

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 *AMICUS CURIAE* TECHFREEDOM
IN SUPPORT OF APPELLANTS AND REVERSAL**

David R. Geiger (BBO 188120)

FOLEY HOAG LLP

155 Seaport Boulevard

Boston, MA 02210-2600

617-832-1000

dgeiger@foleyhoag.com

Counsel for Amicus Curiae

Dated: October 28, 2025

Corporate Disclosure Statement

Amicus Curiae TechFreedom is a nonprofit, tax-exempt corporation organized under § 501(c)(3) of the Internal Revenue Code; it has no parent company, issues no stock, and no publicly held corporation owns a ten percent or greater interest in it.

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Interest Of *Amicus Curiae*¹

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition.

TechFreedom's experts have long been at the forefront of the fight to protect and rigorously enforce Section 230, the bulwark of online free expression, according to its express terms and congressional intent. Through its articles, reports, congressional testimony, legal briefs, regulatory comments, and more, TechFreedom seeks to explain why Section 230 is so important, and why eliminating or gutting it would be a catastrophic mistake. See, e.g., Corbin K. Barthold, *Section 230 Heads to the Supreme Court*, Reason (Nov. 4, 2022), <https://bit.ly/3QoUtC1>; Platform Responsibility & Section 230: Filtering Practices of Social Media Platforms, Hearing Before the House Comm. on the Judiciary (Apr. 26, 2018) (testimony of Berin Szóka), <https://bit.ly/3Wdbqkd>; Br. of

¹ TechFreedom submits this brief 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), TechFreedom declares that no party or party's counsel authored the brief in whole or in part, no one other than TechFreedom or its counsel contributed money intended to fund the brief's preparation or submission, and neither TechFreedom nor its counsel 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.

TechFreedom as Amicus ISO Petitioner, *Gonzalez v. Google*, No. 21-1333 (U.S. Jan. 18, 2023).

Introduction And Summary Of Argument

In short, he became so absorbed in his books that he spent his nights from sunset to sunrise, and his days from dawn to dark, poring over them; and what with little sleep and much reading his brains got so dry that he lost his wits.

Miguel de Cervantes, *Don Quixote* (1605)

Humans are fascinated by stories and ideas. Perhaps that is why each new medium of communication provokes anxiety about its supposed power to unmoor impressionable minds. Before long, though, the fears about each new medium come to look quaint. Books drive men mad. Pamphlets promote disobedience to authority. Novels seduce the young into idleness. Comic books breed violence. Television breeds violence. Video games breed violence. Every time, we are told that *this* time is different. *This* new medium, unlike the last, is *uniquely* dangerous and corrupting. *This* new medium will rob other people—it’s always *other* people, usually children—of reason and virtue.

Now it is social media’s turn. The Commonwealth of Massachusetts has sued Meta for deploying features that supposedly “addict” minors to its platform. What the Commonwealth really objects to, however, is speech itself. Minors spend time on social media because, when they’re there, they see speech they’re *interested in seeing*. The Commonwealth is concerned that the speech is *too*

powerful. They think minors are like Don Quixote, transfixed by stories and ideas. This problem, however—if it’s a problem—is not for the Commonwealth to fix. Under the First Amendment, the strong effects of speech are an *inherent part* of speech—not a ground for regulation. “Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.” *Am. Booksellers Assoc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) (Easterbrook, J.).

Beyond the requirements of the First Amendment, TechFreedom writes to elaborate on why Massachusetts’s claims also fail under Section 230, the law that “further[s] First Amendment . . . interests on the Internet.” *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003). Section 230 protects websites from liability for exercising the traditional editorial functions of a publisher—preparing, arranging, and distributing third-party content. The features the Commonwealth attacks—such as autoplay, infinite scroll, and notifications—are nothing more than digital methods of making editorial choices about how to display user-generated material. The federal courts of appeals have consistently recognized that such choices fall within Section 230, as presenting content in a way that engages users is part and parcel of publishing. To hold otherwise would turn Section 230 on its head by stripping immunity from websites for becoming too effective at the very publishing functions the statute protects.

The trial court tried to escape this settled law by rebranding Meta’s publishing decisions as “product design.” But there is no coherent way to separate the act of publishing content from the choices involved in presenting it. Infinite scroll, autoplay, and notifications have no meaning apart from the user-generated content they deliver; without content, they are empty vessels. Section 230 draws no line between traditional editorial devices, such as headlines or chapter breaks, and their digital counterparts. Because the challenged features are inseparable from the publication of third-party speech, the trial court erred in withholding Section 230 protection.

Argument

I. THE COMMONWEALTH FLOUTS SECTION 230’S PROTECTION OF PUBLISHING

Section 230(c)(1) provides that, with exceptions not relevant here, a website shall not be “treated as the publisher” of third-party content it hosts and distributes. 47 U.S.C. § 230(c)(1). Under the ordinary meaning of the word, a “publisher” prepares information for distribution and disseminates it to the public. See, e.g., “Publish,” Merriam-Webster.com Dictionary, <https://tinyurl.com/yc6uk64s> (viewed Oct. 6, 2025). Under Section 230, therefore, a website is protected from liability for posting, removing, arranging, and otherwise organizing third-party content. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). In other

words, Section 230 protects a website as it fulfills a publisher’s traditional role. And one of Section 230’s stated purposes is to “promote the continued *development* of the Internet”—so the statute plainly envisions the protection of new, technology-driven publishing tools as well. 47 U.S.C. § 230(b)(1) (emphasis added).

The supposedly “addictive” features the Commonwealth challenges are nothing more than publishing decisions: the cadence of content delivery (autoplay), the quantity of content delivered (infinite scroll), and the choice of what content to highlight (notifications). These are classic editorial decisions about “whether and how to display” third-party material, and they fall squarely within Section 230. *Marshall’s Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1270-71 (D.C. Cir. 2019). This is the prevailing view among the United States courts of appeals. *Compare, e.g., id.* (mode of “display” protected); *M.P. v. Meta Platforms, Inc.*, 127 F.4th 516, 526 (4th Cir. 2025), cert. denied, No. 24-1133 (U.S. Oct. 6, 2025) (“format” protected); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (“recommendations and notifications” protected) *with Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 n.13 (3d Cir. 2024) (openly breaking with prevailing view without explaining how the text of Section 230 distinguishes between publishing and non-publishing display features). That such decisions often

aim to “increas[e] consumer engagement” does not strip them of protection. *M.P.*, 127 F.4th at 526. A publisher does not lose immunity simply because it wants more readers and so “prioritizes engagement.” *Id.*

The Second Circuit’s decision in *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), is especially instructive. Plaintiffs there argued that “Facebook’s algorithms make . . . content more ‘visible,’ ‘available,’ and ‘usable.’” They asserted that “Facebook’s algorithms suggest third-party content to users ‘based on what Facebook believes will cause the user to use Facebook as much as possible,’” and “Facebook intends to ‘influence’ consumers’ responses to that content.” *Id.* at 70. As here, the plaintiffs’ core claim was that presenting content in an especially attractive way takes a website outside Section 230. But the Second Circuit disagreed. Nothing in the text of Section 230, it observed, suggests that a website “is not the ‘publisher’ of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer’s interests.” *Id.* at 66. In fact, it noted, the use of such tools promotes Congress’s express policy “to promote the continued development of the Internet.” *Id.* (quoting 47 U.S.C. § 230(b)(1)).

By “making information more available,” the Second Circuit wrote, Facebook was engaging in “an essential part of traditional publishing.” *Id.* at 70. It

was doing what websites have done “on the Internet since its beginning”—that is, “arranging and distributing third-party information” in a manner that “forms ‘connections’ and ‘matches’ among speakers, content, and viewers of content.” *Id.* at 66-67. Accordingly, it “would turn Section 230(c)(1) upside down” to hold that Congress intended to revoke Section 230 protection from websites that, whether through algorithms or otherwise, “become especially adept at performing the functions of publishers.” *Id.* at 67. In short, the court had no authority to curtail Section 230 on the ground that by deploying algorithms, Facebook had “fulfill[ed] its role as a publisher” too “vigorously.” *Id.* at 70.

As the Second Circuit recognized, it would be exceedingly difficult, if not impossible, to draw logical lines, rooted in law, around how a website presents third-party content. What in Section 230 would allow a judge to say that putting a story on the front page of a newspaper is immunized, but putting a post atop a “For You” feed is not? What in the statute supports treating the use of numerous newspaper pages as protected, but autoplay as not? What in the statute could justify drawing a line between magazine cover headlines and social-media notifications? The answer to each of these questions is that Section 230 has *nothing* to say about such distinctions. Cf. Ryan Calo, *Courts Should Hold Social Media Accountable—But Not By Ignoring Federal Law*, Harv. L. Rev. Blog (Sept. 10, 2024),

<https://tinyurl.com/fb6f7n4j> (“[I]f . . . a platform can be held liable just for the way it distributes content, then TikTok or YouTube or anyone could be held liable for alphabetizing content, let alone displaying it in accordance with popularity.”).

At bottom, the trial court withheld Section 230 protection based on the Commonwealth’s complaint that Meta “fulfills its role as a publisher” too “vigorously.” *Force*, 934 F.3d at 70. That was error.

II. THE COMMONWEALTH WRONGLY RECASTS PUBLISHING DECISIONS AS “PRODUCT DESIGN”

Rather than accept that the challenged features are publishing decisions protected by Section 230, the trial court tried to reframe them as “product design.” It claimed that the alleged harm “occurs regardless of the content that users see.” Superior Ct. Memo. & Order on Mo. to Dismiss, Oct. 17, 2024 at 13; RA1/483. But that is illogical.

Features such as autoplay, infinite scroll, and notifications derive all their power from third-party content. Infinite scroll and autoplay present more user posts or videos to the subscriber; notifications present alerts about users’ activity or interactions. In each instance, the alleged harm arises only if the underlying content is something someone *wants to see* and then does. The features have no independent force, no appeal of their own. If posts contained random letters and

videos showed paint drying, no one would read or watch—no “addiction” could possibly occur. Stripped of content, the “features” are useless shells.

The point is not whether the content is a strict “but-for” cause of harm. Cf. *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 122 (4th Cir. 2022). The point is that the features at issue constitute quintessential publishing decisions—decisions about how, when, and in what form to present others’ speech. The Commonwealth cannot carve out some independent “product,” presented by Meta, that is divorced from its “publishing.”

The Supreme Court’s (non-)decision in *Gonzalez v. Google*, 143 S. Ct. 1191 (2023), proves the point. There petitioners argued that algorithmic recommendations fall outside Section 230. The United States agreed. It proposed that Section 230 covers “hosting . . . content,” but not “designing and implementing . . . targeted-recommendation algorithms.” Br. of U.S., p. 12, *Gonzalez v. Google*, No. 21-1333 (U.S. Dec. 7, 2022).

Google’s response explained why this purported dividing line is in fact illusory. Some websites provide a nearly unfiltered feed of third-party content. Others hand-pick certain third-party content and give it prominent placement on a homepage. YouTube presents third-party content in part “based on predictions of what users might consider relevant.” Br. of Google LLC, p. 41, *Gonzalez v.*

Google, No. 21-1333 (U.S. Jan. 12, 2023). But as Google’s brief underscored, the government could not “offer any limiting principle” for parsing these varied methods of organizing third-party content into one category that is protected by Section 230, and another that is not. *Id.* 45.

Google had it right—as became abundantly clear at oral argument. The government’s counsel claimed that YouTube can use “algorithms to identify users who are likely to be especially receptive” to a message, and to target that message at those users specifically. *Gonzalez v. Google*, No. 21-1333, OA Tr. 114 (U.S. Feb. 21, 2023). That capacity, he insisted, was what placed YouTube on the wrong side of the government’s newly concocted Section 230 line.

The justices were unpersuaded. “Well,” said Justice Thomas at one point, “I’m still confused.” *Id.* 72. “How do we draw the line?,” Justice Sotomayor reflected; “that’s where my colleagues [still] seem to be suffering.” *Id.* 97. Under the government’s theory, Justice Kavanaugh opined, “lawsuits will be nonstop.” *Id.*

81. And Justice Kagan summed things up:

[T]he problem [with the government’s position] is that in trying to separate the content from the choices that are being made, whether it’s by YouTube or anyone else, *you can’t present this content without making choices*. So, in every case in which there is content, there’s also a choice about presentation or prioritization.

And the whole point of suits like this is that those choices [inherently] amplify certain . . . messages.

Id. 75-76 (emphasis added). As Justice Kagan and her colleagues saw, therefore, the government’s line was no line at all.

The Court ultimately concluded, in a short per curiam opinion, simply that “plaintiffs’ complaint—independent of §230—states little if any claim for relief.” *Gonzalez*, 143 S. Ct. at 1192. The justices granted certiorari to decide a Section 230 case, but ultimately they didn’t. Why? Partly because they could not separate “targeted” recommendations from “untargeted” ones, or “sophisticated” algorithms from “unsophisticated” ones. They left the broad “publisher” protections of Section 230 squarely in place because there is no principled way to narrow them.

Although *Gonzalez* addressed algorithmic recommendations, the same problem arises with the features the Commonwealth challenges here. Section 230 makes no distinction between traditional editorial choices, like boldface headlines or cliffhanger chapter breaks, and digital ones, like autoplay or notifications. On the contrary, Section 230 seeks “to promote the continued development of the Internet,” and “to preserve the vibrant . . . free market that presently exists for the Internet . . . , unfettered by Federal or State regulation,” 47 U.S.C. § 230(b)(1)-(2).

Conclusion

The Court should reverse.

Respectfully submitted,

TECHFREEDOM

By its attorney,

/s/ David R. Geiger

David R. Geiger (BBO 188120)

FOLEY HOAG LLP

155 Seaport Boulevard

Boston, MA 02210-2600

617-832-1000

dgeiger@foleyhoag.com

Counsel for Amicus Curiae

Dated: October 28, 2025

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

I, David R. Geiger, 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 2469 non-excluded words, which I ascertained using Microsoft 365 Word's word count function. Except on its cover, the brief uses Times New Roman 14-point font and was composed in Microsoft 365 Word.

/s/ David R. Geiger

David R. Geiger (BBO# 188120)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210-2600
617-832-1000
dgeiger@foleyhoag.com

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

I, David R. Geiger, certify that on October 28, 2025, on behalf of amicus TechFreedom, I electronically filed the foregoing *Brief of Amicus Curiae TechFreedom 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, who have consented to electronic service, via email at the email addresses noted below. The contact information of the aforementioned counsel is:

Christina Chan, A.A.G.
Jared Rinehimer, A.A.G.
David C. Kravitz, Esq.
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108
Christina.chan@mass.gov
Jared.rinehimer@mass.gov
David.kravitz@mass.gov

Paul William Schmidt, Esq.
Covington & Burling LLP
One City Center
850 Tenth Street, NW
Washington, DC 20001-4956
pschmidt@cov.com

Felicia H. Ellsworth, Esq.
Wilmer Cutler Pickering Hale and
Dorr LLP
60 State Street
Boston, MA 02109
Felicia.Ellsworth@wilmerhale.com

/s/ David R. Geiger

David R. Geiger (BBO# 188120)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210-2600
617-832-1000
dgeiger@foleyhoag.com