinion ("Order"), the Superior Court rejected Meta's arguments. *See* Add 66-93.

Meta then moved the Superior Court to report its Order to the Appeals Court under Mass. R. Civ. P. 64(a). RA1/502. Simultaneously, Meta petitioned a single justice of the Appeals Court pursuant to G.L. c. 231, §118, ¶1, for permission to take an interlocutory appeal from the Order (Appeals Court No. 2024-J-724), RA2/517, and also noticed a purported appeal of the Order, claiming a right to do so under the doctrine of present execution (Appeals Court No. 2024-P-1473). RA1/499. The single justice stayed the petition in No. 2024-J-724 pending the outcome of the motion to report. RA2/515.

On January 9, 2025, the Superior Court denied the motion to report, finding no "reason to delay this matter" with an interlocutory appeal because, *inter alia*, the Commonwealth's deception claims did not implicate Section 230 or the First Amendment, and denying Meta's motion to dismiss was "consistent with the majority of, and the most cogent, decisions on the topic from around the country." RA2/512-13. Thereafter, the single justice in No. 2024-J-724 vacated the stay. RA2/516.

Meta then filed an application for direct review in No. 2024-P-1473. RA3/532. The Commonwealth did not oppose direct review but responded that the doctrine of present execution is inapplicable. RA3/564.

This Court granted direct review and consolidated the single justice petition with this appeal. RA3/574-75. This Court also denied Meta's request to pursue an interlocutory appeal of all issues decided by the Superior Court, and reserved the issue of an interlocutory appeal under Section 230. RA3/576.

## STATEMENT OF FACTS

Meta is the largest social media company in the world. RA1/28-29 ¶17. It owns, develops, designs, markets, and operates the social media platform, Instagram. RA1/29 ¶¶18-19. Over 33 million young people in the U.S. use Instagram, including over 300,000 daily active users in Massachusetts between the ages of 13–17. RA1/23, 33 ¶¶6, 34. Meta derives substantially all its revenue from monetizing the data collected from its users and the time they spend on the platform to sell targeted third-party advertisements. RA1/37 ¶51.

**Meta's Unfair Acts (Counts I and III):** To build a pipeline of users whose data, time, and attention can be monetized to sell more ads, thereby realizing more revenue, Meta designs and deploys features that it knows exploit vulnerabilities of the teenage brain, knows overrides teenagers' ability to regulate their time on the

platform, and knows cause addictive overuse that results in mental and physical harms. RA1/42-59, 103-106 ¶¶68, 71-133, 134-141, 359-368.

Incessant Notifications and Intermittent Variable Rewards: When a user is not logged into Instagram, Meta "pushes" an incessant stream of audiovisual and haptic signals and alerts (e.g., pop-up banners on a phone's homescreen and/or sounds and vibrations) to notify users of activity on the platform to prompt them to return. RA1/45-49 ¶¶84-96. These "high volume" notifications leverage teens' "fear of missing out" ("FOMO"), "overload" and "overwhelm" young users, and "compel[] [them] to re-open and re-visit the Instagram platform repeatedly throughout the day and at night." RA1/49 ¶93. Meta's own research shows that these notifications disrupt and "psychologically harm[] young users by" "caus[ing] inattention and hyperactivity, and reduc[ing] productivity and well-being" even when they stop using Instagram or are not on their phone at all. RA1/49 ¶96.

In addition, Meta employs a "intermittent variable reward" (IVR) schedule to send users dopamine-inducing notifications (e.g., that someone "liked" a user's post) at optimized times, interspersed with dopamine gaps, to build anticipation and craving, which strengthens the desire to keep returning to the platform—much like the psychological manipulation techniques of slot machines. RA1/55 ¶¶126-133. This habit loop and craving for dopamine engineered by Meta increases depression

and anxiety, and alters young users' brain structure, maturation, and neurological development. RA1/103-106 ¶¶359-367.

Infinite Scroll and Autoplay: Because Meta's "infinite scroll" and "autoplay" formats present a never-ending feed of posts with no end point, and create a harmful flow state that users are unable to escape, young users find it difficult to leave the platform. RA1/50-52 ¶¶100, 103-107. This frictionless design architecture intentionally turns the user's experience into "a bottomless flow" which "fully immerse[s] users, distorts their perception of time," eliminates the opportunity to pause, reconsider, or leave, and causes passive consumption that is "generally worse for wellbeing." RA1/51, 58-59 ¶¶102, 137-140.

Ephemeral Features: Meta also intentionally designs ephemeral, time-sensitive aspects on its platform to make posts available to view for only a limited time. Such features prey upon young users' FOMO and "especially sensitive fear of social exclusion" to compel them to return to the platform to view posts before they disappear. RA1/53 ¶116. Meta knows its ephemeral design induces "problematic and habitual use, contribut[ing] to mental health harms to young users," and renders "young users [] unable to extricate themselves" from the platform. RA1/55 ¶123.

Ineffective Age Assurance Measures: Despite Meta's policy prohibiting underage users from its platform and pledge to inhibit such use, it knowingly uses

ineffective age verification processes resulting in the widespread use of its platform by those under 13 years old. RA1/96-100 ¶¶324-343. Meta knows underage users "should not be using [its] service" because they "fundamentally lack the skill to engage with social media in safe ways." RA1/93, 101 ¶¶304, 348. Despite this knowledge, Meta has failed to meaningfully prevent the hundreds of thousands of underage users it knows are on its platform from being subjected to its severe harms. RA1/101 ¶351.

The above arsenal of addictive-by-design tactics has been recognized by the U.S. Surgeon General as dangerous for our youth: "[I]f we tell a child, use the force of your willpower to control how much time you're spending, you're pitting a child against the world's greatest product designers . . . [It's] just not a fair fight." RA1/22-23 ¶4. Indeed, Meta internally knows its manipulative designs "addict[] and overwhelm[] young users who 'can't help themselves' from returning to the platform," and "cause[] young users mental and physical harm," yet continues to employ them. RA1/57-59 ¶¶134-141.

**Meta's Deceptive Acts (Counts II and III):** Despite knowing the harms its platform causes, Meta has made false, incomplete, or otherwise misleading statements and omissions regarding its platform's safety and its internal business efforts to prioritize user safety and well-being. Meta made such deceptive

statements in media interviews, public Facebook posts, at public events, in official statements and reports on its company website, and in congressional testimony.

Meta's misrepresentations notably include that its platform is not addictive, RA1/62-63 ¶¶156-159, that it does not harm children, RA1/67 ¶174, that youth well-being is its "number one priority," RA1/67 ¶173, that it does not "prioritize profit over safety and well-being," RA1/68 ¶176, and that it is "especially focused" on preventing underage use. RA1/96 ¶324.

These statements are belied by Meta's repeated internal decisions to deprioritize youth well-being, RA1/66-86 ¶¶170-265, its internal data showing that its platform operates to addict and harm kids RA1/49, 55, 57-59, 64, 69, 74, 78-83 ¶¶96, 124, 134-140, 162-163, 181, 201-203, 227-233, 242-248, 252, and its internal acknowledgment that it "do[es] very little to keep" underage users off the platform. RA1/96 ¶325. For example, Meta's senior staff frequently emphasized that well-being initiatives were "understaffed" and "underinvested," that the company "lack[ed] … a roadmap of work that demonstrates we care about well-being," and that additional investment was "necessary to stand behind our external narrative of well-being on our apps." RA1/68-72 ¶¶179-195. Meta also repeatedly refused to make design changes it knew could improve young users' well-being because it would impact profits. RA1/72-77 ¶¶197-222 (refusing to hide "Like" counts on

posts even though it was "one of the clearest things" it could "do to positively impact [] well-being" because of "non-trivial revenue impacts"); RA1/77-79 ¶¶223-239 (refusing to remove harmful cosmetic surgery filters because of "clear[] demand").

**Public Nuisance (Count IV):** Meta's actions have substantially and unreasonably interfered with the well-being of hundreds of thousands of Massachusetts' youth it has purposefully addicted to its platform. RA1/118 ¶¶410-412. This addiction, according to Meta's own data, has caused widespread mental and physical harm to children. RA1/57-59, 102-106 ¶¶134-141, 352-368. The Commonwealth has been left to grapple with the extent of that harm. RA1/106-109, 119-121 ¶¶369-374, 414, 419.

## STANDARD OF REVIEW

This Court "review[s] the denial of a motion dismiss under Mass. R. Civ. P. 12(b)(6) de novo." *Marsh v. Mass. Coastal R.R.*, 492 Mass. 641, 645–46 (2024). "In doing so, [the Court] accept[s] as true all well-pleaded facts alleged in the complaint, drawing all reasonable inferences therefrom in the plaintiff's favor, and determining whether the allegations plausibly suggest that the plaintiff is entitled to relief." *Id.* (citation omitted).

Because Meta's Section 230 and First Amendment arguments are affirmative defenses, to prevail at this stage Meta must definitively establish that all the

Commonwealth's facts, as pled, do not plausibly show any actionable conduct outside the scope of those defenses. *See State Room, Inc. v. MA-60 State Assocs.*, 84 Mass. App. Ct. 244, 248 (2013) ("[T]he appearance on the face of the complaint … of information constituting a *conclusive* affirmative defense will justify dismissal.") (emphasis added); *Nisselson v. Lernout*, 469 F.3d 143, 150 (1st Cir. 2006) (facts establishing an affirmative defense must be "definitively ascertainable from the complaint" and "establish the affirmative defense with certitude.").

## SUMMARY OF THE ARGUMENT

Meta's interlocutory appeal is improper because Section 230 provides immunity from liability, not suit. Nothing in the statutory text, legislative history, or congressional purpose of Section 230 indicates an intention to confer immunity from suit, and Meta identifies no substantial public interest justifying interlocutory appeal. *Infra* pp. 23-33.

The Superior Court correctly found that Section 230 is not implicated where the Commonwealth alleges harms caused by Meta's *own* actions as a product designer in engineering psychologically manipulative tools to exploit children's developing brains. These design elements—and the harm they cause—are independent of the content on Instagram. And Section 230 affords Meta no protection for its *own* misleading statements about its product's safety. *Infra* pp. 33-

44.

The Superior Court correctly found the First Amendment does not bar the Commonwealth's claims where Meta's harmful design elements are not expressive speech but commercial tools that operate to manipulate kids into addictive and excessive use, regardless of content. And the First Amendment does not protect Meta's false and misleading statements. *Infra* pp. 44-50.

The Commonwealth's unfair and deceptive claims are sufficiently pled. The Complaint alleges that Meta, a publicly-traded, Fortune-50 company, targeted its exploitative tools at Massachusetts teens to monetize their data, time, and attention for business reasons, namely, advertising profit. A direct financial exchange between Meta and users is not a required element under Chapter 93A, §2. *Infra* pp. 50-55.

The Commonwealth's public nuisance claim is sufficiently pled. It alleges that Meta's unfair and deceptive conduct has caused a youth mental health crisis among the many thousands of Massachusetts teens whom it has purposefully addicted to its platform, impairing the public right to "preserv[ed] health and safety." *Infra* pp. 55-57.

## ARGUMENT

### I. Meta Is Not Entitled to an Interlocutory Appeal.

Section 230 does not entitle Meta to interlocutory review of the Superior Court's Order under the doctrine of present execution. That doctrine applies only "in narrowly limited circumstances," in order "to avoid piecemeal appeals from interlocutory decisions that will delay the resolution of the trial court case, increase the over-all cost of the litigation, and burden our appellate courts." *Patel v. Martin*, 481 Mass. 29, 32 (2018). Such circumstances are lacking here.

The statutory text and the overwhelming weight of authority hold that Section 230 confers immunity only from liability, not from suit. And even if Section 230 could be read to confer immunity from suit, Meta cannot identify any important public interest that justifies immediate interlocutory review before the trial court proceedings have concluded. Meta's purported interlocutory appeal should therefore be dismissed.

#### A. The Text of Section 230 Confers Immunity From Liability, Not Suit.

The text of the operative provision of Section 230, subsection (c), describes protection from liability, not suit.[1] Paragraph (c)(1) discusses how providers and

[1] As this Court has explained, "[t]hat the statute speaks only of liability and does not specifically spell out immunity from suit is not dispositive," *Lynch v. Crawford*, 483

(footnote continued)

users of interactive computer services "shall be treated"; it says nothing about how or when that determination should be made. 47 U.S.C. §230(c)(1). And paragraph (c)(2)'s immunity-conferring language reads "[n]o provider or user of an interactive computer service *shall be held liable*" if subparagraphs (A) and (B) are satisfied. 47 U.S.C. §230(c)(2) (emphasis added). Indeed, paragraph (c)(2) bears the title "Civil Liability," further emphasizing subsection (c)'s focus on ultimate liability, not complete freedom from the burdens of litigation.

The remainder of Section 230 similarly lacks any apparent intention to confer immunity from suit. Section 230(a) sets forth five congressional "findings," which generally extol the virtues of the internet as, for example, "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. §230(a)(3). And Section 230(b) declares that "the policy of the United States" is to "promote the continued development of the Internet and other interactive computer services," to "preserve the vibrant and competitive free market" for those services "unfettered by Federal or State regulation," and to encourage the development and use of technologies that

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Mass. 631, 633 (2019), but the ultimate question is "whether the Legislature intended to grant immunity from suit," *id.*, and it remains true that "the statutory language" is "the principal source of insight into legislative purpose." *Dental Serv. of Mass., Inc. v. Comm'r of Rev.*, 479 Mass. 304, 306 (2018) (citation, alteration, and internal quotation marks omitted).

enhance "user control over what information is received" and that allow families and schools to control "children's access to objectionable or inappropriate online material." *Id.* §230(b). Not a word of these congressional findings or policy statements concerns the burdens of litigation.

The legislative history of Section 230, too, lacks any apparent intention to shield entities like Meta from the burdens of litigation. To the contrary, the conference report of the Congress that adopted Section 230 states that the "section provides 'Good Samaritan' protections from civil *liability* for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material." S. Rep. No. 104-230, at 194 (emphasis added). The report goes on to explain that Section 230 was intended to advance "the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services." *Id.* There is no hint of a congressional purpose to confer immunity from suit rather than liability. *Cf. Lynch*, 483 Mass. at 639-40 (looking to congressional findings and legislative history stating intention to protect against "unwarranted litigation costs" and to provide "freedom from suit" in determining that statute conferred immunity from suit).

Meta does not and cannot refute any of these points. Instead, Meta relies solely on paragraph (e)(3)'s bar on certain "cause[s] of action" being "brought." 47 U.S.C. §230(e)(3); *see* Meta Br. 20-21. That language does not confer immunity from suit for at least two reasons. First, "reading the text in its entirety reveals that [paragraph] (e)(3) is merely a preemption provision." *Gen. Steel Domestic Sales v. Chumley*, 840 F.3d 1178, 1182 (10th Cir. 2016); *see also Klayman v. Zuckerberg*, 753 F.3d 1254, 1356 (D.C. Cir. 2014) (noting §230(e)(3)'s "preemptive bite"); *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1090 (9th Cir. 2021) (noting that §230(e)(3) "explicitly preempt[s] any state or local law inconsistent with this section"). Subsection (e), entitled "[e]ffect on other laws," consists of five paragraphs, each of which explains the extent to which Section 230 does or does not affect the enforceability of various other laws. Paragraph (e)(3)'s first sentence provides that States may "enforc[e] any State law that is consistent with this section," but its second sentence says 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." 47 U.S.C. §230(e)(3). "[E]xamin[ing] all the provisions of [the] statute, not just isolated phrases," *Lynch*, 483 Mass. at 639, reveals that both sentences of paragraph (e)(3) serve the same function as the rest of subsection (e): explaining which laws Section 230 does and does not preempt.

Second, Meta's argument that the "cause of action" language would be surplusage unless it is construed to confer immunity from suit rather than liability, Meta Br. 21, fails, because the paragraph contains surplusage either way. If Meta is correct, then "no liability may be imposed" is surplusage, because immunity from suit necessarily precludes the imposition of liability. So the surplusage point is a wash.

In short, nothing in the text, findings, policy statements, or legislative history of Section 230 indicates any intention to shield interactive computer services from the burdens of litigation.

### B. The Overwhelming Weight of Authority Confirms That Section 230 Does Not Confer Immunity From Suit.

Numerous courts have already considered whether Section 230 guarantees providers an interlocutory appeal. The overwhelming majority have concluded that it does not.

First, Meta and other social media companies are defendants in cases around the country that are very similar to this one. Add. 99-683. In several of those cases, defendants have attempted to take an interlocutory appeal from orders denying their motions to dismiss based on Section 230. In none of those cases has a defendant succeeded: appellate courts in Nevada, New Hampshire, Tennessee, Utah, and

Vermont have denied interlocutory appeals based on arguments virtually identical to those Meta advances here.[2]

Second, the only federal court of appeals to have squarely decided this question held that Section 230 "provides immunity from liability, not suit." *Chumley*, 840 F.3d at 1179-80.[3] Meta's claim that "multiple federal courts of appeals have interpreted Section 230 as providing immunity from suit," Meta Br. 21, is simply wrong. Those cases mention the issue only in dicta, as they were all appeals from final judgments and had no need to consider the availability of interlocutory appeal. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) ("The district court granted the motion to dismiss…."); 

[2] *See State of New Hampshire v. Meta Platforms, Inc.*, No. 2025-0022 (N.H. Feb. 18, 2025) (Add. 689); *Instagram, LLC v. Utah Div. of Consumer Protection*, No. 20240875-SC (Utah Oct. 18, 2024) (Add. 684); *Meta Platforms, Inc. v. Eighth Judicial District Court*, No. 89920 (Nev. Jan. 27, 2025) (Add. 685); *Tennessee v. Meta Platforms, Inc.*, No. M2024-00877-COA-R9-CV (Tenn. Ct. App., July 10, 2024) (Add. 690); *State of Vermont v. Meta Platforms, Inc.*, No. 24-AP-295 (Vt. Dec. 23, 2024) (Add. 691).

[3] Meta's claim that *Chumley* "failed to engage with" an earlier Tenth Circuit decision, *Ben Ezra, Weinstein, and Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000), Meta. Br. 22 n.5, is unfortunate: *Chumley* squarely addressed that decision, correctly noting that "[o]ur description of the CDA as providing immunity from suit in our case of *Ben Ezra* … did not resolve this question, as this issue was not before us in that case." *Chumley*, 840 F.3d at 1181 n.2. *Ben Ezra*, like the other federal cases upon which Meta relies, was an appeal from a final judgment. 206 F.3d at 984.

*Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) ("The district court … dismissed the federal claims … [and] declined to exercise supplemental jurisdiction over the state law claims."); *Carafano* v. *Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) ("The district court granted the defendants' motion for summary judgment….").[4] Most of Meta's state cases, too, were appeals from final judgments. *See Banaian v. Bascom*, 281 A.3d 975, 980 (N.H. 2022) ("[W]e uphold the trial court's granting of the motions to dismiss…."); *Hassell v. Bird*, 420 P.3d 776, 781 (Cal. 2018) (case on appeal from denial of motion to set aside default judgment); *Doe* v. *America Online, Inc.*, 783 So. 2d 1010, 1012-13 (Fla. 2001) (noting that "[t]he trial court granted AOL's motion to dismiss," and reviewing certified questions unrelated to interlocutory appeal). Only the Texas Supreme Court's outlier decision in *In re Facebook, Inc.*, holds that Section 230 confers immunity from suit. *See* 625 S.W.3d 80, 87 (Tex. 2021). But *In re Facebook* relied—incorrectly, as explained above—on the "cause of action" language in paragraph (e)(3), and also on cases like *Nemet* that did not resolve the issue. *Id.* This Court should decline Meta's invitation to follow *In re Facebook*'s unpersuasive reasoning and should instead conclude, like

[4] The issue is pending before the Ninth Circuit in *California v. Meta Platforms, Inc.*, No. 24-7032.

every other court to have squarely considered the question, that an interlocutory appeal does not lie.

### C. No Important Public Interest Justifies an Interlocutory Appeal in This Case.

Even if Section 230 could be read to authorize an interlocutory appeal in some cases, it would not do so here. Meta offers only one justification for interlocutory appeal: "an entitlement to protection from the burden of litigation." Meta Br. 19 (citation and internal quotation marks omitted); *see also id.* at 23. That is not enough. As the Supreme Court has held, "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is effectively unreviewable if review is to be left until later." *Will v. Hallock*, 546 U.S. 345, 353 (2006); *see also Rodriguez v. City of Somerville*, 472 Mass. 1008, 1010 (2015) (holding that interlocutory appeal on presentment "furthers [an] important public interest" and citing *Will*). Meta does not, and cannot, identify any "substantial public interest" that would be advanced by shielding it from the burden of litigation.

The Sixth Circuit, facing a similar situation, concluded that even "[a]ssuming" that Section 230 offers "immunity from suit, it is still necessary to determine if an immunity claim … is sufficiently important to warrant an immediate appeal." *Jones v. Dirty World Entertainment Recordings LLC*, No. 12-5133, 2012 WL 13418361,

at *1 (6th Cir. May 9, 2012). Noting that the defendants there "failed to demonstrate how a substantial public interest will be imperiled by delaying their appeal until after the district court enters a final order," the court dismissed the interlocutory appeal. *Id.* Meta, like the *Dirty World* defendants, identifies no "substantial public interest" that "will be imperiled" by awaiting the trial court's final resolution of the case. *Id.*

Indeed, any interest in protection from the burdens of litigation is especially weak here. First, as Meta has acknowledged, "discovery is ongoing" in this case and will continue regardless of whether Meta's interlocutory appeal proceeds. RA3/543-44 (Meta DAR App.) ("Given the unique circumstances of the case—including the coordination of discovery in this matter with the discovery in the ongoing Federal multidistrict litigation—Meta has not sought a stay of discovery in the Superior Court while this appeal is pending."). Second, as the Superior Court observed in denying Meta's motion to report, parts of the Commonwealth's case are outside the scope of Meta's Section 230 and First Amendment defenses. *See* RA2/513 ("For example, the claim that Meta violated G.L. c. 93A by its own various false public statements rests on long-established caselaw outside the scope of the CDA and is not subject to a First Amendment challenge."). Thus, Meta's Section 230 and First Amendment defenses cannot fully resolve this case.

In sum, even if Section 230 might authorize interlocutory appeal in some cases—and, as explained above, it does not—there is no reason to entertain such an appeal in this case. This appeal should be dismissed.

## II. Section 230 Does Not Bar the Commonwealth's Claims.

If this Court concludes that it has jurisdiction, it should affirm the Superior Court's conclusion that, because the Commonwealth's claims do not seek to hold Meta liable for content posted by others, Section 230 does not bar them.

As to unfairness, the Superior Court correctly concluded that Section 230 does not apply because "the Commonwealth is seeking to hold Meta liable for its own injurious conduct (creating and employing tools to addict young users and engaging in ineffective age verification), not that of any other party." Add. 78. And as to deception, the Superior Court correctly found that, because the Commonwealth's claims are based on Meta's own false statements, Section 230 is not implicated at all. Add. 75. At least 18 decisions from 14 other states' trial courts have concluded similarly based on virtually identical claims against Meta and other social media platforms. Add. 99-458, 505-683.

### A. Section 230 Does Not Bar the Commonwealth's Unfairness Claims.

Under this Court's 3-pronged test, Section 230 immunity extends only to claims that are both "*based on* information provided by *another* information content

provider" (Prong 2); **and** "*treat* the defendant *as the publisher* or speaker of *that* information" (Prong 3). *Massachusetts Port Auth. v. Turo Inc.*, 487 Mass. 235, 240 (2021) (emphasis added).[5] Because the Commonwealth's claims do not allege harm arising from "information provided by" others, the Commonwealth's unfairness claims satisfies neither Prongs 2 or 3.

### 1. Prong 2: The Commonwealth's Claims Are Not "Based On" Third-Party Content.

The Superior Court correctly found Prong 2 is not satisfied because the Commonwealth's unfairness claims allege harm directly chargeable to Meta's own actions—i.e., creating addictive tools that manipulate teens into spending more time than they would otherwise choose on the platform. Add. 76-79. These claims cannot be "'based on'" third-party content, as Prong 2 requires, because each user sees a unique set of custom-tailored content (i.e., no user sees the same content as another), yet the alleged harm of addictive use is common to *all* users no matter what content the user sees. As another court put it in rejecting Meta's similar Section 230 defense, "[w]hether [users] are watching porn or puppies, the claim is that they are harmed by the time spent, not by what they are seeing." *Vermont v. Meta*, No. 23-cv-04453, Slip Op. at 12 (Vt. Super. Ct. July 29, 2024) (Add. 677).

[5] The Commonwealth does not dispute that Meta qualifies as an "interactive computer service" provider under Prong 1.

Numerous courts, including virtually every other state court that has analyzed similar claims asserting harms from the psychologically manipulative qualities of Meta's or another platform's design features *themselves* have also concluded Section 230 does not bar such claims.[6] For example, the California Superior Court rejected

[6] *See Tennessee v. Meta Platforms, Inc.*, No. 23-1364-IV, Slip Op. at 24 (Tenn. Super. Ct. Oct. 17, 2024) (Add. 614) (Section 230 not bar where "it is the design and the way Instagram functions that makes it addictive and thus harmful to consumers …not the content itself."); *Vermont v. Meta*, Slip Op. at 10 (Add. 675) (Section 230 not bar to claim "that the intentional *addictiveness* [of the platform design] itself harms Young Users' mental health, separate and apart from the *content* of what they see.") (emphasis in original); *Utah v. Meta Platforms, Inc.*, No. 230908060, Slip Op. at 11 (Utah 3d Dist. July 25, 2024) (Add. 639) (Section 230 not bar because "the Division's claims rest on the Defendant's own acts: their use of features and practices to target children into spending excessive amounts of time on their platforms"); *Arkansas v. Meta Platforms, Inc.*, No. 57CV-23-47, Slip Op. at 5 (Ark. Cir. Ct. June 13, 2024) (Add. 103) (Section 230 not bar where alleged that "the design features of Meta's platforms themselves are hazardous to adolescents because the features are designed to addict and exploit the frailties of developing brains."); *District of Columbia v. TikTok, Inc.*, No. 2024-CAB-006377, at Tr. 65-66 (D.C. Super. Ct. Feb. 24, 2025) (Add. 180-181) (Section 230 not bar where harmful "addiction is not to the content, but to th[e] expectation and anticipation [of dopamine] which is specifically engineered by" the platform); *New Hampshire v. TikTok, Inc.*, No. 217-2024-CV-00399, Slip Op. at 26-27 (Merrimack Super. Ct. July 8, 2025) (Add. 336-337) (Section 230 not bar where claims alleged liability "not in the way [TikTok's features] publish certain content, but in the way they manipulate young minds causing addiction, FOMO, and other psychological effects."); *New Hampshire v. Meta Platforms, Inc. et al.*, No. 217-2023-CV-00594, Slip Op. at 25-26 (Merrimack Sup. Ct. Dec. 10, 2024) (Add. 279-280**)** (Section 230 not bar where alleged that "Meta's product design features, in and of themselves, are harmful to New Hampshire children regardless of the substance of the third-party content displayed."); *Montana v. Meta Platforms et al.*, Case No. BDV-2024-797, Slip Op. at 26 (Mont. Dist. Ct. July 7, 2025) (Add. 588) (Section 230 not bar because "the

(footnote continued)

a Section 230 defense where "[t]he features themselves allegedly operate to addict and harm minor users of the platform regardless of the particular third-party content viewed," as "Section 230 does not shield [d]efendants from liability for the way in which their platforms actually operate." *Social Media Cases*, No. 22STCV21355, 2023 WL 6847378, at **31, 33 (Cal. Super. Oct. 13, 2023) (Add. 533-535). The Ninth Circuit similarly concluded that Prong 2 is not met where a "negligent design claim faults [defendant] solely for [the platform's] architecture" and "stand[s] independently of the content that [the platform]'s users create." *Lemmon*, 995 F.3d at 1093.

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State's claim is based on Meta's actions, namely: 'creating and marketing an app that is intentionally addictive"); *District of Columbia v. Meta Platforms*, No. 2023-CAB-6550, Slip Op. at 20 (D.C. Super. Ct. Sept. 9, 2024) (Add. 146) (similar); *Oklahoma v. Meta Platforms, Inc.*, No. CJ-2023-180, Slip Op. at 6 (Okla. Dist. Ct. Nov. 20, 2024) (Add. 452) (similar); *New Mexico v. Meta Platforms Inc. et al.*, No. D-101-CV-2023-02838, Slip Op. at 2 (N.M. 1st Jud. Dist. Ct. June 21, 2024) (Add. 361) (similar); *Utah v. TikTok, Inc.*, Case No. 230907634, Slip Op. at 13 (Utah 3d Dist. Nov. 12, 2024) (Add. 658**)** (similar); *Arkansas v. TikTok Inc.*, No. 12CV-23-65, Slip Op. at 13-14 (Ark. Cir. Ct. May 15, 2024) (Add. 124-125) (similar); *Nevada v. TikTok, Inc.*, No. A-24-886127-B, Slip Op. at 7-8 (Nev. Dist. Ct. Sept. 24, 2024) (Add. 242-243) (similar); *New York v. TikTok, Inc. et al.*, No. 452749/24, Tr. at 66 (N.Y. Sup. Ct. May 28, 2025) (Add. 430) (similar); *Illinois v. TikTok Inc. et al.*, Case No. 2024CH09302, Slip Op. at 19-20 (Cook Cty Cir. Ct. June 12, 2025) (Add. 228) (similar); *South Carolina v. TikTok Inc. et al.*, No. 2024-CP-40-06018, Slip Op. at 10-11 (Ct. of Common Pleas, 5th Jud. Cir. May 6, 2025) (Add. 558-559) (similar). *But see Oregon v. TikTok Inc. et al*, No. 24CV-48473, Slip Op. at 19-25 (Or. Cir. Ct. July 22, 2025) (Add. 459).

Indeed, each of Meta's unfair product design features operates to induce addictive use and its attendant harms by impairing and interfering with young users' autonomy and ability to regulate their amount of time spent on the platform, irrespective of third-party content viewed. As described *supra* pp. 16-19, Meta's incessant, high volume "push" notifications, delivered on an optimized IVR schedule, create dopamine cravings that compel teens to compulsively engage with and return to the app and disrupt attention and sleep even while off the platform; Meta's frictionless infinite scroll and autoplay formats create a "bottomless flow" that eliminates young users' opportunity to pause, reconsider, or leave, and induces harmful "passive consumption"; and Meta's ephemeral design format induces teenagers' fear of social exclusion and a compulsive need to return to the platform to view posts before they disappear. All of these features operate to override young users' agency *regardless* of the content viewed. Further, Meta's ineffective age verification processes harms the thousands of underage users it allows on the platform who, by virtue of their age, lack the skill to engage with it safely; this too is *unrelated* to any third-party content. *See In re Social Media Adolescent Addiction/Pers. Inj. Prod Liab. Litig.*, 702 F. Supp. 3d 809, 830 (N.D. Cal. 2024) (platforms can take age-verification steps "that would not impact their publication of third-party content" or "require defendants [to] change how or what speech they

disseminate").

Meta advances the erroneous view that, simply because its addiction-inducing features are "tied to the display" of third-party content, this means the Commonwealth's "claims depend on [third-party] content" sufficient to meet Prong 2. *See, e.g.*, Meta Br. 26 ("[I]f there were no videos to play, there would be no 'autoplay.' Nor does the Complaint allege how users would be addicted to Instagram if there was no content on the service."). This is emphatically wrong. Courts have consistently rejected such a "but-for" test in determining Section 230 immunity. *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016) ("Section 230 does not create immunity simply because publication of third-party content is relevant to or a but-for cause of the plaintiff's harm."); *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) ("It is not enough that third-party content is involved;" courts "reject[] use of a 'but-for' test that would provide immunity under the CDA solely because a cause of action would not otherwise have accrued but for the third-party content."); *Henderson* v. *Source for Public Data, L.P.*, 53 F.4th 110, 122-123 (4th Cir. 2022) ("for [immunity] to apply we required that liability attached to the defendant on account of some improper content within their publication;" "we do not apply a but-for test").

In fact, the Commonwealth has not found—nor has Meta identified[7]—any case in which a court granted Section 230 immunity when the harm alleged could not be traced to the "improper character" of the speech published. *Henderson*, 53 F.4th at 122-123; *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) (noting that because an "original culpable [third] party" who posts the content can be held accountable for the harm it causes, Section 230 reflects Congress's decision not to "impos[e] tort liability on companies that serve as intermediaries for other parties' potentially injurious messages"). In every case that Meta relies upon, "Prong 2 was conceded, undisputed, or satisfied" (Add. 78) because the case alleged harm caused by improper content provided by third parties.[8]

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[7] The Superior Court correctly found unpersuasive the single decision in Meta's favor on this issue, *In re Social Media*, 702 F. Supp. 3d at 825 ("MDL"), because that court "did not explicitly conduct a Prong 2 analysis" and its findings were inconsistent with the most cogent decisions around the country "that reache[d] the opposite conclusion." Add. 78-79; *accord* Add. 99-458, 505-683. Other courts have declined to follow the MDL court's decision for similar reasons. *See, e.g., District of Columbia v. Meta*, Slip Op. at 18-19 (Add. 144-145); *Vermont v. Meta*, Slip Op. at 11-12 (Add. 676-677).

[8] *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20–21 (1st Cir. 2016) (sex traffickers' advertisements); *Force v. Facebook, Inc.*, 934 F.3d 53, 59 (2d Cir. 2019) (third-party terrorist content); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098–99 (9th Cir. 2019) (drug dealer's post selling narcotics); *Estate of Bride v. Yolo Technologies, Inc.*, 112 F.4th 1168, 1180 (9th Cir. 2024) (third-party bullying and harassing content); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016) (third-party negative business review); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098–99 (9th Cir. 2009) (ex-boyfriend's explicit posts); *M.P. v. Meta Platforms Inc.*, 127

(footnote continued)

Where, like here, the harm is chargeable to the defendant's own injurious actions (here, Meta's exploitative product design), Section 230 immunity is routinely denied. *See Turo Inc.*, 487 Mass. at 241; *Roommates.com*, 521 F.3d at 1167; *Lemmon*, 995 F.3d at 1092-93; *Airbnb, Inc. v. City of Bos.*, 386 F. Supp. 3d 113, 122 (D. Mass. 2019); *Moving & Storage, Inc. v. Panayotov*, No. 12-12262-GAO, 2014 WL 949830, at *2 (D. Mass. Mar. 12, 2014) (Prong 2 not met where harm "d[id] not arise from the content of [third-party customer] reviews" but instead defendants' "ill-intentioned" manipulation of "[t]he manner in which [they] were presented"); Add. 99-458, 505-683.

F.4th 516, 521-524 (4th Cir. 2025) (third-party "extremist and racist" content); *FTC v. Match Grp., Inc.*, No. 3:19-CV-2281-K, 2022 WL 877107, at *7 (N.D. Tex. Mar. 24, 2022) (third-party fraudulent communications); *Doe v. Snap, Inc.*, No. H-22-00590, 2022 WL 2528615, at *14 (S.D. Tex. July 7, 2022) (third-party sexually explicit content); *Doe (K.B.) v. Backpage.com, LLC*, 768 F. Supp. 3d 1057, 1062 (N.D. Cal. Mar. 3, 2025) (third-party sex trafficking content); *V.V. v. Meta Platforms, Inc. et al.*, 2024 WL 678248, at *8 (Conn. Super. Ct. Feb. 16, 2024) (adult predator's communications); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1118 (N.D. Cal. 2016) (third-party terrorist content); *Herrick v. Grindr LLC*, 765 F. App'x 586, 590-91 (2d Cir. 2019) (ex-boyfriend's harassing content); *In re Facebook, Inc.*, 625 S.W.3d 80, 93 (Tex. 2021) (sex traffickers' messages); *L.W. v. Snap Inc.*, 675 F. Supp. 3d 1087, 1096 (S.D. Cal. 2023) (third-party child sexual abuse material); *Lama v. Meta Platforms, Inc.*, 732 F. Supp. 3d 214, 221 (N.D.N.Y. 2024) (third-party bullying content); *Doe v. Grindr Inc.*, 128 F.4th 1148, 1152–53 (9th Cir. 2025) (third-party messages and child sexual abuse material).

### 2. Prong 3: The Commonwealth's Claims Do Not Treat Meta as a Publisher or Speaker.

As the Superior Court correctly found, Prong 3 is not met because the Commonwealth is "not seek[ing] to hold Meta liable for its conduct as a publisher or speaker, i.e., for its publication decisions," but rather in "'its distinct capacity as a product designer.'" Add. 81 (quoting *Lemmon*, 995 F.3d at 1092). This is because Meta's product designs "in and of themselves" directly "cause its young users to become addicted or participate on the platform at an inappropriate age" "*regardless* of their associated content." *Id*. As such, the "Commonwealth is seeking to hold Meta liable for its own conduct, not that of a third-party." Add. 82. Numerous courts around the country have rejected Section 230 defenses in similar cases. *See New Hampshire v. Meta,* Slip Op. at 25 (Add. 279) (Meta's liability springs from its capacity as a product "manufacturer" in designing an unsafe product which is "independent of Meta's role as a publisher of third-party content"); *Utah v. Meta*, Slip Op. at 11 (Add. 639) (where claims rest on Meta's "own acts" in using "features and practices to target children into spending excessive amounts of time on their platforms," they "do not seek to treat Meta as a publisher or speaker"); *Social Media Cases*, 2023 WL 6847378, at *32 (Add. 534) ("Where [Meta's features] manipulate[] third party content in a manner that injures a user," Meta is "allegedly liable for [its] own actions, not for the content of third-party postings"); *Illinois v.*

*TikTok*, Slip Op. at 20-21 (Add. 229-230) (where harmful addiction "is not to the content, but to [the] expectation and anticipation [of dopamine] which is specifically engineered by" the platform's "content-agnostic technology," Defendants are not treated "as a publisher or speaker, but as a product maker.") (cleaned up).

Courts routinely reject assertions, like Meta's, of extravagant immunity from all claims relating to publication. *E.g.*, *Henderson*, 53 F.4th at 122-123 (Section 230 "does not provide blanket protection from claims just because they depend in some way on publishing information"); *Airbnb*, 386 F. Supp. 3d at 120 n.5 (rejecting that the "First Circuit has adopted a dramatically broader interpretation of § 230" that "protects all decisions a company makes that in any way implicate the overall design and operation of its online platform."); *Lemmon*, 995 F.3d at 1094 (rejecting Section 230 defense where "even if [defendant] is acting as a publisher in releasing [the platform] and its various features to the public, [plaintiff]s' claim still rests on nothing more than [defendant]'s own acts.").

### B. Section 230 Does Not Apply to the Commonwealth's Deception Claims.

As the Superior Court correctly held, because the Commonwealth's deception claims seek to hold Meta responsible for its own misleading speech, Section 230 is not implicated at all. Add. 75. A website "remains liable for its own speech." *Turo Inc.*, 487 Mass. at 240; *Hiam v. HomeAway.com, Inc.*, 267 F. Supp. 3d 338, 346–47

(D. Mass. 2017) ("[C]laims based on a publisher's representations about its publishing conduct are not immunized under Section 230."). Here, Counts II and III allege Meta publicly misrepresented the safety of its platform, its efforts to protect the well-being of young users, and its age-verification efforts which created a misleading impression that had the capacity to impact users' and their families' ability to make informed decisions related to their platform usage. RA1/62-101. The Superior Court correctly found that because the "Commonwealth's [deception] claims are based on these purportedly false statements, they are not subject to Section 230 immunity." Add. 75.[9]

Meta misconstrues the Commonwealth's deception claims as alleging injury from harmful third-party content that Meta failed to adequately warn about, protect against, moderate, monitor, or remove. Meta Br. at 36-40. That is wrong: the harm alleged from Meta's false, incomplete, or otherwise misleading statements is the inability of consumers to make an informed decision about their platform use

[9] Meta makes no Section 230 argument as to misrepresentations regarding Meta's "off-platform" business decisions unrelated to third-party content. *See, e.g.*, RA1/64-65 ¶¶164-169 (misled it does not set goals to increase time spent, when it in fact does); RA1/68-72 ¶¶179-195 (misled it prioritizes well-being when it failed to invest); RA/83-86 ¶¶255-265 (misled it prioritizes well-being when it launched ineffective time management tools). Moreover, Meta mischaracterizes the Complaint's reference to examples of specific content present on Meta's platform (Meta. Br. at 25) as alleging harm from such content, when, in fact, it is only to demonstrate the false and misleading nature of Meta's own statements.

(RA1/91-92 ¶¶298-299)—*not* that they were harmed by specific content on the platform.[10]

Section 230 accordingly "poses no bar" to such claims because Meta could avoid future liability without changing the third-party content it publishes—"that is, Meta could simply stop making statements that have a tendency to mislead due to their omission of inconsistent or contrary information." *DC v. Meta*, Slip Op. at 13, 22 (Add. 139, 148); *Arkansas v. TikTok*, Slip Op. at 13 (Add. 124) (State's deception claims "demand[] only that [social media companies] be honest with consumers about what content the app contains.").

## III. The First Amendment Does Not Bar the Commonwealth's Claims.

Because the Commonwealth's claims are based on Meta's own unlawful commercial conduct and misleading speech, the First Amendment does not bar them.[11] As to the Commonwealth's unfairness claims, the Superior Court correctly

[10] For this reason, all Meta's "failure to warn" cases are distinguishable. Meta Br. at 36-39. *See In re Soc. Media*, 702 F. Supp. 3d at 834 (Section 230 not bar failure to warn claim where claims not based on Meta's "publication of [third-party content], but [on] [its] knowledge, based on public studies or internal research, of the ways that [its] products harm children."); *Social Media Cases*, 2023 WL 6847378, at *48 (Add. 547) (Section 230 not bar failure to warn claims because the "adverse effects that allegedly should have been disclosed result from Meta's own conduct, not from any particular content displayed.").

[11] Meta fails to develop and thus waives any argument for broader protection under the Massachusetts Constitution (Meta Br. 40 n.12).

found such claims are "principally based on conduct and product design, not on expressive content."[12] Add. 84. And as to deception, the Superior Court correctly held that the First Amendment does not protect Meta's untruthful statements to the public under well-established law. *Id*. Virtually every state court to have analyzed similar claims has found the same.[13]

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[12] It further correctly noted that "[e]ven if . . . some expressive element" is implicated, "the claim may very well be permitted under the intermediate scrutiny test" for commercial speech, but that determination is appropriately addressed at "a later stage of the litigation." Add. 84. That ruling was especially appropriate given that the First Amendment is raised here as an affirmative defense and therefore can justify dismissal at this stage only if its merit is conclusively established from the face of the complaint. *State Room*, 84 Mass. App. Ct. at 248.

[13] *See Vermont v. Meta*, Slip Op. at 13 (Add. 678) (First Amendment not bar where Meta not liable for its "role as an editor of content" but rather "its alleged role as a manipulator of Young Users' ability to stop using the product"); *Social Media Cases*, 2023 WL 6847378, at *37 (Add. 538) (First Amendment not bar where harm alleged was "caused by [plaintiffs'] addiction to Defendants' platforms themselves, not simply to exposure to any particular content visible on [its] platforms."); *Illinois v. TikTok*, Slip Op. at 24-25 (Add. 233-234) (First Amendment not bar claims "based on TikTok's alleged role in manipulating young users' brain chemistry to induce compulsive and excessive use of the TikTok Platform" as it "challeng[es] non-expressive conduct, not a manifestation of the Defendants' expression"); *Utah v. TikTok*, Slip Op. at 14-15 (Add. 659-660) (First Amendment not bar where claim "does not seek to curtail any speech but rather to curtail" the "content-neutral" "addictive features challenged" which do not "convey any message or viewpoint"); *Nevada v. TikTok*, Slip Op. at 8-9 (Add. 243-244) (First Amendment not bar claim "based on specific content-neutral design features [] that are intrinsically addictive to children and cause harm," which "exist independent of any editorial judgment by TikTok" and "do not involve speech at all," but rather "TikTok's *actions* in designing and operating its platform.") (emphasis in original); *New Hampshire v. Meta*, Slip Op. at 27 (Add. 281) (similar); *Oklahoma v. Meta*, Slip Op. at 7 (Add.

(footnote continued)

**Unfairness.** Because the Commonwealth's unfairness claims seek to hold Meta liable for its role as a product designer in embedding addictive qualities into its platform features, the First Amendment does not bar the Commonwealth's claims. The harm arises from the manner in which Meta's platform operates; not the expressive content users see.

Meta's nearly-exclusive reliance on *Moody v. NetChoice*, 603 U.S. 707 (2024) for its First Amendment defense is unavailing. *See* Meta Br. 41-45. *Moody* is about social media platforms' content moderation and algorithm procedures. *See* 603 U.S. at 717 (noting that "government efforts to alter an *edited* compilation of third-party expression" implicate the First Amendment (emphasis added)); *id*. at 728 ("Texas's law requires the platforms to carry and promote user speech that they would rather discard or downplay."). Here, the Commonwealth makes no effort to alter Meta's content moderation or algorithm-creating procedures, or otherwise influence what content Instagram displays. Rather, it faults Meta's choice to design its platform with psychologically manipulative characteristics, affecting *how* children are drawn to the platform and addicted to it, not *what* they are shown while using the platform.

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453) (similar); *District of Columbia v. Meta*, Slip Op. at 25 (Add. 151) (similar); *Utah v. Meta*, Slip Op. at 13 (Add. 641) (similar); *New Mexico v. Meta*, Slip Op. at 2 (Add. 361) (similar); *New Hampshire v. TikTok*, Slip Op. at 29 (Add. 339) (similar); *South Carolina v. TikTok*, Slip Op. at 12 (Add. 560) (similar).

Again, the Commonwealth's claims are independent of content. Further, by its own words, *Moody* did not address the type of algorithm designed to maximize user time spent by "automatically" "giving [users] content they appear to want, without any regard to independent content standards" for which it noted, "the First Amendment implications might be different." *Id.* at 736 n.5, 746 (Barrett, J., concurring), 781-82 (Alito, J., concurring in judgment). That is why multiple state courts have found *Moody* inapplicable here; this Court should do the same.[14]

**Deception.** Meta does not (and cannot) dispute that the First Amendment offers no protection for its own misleading speech or omissions. Instead, it

[14] *See, e.g.*, *New York v. TikTok*, Tr. at 70 (Add. 434) (*Moody* inapplicable where design features alleged to "automatically, and without expressive curation, create an addictive environment that entices users to stay on the app to the detriment of their own health."); *District of Columbia v. TikTok*, Tr. at 74-76 (Add. 189-191) (*Moody* "doesn't warrant dismissal" where "the District claims are content-neutral" and "TikTok is not . . . expressing any message by allowing its users to continue to scroll from one video to the next" or "by sending notifications to children" during the school and night hours); *District of Columbia v. Meta*, Slip Op. at 26-27 (Add. 152-153) (distinguishing *Moody* as "unhelpful to Meta" because it "involved state regulations of online platforms' decisions to remove or deprioritize posts based on the posts' content or viewpoint," which are "concerns not present" with the addictive "design features at issue here"); *Vermont v. Meta*, Slip Op. at 14 (Add. 679) (finding *Moody* "does not change the result here" because "[u]nlike *Moody*, where the issue was government restriction on content, . . . it is not the substance of the speech that is at issue here"); *Tennessee v. Meta*, Slip Op. at 25 n.4 (Add. 615) (similar); *Oklahoma v. Meta.*, Slip Op. at 7 (Add. 453) (similar); *Montana v. Meta*, Slip Op. at 27-28 (Add. 590) (similar); *Illinois v. TikTok*, Slip Op. at 22-23 (Add. 233) (similar).

misconstrues the Commonwealth's deception claims as "failure to warn" claims seeking to compel specific speech and attempts to apply inapplicable defamation, fraud and antitrust caselaw to claim its statements are not actionable.

Contrary to Meta's assertion, the Commonwealth's deception claims do not seek to "force Meta" to "make the Commonwealth's preferred warnings about the services' alleged risks and harms" (Meta Br. at 50-51) or implement its "preferred age-verification measures" (Meta Br. at 45-46). The Commonwealth simply asks that Meta be truthful and accurate in its voluntary statements about the platform. *See DC v. TikTok*, Tr. at 78-79 (Add. 193-194) (rejecting that claim was "compel[ling] speech to give warnings" where alleged that users and parents "are simply unaware of the potential risk[s] of the platform" and thus "misled by TikTok's assertions that everything on the platform is child safe."). For this reason, Meta's reliance on *NetChoice, LLC v. Bonta*, 113 F.4th 1101 (9th Cir. 2024) and other First Amendment cases is misplaced. Unlike here, those cases compelled or restricted particular messages or speech from particular speakers or based on specific viewpoints, or otherwise alleged harm from specific expressive content.[15]

[15] *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 243 (1974) (compelled particular speech); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 14-16 (1986) (compelled particular speech); *Nat'l Inst. Of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (compelled particular speech);
(footnote continued)

Meta's reliance on cases holding statements of opinion to be protected by the First Amendment, Meta Br. at 47-48, was not developed below, and involves factual issues not subject to resolution at this stage. Further, Chapter 93A caselaw is clear that statements of "opinion" are actionable where it "may reasonably be understood by the recipient as implying that there are facts to justify the opinion or at least there are no facts that are incompatible with it." *McEneaney v. Chestnut Hill Realty Corp.*, 38 Mass. App. Ct. 573, 575 (1995). Additionally, Meta's argument that the *Noerr-Pennington* anti-trust doctrine applies to its statements made to Congress is a factual question not resolved at this stage.[16] *MJ's Mkt., Inc. v. Jushi Holdings, Inc.*, 766 F.

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*NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1113 (9th Cir. 2024) (compelled particular speech); *Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 787-88 (2011) (restricted particular speaker and viewpoint); *NetChoice, LLC v. Reyes*, 748 F. Supp. 3d 1105, 1122-23 (D. Utah 2024) (disfavored particular speaker's speech); *Students Engaged in Advancing Tex. v. Paxton*, 765 F. Supp. 3d 575, 595-596 (W.D. Tex. Feb. 7, 2025) (chilled certain speech); *NetChoice, LLC v. Griffin*, No. 5:23-CV-5105, 2025 WL 978607, at *8, 13 (W.D. Ark. Mar. 31, 2025) (deterred speech); *NetChoice, LLC v. Yost*, No; 2:24-cv-00047, 2025 WL 1137485, at *15 (S.D. Ohio Apr. 16, 2025) (restricted specific speakers' speech); *NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2025 WL 807961, at *15 (N.D. Cal. Mar. 13, 2025) (compelled certain speech); *Volokh v. James*, 656 F. Supp. 3d 431, 441-443 (S.D.N.Y. 2023) (compelled specific speech); *Watters v. TSR, Inc.*, 715 F. Supp. 819, 822-823 (W.D. Ky. 1989) (alleged harm from particular speech); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 182 (D. Conn. 2022) (alleged harm from particular speech); *O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1187–88 (N.D. Cal. 2022) (9th Cir. 2023) (alleged harm from particular speech).

[16] The Commonwealth further submits that the *Noerr-Pennington* doctrine does not apply in this context where courts have limited the doctrine's applicability to

(footnote continued)

Supp. 3d 197, 213–14 (D. Mass. 2025). And Meta remains liable for its countless identical or substantially similar misleading statements made in settings outside of Congress, such as in news media, posted on Meta's website, or on its CEO's Facebook page. RA1/62-63, 66-68, 86-87 ¶¶156, 171-173, 176-177, 266-270.

## IV. The Commonwealth's G.L. c. 93A Claims Are Sufficiently Pled.

### A. Meta's Unfair and Deceptive Acts Occurred in Trade or Commerce.

Meta's unfair and deceptive acts occur "in the conduct of any trade or commerce" where its exploitative tactics to addict kids to its platform fuel its billion-dollar, advertising-revenue-based business model—which relies on increasing user time spent to show more ads, collect more data, and sell more targeted advertising opportunities.

Accordingly, the Superior Court correctly found, irrespective of the fact that access to the Instagram platform is "free" to users, Meta is "engaged in trade or commerce" where it "offers and distributes its social media services to millions of Massachusetts users, including over 300,000 teens, in exchange for the collection of personal data, which it then uses to sell targeted advertising opportunities to third parties[,] and derives revenue from selling this advertising." Add. 91. Thus, "the

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antitrust actions (where the doctrine originated). *See, e.g., Andrx Pharm., Inc. v. Elan Corp., PLC*, 421 F.3d 1227, 1233 (11th Cir. 2005).

provision of Instagram accounts serves a commercial end" sufficient for G.L. c. 93A to apply. *Id.*; *Lantner v. Carson*, 374 Mass. 606, 611 (1978) (the phrase "in the conduct of any trade or commerce" "must be read to apply to those acts or practices which are perpetrated in a business context."); *Dushkin v. Desai*, 18 F. Supp. 2d 117, 125 (D. Mass. 1998) (A defendant who "seek[s] to gain financially from their unfair practices," "unquestionably" satisfies the trade or commerce requirement) (citation omitted); *Poznik v. Massachusetts Med. Pro. Ins. Ass'n*, 417 Mass. 48, 53 (1994) ("Chapter 93A imposes liability on persons seeking to profit from unfair practices.").

Meta's claim that it does not act in "trade or commerce" because users use Instagram "free of charge" (Meta Br. at 57) fails where Chapter 93A's plain language does not require an exchange of money nor has any Massachusetts court ever so held. *See* G.L. c. 93A, § 1 (defining "trade" and "commerce" to include "the advertising…or distribution of any services and any property"); *Rafferty v. Merck & Co.*, 479 Mass. 141, 161–62 (2018) ("a plaintiff need not have purchased [a] product directly from the defendant" so long as plaintiff "used the product . . . and was injured as a result."). Moreover, such argument lacks merit when users in fact *do* exchange what is of considerable value for access to Meta's services: their time,

attention, and data.[17] *See New Hampshire v. Meta,* Slip Op. at 33 (Add. 287) (trade or commerce met where "consumers . . . access Meta's Social Media Platforms in exchange for a price – Meta's collection of their personal data."); *DC v. Meta,* Slip Op. at 32 (Add. 158) ("Meta receives something of very significant value in return for the use of its platforms: the right to monetize its users' time and data"); *In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 753 F. Supp. 3d 849, 909–10 (N.D. Cal. 2024) ("A social media company cannot exempt itself from consumer-protection law because its consumers exchange their personal data and time for a product or service rather than cash for goods").[18]

[17] Indeed, Meta's Terms of Use for Instagram expressly states, "[i]nstead of paying to use Instagram, by using the [s]ervice covered by these Terms, you acknowledge that we can show you ads that businesses and organizations pay us to promote on and off the Meta Company Products," and that "[w]e use your personal data, … to show you ads." RA1/37 ¶51.

[18] *See also Tennessee v. Meta*, Slip Op. at 32-33 (Add. 622-623) (trade or commerce met where Meta collects data from consumers which it "monetizes by selling targeted advertising"); *Vermont v. Meta* at 15-16 (Add. 680) (trade or commerce met where users "agree[] to give Instagram access to personal information for advertising purposes in exchange for using the site."); *New Hampshire v. TikTok*, Slip Op. at 33 (Add. 343) ("While [TikTok] does not charge for its product, it receives valuable consideration in the form of personal information"); *Utah v. Meta*, Slip Op. at 13-14 (Add. 641-642) (same); *Oklahoma v. Meta*, Slip Op. at 9 (Add. 455) (same); *New Hampshire v. TikTok*, Slip Op. at 32-333 (Add. 342-343) (same); *South Carolina v. TikTok*, Slip Op. at 8 (Add. 556) (same).

### B. Counts I, II, and III Sufficiently Allege Unfair and Deceptive Conduct.

Meta does not and cannot seriously contest that the Complaint's allegations fall within G.L. c. 93A, § 2's definition of "unfair or deceptive" conduct. As the Superior Court properly found, the Commonwealth sufficiently alleges Meta's conduct is unfair where Meta designs and employs features "that it knows encourage addictive use by teenagers" (Count I) and that it fails to meaningfully ensure that children under 13 cannot use the platform despite knowing how harmful it is for children (Count III). Add. 86-87; RA1/109-113, 115-117 ¶¶376-388, 398-406.

Such conduct comfortably: (1) falls "within at least the penumbra of some common-law, statutory, or other established concept of unfairness;" (2) is "immoral, unethical, oppressive, or unscrupulous"; or (3) "causes substantial injury to consumers." *Columbia Plaza Assocs. v. Northeastern Univ.*, 493 Mass. 570, 587 (2024). *See FTC v. Sperry & Hutchinson*, 405 US 233, 243 (1972) (vendor who deployed a gambling element to hook kids into buying its inferior candy unfairly exploited children); *Commonwealth v. Purdue Pharma*, No. 1884CV01808BLS2, 2019 WL 5495866, at *1 (Mass. Super. Sept. 17, 2019) (manufacturer's "abus[ive]" tactics to get vulnerable individuals prescribed addictive opioids at "greater frequency," "ever-higher [] doses," and "for longer [] durations" was unfair).

Numerous state courts analyzing the same conduct by Meta or a different

social media platform have found that it is unfair under similar state consumer protection laws. *See, e.g.*, *Utah v. Meta*, Slip Op. at 14 (Add. 642) ("manipulating" and "exploit[ing]…neurological vulnerabilities in children" in order to maximize time spent is unfair); *New Hampshire v. Meta*, Slip Op. at 37 (Add. 291) (Meta's "knowing exploitation of children's health" and "psychological vulnerabilities for financial gain" is unfair); *Illinois v. TikTok*, Slip Op. at 14 (Add. 223) ("creating an application meant to addict minors falls within the penumbra of various [state] laws to shield minors from products and services that tend to be used addictively, such as drugs, alcohol, and gambling.").

As to deception (Count II), the Superior Court properly concluded that Meta's repeated misrepresentations about its platform's safety and its efforts to promote young users' well-being were not mere opinions but were, in light of Meta's inconsistent, contemporaneous actions, "at the very least misleading half-truths" that "created an over-all misleading impression through failure to disclose material information." Add. 89 (citing *Aspinall v. Philip Morris Co., Inc.*, 442 Mass. 381, 394-95 (2004)). Because these statements and omissions "could reasonably be found to have caused [users and families] to act differently" with respect to their platform use, they are actionable under c. 93A. Add. 90; *Aspinall*, 442 Mass. at 394; *Purdue*, 2019 WL 5495866, at *1 (actionable deception claim where despite

knowledge of harm, Purdue "downplay[ed] its opioids' propensities for addiction," "minimize[d] the dangers" of its drugs and "ma[d]e false representations regarding their safety"); *Commonwealth v. Exxon Mobil Corp.*, No. 1984CV03333BLS1, 2021 WL 3493456, at *13 (Mass. Super. June 22, 2021) (actionable deception claim where Exxon "convey[ed] a false impression that [it] [was] more environmentally responsible than it really [wa]s" and "falsely depict[ed] ExxonMobil as a leader in addressing climate change [] without disclosing [its] minimal investment [] in clean energy").

## V. The Commonwealth's Public Nuisance Claim is Sufficiently Pled.

Because Meta's actions have interfered with the public right to "preserv[ed] health and safety" by promoting addictive use of its platform among hundreds of thousands of Massachusetts teens, the Commonwealth has sufficiently alleged a public nuisance claim. *Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Ct.*, 448 Mass. 15, 34 (2006) ("preservation of [members of the public's] health and safety" is a "right common to the general public").

As the Superior Court correctly found, "Massachusetts courts have allowed public nuisance claims concerning dangerous products" that, as here, are alleged to have substantially contributed to a public health crisis. Add. 92. *See, e.g.*, *Purdue*, 2019 WL 5495866, at *2 (denying motion to dismiss public nuisance claim that

pharmaceutical company's abusive marketing tactics to procure addictive use of its drug "significantly contributed to the opioid epidemic in Massachusetts"); *Evans v. Lorillard Tobacco Co.*, No. 04-2840A, 2007 WL 796175, at *18–19 (Mass. Super. Feb. 7, 2007) (denying motion to dismiss public nuisance claim that cigarette manufacturer's marketing tactics to promote addictive use of its cigarettes by teens significantly interfered with the public health and safety)*; City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *13-14 (Mass. Super. July 13, 2000) (denying motion to dismiss public nuisance claim that gun manufacturer knowingly created and supplied an illegal, secondary gun market that fueled a gun violence epidemic). The fact that a public nuisance claim's "legal theory is unique in the Commonwealth . . . is not reason to dismiss at this stage of the proceedings." *Smith & Wesson*, 2000 WL 1473568, at *14.[19]

Here, the U.S. Surgeon General has pronounced a "youth mental health crisis" driven by excessive social media use among the millions of U.S. teens (and hundreds

[19] While a public nuisance claim has "traditional[ly]" involved water or land (Meta Br. at 52-53), given Instagram's ubiquitous use among the public, it is not a far stretch to say that online social media is effectively the new public "land" frontier in the virtual reality space. Whether occurring offline or online, the pervasive harm to millions of teens' "health and safety" is substantial and real. *Cf. Roommates.com LLC*, 521 F.3d at 1164 (cautioning against "creat[ing] a lawless no-man's land on the Internet").

of thousands of Massachusetts teens) who are lured to being on Instagram almost constantly. RA1/22, 108 ¶¶3-4, 374. This "injury of direct and substantial character" to the public's right to "preserv[ed] health and safety" is "special" and particularized to minors and children, whose still-developing brains, minimal ability to self-regulate, and other vulnerabilities render them uniquely susceptible to Meta's psychologically manipulative tactics to compel them to spend more time on the platform than they otherwise choose, and thus is distinct from that of the public at large. *Sullivan*, 448 Mass. at 35-36.

As alleged, Meta's unfair and deceptive conduct in addicting kids to its platform has impaired the public's right to their health and safety and has contributed to harms to youth that the Commonwealth has expended efforts to repair, address, and abate. RA1/106-108 ¶¶369-374; *see Dartmouth v. Silva*, 325 Mass. 401, 404 (1950) (sustaining public nuisance claim "where the interference with a public right [] is of such a nature that a town may be put to expense in repairing" the harm caused).

## CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal. Alternatively, the Court should affirm the Superior Court's Order denying Meta's Motion to Dismiss.

Respectfully submitted,
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## CERTIFICATE OF COMPLIANCE

I, Christina Chan, hereby certify to the best of my knowledge that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 10,999 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word 365 (version 2502).

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## CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2025, I filed and served the attached Brief of the Appellee in *Commonwealth v. Meta Platforms, Inc et al.*, No. SJC-13747, via the Massachusetts Appellate Court's electronic Odyssey File & Serve site, and also served copies on the following counsel of record by e-mail:

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