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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

IN RE: SOCIAL MEDIA ADOLESCENT
ADDICTION/PERSONAL INJURY
PRODUCTS LIABILITY LITIGATION

MDL No. 3047

Case No. 4:22-md-03047-YGR-TSH

THIS DOCUMENT RELATES TO:

Honorable Yvonne Gonzalez Rogers

ALL ACTIONS

**DEFENDANTS' REPLY IN SUPPORT
OF JOINT MOTION TO DISMISS
PURSUANT TO RULES 12(b)(1) AND
12(b)(6) PLAINTIFFS' PRIORITY
CLAIMS ASSERTED IN AMENDED
MASTER COMPLAINT**

Hearing:

Date: TBD

Time: TBD

Place: Oakland, California

Judge: Hon. Yvonne Gonzalez Rogers

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I. INTRODUCTION

1
2 Plaintiffs' Opposition confirms that they seek to have this Court create new tort law for all 50
3 states and override established limits on product liability and negligence per se claims. The Court
4 should decline Plaintiffs' request to "adapt"—that is, remake—state law into an unprecedented tool for
5 regulating services that millions of Americans use to communicate, learn, and express creativity.

6 The core of Plaintiffs' claims is that Defendants' services are defective "products" because they
7 make potentially harmful speech available to users and because Defendants offer features that help
8 curate user content or make it more engaging. No court has ever allowed such an expansive product
9 liability theory. To the contrary, case after case recognizes that Defendants' services, and similar ones,
10 are just that: *services*, not tangible products regulated by product liability law. Courts also routinely
11 recognize that product liability law does not apply to harm allegedly caused by dissemination of
12 intangible information, content, and ideas—including through technological features.

13 Plaintiffs ignore this uniform case law and instead mischaracterize narrow, inapposite cases that
14 discuss "software" affecting the safe operation of cars or similar tangible products. There is no support
15 for Plaintiffs' argument that software in *all* its forms—much less software that operates as a service or
16 that is used to communicate ideas—is a "product" under product liability law. Plaintiffs' demand that
17 this Court reject these foundational limitations misconceives the role of a federal court sitting in
18 diversity and ignores the constitutional avoidance concerns underlying courts' longstanding refusal to
19 apply product liability law to the dissemination of speech. This Court should not push product liability
20 law to a place where it has never been and does not belong.

21 Plaintiffs' negligence-based claims fail for the additional reason that there is no duty of care to
22 support those claims here. The Opposition cites no case finding that Defendants (or services like theirs)
23 owe a general duty of care to their billions of users—nor a heightened duty to minors. Plaintiffs also
24 concede that no special relationship exists that could give rise to a duty of care. Instead, Plaintiffs rely
25 almost entirely on the alleged foreseeability of injuries to some users to argue that this Court should
26 recognize a duty where no other court has done so. Plaintiffs' resort to public policy considerations
27 further underscores that established law does not support their argument.

1 Plaintiffs’ priority claims also do not plead that Defendants’ services were the proximate cause
 2 of any alleged injuries. Plaintiffs’ Opposition confirms that Plaintiffs fail to tie the features of
 3 Defendants’ services to any of their alleged harms, and that they seek, contrary to recent Supreme Court
 4 precedent, to hold Defendants liable for harms caused by third-party misuse of Defendants’ services.
 5 *See Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023). The Court’s approval of the format for Plaintiffs’
 6 pleadings does not give Plaintiffs license to ignore the Federal Rules of Civil Procedure.

7 Plaintiffs’ negligence per se claim is barred by established law in more than 40 states, and there
 8 is no basis for recognizing the claim in the remaining states. No court has ever recognized a negligence
 9 per se claim predicated on alleged violations of the federal statutes that Plaintiffs invoke. For good
 10 reason: those statutes are not privately enforceable and lack any common law antecedent. Moreover,
 11 Plaintiffs fail to state a claim because they do not plausibly allege a violation of either predicate federal
 12 statute or a concrete personal injury suffered by any plaintiff as a result of such a violation.

13 II. ARGUMENT

14 Plaintiffs’ product liability and negligence per se priority claims should be dismissed because
 15 they are barred by Section 230 of the Communications Decency Act and by the First Amendment, as
 16 explained in Defendants’ Supplemental Joint Motion to Dismiss (Dkt. 320). This Reply and the initial
 17 Joint Motion to Dismiss (Dkt. 237) (“Mot.”) demonstrate that the priority claims also should be
 18 dismissed for failure to state a claim under state law.

19 A. Plaintiffs’ Product Liability Claims Should Be Dismissed.

20 Plaintiffs have no good response to the uniform case law expressly holding that Defendants
 21 provide “services”—not “products”—and thus are not subject to product liability law. Mot. 14–17.
 22 They also do not demonstrate any reason for the Court to depart from the unanimous authority,
 23 grounded in constitutional avoidance concerns, that rejects applying product liability law to harm from
 24 the dissemination of information, content, and ideas. *Id.* 17–26.

25 Seeking to change these established state law limitations on product liability claims, Plaintiffs
 26 rely on the unsupported and incorrect assertion that “software” is necessarily a product, based on
 27 inapposite case law addressing software that affected the safe operation of cars or similar products.
 28 And Plaintiffs also make misplaced appeals to public policy. But this case is not akin to a challenge to

1 an airplane’s autopilot system that goes haywire and causes a plane to crash—or suing the manufacturer
 2 of a radio that plays too loudly and causes hearing loss. *Contra* Pls.’ Opp. to Joint Mot. (Dkt. 302)
 3 (“Opp.”) 23. Instead, it is akin to suing a radio station because its programming choices and
 4 broadcasting techniques cause certain people to listen “too much” and expose them to harmful content.
 5 That is not the domain of product liability law.¹

6 **1. Precedent Uniformly Holds That Defendants Provide Services, Not Products.**

7 Defendants cited numerous cases in which courts have repeatedly dismissed product liability
 8 claims against them on the ground that they provide *services*, not products. *See* Mot. 14–17. Plaintiffs’
 9 only response to those cases is to incorrectly assert that those courts “declined to address whether a
 10 social media app was a product.” Opp. 28. But that is incorrect. Each of those courts specifically held
 11 that Defendants provide services. In *Jacobs v. Meta Platforms, Inc.*, 2023 WL 2655586 (Cal. Super.
 12 Ct. Mar. 10, 2023), the court held that “as a social media platform that connects its users, Facebook is
 13 more akin to a service than a product.” *Id.* at *3–4 (citing Restatement (Third) of Torts: Products
 14 Liability § 19 (1998) (“Restatement (Third)”).² In *In re Facebook, Inc.*, 625 S.W.3d 80 (Tex. 2021),
 15 the Texas Supreme Court noted that the trial court “granted Facebook’s motion to dismiss the
 16 [plaintiffs’] products-liability claim on the ground that Facebook is not a ‘product.’” *Id.* at 85 n.1. In
 17 *Grossman v. Rockaway Township*, 2019 WL 2649153 (N.J. Super. Ct. June 10, 2019), the court noted
 18

19 ¹ Plaintiffs concede that strict liability claims are unavailable under the product liability laws of
 20 **Massachusetts, Michigan, North Carolina, and Virginia**. Opp. 22 n.8. And Plaintiffs do not dispute
 21 that “courts applying **Alabama** law have declined to recognize a freestanding cause of action for strict
 22 liability in the products liability context.” *Foster v. Bridgestone Americas, Inc.*, 2013 WL 489162, at
 23 *2 (S.D. Ala. Feb. 8, 2013) (emphasis added). Plaintiffs speculate that they might be able to assert a
 24 claim under the “differen[t]” “Alabama Extended Manufacturers’ Liability Doctrine,” Opp. 22 n.8, but
 25 no such claim is at issue here. **Delaware** law also does not recognize strict product liability claims.
 26 *See Cline v. Prowler Indus. of Md., Inc.*, 418 A.2d 968, 974 (Del. 1980). *Contra* Opp. 22 n.8. The
 27 only *exception*, where such claims are recognized, requires “a bailment-lease” transaction between the
 28 parties, *Cline*, 418 A.2d at 971, and none is alleged here. Finally, Plaintiffs do not dispute that
Connecticut, Louisiana, New Jersey, Ohio, and Washington do not recognize negligence product
 liability claims. *See* Mot. 14 n.9.

² Plaintiffs contend that *Jacobs* did not concern Facebook’s “algorithms or related features,” Opp. 28,
 but the court addressed allegations that “Meta’s algorithms promoting divisive content” caused
 plaintiff’s harm, holding that “the *design* of the social media platform itself . . . provides a *service* for
 purposes of [product liability] analysis.” *Jacobs*, 2023 WL 2655586, at *2, *4 (emphases added).

1 that the plaintiffs there had failed to identify any “persuasive or other authority” suggesting that
 2 Snapchat “constituted a ‘product’ rather than a ‘service.’” *Id.* at *11. And in *Ziencik v. Snap, Inc.*,
 3 2023 WL 2638314 (C.D. Cal. Feb. 3, 2023), the court held—in accord with multiple “[o]ther courts”—
 4 that Snapchat “is more like a service than a product.” *Id.* at *4.

5 The uniform result reached by every court to consider this question aligns with other cases
 6 holding that analogous online services are not products. *See, e.g., Jackson v. Airbnb, Inc.*, 2022 WL
 7 16752071, at *9 (C.D. Cal. Nov. 4, 2022) (online “platform that connects users . . . is more akin to a
 8 service than to a product”); *Quinteros v. InnoGames*, 2022 WL 898560, at *1, *7 (W.D. Wash. Mar.
 9 28, 2022) (allegedly “psychologically addictive” “mobile app” that enabled “interaction between online
 10 players . . . over chat and other message systems” was “not a product”); Mot. 16.

11 These decisions make good sense, and their rationale fully applies here. At their core, Plaintiffs
 12 challenge how Defendants’ services recommend and deliver various types of content to users based on
 13 their interests or facilitate connections and communications between users. Such services are akin to
 14 services that businesses have provided for decades—such as bookstores offering personalized
 15 recommendations to customers; interior designers selecting, organizing, and displaying art; and
 16 businesses connecting people to one another (such as job candidates and employers). *See* Mot. 14–17.
 17 No court has ever treated those as a “product” subject to product liability law. That such services are
 18 provided within software or other digital technology does not change the analysis. *See infra* Part II.A.2.

19 Plaintiffs offer no meaningful response. They instead isolate unrelated business contexts where
 20 Defendants described their services as “products,” Opp. 3, 25, but they do not dispute that whether
 21 “something is, or is not, a product [subject to product liability law] is a question of law for the Court,”
 22 Mot. 17 (quoting Restatement (Third) § 19 cmt. a). It is irrelevant how a company describes its own
 23 offerings in other contexts. *See, e.g., Burghart v. S. Corr. Entity*, 2023 WL 1766258, at *3 (W.D.
 24 Wash. Feb. 3, 2023) (regardless of whether “services are . . . presented as ‘products’ to purchase, they
 25 are not considered products” subject to product liability law); *Jacobs*, 2023 WL 2655586, at *3 n.1 (the
 26 “use by Facebook of the term ‘product’” is immaterial to whether “Facebook represents a ‘product’ for
 27 the purposes of” product liability law); *cf. also Prager Univ. v. Google LLC*, 951 F.3d 991, 999 (9th
 28 Cir. 2020) (isolated statements by a party “cannot somehow convert” entity’s character).

1 This Court should follow *every* court that has addressed this issue—and hold that Defendants’
2 interactive communication services are services, and are not products subject to product liability law.

3 **2. Plaintiffs’ Inapposite Case Law Involving Software Does Not Demonstrate That**
4 **Defendants’ Services Are Subject to Product Liability Law.**

5 Seeking to upend the judicial consensus, Plaintiffs premise their opposition on the sweeping
6 assertion that “[f]or nearly as long as computer software has existed, courts have treated software as a
7 ‘product’ in circumstances similar to those here.” Opp. 20. This is demonstrably wrong. Indeed, it is
8 an open question whether product liability law applies to computer software *at all*. See Restatement
9 (Third) § 19 cmt. d (noting “dictum” in *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991),
10 that computer software might be a product in some circumstances but expressing no view on that issue
11 because “there are no cases on point”).

12 Plaintiffs primarily rely on cases where courts conspicuously did *not* address whether
13 Defendants’ services are products for purposes of product liability law. Opp. 21–22. For instance,
14 *Maynard v. Snapchat, Inc.*, 870 S.E.2d 739 (Ga. 2022), and *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th
15 Cir. 2021), dealt with distinct legal questions—of duty and proximate causation, and Section 230
16 immunity, respectively—concerning a specific Snapchat “speed filter” that has been defunct for years
17 and is not at issue in this litigation. Whether Snapchat constituted a “product” subject to product
18 liability law was not addressed in the briefing nor in either decision.³

19 Courts have specifically recognized that *Lemmon* “did not address whether Snapchat (a
20 photosharing application) was ‘a product’ for purposes of California tort law.” *Jacobs*, 2023 WL
21 2655586, at *3–4. The same is true of the subsequent district court proceedings in *Lemmon v. Snap,*
22 *Inc.*, 2022 WL 1407936, at *6–7 (C.D. Cal. Mar. 31, 2022) (“*Lemmon IF*”) (cited at Opp. 21). Courts

23 _____
24 ³ Plaintiffs cite *A.M. v. Omegle.com, LLC*, 614 F. Supp. 3d 814 (D. Or. 2022). Opp. 20–22, 30. That
25 ruling similarly did “not address the issue before this court, *i.e.*, whether [Defendants’ services are] ‘a
26 product’ for purposes of products liability law.” *Jacobs*, 2023 WL 2655586, at *3 (distinguishing
27 *Omegle*). When the defendant attempted to raise the issue later in the case, the court held that it had
28 been waived. *A.M. v. Omegle.com, LLC*, 2023 WL 1470269, at *2 (D. Or. Feb. 2, 2023) (citing Fed.
R. Civ. P. 12(g)(2)). Plaintiffs also cite *Hardin v. PDX, Inc.*, 227 Cal. App. 4th 159 (2014), where the
court denied an anti-SLAPP motion while noting that the defendant “*has not argued*” its software
program was not a “product”—and so refused to consider that issue at that point. *Id.* at 170 (emphasis
added).

1 have *twice* rejected identical attempts by plaintiffs to mischaracterize those proceedings—explaining
2 that “[t]he analysis in *Lemmon II* was under an ordinary negligence analysis, not a product liability
3 analysis.” *Jacobs*, 2023 WL 2655586, at *4 (alteration omitted) (quoting *Jackson*, 2022 WL 16752071,
4 at *9).

5 Moreover, Plaintiffs disregard the fact that courts have consistently declined to apply product
6 liability law to online services, video games, and other media that are comprised of computer software.
7 *See supra* Part II.A.1; *see also, e.g., Rodgers v. Christie*, 795 F. App’x 878, 879–80 (3d Cir. 2020) (“an
8 ‘algorithm’ or ‘formula’” used to present “information, guidance, ideas, and recommendations” is not
9 a product); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 170 (D. Conn. 2002) (dismissing
10 product defect claim against video game software that was allegedly “designed” “to addict players”);
11 *Sanders v. Acclaim Ent., Inc.*, 188 F. Supp. 2d 1264, 1269–70 (D. Colo. 2002) (dismissing product
12 defect claim concerning video game); *James v. Meow Media, Inc.*, 300 F.3d 683, 701 (6th Cir. 2002)
13 (“words and images purveyed [through] electrical pulses through the internet” do not “constitute
14 products”). This Court reached the same conclusion in *Estate of B.H.*, rejecting plaintiffs’ argument
15 that a video-streaming “platform and targeting algorithms are tangible software products.” Pls.’ Opp.
16 to Defs. Motn. to Strike & Alternatively to Dismiss, *Estate of B.H. v. Netflix, Inc.*, 4:21-cv-06561 (filed
17 Nov. 29, 2021), ECF No. 53 at 21. That effort did “not persuade.” *Estate of B.H. v. Netflix*, 2022 WL
18 551701, at *3 (N.D. Cal. Jan. 12, 2022), *appeal docketed*, No. 22-15260 (9th Cir. Feb. 23, 2022). It is
19 equally unpersuasive here.

20 As these cases demonstrate, software is not a product subject to product liability law for either
21 of two reasons. *First*, software can be used to deliver a service, and the Restatement is clear that
22 “services, even when provided commercially, are not products.” Restatement (Third) § 19(b); *see also*
23 *id.* cmt. f (“Courts are unanimous in refusing to categorize commercially-provided services as
24 products.”); *supra* Part II.A.1. *Second*, product liability law does not apply when a plaintiff alleges
25 injury from intangible information, content, and ideas. Restatement (Third) § 19(a). Indeed, courts
26 are unanimous in refusing to apply product liability law when the plaintiff alleges harm from
27 information, content, or ideas—and that includes when software is playing the “role [of] bringing ideas
28 and information to the public.” *Winter*, 938 F.2d at 1037 n.8. That software is involved in

1 disseminating ideas does not change the analysis; in other words, *Winter* would not have come out
2 differently if the *Encyclopedia of Mushrooms* had been an e-book.

3 Far from demonstrating a broad categorical rule treating computer software as a “product,”
4 Plaintiffs fail to identify a *single* “software” case departing from these established limits on the scope
5 of product liability law. Plaintiffs instead cite cases addressing a narrow circumstance—when software
6 causes a *tangible product* (like a car) to malfunction or be operated unsafely and the *tangible product*
7 injures the plaintiff (as in a car crash). That is not this case.⁴

8 Plaintiffs rely heavily on the trial court’s decision in *Brookes v. Lyft Inc.*, 2022 WL 19799628
9 (Fla. Cir. Ct. Sept. 30, 2022). Opp. 22–28. But that case involved an application used to navigate a
10 car that struck the plaintiff. *See Brookes*, 2022 WL 19799628, at *1, *3. The court held that the
11 plaintiff could challenge as “defective” the features of the application which “required [the] Defendant
12 to take his eyes off the road” while navigating the car. *Id.* at *1. The court emphasized that the
13 plaintiff’s claim was based on how “the Lyft application distracted Defendant . . . and thereby caused
14 the [car] accident resulting in injury to Plaintiff.” *Id.* at *6. In so ruling, the court expressly stated that
15 the plaintiff’s claim “is not based on expressions or ideas transmitted by the Lyft application.” *Id.* at
16 *4. In contrast, when a plaintiff brought product liability claims challenging the design of a similar
17 ridesharing application, but did not allege that the software made the operation of the vehicle more
18 dangerous, the court dismissed the claims because the ridesharing “app was not a product.” *Jane Doe*
19 *No. 1 v. Uber Techs., Inc.*, 79 Cal. App. 5th 410, 419 (2022).

20 _____
21 ⁴ Plaintiffs contend that the tangibility requirement is satisfied because Defendants’ services are
22 accessed by clicking on computers or tapping on phones, and that Defendants take into account these
23 “physical interactions with the apps.” Opp. 25–26. But the Master Complaint nowhere asserts any
24 harm from interaction with physical devices. This case does not involve, for example, carpal tunnel
25 syndrome or a phone that overheated and burned a user. Indeed, reading a book (or performing a
26 service, like a librarian delivering recommended books to patrons based on their interests) can involve
27 physical acts, too, but that does not make the information communicated in books (or the librarian’s
28 recommendations) subject to product liability law. *See Winter*, 938 F.3d at 1035–36. Plaintiffs also
assert that “Snap targets ads to users based” on “children’s heartbeats.” Opp. 26. That assertion not
only is false, but is entirely unsupported by the Master Complaint, which cites a blog post describing a
focus group where a discrete group of consenting individuals’ heart rates were measured. MC ¶ 459.
Plaintiffs do not and could not allege that Snap targeted advertisements to Snapchat users based on
their heartbeats.

1 Similarly, *Lemmon* and *Maynard* involved plaintiffs harmed in car crashes allegedly caused by
 2 a design feature that functioned akin to a car’s “speedometer.” *Maynard*, 870 S.E.2d at 743 (“McGee
 3 was [allegedly] using a “Speed Filter” feature . . . to record her real-life speed” while driving and “then
 4 rear-ended a car”); *Lemmon*, 995 F.3d at 1088 (similar). Those cases at most indicate that product
 5 liability law could apply to software “used to guide an individual” in relation to a physical product that
 6 causes harm—similar to “a compass” or a component part of a car.⁵ *Winter*, 938 F.3d at 1036.

7 *Brookes*, *Lemmon*, and *Maynard* do not suggest that product liability law applies where the
 8 plaintiff alleges harm from provision of a service or from information, ideas, and content expressed
 9 through the service. See, e.g., *Camacho v. The Control Grp. Media Co.*, 2022 WL 3093306, at *15
 10 (S.D. Cal. July 18, 2022) (distinguishing *Lemmon* from claim alleging harm based on how online
 11 service was designed to imbue images in advertisements); *Doe ex rel. Roe v. Snap, Inc.*, 2022 WL
 12 2528615 (S.D. Tex. July 7, 2022) (distinguishing *Lemmon* from claim alleging harm based on how
 13 “Snapchat has [allegedly] failed to monitor content and messages sent between parties on its
 14 platform”), *aff’d*, No. 22-20543 (5th Cir. June 26, 2023); *Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889, 930
 15 (N.D. Cal. 2021) (distinguishing “*Lemmon* because the nature of the alleged design flaw in this case—
 16 and the harm that is alleged to flow from that flaw”—is “related to the posting of third-party content”),
 17 *aff’d in relevant part sub nom.*, *Doe # 1 v. Twitter, Inc.*, 2023 WL 3220912, at *1 (9th Cir. May 3,
 18 2023).

19 In sum, the case law and Third Restatement are unanimous. Where, as here, defendants are
 20 sued for providing services—not for making more dangerous a specific tangible product that physically
 21 harmed the plaintiff—such claims are not subject to product liability law, whether or not software is
 22 involved.

23
 24
 25 ⁵ Plaintiffs’ reliance on other cases where software affected the operation of a vehicle or other tangible
 26 product that physically harmed the plaintiff is misplaced for the same reason. See *Wickersham v. Ford*
 27 *Motor Co.*, 194 F. Supp. 3d 434, 435 (D.S.C. 2016) (allegedly defective airbag); *In re MyFord Touch*
 28 *Consumer Litig.*, 2016 WL 7734558, at *1, *24 (N.D. Cal. Sept. 14, 2016) (allegedly defective system
 that generated vehicle “safety concerns”); *Holbrook v. Prodomax Automation Ltd.*, 2021 WL 5052101,
 at *1 (W.D. Mich. Oct. 15, 2021) (allegedly defective robotic arm on automated assembly line).

1 **3. Plaintiffs Allege Harm From Intangible Information, Content, and Ideas.**

2 Plaintiffs’ product liability claims fail for the independent reason that they are based on alleged
3 injuries from intangible information, content, and ideas. Plaintiffs concede that product liability law
4 does not apply to allegations of harm from information, content, and ideas. Opp. 20. To get around
5 this undisputed point of law, they insist they “do not seek to hold Defendants liable for the content
6 uploaded by their users.” *Id.* at 30. But Plaintiffs’ brief and Master Complaint tell a different story.

7 Plaintiffs themselves explain that their theory is “specifically that they would not have been
8 harmed *by the content* on Defendants’ platforms but for the alleged design defects.” Opp. 43 (emphasis
9 added). Plaintiffs thus concede that it is content that allegedly harmed Plaintiffs. Likewise, the Master
10 Complaint contains numerous allegations that identify the specific content that Plaintiffs allege harmed
11 them. *See* Mot. 25 (citing Am. Master Compl. (Dkt. 234-1) (“MC”) ¶¶ 114, 257 n.303, 278, 610, 762).
12 And Plaintiffs do not explain how they would “attempt[] to hold [Defendants] liable [without] using
13 such evidence.” *Lemmon*, 995 F.3d at 1093 n.4.

14 To the contrary, Plaintiffs expressly challenge the presence of certain content provided by users
15 on Defendants’ services and the alleged failure to “take [it] down.” Opp. 14; *see id.* (discussing how
16 criminals “conceal and exchange CSAM”). They also reference “[i]njuries from online challenges and
17 viral pranks,” but such challenges and pranks consist of “certain types of videos” allegedly posted on
18 Defendants’ services, and any alleged harm stems from users deciding to imitate the *content* in those
19 videos—for example, they decide to perform the routine or prank that another user recorded themselves
20 performing. MC ¶¶ 44, 125–26, 632–34, 731. Holding Defendants liable under product liability law
21 for that third-party content communicated by users on their services is imposing liability for the content
22 itself. And “strict [product] liability has never been extended to words or pictures” or to a defendant
23 publishing them. *Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990); *see* Mot. 24–25 (collecting
24 cases).

25 Plaintiffs cannot plead around their reliance on content communicated by users through their
26 argument that they challenge only purported “design defects” of Defendants’ services. Opp. 22. As
27 Defendants explained in their motion to dismiss, each of the purported design defects relates to how
28

1 Defendants disseminate information and content provided by users, and Plaintiffs allege harm from the
2 presentation or presence of such content. Mot. 22–26.

3 *First*, Plaintiffs argue that Defendants’ services are defective because they apply “usage-
4 maximizing algorithms.” Opp. 8–10. But Plaintiffs’ own descriptions of Defendants’ algorithms show
5 that their alleged harm is from how content affects them—for example, by alleged increased exposure
6 to “videos [that] tend to be sensationalist.” *Id.* 9–10. The use of an algorithm to present information
7 or content is not a product, *see Rodgers*, 795 F. App’x at 879, and instead reflects a service “vigorously
8 fulfilling its role as a publisher,” *Force v. Facebook, Inc.*, 934 F.3d 53, 70 (2d Cir. 2019); *see also*
9 *Taamneh*, 143 S. Ct. at 1227 (“content on [Defendants’] platforms is filtered through these algorithms,”
10 which “sort the content by information and inputs provided by users and found in the content” and
11 “match[] any content . . . with any user who is more likely to view that content”).

12 *Second*, Plaintiffs point to various “design features” related to the display and dissemination of
13 information, ideas, and content provided by users on Defendants’ services. Plaintiffs discuss how users
14 may “receive[] a message, notification, or ‘like,’” Opp. 4, 6; how users may view video clips that
15 “automatically play and restart,” *id.* 4; and how users may receive “notifications” about users’
16 activities, *id.* 7. Courts have specifically held that such “functions—[including] recommendations and
17 notifications—are features meant to facilitate the communication and content of others.” *L.W. v. Snap*
18 *Inc.*, 2023 WL 3830365, at *5 (S.D. Cal. June 5, 2023) (quoting *Dyroff v. Ultimate Software Grp., Inc.*,
19 934 F.3d 1093, 1098 (9th Cir. 2019)). Imposing product liability would thus “seriously inhibit those
20 who wish to share thoughts and theories.” *Winter*, 938 F.2d at 1035; *see* Mot. 25. Indeed, the alleged
21 harm from these functions is that they lead users to consume or engage with “too much” content or
22 content that, in Plaintiffs’ view, is harmful.

23 *Third*, Plaintiffs challenge features that allow users to personalize photos and videos using
24 “filters and lenses.” Opp. 6. They also take issue with features that “enable[] users to post a video
25 side-by-side with another . . . user’s video,” *id.*, and even with users’ general ability to share
26 “information” such as “posts, friends, pictures, and general online sharing” with one another, *id.* 13.
27 Courts have rejected the argument that these features, which allow users to “develop messages or
28 graphic overlays that accompany photographs,” mean that Defendants’ services “qualify [as] or

1 constitute a product.” *Grossman*, 2019 WL 2649153, at *4, *15; *accord* Mot. 23. For good reason:
 2 the alleged harm associated with these filters is that using them to view or create content may lead
 3 some users to engage in social comparisons or to have bad feelings about themselves. *E.g.*, MC ¶¶ 319,
 4 324. What Plaintiffs allege is harm from information and content.

5 *Fourth*, Plaintiffs challenge features that users use to share content and “connect” with one
 6 another. *Opp.* 11–12. For example, Plaintiffs challenge the alleged manner in which certain
 7 “recommendation algorithms [effectively] function as a digital matchmaking *service*.” *Id.* 13
 8 (emphasis added). But Plaintiffs are alleging harm from how Defendants allegedly enable users to
 9 communicate and transmit information to one another. *See* MC ¶¶ 138, 145; *Quinteros*, 2022 WL
 10 898560, at *2, *7 (online game that some users misused to exchange “harassing” messages was “not a
 11 product”). Moreover, an online service that “connects its users . . . is more akin to a *service* than a
 12 product.” *Jacobs*, 2023 WL 2655586, at *4 (quoting *Jackson*, 2022 WL 16752071, at *9) (emphasis
 13 added); *see also, e.g., Crouch v. Ruby Corp.*, 2022 WL 16747282, at *9 (S.D. Cal. Nov. 7, 2022) (online
 14 matchmaking company “do[es] not sell products on their website, they sell a service”).

15 *Finally*, Plaintiffs take issue with *how* users can access the information, ideas, and content on
 16 Defendants’ services. Plaintiffs demand that their preferred “age verification,” “account deletion,” or
 17 “parental control” measures be imposed, all of which would “limit” access. *Opp.* 7–8, 10–11. But the
 18 encyclopedia in *Winter* would not have been transformed into a product if the plaintiff’s claim had been
 19 that the publisher should have limited its availability to qualified mycologists. Plaintiffs likewise seek
 20 to use product liability law to restrict the “words and images” that Defendants make available—content
 21 that Plaintiffs say Defendants should have “prevented from reaching minors.” *James*, 300 F.3d at 697,
 22 701; *see In re Facebook*, 625 S.W.3d at 84–85, 85 n.1 (noting dismissal of similar product liability
 23 claim predicated on age-verification and parental-control features); *see also Herrick v. Grindr, LLC*,
 24 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018) (allowing a user to access and create a “profile” on an online
 25 service implicates “expressive content”), *aff’d*, 765 F. App’x 586 (2d Cir. 2019).

26 In sum, Plaintiffs do not seek to hold Defendants liable for any physical attributes of their
 27 services; Plaintiffs’ purported “design defects” instead concern “words and ideas” or a “publisher’s
 28

1 role in bringing ideas and information to the public.”⁶ *Winter*, 938 F.2d at 1035, 1037 n.8. Plaintiffs’
 2 alleged harm necessarily depends on the content on Defendants’ services and their choices about how
 3 that content is presented. “Without the content, there would be no claim.” *Estate of B.H.*, 2022 WL
 4 551701, at *3.⁷ Product liability law does not apply to such claims. *Id.*

5 **4. The Court Should Not Create New State Tort Law for Every State.**

6 Implicitly recognizing their claims are contrary to established law, Plaintiffs urge the Court to
 7 “adapt” tort law in response to Defendants’ “major inventions,” Opp. 1, because “public policy
 8 confirms strict products liability is appropriate here,” *id.* 31 (cleaned up). The Court should reject that
 9 request and instead “take state law as it exists.” *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007).

10 *First*, Plaintiffs contend that a federal court must be able to extend state law to claims “involving
 11 novel issues” because otherwise “defendants could ensure a decision in their favor simply by removing
 12 the case to federal court.” Opp. 19 (cleaned up). But when addressing novel state law claims, federal
 13 courts predict how a state’s highest court would decide the issue by looking to “intermediate appellate
 14 court decisions, decisions from other jurisdictions, statutes, treatises, and restatements.” *Judd v.*
 15 *Weinstein*, 967 F.3d 952, 955–56 (9th Cir. 2020). Plaintiffs instead are asking the Court to reject
 16 established limits on state law and create new law on the basis of (ill-considered) policy arguments.
 17 Such “trailblazing initiatives under state law” are precisely what the Ninth Circuit has advised against.
 18 *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1043 (9th Cir. 2011).

19
 20
 21 ⁶ That some cases have treated electricity as a product, Opp. 25, is irrelevant here. Electricity is a
 22 “force[]” that can cause “personal injury or property damage,” Restatement (Third) § 19, and the cases
 Plaintiffs cite have nothing to do with injuries resulting from information, ideas, or content.

23 ⁷ Plaintiffs’ assertion that *Estate of B.H.* concerned only the “content of a show,” Opp. 29, is
 24 contradicted by the record in that case. The plaintiffs there alleged that Netflix used “sophisticated,
 25 targeted recommendation systems to push” allegedly harmful content “on unsuspecting and vulnerable
 26 children,” that these “recommendation algorithms” were themselves “a product,” and similarly
 27 disclaimed that the product liability claim did “not arise from Netflix’s manufacture or creation of
 28 [content], but rather from its targeting of . . . vulnerable children and its failure to include adequate
 warnings.” Am. Compl. ¶¶ 14–15, 78 & p.14, *Estate of B.H.*, No. 4:21-CV-06561-YGR (N.D. Cal.
 Sept. 22, 2021), ECF No. 22. This Court correctly held that the purported distinctions, including
 between content and design features, were immaterial. *See Estate of B.H.*, 2022 WL 551701, at *3.

1 In similar circumstances, federal courts—including those presiding over MDLs—have rejected
 2 invitations to “predict” that state courts would eschew established legal doctrines. *See, e.g., Laron v.*
 3 *Wright Med. Tech., Inc.*, 587 F. Supp. 3d 1065, 1077 (D. Nev. 2022) (“this Court can see no clear
 4 indication that [a state high court] would depart from [the Restatement’s] rationale in this case”); *In re*
 5 *Med. Cap. Sec. Litig.*, 842 F. Supp. 2d 1208, 1213 (C.D. Cal. 2012) (“Perhaps the California Supreme
 6 Court or the California Legislature will extend the law at some future date and, at that time, this Court
 7 will be happy to enforce it. At the present time, however, California state law clearly prohibits the
 8 [plaintiffs’] claims.”); *In re Packaged Seafood Prods. Antitrust Litig.*, 2022 WL 11337564, at *6 (S.D.
 9 Cal. Oct. 19, 2022) (“it is not for this Court to reimagine [state law] under a modern framework”); *In*
 10 *re Qualcomm Antitrust Litig.*, 2023 WL 121983, at *18 (N.D. Cal. Jan. 6, 2023) (refusing to predict
 11 that state court would reach a “novel” conclusion that lacks “any basis in case law” from the relevant
 12 state); *Orkin*, 487 F.3d at 741 (“it is highly unlikely that the California Supreme Court would . . . adopt
 13 a new rule” that diverges from existing law).

14 *Second*, public policy does not support Plaintiffs’ creation of new product liability law. As the
 15 Ninth Circuit observed in *Winter*, the “cost/benefit analysis” that supports applying strict liability law
 16 to tangible products does not apply to claims of harm from ideas and expression. “Strict liability
 17 principles even when applied to products are not without their costs. Innovation may be inhibited. We
 18 tolerate these losses. They are much less disturbing than the prospect that we might be deprived of the
 19 latest ideas and theories.” 938 F.2d at 1035. This Court similarly refused to expand product liability
 20 law based on policy considerations in *Estate of B.H.*, 2022 WL 551701, at *1, *3; *see also, e.g., Wilson*,
 21 198 F. Supp. 2d at 174 (rejecting plaintiff’s argument that “technological advances” warranted
 22 abandoning “the ‘intangible’ category that is demarcated in the case law”); *Jacobs*, 2023 WL 2655586,
 23 at *3 (rejecting argument that “the times and needs of society” justify “chang[ing]” product liability
 24 law such that Facebook could be considered a product (citation omitted)).⁸

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 28 ⁸ None of the cases cited by Plaintiffs support applying a public policy analysis to create new state law liability when a plaintiff alleges harm from information, ideas, or content. Those cases instead concerned plaintiffs suffering harm from tangible items, such as “large, industrial coke ovens.” *Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 N.Y.3d 488, 491 (2019).

1 That is all the more important here. Users employ Defendants’ services “to engage in a wide
 2 array” of communication “on topics as diverse as human thought.” *Packingham v. North Carolina*,
 3 582 U.S. 98, 105 (2017) (citation omitted). Imposing product liability law on how Defendants
 4 disseminate such information and speech could severely restrict what users can say or see online and
 5 how effectively their messages can flow. *See DeFilippo v. Nat’l Broad. Co.*, 1980 WL 336092, at *2–
 6 3 (R.I. Super. Ct. June 8, 1980) (it “would create a chilling effect” that could “result in suppression” of
 7 speech if product liability law applied to the dissemination of intangible information or content), *aff’d*,
 8 446 A.2d 1036 (R.I. 1982). That is apparent from the very nature of Plaintiffs’ claims—which demand
 9 that Defendants redesign their services to ensure Plaintiffs’ disfavored content, such as “sensationalist”
 10 videos, is suppressed, *Opp.* 8–10; to make it harder for users to connect or communicate with one
 11 another, *id.* at 11–12; to limit the features users can use to create or personalize content they choose to
 12 share, *id.* at 6; and even to eliminate users’ ability to share ideas and content at all, *id.* at 7–8. This
 13 Court “must exercise extreme caution before suggesting” that such drastic results are mandated by state
 14 law, *Packingham*, 582 U.S. at 105—much less by a body of law that has *never* before regulated a
 15 defendant’s “role in bringing ideas and information to the public,” *Winter*, 938 F.2d at 1037 n.8.

16 **B. Plaintiffs’ Negligence-Based Product Liability Claims Should Also Be Dismissed**
 17 **for Failure to Allege a Cognizable Duty.**

18 Plaintiffs attempt to avoid their obligation to allege that Defendants owe them a legally
 19 recognized duty by relying on their flawed product liability arguments. *Opp.* 35. But Plaintiffs’
 20 argument that “Defendants owe them the same duties that all product makers owe to product users,”
 21 *id.*, necessarily fails because Defendants’ online services are not products. *See supra* Part II.A.

22 Plaintiffs’ other attempts to establish a duty also fail. *First*, Defendants do not owe a “general
 23 duty” to Plaintiffs. And Plaintiffs have not rebutted or distinguished the myriad cases declining to
 24 recognize such a duty owed by online communications services to their billions of users. *Second*,
 25 Plaintiffs’ allegations that Defendants’ services are “addictive” cannot create a duty of care that does
 26 not otherwise exist. Plaintiffs cite no authority supporting the existence of such a duty and ignore the
 27 many cases with contrary holdings. *Third*, Plaintiffs cite no legal support for their suggestion that the
 28 Court can or should create a special relationship between Defendants and their minor users or other

1 third parties to support a duty of care. *Fourth*, because there is no “general duty,” this Court need not
 2 address “public policy” factors, which in any event would weigh in favor of limiting any such duty.

3 **1. Plaintiffs Do Not Allege a Cognizable General Duty Owed by Defendants.**

4 Plaintiffs incorrectly argue that they have adequately pleaded “a general duty” by simply
 5 asserting a product liability claim. *Contra* Opp. 35. Courts in other cases involving online services,
 6 communication apps, and expressive media have considered and rejected similar arguments. Mot. 28–
 7 31 (citing cases rejecting “general duties” allegedly owed by communication apps, online services, or
 8 expressive media). Plaintiffs’ claims are another chapter in a long history of failed attempts to impose
 9 tort duties on new forms of media and entertainment—spanning television and movies, video games,
 10 publishers of “pranks” or “dangerous” content, and online services. *See id.*

11 It is *Plaintiffs’* burden to “plead facts establishing” a duty. *Castillo v. Seagate Tech., LLC*, 2016
 12 WL 9280242, at *3 (N.D. Cal. Sept. 14, 2016). And it has long been insufficient to baldly assert, as
 13 Plaintiffs do, that Defendants owe billions of users “a general duty.” Opp. 38. “Duty is not universal;
 14 not every defendant owes every plaintiff a duty of care.” *Brown v. USA Taekwondo*, 11 Cal. 5th 204,
 15 213 (2021). The risk of imposing untenable and limitless duties is particularly pronounced for online
 16 communication services, who have “arm’s length” relationships with “billions of people, most of whom
 17 use the platforms for interactions that once took place via mail, on the phone, or in public areas.”
 18 *Taamneh*, 143 S. Ct. at 1227–28 (rejecting claims whose “expansive scope” would impose limitless
 19 duties on “communication-providing services”).

20 Nor is foreseeability the “sole or predominant consideration of the duty analysis” in “most
 21 jurisdictions.” Opp. 36. “[F]oreseeability is not synonymous with duty; nor is it a substitute.” *Erlich*
 22 *v. Menezes*, 21 Cal. 4th 543, 552 (1999); *cf. Lowery v. Echostar Satellite Corp.*, 160 P.3d 959, 965
 23 (Okla. 2007) (defendant owed no duty, despite finding that “[t]he foreseeability of the risk of harm to
 24 [plaintiff] . . . is tacitly admitted by the parties”). As one of Plaintiffs’ own cases explains, “[m]any
 25 products can foreseeably be used in numerous ways with numerous other products and parts,” and
 26 requiring a warning “about all of those possible uses . . . would impose a difficult and costly burden on
 27 manufacturers, while simultaneously overwarning users.” *Air & Liquid Sys. Corp. v. DeVries*, 139 S.
 28 Ct. 986, 994 (2019) (cited at Opp. 1, 35); *see also Taamneh*, 143 S. Ct. at 1228 (theoretical

1 foreseeability is insufficient because “there is no allegation that the platforms here do more than
2 transmit information by *billions of people*,” and because plaintiffs’ claims would necessarily hold
3 platforms liable for every bad act “committed *anywhere* in the world” (emphases added).

4 These principles have even greater force here, as online services, like “broadcasters and
5 publishers[,] owe no duty to the general public who may view their broadcasts or read their
6 publications.” *Brandt v. Weather Channel, Inc.*, 42 F. Supp. 2d 1344, 1346 (S.D. Fla. 1999) (collecting
7 cases), *aff’d*, 204 F.3d 1123 (11th Cir. 1999); *see also* Mot 28–31. Plaintiffs’ opposition does not cite
8 a single case where a court has imposed a comparable duty based merely on information or ideas
9 exchanged on an online service. Plaintiffs’ legal conclusions that such a duty exists here do not make
10 it so. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

11 Courts have rejected similar assertions that “known risks” about harmful media are sufficient
12 to establish duty as a matter of law. *E.g.*, *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199, 206
13 (S.D. Fla. 1979) (granting motion to dismiss for lack of duty, despite acknowledging that “television
14 programming presents problems and the study of these continues”); *James*, 300 F.3d at 693 (affirming
15 dismissal because no duty owed by internet websites, video game makers, or movie producers after
16 classmate killed students, while acknowledging that “[m]ental health experts could quite plausibly
17 opine about the manner in which violent movies and video games affect viewer behavior”); *cf. Brown*
18 *v. Ent. Merchants Ass’n*, 564 U.S. 786, 798, 800–02 (2011) (rejecting reliance on “research” and
19 “psychological studies” about violent video games).

20 In any event, Plaintiffs do not meaningfully rebut the many cases holding that, as a matter of
21 law, personal injury and death are not foreseeable consequences of distributing content. *See* Mot. 28–
22 29 (citing cases); *see also Sanders*, 188 F. Supp. 2d at 1272 (collecting cases rejecting tort liability
23 premised on the purported foreseeability of injury arising from viewing or listening to content).
24 Plaintiffs claim the injuries in those cases involved “speculative,” “unforeseeable—often erratic,
25 idiosyncratic—harm,” and “content censorship.” Opp. 37–38. But they are no different than the harms
26 Plaintiffs assert here. Plaintiffs concede that users interact with Defendants’ services in varied ways—
27 asserting “*unique* characteristics” of each service, with “multiple, *distinct* defects,” that “manifest in
28 *different* ways,” and result in individualized user experiences “based on a *staggering number of*

1 variables and datapoints.” Opp. 4, 9 (emphases added). Plaintiffs do not (and cannot) explain why a
 2 “general duty” to “foresee” and prevent variable harm to billions of users should be created here, when
 3 it already has been rejected in contexts involving streaming content about suicide (*Estate of B.H.*),
 4 creating “addictive” video games (*James*), publishing shooting sports supplements (*Way*), and
 5 disseminating an article describing autoerotic acts (*Herceg*). See Mot. 28–29 (citing cases).

6 Unable to articulate a principled basis to distinguish these cases, Plaintiffs pivot to inapposite
 7 cases involving physical products and injuries. Opp. 36. In *Lowery*, for instance, the court declined to
 8 impose a duty on a satellite dish company after the plaintiff slipped from a ladder while attempting to
 9 repair a satellite dish, even after the defendant had advised “that [the plaintiff] could make the minor
 10 repair to the dish.” 160 P.3d at 962, 965–66. Here, Plaintiffs do not allege that Defendants have direct
 11 communications with Plaintiffs, making any interactions even more attenuated than in *Lowery*.
 12 Plaintiffs also cite *Sewell v. Racetrac Petroleum, Inc.*, 245 So. 3d 822 (Fla. Dist. Ct. App. 2017), but
 13 that case involved a recognized theory of liability—*i.e.*, that “[a]n owner can be liable for actions it
 14 takes or fails to take on its own property that cause vehicles to exit in a manner that the owner knew or
 15 should have known creates an unreasonable danger to vehicles on the adjacent roadway.” *Id.* at 827–
 16 28 (citing cases). In other words, the foreseeable harm was physical, took place on the defendant’s
 17 property, and was redressable through limited safety measures. By contrast, Plaintiffs’ claims would
 18 impose on Defendants a sprawling duty to prevent harm from third-party content to billions of users,
 19 each of whom interacts with Defendants’ services differently.⁹ Opp. 36, 43 (arguing Plaintiffs “would
 20 not have been harmed *by the content* on Defendants’ platforms but for the alleged design defects.”
 21 (emphasis added)); see *supra* Part II.A (product intangibility); Mot. 28.

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 26 ⁹ The two cases Plaintiffs cite for “foreseeability” in the context of “social media” merely held that
 27 some plaintiffs had plausibly alleged a duty related to collecting and storing individuals’ personal
 28 information, *not* that Facebook owed “a general duty” to all users of the Facebook service. See Opp.
 38 (citing *Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024, 1039 (N.D. Cal. 2019); *In re Facebook, Inc.*,
Consumer Priv. User Profile Litig., 402 F. Supp. 3d 767, 799 (N.D. Cal. 2019)).

1 **2. Plaintiffs’ Allegations Regarding the Alleged Addictiveness of Defendants’**
 2 **Services Do Not Create a Duty of Care.**

3 Plaintiffs’ argument for a duty based on the allegedly addictive nature of Defendants’ services
 4 also fails. Opp. 44–45. Defendants’ purported duty to prevent “compulsive” use—*e.g.*, through
 5 “feeds” that “winnow[] a mass of content” (MC ¶ 591)—necessarily derives from users accessing,
 6 viewing, and interacting with content. Defendants’ “recommendation algorithms are merely part of
 7 [the] infrastructure through which all the content on their platforms is filtered.” *Taamneh*, 143 S. Ct.
 8 at 1227. And where claims are inextricably intertwined with the dissemination of speech and content,
 9 courts have declined to impose a duty to “prevent addiction” or over-consumption of that content. Mot.
 10 31–33; *see also supra* Part II.A.3 (product intangibility).

11 Plaintiffs’ claim that “[t]here is no special exemption in negligence for addiction,” Opp. 44, has
 12 it backwards. It is *Plaintiffs* who must identify an exception to the rule that there is no general duty in
 13 tort, not vice versa. This they cannot do. And courts have rejected duties premised on “addictiveness.”
 14 *See* Mot. 31–33 (citing cases). Again, attempts to invoke “studies” about allegedly harmful content—
 15 including from “defendants’ creation and distribution of their games, movie, and internet sites”—do
 16 not establish foreseeability. *See James*, 300 F.3d at 692 (“The mere fact that the risk may have
 17 materialized does little to resolve the foreseeability question.”). Nor may Plaintiffs sidestep “slippery-
 18 slope hypotheticals” (Opp. 45) because their own theories would apply not just to Defendants’ online
 19 services but to other services (online or not). *E.g.*, MC ¶ 12 (alleging children are susceptible to
 20 addictive features in “digital products”); *id.* ¶ 77 (alleging all products using intermittent variable
 21 reward techniques are “highly addictive or habit forming”). The element of duty stands “as a
 22 gatekeeper for the otherwise extremely broad concept of negligence.” *James*, 300 F.3d at 692.

23 Plaintiffs’ attempt to analogize Defendants’ services to slot machines, MC ¶ 78–79, also fails.
 24 It is irrelevant that casinos are “carefully regulated.” Opp. 44 n.25. Courts have held that operators of
 25 casinos and slot machine manufacturers *do not* owe a general duty to prevent addiction. *See Merrill v.*
 26 *Trump Ind., Inc.*, 320 F.3d 729, 732–33 (7th Cir. 2003) (declining to impose common law duty); *see*
 27 *also Taveras v. Resorts Int’l Hotel, Inc.*, 2008 WL 4372791, at *4 (D.N.J. Sept. 19, 2008) (casino not
 28 liable for excessive gambling, which would require “impos[ing] a duty on shopping malls and credit-

card companies to identify and exclude compulsive shoppers”); *Stevens v. MTR Gaming Grp., Inc.*, 788 S.E.2d 59, 66 (W. Va. 2016) (rejecting claim where gambling allegedly caused customer to embezzle, spend all family funds, and die by suicide); *NOLA 180 v. Harrah’s Operating Co.*, 94 So. 3d 886, 889 (La. Ct. App. 2012) (casinos have no duty to identify and exclude “problem gamblers”).

Plaintiffs attempt to rely on two cases—involving nicotine and opiates—that involve physical products that contain *chemical* components. And these chemical components have direct, traceable, common, and predictable effects on most individuals. Opp. 44–45 (citing *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.*, 497 F. Supp. 3d 522, 655 (N.D. Cal. 2020); *In re Nat’l Prescription Opiate Litig.*, 452 F. Supp. 3d 745, 785–87 (N.D. Ohio 2020)). In contrast, Plaintiffs make no claim that Defendants created the harmful content to which Plaintiffs were allegedly exposed, or that the vast majority of the billions of users of Defendants’ services are “addicted.” Nor do they explain how Defendants could predict which users will become “addicted” and suffer mental health harms. Inventing a duty to prevent or warn about alleged “addictiveness” of information, content, and ideas would provide “no recognizable standard” for courts. *Zamora*, 480 F. Supp. at 202.

3. Plaintiffs Do Not—and Cannot—Allege Any Legally Cognizable Special Relationship That Would Impose Duties on Defendants.

Plaintiffs concede that Defendants do not owe a heightened duty to minors based on the existence of a “special relationship” with users. Opp. 45–46. And courts have repeatedly recognized that there is not a “special relationship” between millions of users and services that users can join (or leave) at will. *E.g.*, *Dyroff*, 934 F.3d at 1101 (“[N]o special relationship [exists] between Facebook and its users.”); *James*, 300 F.3d at 694; *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 851 (W.D. Tex. 2007); *cf. M. L. v. Craigslist Inc.*, 2020 WL 6434845, at *13 (W.D. Wash. Apr. 17, 2020) (there is no “general duty” for website operators “to ensure that their website does not endanger minors”).¹⁰

¹⁰ Plaintiffs’ cited cases involve *physical* products or custodial relationships. Neither support recognizing a heightened duty of care to minors here. *Cf. Swix v. Daisy Mfg. Co.*, 373 F.3d 678, 686–88 (6th Cir. 2004) (using an “objective reasonable child standard” to find that it was foreseeable that a 12-year-old would misuse a BB gun to shoot at another person); *Sims v. United States*, 2020 WL 3273040, at *3 (W.D. Mo. June 17, 2020) (recognizing a duty of care arising from a supervisory relationship under Missouri law); *In re JUUL*, 497 F. Supp. 3d at 656 (duty of care analysis premised on foreseeability and public policy factors, not solely the age of plaintiffs).

1 Instead, Plaintiffs claim that Defendants engaged in misfeasance, a narrow exception to the
2 special relationship requirement, arguing that “Defendants’ social media apps actively contributed to
3 [such] conduct” or “created a risk of harm.” Opp. 46, 48; *see Vesely v. Armslist LLC*, 762 F.3d 661,
4 666 (7th Cir. 2014) (“If a plaintiff can demonstrate that the defendant did not merely fail to act, *but*
5 *also assisted the third party*, then the requirement of a special relationship no longer applies.”
6 (emphasis added, citation omitted)). But such conclusory allegations would destroy the guardrails
7 around tort liability, as the Supreme Court recently confirmed.

8 In *Taamneh*, the Supreme Court rejected claims that Facebook, Twitter, and YouTube were
9 *secondarily* liable under a federal terrorism statute for the posting (and alleged algorithmic
10 recommendation) of terrorism content that allegedly radicalized users. 143 S. Ct. at 1218. Reasoning
11 from “common law” principles about the “limits on tort liability” and “duty,” *id.* at 1220–21, 1226,
12 1227 & n.14, 1229, the Court explained that while “it might be that bad actors . . . are able to use [online
13 communications services] for illegal—and sometimes terrible—ends,” “the same could be said of cell
14 phones, email, or the internet generally.” *Id.* at 1226. Creating a rule that imposes liability “merely
15 for knowing that . . . wrongdoers were using [defendant’s] services and failing to stop them” would
16 “run roughshod over the typical limits on tort liability.” *Id.* at 1228–29. The Court declined to sanction
17 such a dramatic expansion of tort liability, noting that “when legislatures have wanted to impose a duty
18 to remove content on these types of entities, they have apparently done so by statute.” *Id.* at 1227 n.14.

19 *Taamneh*’s reasoning applies with even more force here, where Plaintiffs attempt to impose
20 *direct* liability on Defendants for third-party misconduct on their services. The Master Complaint is
21 devoid of well-pleaded allegations that Defendants’ services *actively contributed* to Plaintiffs’ injuries.
22 Billions of people use Defendants’ services, and the “mere creation of their media platforms is no more
23 culpable than the creation of email, cell phones, or the internet generally.” *Id.* at 1209. And the
24 possibility that a service could be misused by *some* bad actors is not sufficient to allege an increased
25 risk of harm. *See* Mot. 35–38; *see also Taamneh*, 143 S. Ct. at 1227 n.14 (“Plaintiffs have not presented
26 any case holding such a company liable for merely failing to block such criminals despite knowing that
27 they used the company’s services.”); *Dyroff v. Ultimate Software Grp., Inc.*, 2017 WL 5665670, at *15
28 (N.D. Cal. Nov. 26, 2017), *aff’d*, 934 F.3d 1093 (9th Cir. 2019) (website’s use of neutral tools and

1 functionalities is not misfeasance); *Ziencik*, 2023 WL 2638314, at *5 (“[d]efendant’s creation and
2 operation of a communication platform . . . does not by itself create a risk of third-party misuse as a
3 matter of law”); *Vesely*, 762 F.3d at 666 (“simply enabling consumers to use a legal service is far
4 removed from encouraging them to commit an illegal act”).

5 Cases involving firearms are inapposite. *See* Opp. 47–48. *Ileto v. Glock Inc.*, 349 F.3d 1191
6 (9th Cir. 2003), is readily distinguishable because (1) firearms are tangible products; (2) they were the
7 sole cause of the direct and immediate physical harms at issue (injury and death of multiple
8 individuals); and (3) the plaintiff alleged that the defendant took “affirmative action” to “creat[e] an
9 illegal secondary market for guns that targets illegal purchasers,” none of which apply here. *Id.* at
10 1201. Further, the Seventh Circuit has held that a “website that facilitates the sale of guns between
11 private owners” did not owe a duty of care to the deceased, because there was no special relationship
12 between the parties, and the website “did not invite [third parties] to break the law.” *Vesely*, 762 F.3d
13 at 665–66. Here, Plaintiffs do not allege that Defendants “encourag[ed] [third parties] to commit an
14 illegal act.” *Id.*

15 Plaintiffs’ reliance on cases about other physical products is misplaced. For example, *Hacala*
16 *v. Bird Rides, Inc.*, 90 Cal. App. 5th 292 (2023) (cited at Opp. 48), involved allegations of a tangible
17 product (a scooter), “controlled, operated, unlocked, and rented” by the scooter company, which then
18 caused a physical injury. *Id.* at 311. Due to its control over the product, the scooter company
19 affirmatively agreed “to take measures to prevent such injuries when it obtained [a] permit from the
20 City.” *Id.* at 301. The court limited its ruling to a *codified* duty “in the management of [one’s]
21 *property*,” based on allegations that the company “le[ft] scooters on sidewalks in a manner that posed
22 a tripping hazard to pedestrians.” *Id.* at 312–13 (emphasis added). Here, there is no physical product
23 leading to physical injury, and no undertaking to manage property or prevent injury.

24 Plaintiffs’ reliance on *Gersh v. Anglin*, 353 F. Supp. 3d 958 (D. Mont. 2018), is also misplaced.
25 Opp. 48. In *Gersh*, the defendant personally directed the alleged tortious activity—“publishing
26 personal and professional contact information for the Gersh family, and offering samples of the types
27 of anti-Semitic and misogynistic messages his readers should leave.” 353 F. Supp. 3d at 969. Plaintiffs
28 here do not allege that Defendants directed users to create or share the content that harmed Plaintiffs.

1 **4. This Court Should Decline to Create New “Public Policy” Duties.**

2 The Court should reject Plaintiffs’ request to create a duty based on “a set of ‘public policy’
3 factors” that they claim are “regularly consider[ed]” by states. Opp. 40. Again, Plaintiffs have it
4 backwards. Those factors, first articulated in *Rowland v. Christian*, 69 P.2d 561, 564 (Cal. 1968), are
5 *not* a “freestanding means of establishing duty, but instead a means for deciding whether to limit a duty
6 derived from other sources.” *Brown*, 11 Cal. 5th at 217. Thus, where, as here, a plaintiff alleges a duty
7 to protect from third-party misconduct, there is no duty absent a “special relationship between the
8 parties or some other set of circumstances giving rise” to such a duty. *Id.* at 209. Only if such a
9 relationship or circumstances exist may courts consult the *Rowland* factors. Moreover, the *Rowland*
10 factors “remain a minority approach.” W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern*
11 *Duty Law in Microcosm*, 91 B.U. L. Rev. 1873, 1879, 1884 (2011) (citing *Rowland*).

12 Even if the Court examines the *Rowland* factors, they do not support a finding of duty here.
13 *See supra* Part II.A.3 (product intangibility). The harms alleged are not foreseeable under *Rowland*.
14 Defendants each provide disparate services with varied features, that billions of users engage with in
15 individualized experiences alleged to be “based on a staggering number of variables and datapoints.”
16 Opp. 9. In turn, Plaintiffs allege only that some users may be injured in any number of ways, depending
17 on how they individually engage with different combinations of Defendants’ services or with third
18 parties. Courts have declined to impose a duty under the *Rowland* factors when claims were similarly
19 attenuated. Thus, for example, in *Jackson*, the court refused to recognize a duty for Airbnb, a short-
20 term rental website, to prevent a shooting on one of the properties booked through the site. 2022 WL
21 16752071, at *8. “Even if there were some exception to the limitations on duties applied here,” the
22 court held, the “*Rowland* factors do not support a finding of duty” because “the foreseeability of the
23 crime was low,” “the connection between Airbnb’s conduct[] and the injury is virtually nonexistent,”
24 and “the burden of preventing this sort of incident in the future is high.” *Id.*

25 *Rowland*’s public policy considerations weigh against a duty as well. Any blame is
26 appropriately placed on third parties who create the content that Plaintiffs allegedly cannot disengage
27 from or who harmed Plaintiffs directly; Defendants are not the cause of those injuries. The policy of
28 preventing future harm would not be best served by imposing the costs of third-party conduct upon

1 Defendants. Moreover, imposing liability on Defendants would have significant consequences to the
 2 community because of the chilling effect on expression. In *Delfino v. Agilent Technologies, Inc.*, 145
 3 Cal. App. 4th 790 (2006), the California Court of Appeal declined to find that an employer could be
 4 responsible for the transmission of threats online by an employee using the employer’s computer,
 5 reasoning that a duty “might have a significant chilling effect upon Internet free speech.” *Id.* at 816;
 6 *see also, e.g., Estate of B.H.*, 2022 WL 551701, at *3 (“California courts have declined to find a duty
 7 as a matter of law under the *Rowland* factors for claims implicating expression.”). So too, here, creating
 8 a new duty to prevent unforeseeable bad acts by third parties who use Defendants’ services would fail
 9 the *Rowland* factors.

10 **C. Plaintiffs Fail to Adequately Allege Proximate Causation.**

11 Plaintiffs’ Opposition confirms that they fail to allege the requisite causal connection between
 12 any Defendant and *any* of Plaintiffs’ alleged harms. Nowhere is this more apparent than their numerous
 13 attempts to impose liability on Defendants for the criminal and tortious actions of *third parties*.¹¹

14 **1. Defendants Are Not Liable Under Settled Case Law for Harms Caused by the**
 15 **Tortious or Criminal Acts of Third Parties.**

16 At a minimum, all claims premised on harms allegedly caused by third parties who misused
 17 Defendants’ services to commit criminal and tortious acts should be dismissed (*e.g.*, alleged harms
 18 resulting from third parties’ sexual predation and exploitation, solicitation and transmission of CSAM,
 19 and bullying). Plaintiffs’ Opposition makes plain that their claims would impose liability on
 20 Defendants for such harms. *See* Opp. 53 (arguing Defendants’ services “facilitate and contribute to
 21 sexual exploitation and CSAM dissemination” and provide forum for predators “to groom and abuse
 22 children”); *see, e.g., MC* ¶ 17 (alleging Defendants’ services facilitate bullying). Plaintiffs misstate
 23 their burden in pleading proximate cause, contending they need allege only that Defendants generally
 24 could have foreseen that some third parties might misuse their services to cause the types of harms
 25 Plaintiffs allegedly suffered. Opp. 52–53. But this argument ignores the many authorities cited in
 26

27 ¹¹ Plaintiffs do not contest that the issue of proximate causation may be decided as “one of law, not
 28 *fact*,” on a motion to dismiss. *Modisette*, 30 Cal. App. 5th at 152; *see also Scurry v. N.Y.C. Hous.*
Auth., 140 N.Y.S.3d 255, 260 (2021).

1 Defendants’ Motion, MTD 43, as well as the Supreme Court’s recent decision in *Taamneh*, which held
 2 that merely providing online services to the general public does not make a company liable for the
 3 wrongful acts of others, even if it is generally foreseeable that misuse might occur. *See, e.g., Taamneh*,
 4 143 S. Ct. at 1226, 1228–29 (the “mere creation of [social media] platforms” is insufficient to make a
 5 company legally responsible for harms caused by third parties, even where the company knew “that
 6 the wrongdoers were using [its] services and fail[ed] to stop them”).¹²

7 Likewise, here, the Court should follow settled law and reject Plaintiffs’ argument that
 8 Defendants proximately cause all of the harms that they could generally foresee being committed
 9 through the use of their communication services. *See id.* at 1228–29; *see also Modisette v. Apple Inc.*,
 10 30 Cal. App. 5th 136, 155 (2018) (even assuming “use of the iPhone while driving” was generally
 11 foreseeable to result in car accident, “the gap between Apple’s design of the iPhone and the [plaintiffs’]
 12 injuries is too great for the tort system to hold Apple responsible”); *Fields v. Twitter, Inc.*, 881 F.3d
 13 739, 749–50 (9th Cir. 2018); *Crosby v. Twitter, Inc.*, 921 F.3d 617, 623 (6th Cir. 2019).

14 Plaintiffs’ attempt to distinguish the wealth of case law declining to hold online communication
 15 services liable in similar circumstances confirms that those decisions apply here. *See Mot.* 43–45.
 16 Plaintiffs are wrong that “the connection between the defendants’ actions and the plaintiffs’ harm in
 17 those cases was far more attenuated than it is here.” *Opp.* 54. Like Plaintiffs’ allegations here, the
 18 cases Defendants cited in Defendants’ Motion involve claims that plaintiffs suffered harm after third
 19 parties used the defendants’ services for nefarious ends. For example, there is no legal distinction
 20 between Plaintiffs’ argument that Defendant’ services “help sexual predators connect with children,”
 21 *see, e.g., MC* ¶ 134, and the plaintiffs’ arguments in *Crosby*, *Field*, and *Taamneh* that the defendants’
 22 services helped terrorists connect with one another, recruit users, or communicate about their plan, *see*
 23 *Crosby*, 921 F.3d at 620 (no proximate cause where plaintiffs alleged that defendants “provid[ed] social
 24 media platforms to ISIS” that ISIS used to post graphic and threatening content and to “connect[] and
 25 reconnect[]” with its supporters); *Fields*, 881 F.3d at 743 (no proximate cause where plaintiffs alleged
 26

27 ¹² As the Supreme Court’s comments in *Taamneh* show, that Defendants’ services are intended to be
 28 used and are used overwhelmingly for lawful and beneficial purposes, and that fact is highly relevant
 to the proximate causation analysis despite Plaintiffs’ attempt to argue otherwise (*Opp.* 55).

1 that ISIS used Twitter “to communicate with potential recruits” and “post[] graphic photos and
 2 videos”); *see also Taamneh*, 143 S. Ct. at 1226 (explaining that plaintiffs alleged that “ISIS was able
 3 to upload content to the platforms and connect with third parties,” and that “defendants’ algorithms
 4 matched ISIS-related content to users”).¹³ Indeed, as one court recently noted in rejecting product
 5 defect claims against some of the same features challenged here (*i.e.*, friend recommendation features
 6 and ephemeral content), “the harm animating Plaintiffs’ claims [that Snapchat was used in an alleged
 7 sextortion scheme] is ‘directly related to the posting of third-party content on [Snapchat]’” and “*doesn’t*
 8 *flow from a design defect.*” *L.W.*, 2023 WL 3830365, at *4–5 (emphasis added).

9 There also is no merit to Plaintiffs’ suggestion that, in *Crosby*, the Sixth Circuit applied “a more
 10 stringent showing of causation than state tort law.” *Opp.* 54. To the contrary, the Sixth Circuit
 11 expressly stated that it was affirming the dismissal of both the federal Anti-Terrorism Act and “*state*
 12 *law claims*” for negligence for failure to “show[] proximate cause.” *Crosby*, 921 F.3d at 627 (emphasis
 13 added). In *Fields*, the court likewise heavily cited decisions discussing proximate causation in other
 14 contexts, including under state law. *See* 881 F.3d at 745–48. And, contrary to Plaintiffs’ assertion, the
 15 California Court of Appeal’s holding in *Modisette* was not “premised on a prior determination”
 16 concerning the duty of care. *Contra Opp.* 54. Rather, the court specifically held that lack of proximate
 17 causation was an independent basis for dismissal and that Apple’s “failure” to “automatically disable
 18 [the FaceTime app while driving] did nothing more than create the condition that made Plaintiffs
 19 injuries possible,” and was “too remotely connected with Plaintiffs’ injuries to constitute their legal
 20 cause.” *Modisette*, 30 Cal. App. 5th at 154.

21 Against this weight of authority involving online services, Plaintiffs offer only plainly
 22 distinguishable decisions involving physical products, pharmaceuticals, and foster care placements in
 23 dangerous homes. For example, in *In re JUUL Labs*, the plaintiffs alleged that Juul was culpable for
 24

25 ¹³ *See also Gamache v. Airbnb, Inc.*, 2017 WL 3431651, at *2–3 (Cal. Ct. App. Aug. 10, 2017) (no
 26 proximate cause where plaintiffs alleged “Airbnb facilitated short-term rentals at their building”); *A.B.*
 27 *v. Salesforce.com, Inc.*, 2021 WL 3616097, at *5 (S.D. Tex. Mar. 22, 2021) (no proximate cause where
 28 plaintiffs alleged that Salesforce provided “targeted solutions that were critical to Backpage’s growth
 and success,” and that “Salesforce knowingly assisted, supported, and facilitated sex trafficking”);
Gonzalez v. Google, Inc., 335 F. Supp. 3d 1156, 1161, 1178 (N.D. Cal. 2018) (similar).

1 third parties illegally providing its physical nicotine products to minors because Juul “intended” this
2 result. 497 F. Supp. 3d at 664. Here, Plaintiffs nowhere allege that Defendants *intended* for criminals
3 to misuse their services, nor could they given that Defendants’ terms of use expressly prohibit such
4 activities. Mot. 37–38.

5 Similarly, in *City of Everett v. Purdue Pharma L.P.*, 2017 WL 4236062 (W.D. Wash. Sept. 25,
6 2017), the plaintiffs alleged that Purdue “supplied suspicious quantities of OxyContin to obviously
7 suspicious physicians and pharmacies in Everett . . . without disclosing suspicious orders as required
8 by regulations,” and that Purdue “continued to supply massive and disturbing quantities of Oxycontin
9 pills to the drug ring” despite tracking “extensive data evidencing the illegal trafficking of Oxycontin.”
10 *Id.* at *2. But Plaintiffs here have not alleged that any Defendant actively supported any specific
11 individuals or organizations who Defendant knew were engaging in illegal activity.

12 In *S.P. v. County of San Bernardino*, 2020 WL 3051360 (C.D. Cal. Mar. 24, 2020), the
13 defendants were county employees responsible for supervising the welfare of a group of foster children
14 who failed to intervene in or report the abuse of those children despite their actual knowledge that this
15 abuse was taking place in the home *where the defendants had placed them*. *See id.* at *3–4, *7–8.
16 Plaintiffs have not alleged that Defendants in this case had a similar responsibility for users’ physical
17 welfare, *see supra* Part II.B.3 (lack of special relationship with or physical control of minors); that
18 Defendants physically placed Plaintiffs in the care of dangerous individuals; or that they ignored actual
19 notice of specific ongoing harms to the individual Plaintiffs.

20 Plaintiffs’ citations to *Maynard* and *Lemmon* are even further afield. These cases did not
21 involve third-party bad actors misusing a service with the deliberate aim of hurting someone else; they
22 concerned allegations that a now-defunct filter on Snapchat that recorded a user’s speed encouraged
23 drivers to drive recklessly, and the courts found that there was no plausible purpose for the filter *beyond*
24 that alleged encouragement. *See Maynard*, 883 S.E.2d at 535–36; *Lemmon II*, 2022 WL 1407936, at
25 *10. By contrast, Plaintiffs do not (and could not) plausibly allege that Defendants purposefully
26 encouraged or incentivized criminal sexual predatory behavior or other bad acts by third parties, and
27 the features challenged here indisputably have widespread legitimate uses. *See Lemmon II*, 2022 WL
28 1407936, at *10 (distinguishing *Modisette* by noting that “[t]he FaceTime app at issue in [that case]

1 served many useful purposes”). The Court should apply established law and dismiss all of Plaintiffs’
2 priority claims that are premised on third-party bad acts.

3 **2. Plaintiffs Fail to Tie Defendants’ Services to Plaintiffs’ Alleged Injuries.**

4 Plaintiffs’ disregard of established limits on proximate causation underscores a more pervasive
5 problem that afflicts all of their alleged harms: Plaintiffs have not plausibly alleged that specific
6 conduct by Defendants actually caused *each* Plaintiff’s injuries. Indeed, Plaintiffs have not even
7 alleged which of the Defendants’ various services, let alone which features of those services, caused
8 each of the harms alleged by each individual Plaintiff. In their Opposition, Plaintiffs argue that they
9 need only (1) allege generally how various features of one or more of Defendants’ services could
10 theoretically harm users; and (2) assert vaguely that “the defective features in each of Defendants’ apps
11 work in concert to cause injury.” Opp. 49–50. This is plainly insufficient. Imagine a group of
12 teenagers who, having attended different high schools, decided to sue all of the schools they attended
13 in a single suit for a range of alleged legal shortcomings. It would not be enough for these teenagers
14 to simply allege that (1) a variety of issues—from abusive teachers, to inadequate special education
15 services, to unsafe bus drivers, to insufficient protection from bullies, to nutritionally deficient food—
16 have been known to occur in schools; and (2) they all suffered harm linked to one of more of these
17 issues. To survive a pleadings challenge, these teenagers would have to specify not only which high
18 school, but which aspect of their experience at a particular school, actually caused their injuries. *Cf.*
19 *In re iPhone Application Litig.*, 2011 WL 4403963, at *8 (N.D. Cal. Sep. 20, 2011) (dismissing
20 complaint under Rule 8 because “[t]he Mobile Industry Defendants persuasively argue that, by lumping
21 all eight of them together, Plaintiffs have not stated sufficient facts to state a claim for relief that is
22 plausible against one Defendant”); *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 857 (N.D. Cal.
23 2012) (dismissing claims where “plaintiffs did not allege a sufficient nexus” between the specific
24 alleged defect and the resulting harm because “they failed to explain how” this defect caused the harm);
25 *Ferrari v. Nat. Partner, Inc.*, 2017 WL 76905, at *6 (N.D. Cal. Jan. 9, 2017) (dismissing design defect
26 claim under Rule 8 because it did not “provide supporting facts that ‘explain how the particular design’
27 of the product caused Plaintiff’s alleged harm” (citation omitted)). The same is required here.
28

1 Plaintiffs’ reliance on general studies, which Plaintiffs claim show that certain online services
2 have harmed some people in the past, underscores the insufficiency of their factual allegations.
3 Plaintiffs do not allege that these studies involved any of the Plaintiffs, nor that they show that any
4 Plaintiff was actually harmed by any feature of Defendants’ services (in the manner discussed in the
5 study or otherwise). Rather, Plaintiffs’ argument boils down to the contention that *someone* (for
6 example, the subjects of those studies) might theoretically have a claim against Defendants. This
7 theoretical assertion does not satisfy Plaintiffs’ obligation to plead facts establishing *their own*
8 entitlement to relief. *See* Mot. 41–42; *see also Crosby*, 921 F.3d at 625–26 (plaintiffs failed to state a
9 claim because while they “identif[ied] hypothetical facts that may help them connect ISIS to a ‘lone
10 wolf’ terrorist attack,” they “allege[d] [no] facts connecting Defendants to [the perpetrator] or
11 the . . . shooting”); *Fields*, 881 F.3d at 750 (similar).

12 Plaintiffs cannot avoid the requirement of pleading causation by asserting in a conclusory
13 manner that “the defective features in each of Defendants’ apps work in concert to cause injury.” Opp.
14 50. Plaintiffs’ own cases illustrate why this theory does not work in this case. *Clark v. Am. Honda*
15 *Motor Co.*, 528 F. Supp. 3d 1108 (C.D. Cal. 2021), for instance, involved “miscommunications among”
16 multiple systems *within the same car* that allegedly caused a *single* “defect” leading to “unintended
17 and uncontrollable deceleration, engine stalls,” and other problems that collectively caused unsafe
18 driving conditions. *Id.* at 1116. By contrast, Plaintiffs in this case do not allege that the various
19 Defendants manufactured components that were then combined together into a single product, nor do
20 they allege that their harms were caused by a single defect. Instead, the Master Complaint alleges that
21 various alleged defects in Defendants’ various services—each of which operates differently and has its
22 own system architecture and primary use cases—caused a wide range of disparate harms through
23 various possible mechanisms. *See* Mot. 41; *see also* MC ¶ 103 (“push notifications and emails at night”
24 cause insufficient sleep); *id.* ¶ 279 (viewing “content related to suicide, self-injury, and depression”
25 causes harm); *id.* ¶ 319 (“negative social and appearance comparison” with other users causes harm).
26 Plaintiffs’ reliance on *Martifer-Silverado Fund I, LLC v. Zhongli Science & Technology Group Co.*,
27 2020 WL 5500381 (N.D. Cal. Sept. 11, 2020), is also misplaced. There, the court relied on the
28 complaint “contain[ing] numerous allegations regarding the role each defendant played in the scheme

1 to induce plaintiff to enter into [fraudulent] agreements,” including identifying specific representations
2 made by each defendant constituting the alleged fraud. *Id.* at *5. No such allegations are made here.

3 Contrary to Plaintiffs’ suggestion, the fact that the Court allowed Plaintiffs to choose how to
4 plead their case does not mean that Plaintiffs are excused from Rule 8’s requirements. *Opp.* 51–52.
5 Because Plaintiffs are the masters of their own complaint, they are responsible for its shortcomings.
6 And here, unlike in the cases Plaintiffs cite, the Short-Form Complaints do not cure the Master
7 Complaint’s fatal flaw in failing to plead causation because they do not allege how any Plaintiff was
8 actually harmed by Defendants’ services, or even which of the various Defendants’ services are alleged
9 to have caused which harms.¹⁴ For instance, in *Adams v. BRG Sports, Inc.*, 2018 WL 4853130 (N.D.
10 Ill. Oct. 5, 2018), which *Plaintiffs* rely upon (*Opp.* 51–52), the court found the short-form complaints
11 at issue to be insufficient under Rule 8 for many of the same reasons that the Court should dismiss
12 Plaintiffs’ claims here. *Adams* involved claims against manufacturers of football helmets by a group
13 of football players who allegedly suffered injuries. All the short-form complaints stated was “when
14 and where the plaintiff played football”; “the nature of the injuries [and symptoms] the plaintiff suffered
15 playing football”; that “the plaintiff wore a helmet designed or manufactured by defendants; and a
16 listing of the causes of action set forth in the master complaint that the plaintiff is adopting.” *Id.* at *1.
17 The court held that this did not suffice to plead proximate cause because “the short-form complaints
18 sa[id] nothing about whether or how defendants’ [conduct] . . . caused plaintiffs’ injuries.”
19

20
21 ¹⁴ Plaintiffs’ references to short-form complaints in other cases are inapposite because in each of those
22 cases, the plaintiffs’ claims all centered on a *single* type of physical product and defect. *See* Third Am.
23 Master Long-Form Compl. and Jury Demand at 10–17, *In re Testosterone Replacement Therapy Prods.*
24 *Liab. Litig.*, No. 1:14-cv-01748 (N.D. Ill. Nov. 24, 2015), Dkt. No. 1074 (claims about one type of
25 drug); *In re Allergan Biocell Textured Breast Implant Prods. Liab. Litig.*, 537 F. Supp. 3d 679, 700
26 (D.N.J. 2021) (claims against one manufacturer of implants for a single alleged defect); Plaintiffs’
27 Consolidated Master Compl. (Personal Injury) at 3–8, *In re JUUL Labs, Inc., Mktg., Sales Pracs., and*
28 *Prod. Liab. Litig.*, No. 19-md-02913 (N.D. Cal. Mar. 11, 2020), ECF No. 388 (claims about one
substance—nicotine—in one company’s e-cigarette products); Master Long Form Compl. and Jury
Trial Demand at 1–2, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885 (N.D.
Fl. Sept. 20, 2019), ECF No. 704 (claims about one product—poor-fitting earplugs intended for use
with firearms); Plaintiffs’ Master Complaint and Jury Demand at 3–4, *In re Tylenol (Acetaminophen)*
Mktg, Sales Pracs., and Prods. Liab. Litig., 2:13-md-02436 (E.D. Pa. June 18, 2013), ECF No. 32
(claims about a specific set of acetaminophen products).

1 *Id.* at *1–3. The same is true here. Plaintiffs’ priority claims should be dismissed for failure to plead
2 proximate cause.

3 **D. The Negligence Per Se Claim Is Barred by Established Law in Most States and**
4 **There Is No Support for Creating Such a Claim in the Others.**

5 Plaintiffs ask this Court to allow a negligence per se claim based on alleged violations of the
6 data-collection provisions of COPPA and the reporting provisions of the PROTECT Act regarding
7 CSAM, despite no other court having allowed such a claim. *See* Mot. 51–53. Acknowledging the
8 “dearth of caselaw” supporting their approach, and conceding that no negligence per se claim of any
9 type is available in at least 15 states, Opp. 59, Plaintiffs urge the Court to “predict[]” that the highest
10 court of nearly every other state would create new law to allow such a claim, *id.* 58, but they offer no
11 persuasive reason why the Court should do that. Beyond that, Plaintiffs cannot overcome the failure
12 to plausibly allege that Defendants violated either of the two predicate federal statutes or that the
13 alleged statutory violations caused any individual plaintiff to suffer a concrete personal injury.

14 **1. Plaintiffs’ Claim Is Barred in More Than 40 States, and Plaintiffs Provide**
15 **No Basis for This MDL Court to Create New Law in Other States.**

16 From the outset, Plaintiffs defend their negligence per se claim under the laws of 35 states,
17 conceding that it is not cognizable in the remaining 15 states. Opp. 59. But in addition to the states
18 conceded by Plaintiffs as unavailable, the claim is barred by various legal doctrines in a host of
19 additional states, and Plaintiffs’ request to create a new claim is contrary to the role of a federal court
20 in applying state law. *See supra* Part II.A.4. When all of the state laws limiting negligence per se
21 claims are taken into account, Plaintiffs’ claim is barred in more than 40 states.¹⁵

22 *No standalone claim.* Plaintiffs concede that they have no negligence per se claim in 15 states
23 (either because those states do not recognize negligence per se as a standalone claim at all or place
24 other limitations on the doctrine that bar Plaintiffs’ claim): **Arkansas, Hawaii, Kentucky, Louisiana,**
25 **Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, North Dakota,**
26 **Ohio, Pennsylvania, South Carolina, and Washington.** *See* Opp. 59 & n.42. Plaintiffs assert that 8
27

28 ¹⁵ State names are **bolded** on first reference throughout this section.

1 other states—**California, Illinois, Maine, Michigan, Rhode Island, Utah, Vermont, and West**
 2 **Virginia**—“treat statutory violations as prima facie evidence of negligence or apply a presumption of
 3 negligence.” Opp. 59 & n.41. But that is not a negligence per se claim. Whether a statutory violation
 4 could be used as evidence to support a basic negligence claim—a claim Plaintiffs pleaded, but did not
 5 select as a “priority” claim—is irrelevant to whether Plaintiffs can plead a stand-alone negligence per
 6 se claim in those states. Moreover, most of these states limit the type of statutory violations that can
 7 give rise to such a presumption, which (as discussed below) would rule out even an evidentiary
 8 presumption here.

9 *No claim absent legislative intent in the predicate statute to impose private civil liability.* In
 10 23 states, a negligence per se claim (or the use of a statutory violation as evidence of negligence) cannot
 11 be premised on violations of federal statutes unless the statutes have a private right of action or there
 12 is evidence of legislative intent to impose private civil liability.

13 COPPA and the PROTECT Act do not have a private right of action and there is no legislative
 14 intent to impose private civil liability, and Plaintiffs do not dispute that.¹⁶ See *Doe v. Twitter, Inc.*, 555
 15 F. Supp. 3d 889, 926 (N.D. Cal. 2021) (neither Section 2258A or 2258B “reflects a clear intent on the
 16 part of Congress to establish a private right of action to enforce the reporting requirement found in
 17 Section 2258A”), *aff’d in relevant part sub nom., Doe #1 v. Twitter, Inc.*, 2023 WL 3220912 (9th Cir.
 18 May 3, 2023). Plaintiffs either expressly concede or fail to contest that this rule thus bars their claim
 19 in: Arkansas, **Colorado, Florida**, Maine, Montana, Nebraska, **Nevada**, New Jersey, **New York**, North
 20 Dakota, Ohio, South Carolina, and **Wisconsin**. Opp. 59 nn.40 & 42; *see id.* 78, 80, 87, 90–94, 96, 99–
 21 100. While Plaintiffs quibble about the law in additional states, this same private right of action
 22 requirement also applies to bar their claim in **Georgia, Indiana, Iowa, Kansas, Missouri, North**
 23
 24

25 _____
 26 ¹⁶ Plaintiffs contend that “the PROTECT Act *does* allow civil claims ‘for failing to report . . . known
 27 child pornography,’” Opp. 57, but leave out the key fact that only the *government*—not private
 28 plaintiffs—can bring such claims, and only under very limited circumstances, *see* 18 U.S.C. § 2258B;
 Mot. 49.

1 **Carolina, South Dakota, Tennessee, Utah, and West Virginia.** *See* Reply Appendix; *see also, e.g.,*
 2 *Highmark Fed. Credit Union v. Hunter*, 814 N.W.2d 413, 418 (S.D. 2012).¹⁷

3 ***No claim absent an underlying common law duty.*** Fourteen (14) states do not allow
 4 negligence per se claims (or the use of a statutory violation as evidence of negligence) unless there is
 5 an underlying duty at common law. Plaintiffs either expressly concede or fail to contest that this rule
 6 applies in: **Arizona**, California, Colorado, Massachusetts, New Hampshire, Pennsylvania, South
 7 Carolina, **Texas**, Utah, Vermont, and **Virginia**. *Opp.* 59 n.42, 78–80, 88, 91, 95–98. They also fail to
 8 rebut Defendants’ case law showing that the common law duty requirement also applies in Illinois,
 9 **Minnesota**, and **Oregon**, *see* Reply Appendix.¹⁸

10 Thus, Plaintiffs’ claim is barred in these 14 states because COPPA and the PROTECT Act
 11 impose statutory duties lacking a common law antecedent. *Mot.* 50. Plaintiffs cite *Jones v. Google*
 12 *LLC*, 56 F.4th 735 (9th Cir. 2022) (at *Opp.* 56–57), but that case simply held that state law claims
 13 alleging conduct that would violate COPPA were not *preempted*; it did not hold that such claims were
 14 actually viable under state tort law (an issue the Ninth Circuit remanded to the district court, 56 F.4th
 15 at 742), much less that COPPA itself reflects pre-existing common law duties. And Plaintiffs do not
 16 point to any state that has found a common law duty for online service providers to not collect certain
 17 data or to report CSAM to a federally-established nonprofit organization (or anything similar).

18 ***No claim based on a statute that requires assessment of complex factors.*** Three (3) states—
 19 **New Mexico**, Ohio, and **Wyoming**—require a negligence per se claim to be premised on statutes that
 20 impose a specific, bright-line standard of care, which requires dismissal of the claim here. Plaintiffs
 21 do not meaningfully dispute that assessing whether Defendants violated the PROTECT Act and
 22 COPPA would require a factfinder to make numerous complex determinations. For example, a
 23 factfinder would have to determine Defendants’ mental state and whether any “apparent” violations of
 24

25 ¹⁷ In **Connecticut, Idaho, and Mississippi**, some courts have required that there be legislative intent
 for private civil liability, but other courts have not. *See Mot.* 68, 70, 74; *Opp.* 80–81, 83–84, 89.

26 ¹⁸ Plaintiffs rely on *McClellan v. I-Flow Corp.*, 776 F.3d 1035 (9th Cir. 2015) (at *Opp.* 56), but the
 27 Ninth Circuit held only that federal law did not preempt a negligence per se claim under Oregon
 28 law. *Id.* at 1037. It did not address substantive state law or whether a freestanding negligence per se
 claim would be available under state law. *See Mot.* 78.

1 certain other laws were present for a PROTECT Act violation. *See* 18 U.S.C. § 2258A(a)(1)–(2)
 2 (requiring “actual knowledge” of “apparent violation[s]”); *id.* § 2258A(e)(1) (“knowing and willful”
 3 failure to report). And for COPPA, a factfinder would have to determine whether Defendants’ services
 4 were “directed to children” under a complex federal regulatory standard. *See* 16 C.F.R. § 312.2.
 5 Moreover, regardless of whether these statutes “impose[] a clear standard of conduct” on Defendants,
 6 *Opp.* 67; *see also id.* 92, 94, 100, a factfinder would still have to “evaluate the factual
 7 circumstances . . . to determine whether [Defendants] acted reasonably,” *Heath v. La Mariana*
 8 *Apartments*, 180 P.3d 664, 666 (N.M. 2008); *accord Machlup v. Bowman*, 2021 WL 5882102, at *4
 9 (Ohio Ct. App. 2021); *Otten v. BNSF Ry. Co.*, 2023 WL 1948626, at *11 (10th Cir. Feb. 13, 2023)
 10 (quoting *Short v. Spring Creek Ranch, Inc.*, 731 P.2d 1195, 1198 (Wyo. 1987)).¹⁹

11 * * *

12 These four aspects of established state law collectively bar Plaintiffs’ negligence per se claim
 13 in more than 40 states. For the remaining states, Plaintiffs incorrectly assert that this MDL Court should
 14 create new state tort law, but Plaintiffs make no effort to show that the highest court of any state would
 15 embrace the common law policymaking their theories would require. The decision to create new
 16 negligence per se claims rests, ultimately, on a state court’s decision to exercise its “common-law
 17 authority to develop tort doctrine.” Restatement (Third) § 14 cmt. c. Especially for a federal court,
 18 exercising such discretion requires affirmative, state-specific justification that is wholly absent here.
 19 *See Del Webb Cmtys., Inc. v. Partington*, 652 F.3d 1145, 1154 (9th Cir. 2011).

20 Plaintiffs’ citation to *In re Lithium Ion Batteries Antitrust Litigation*, 2014 WL 4955377 (N.D.
 21 Cal. Oct. 2, 2014), underscores the problem with their open-ended invitation for tort-law creation. The
 22 Court there recognized that its obligation “is to make a conscientious prediction of what rule a state
 23 high court would adopt in the case before it, without regard to the Court’s own view of what the best
 24 rule may be.” *Id.* at *8. Here, all “the available reliable evidence” weighs against Plaintiffs’ position.
 25 *Id.* Defendants’ Joint Motion discusses the Restatements, treatises, and decisions across the country
 26 that are cautious of expanding negligence per se, Mot. 47–53, and Plaintiffs cite no authority suggesting

27 _____
 28 ¹⁹ Plaintiffs concede that this standard applies in New Mexico and Wyoming, *Opp.* 92, 100, and cite
 no authority that would preclude applying the rule in Ohio.

1 that any court would adopt COPPA or the PROTECT Act as setting a standard of care enforceable in
 2 a negligence per se claim, Opp. 56–58. Plaintiffs cite no case allowing negligence per se claims based
 3 on either statute, and Defendants are aware of none.

4 COPPA and the PROTECT Act refute any idea that Congress intended to create a duty
 5 enforceable in private state tort suits. Neither statute includes a private right of action, and both are
 6 enforceable solely by the government. Mot. 49. Regardless of whether it affirmatively preempts
 7 Plaintiffs’ claim, COPPA’s express preemption provision underscores Congress’s intent *not* to have
 8 the statute serve as a predicate for expanded state-law tort liability. 15 U.S.C. § 6502(d).²⁰

9 Plaintiffs contend that “the court should not dismiss the negligence per se count from the Master
 10 Complaint” because *some* individual Plaintiffs’ claims may be able to survive under *some* states’ laws.
 11 Opp. 59 n.42. That is misguided. Plaintiffs’ claim fails in every state, but (as discussed below) even
 12 if there were a handful of states in which Plaintiffs’ claim was possible in theory, Plaintiffs still have
 13 not plausibly alleged a violation of either federal statute at issue. Moreover, state-by-state briefing is
 14 intended to guide the MDL Court at the outset on whether Plaintiffs’ claim can proceed in particular
 15 states. If the Court does not dismiss the negligence per se count outright, Defendants respectfully
 16 request that it dismiss the claim under the law of all of the states where the claim is not available.

17 **2. Plaintiffs Have Not Alleged a Violation of the Predicate Federal Statutes.**

18 Plaintiffs’ negligence per se claim fails for the independent reason that they have not plausibly
 19 alleged that Defendants violated the predicate federal statutes.

20 ***The PROTECT Act.*** Plaintiffs concede that the PROTECT Act does not require Defendants to
 21 monitor or affirmatively search their services for CSAM or to build particular features that enable them
 22 to uncover and remove CSAM. Opp. 68, 70; 18 U.S.C. § 2258A(f). Plaintiffs recognize that the statute

23 _____
 24 ²⁰ As Defendants have explained, *Jones* did not involve negligence per se claims and did not address
 25 the issue here, which is whether it is proper *as a matter of state law* to create civil state law liability
 26 predicated on the violation of a federal reporting or data-collection statute, thereby effectively making
 27 federal statutes privately enforceable when Congress intentionally elected not to impose private
 28 liability. Mot. 52 n.30. *Jones* simply read COPPA as not preempting state law claims that would
 independently enforce existing state law duties consistent with COPPA. But the fact that COPPA does
 not contemplate private civil enforcement of its own requirements weighs against using the statute as
 the basis for a new duty of care based on those requirements enforceable through state tort law. Nothing
 in *Jones* suggests otherwise.

1 mandates only that Defendants “report” to NCMEC apparent violations involving CSAM about which
 2 they have “actual knowledge.” Opp. 67; 18 U.S.C. § 2258A(a)(1)(A). But even as they acknowledge
 3 that, Plaintiffs premise their claim on alleged activity that does not violate that reporting requirement.

4 *First*, several of Plaintiffs’ allegations are based on Defendants’ purported *failure to remove*
 5 CSAM. Opp. 68 (Plaintiffs’ “requests to remove and take down [CSAM] from Defendants’ products[]
 6 often fall on deaf ears” (citation omitted)); *see also* MC ¶¶ 395, 419, 670, 805. But an alleged failure
 7 to remove CSAM is not a violation of the PROTECT Act and could not be the basis for Plaintiffs’
 8 negligence per se claim—especially given the lack of any allegation that any such CSAM relates to
 9 any of the Plaintiffs in this case. If negligent failure to remove CSAM were the predicate of Plaintiffs’
 10 claim, it would be barred by Section 230. *See* Defs.’ Supp. Joint Mot. to Dismiss (Dkt. 320) 12.

11 *Second*, Plaintiffs offer nothing beyond conclusory allegations to suggest that any alleged
 12 failure to report known CSAM was “intentional, malicious, or reckless,” as required for their claims to
 13 avoid the safe harbor in the PROTECT Act, which bars civil claims against a provider “arising from
 14 the performance of the reporting or preservation responsibilities” under the Act. Mot. 56, Opp. 70; 18
 15 U.S.C. § 2258B. Plaintiffs cite portions of the Master Complaint alleging in a conclusory manner that
 16 Defendants “have not ‘report[ed] to NCMEC the violations of [CSAM] laws that they suspected to be
 17 in existence within [their] respective products.’” Opp. 68 (quoting MC ¶ 1004); *see also* Opp. 68–70
 18 (citing MC ¶¶ 420, 669–670, 800, 1004–1006). But these conclusory allegations, which parrot the
 19 language of the statute and are unsupported by factual allegations, do not suffice under federal pleading
 20 standards. Mot. 55.²¹ Indeed, Plaintiffs’ Defendant-specific assertions highlight that they have *not*
 21 alleged a violation of the reporting requirement of the PROTECT Act:

22 Meta: Plaintiffs allege Meta’s content moderation processes are inadequate to meet the
 23 PROTECT Act’s requirements. MC ¶¶ 409, 413–14, 427; *see also* Opp. 68–69. In Plaintiffs’ view,
 24 the alleged deficiencies in Meta’s process mean it has “failed to take down dozens of images and videos

25 _____
 26 ²¹ Plaintiffs also fail to respond to the fact that they did not allege facts supporting a violation of 18
 27 U.S.C. § 2258B(c), which requires service providers to “minimize the number of employees that are
 28 provided access to” CSAM. Mot. 55. Plaintiffs’ failure to respond “concedes it through silence.”
Ardente, Inc. v. Shanley, 2010 WL 546485, at *6 (N.D. Cal. Feb. 10, 2010). Any claim based on this
 separate provision must be dismissed.

1 that were ‘flagged’ to its moderators” in the past. *Id.* ¶ 395. Meta disputes these allegations. But even
2 if they were accurate, the PROTECT Act’s reporting requirements apply only when a service has *actual*
3 *knowledge* of CSAM, *see* 18 U.S.C. § 2258A, and the PROTECT Act does not require services to
4 maintain a particular system to obtain knowledge. *See United States v. Bohannon*, 506 F. Supp. 3d
5 907, 914 n.3 (N.D. Cal. 2020). Moreover, an alleged violation must be a knowing and willful failure
6 to *report* CSAM, not a failure to *remove* potential CSAM.

7 Snap: Plaintiffs claim that Snap “maintains features” that facilitate CSAM and make it difficult
8 for users to report CSAM. *Id.* 69. Snap disputes these allegations. But, in any event, as Plaintiffs
9 acknowledge, *id.* 70, the PROTECT Act does not require Defendants to design their services to make
10 it easier to detect CSAM or simplify user reporting. *See Bohannon*, 506 F. Supp. 3d at 914 n.3.

11 TikTok: Plaintiffs contend that TikTok maintains features that facilitate CSAM, “does not
12 permit users to specifically report CSAM,” and “does not respond even when abuse is reported.” *Opp.*
13 69. The PROTECT Act does not speak to user-reporting features, and Plaintiffs allege no instance in
14 which TikTok had “actual knowledge” of an “apparent violation” and failed to report CSAM to
15 NCMEC.

16 YouTube: Plaintiffs concede that they have no negligence per se claim against YouTube based
17 on the PROTECT Act: “no MDL Plaintiff has alleged injury as a result of any CSAM on
18 YouTube.” *Opp.* 67 n.48.²²

19 **COPPA**. Plaintiffs’ Opposition abandons the theory suggested in the Master Complaint: that
20 Defendants have a duty under COPPA to implement different age verification measures. MC ¶ 1002;
21 *see Opp.* 64–67. And Plaintiffs’ remaining COPPA arguments fare no better.

22 Beyond bare conclusions that do not meet pleading standards, MC ¶ 1010; *see Mot.* 57,
23 Plaintiffs have not alleged that Defendants actually knew that any Plaintiff was younger than 13 years
24 old such that Defendants would be required to obtain verifiable parental consent under COPPA.
25 Plaintiffs contend that Defendants were willfully blind to the age of their users, *Opp.* 63, but they fail

26 ²² Regardless of this dispositive concession, Plaintiffs contend that YouTube displays ads alongside
27 CSAM and makes it difficult for users to flag CSAM. *Opp.* 70. YouTube disputes these allegations,
28 but they too have nothing to do with the reporting requirement of the PROTECT Act and do not give
rise to any possible negligence per se claim.

1 to allege either requirement of willful blindness: that Defendants (1) “subjectively believe[d] that there
 2 is a high probability” that any specific individual Plaintiff was younger than 13 years old, and (2)
 3 “t[ook] deliberate actions to avoid learning of that fact,” *i.e.*, “shield[ed] themselves from clear
 4 evidence” that was readily available. *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766–69
 5 (2011). Plaintiffs argue instead that Defendants may have general knowledge of children on their
 6 services and may be able to “estimate real user ages.” Opp. 63. But suspicion about general user
 7 demographics is not a belief about a specific user’s age, and even assuming Defendants had the ability
 8 to estimate user ages under 13, such an ability is not tantamount to deliberately avoiding a suspected
 9 fact.²³

10 Moreover, the COPPA Rule “does not require operators of general audience sites to investigate
 11 the ages of visitors to their sites or services,” and a “service that chooses to screen its users for age in
 12 a neutral fashion may rely on the age information its users enter, even if that age information is not
 13 accurate.” *Complying with COPPA: Frequently Asked Questions*, FTC (July 2020),
 14 <https://www.ftc.gov/businessguidance/resources/complying-coppa-frequently-asked-questions> (cited
 15 in MC ¶ 56 n.20) (“*Complying with COPPA*”). Plaintiffs’ willful blindness argument flies in the face
 16 of that FTC interpretation. It also ignores the FTC’s recognition that even if a user reveals in a social-
 17 media post that they are under 13, the operator of that service does not have actual knowledge of the
 18 user’s age for the purposes of COPPA unless it has actual knowledge *of that post*, and thus “knows that
 19 a *particular visitor* is a child.” *Id.* (emphasis added). Hence, even if Defendants as a general matter
 20 may be able to *estimate* user ages, that does not meet the actual knowledge requirement of COPPA for
 21 particular users. *Id.* While the FTC’s examples suggest that actual knowledge about a specific child’s
 22 age may come through “direct communications” (*e.g.*, by “learn[ing] of a child’s age or grade from a
 23 concerned parent”), *id.*, Plaintiffs have not alleged anything like that here.²⁴

24 ²³ That advertisers may rely on estimates of viewer age to choose which ads to run, Opp. 63–64, says
 25 nothing about whether Defendants have actual knowledge of any specific user’s age.

26 ²⁴ Plaintiffs also assert that Defendants’ entire services (not just their “Kids” versions) are “directed to
 27 children.” Opp. 60–63. But this theory is not supported by the Master Complaint, which does not
 28 allege as much or offer facts that, taken as true, would bring Defendants’ general services—in contrast
 to the distinct services they operate for children, *see* MC ¶¶ 207, 462, 574, 705—within the FTC’s
 carefully limited definition of online services “directed to children.” 16 C.F.R. § 312.2.

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Respectfully submitted,

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ATTESTATION

I, Phyllis A. Jones, hereby attest, pursuant to N.D. Cal. Civil L.R. 5–1, that the concurrence to the filing of this document has been obtained from each signatory hereto.

DATED: June 30, 2023

By: /s/ Phyllis A. Jones
Phyllis A. Jones

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IV. APPENDIX²⁵

AZ	<p>Not a Product: <i>Menendez v. Paddock Pool Construction Co.</i>, 836 P.2d 968 (Ariz. Ct. App. 1991), is inapposite; the case concerns a plaintiff “thrown headlong” into a tangible in-ground swimming pool. <i>Id.</i> at 970, 972.</p>
	<p>NPS: <i>Quiroz v. Alcoa Inc.</i>, 416 P.3d 824 (Ariz. 2018), did not involve a NPS claim <i>or</i> find a statutory duty. <i>Id.</i> at 831. And <i>Martin v. Schroeder</i>, 105 P.3d 577 (Ariz. Ct. App. 2005), is distinguishable because “[c]ommon sense dictate[d]” the finding of a duty. <i>Id.</i> at 583. Not so here.</p>
AR	<p>Not a Product: Arkansas product liability law defines “Product” as “any tangible object or goods produced”; both the “object” and “goods” must be “tangible.” Ark. Code Ann. § 16-116-202(4).</p>
CA	<p>Not a Product: Plaintiffs concede <i>Winter</i> is “control[ling]” and that California courts hold that “a ‘product’ must be tangible.”</p>
	<p>NPS: Plaintiffs concede they must “otherwise state a viable claim for negligence,” and their citation confirms this requires them to “show[] that there is an independent duty of care to support a negligence claim.” <i>Kirsten v. Cal. Pizza Kitchen, Inc.</i>, 2022 WL 16894503, at *8 (C.D. Cal. July 29, 2022) (citation omitted).</p>
CO	<p>NPS: Plaintiffs’ cases confirm NPS requires legislative intent to impose civil liability. <i>Lombard v. Colo. Outdoor Educ. Ctr., Inc.</i>, 187 P.3d 565, 574–75 (Colo. 2008) (statute contemplated civil liability); <i>Gerrity Oil & Gas Corp. v. Magness</i>, 946 P.2d 913, 931 (Colo. 1997) (requiring “clear indication [of] legislat[ive] inten[t]”); <i>Bittle v. Brunetti</i>, 750 P.2d 49, 59 (Colo. 1988) (no NPS where statute “did not expressly provide for imposition of civil liability”). And two of their cases</p>

²⁵ Plaintiffs do not dispute the majority of the Appendix included in Defendants’ Motion to Dismiss. For example, Plaintiffs’ Appendix concedes that the vast majority of states have adopted or would follow the Restatement (Second) of Torts § 402A (1965) or the Restatement (Third) § 19 in assessing whether Defendants’ services are “products.” And Plaintiffs concede (or fail to dispute) that various states apply limitations to the negligence per se doctrine that would bar their claim here. *See supra* Part II.D.1. This Appendix does not repeat that law, and it addresses only Plaintiffs’ attempts to distinguish it. It also does not repeat rebuttals to Plaintiffs’ arguments contained elsewhere in this Reply. In addition, Plaintiffs’ reliance on UCC cases throughout the Appendix is misplaced. *Opp.* 26, 34. The principles of contract law underlying UCC cases (which classify, *e.g.*, books as goods) do not translate to the tort-law doctrines underlying product liability law. *See, e.g., Rodgers v. Laura & John Arnold Found.*, 2019 WL 2429574, at *1 (D.N.J. June 11, 2019) (rejecting plaintiff’s attempt to rely on UCC cases in product liability case; holding algorithms were not a product), *aff’d*, 795 F. App’x 878 (3d Cir. 2020).

1		based NPS claims on federal motor carrier regulations that had a private right of action, <i>see</i> 49
2		U.S.C. § 14704(a)(2). <i>Connes v. Molalla Transp. Sys., Inc.</i> , 817 P.2d 567, 572 (Colo. App. 1991),
3		<i>aff'd</i> , 831 P.2d 1316 (Colo. 1992); <i>Hageman v. TSI, Inc.</i> , 786 P.2d 452, 453 (Colo. App. 1989).
4		Plaintiffs ignore the limitation that, absent such intent, NPS requires a common law duty.
5	CT	Not a Product: In Connecticut “intangible thoughts, ideas and messages . . . are not products.”
6		<i>Wilson</i> , 198 F. Supp. 2d at 173.
7	DC	Not a Product: <i>In re Fort Totten Metrorail</i> , 895 F. Supp. 2d 48 (D.D.C. 2012), is inapposite
8		because it concerns individuals “injured in a collision between two . . . [tangible] trains.” <i>Id.</i> at 55.
9	FL	NPS: Florida “refuse[s] to recognize” NPS based on federal statutes lacking a private right of
10		action. <i>Weinberg v. Advanced Data Processing, Inc.</i> , 147 F. Supp. 3d 1359, 1365 (S.D. Fla. 2015).
11		<i>Bartsch v. Costello</i> , 170 So. 3d 83 (Fla. Dist. Ct. App. 2015), rejected a state statute-based claim.
12		<i>Id.</i> at 88.
13	GA	NPS: No NPS based on federal statutes absent legislative intent to impose private liability. <i>See</i>
14		<i>Govea v. City of Norcross</i> , 608 S.E.2d 677, 683 (Ga. Ct. App. 2004); <i>Owens v. Perdue Foods LLC</i> ,
15		2021 WL 2323718, at *1 (M.D. Ga. June 7, 2021). <i>Scoggins v. Floyd Healthcare Management</i>
16		<i>Inc.</i> , 2016 WL 11544774 (N.D. Ga. June 10, 2016), held NPS fails “if the statute or regulation
17		reportedly giving rise to the legal duty does not provide a civil remedy.” <i>Id.</i> at *42.
18	HI	Not a Product: <i>Smallwood v. NCsoft Corp.</i> , 730 F. Supp. 2d 1213 (D. Haw. 2010), did not address
19		a product liability claim. <i>Id.</i> at 1219.
20	IL	NPS: Plaintiffs’ cases confirm that a statutory violation “does not constitute negligence <i>per se</i> , <i>i.e.</i>
21		strict liability, unless the legislature clearly intends to impose strict liability.” <i>Magna Tr. Co. v. Ill.</i>
22		<i>Cent. R.R.</i> , 728 N.E.2d 797, 805 (Ill. App. Ct. 2000) (citing <i>Abbasi ex rel. Abbasi v.</i>
23		<i>Paraskevoulakos</i> , 718 N.E.2d 181, 185 (Ill. 1999)). Plaintiffs do not contest that, absent such intent,
24		a statutory violation may be evidence of negligence only if an underlying common law duty exists.
25	IN	NPS: NPS requires legislative intent to impose private liability, which is absent where, as here, the
26		statute “contains an enforcement mechanism.” <i>Brown v. City of Valparaiso</i> , 67 N.E.3d 652, 658
27		(Ind. Ct. App. 2016); <i>see also Howard Reg’l Health Sys. v. Gordon</i> , 952 N.E.2d 182, 187 (Ind.
28		

1		2011). The procedural state statute in <i>Kho v. Pennington</i> , 875 N.E.2d 208 (Ind. 2007), contained
2		no such mechanism. <i>Id.</i> at 213–15. And Plaintiffs’ other cases based NPS claims on federal statutes
3		with private rights of action—the Lead-Based Paint Hazard Reduction Act, <i>see</i> 42 U.S.C. § 4852d;
4		<i>Erwin v. Roe</i> , 928 N.E.2d 609, 619 (Ind. Ct. App. 2010), and the Pipeline Safety Act, <i>see</i> 49 U.S.C.
5		§ 60121; <i>Town of Montezuma v. Downs</i> , 685 N.E.2d 108, 116 (Ind. Ct. App. 1997).
6	IA	NPS: Plaintiffs’ cases significantly predate <i>Bagelmann v. First National Bank</i> , 823 N.W.2d 18
7		(Iowa 2012), which held that NPS cannot be based on a federal statute lacking a private right of
8		action absent an underlying common law duty. <i>Id.</i> at 27.
9	KS	Not a Product: <i>Andrewjeski v. Bimbo Foods Bakeries Distribution, LLC</i> , 2019 WL 2250068 (D.
10		Kan. May 24, 2019), is inapposite as the case addresses the tort of conversion—not product liability
11		law. <i>Id.</i> at *5.
12		NPS: For a court to “recognize a duty of care based on [a] statute[] alone,” there must be legislative
13		intent that the statute be privately enforceable. <i>Kudlacik v. Johnny’s Shawnee, Inc.</i> , 440 P.3d 576,
14		583 (Kan. 2019); <i>see also Kan. State Bank & Tr. Co. v. Specialized Transp. Servs., Inc.</i> , 819 P.2d
15		587, 603 (Kan. 1991). <i>Shirley v. Glass</i> , 308 P.3d 1 (Kan. 2013), is inapposite—not only did it
16		involve a state statute, but the plaintiff was merely using a statute to “fill in some of the elements
17		of a negligent entrustment claim.” <i>Id.</i> at 6–7; <i>see also Kudlacik</i> , 440 P.3d at 583 (explaining
18		difference).
19	KY	Not a Product: <i>Powell v. Tosh</i> , 929 F. Supp. 2d 691 (W.D. Ky. 2013), cited by Plaintiffs,
20		highlights that the “Restatement defines a product as ‘tangible personal property.’” <i>Id.</i> at 713.
21	LA	Not a Product: <i>Schafer v. State Farm Fire & Casualty Co.</i> , 507 F. Supp. 2d 587 (E.D. La. 2007),
22		held a product liability claim was not adequately alleged and indicates that Louisiana would follow
23		the Third Restatement. <i>Id.</i> at 601.
24	MA	Not a Product: Plaintiffs’ discussion of “UCC warranty claims,” Pls. App’x 88, is irrelevant as no
25		such claim is at issue here.
26	MN	Not a Product: Minnesota defines a “product” as “ <i>tangible</i> personal property”—in a provision
27		that itself <i>defines</i> a “[p]roduct defect tort claim.” Minn. Stat. § 604.101(1)(c), (e) (emphasis added).
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1		NPS: NPS “sets the standard of care ‘where an underlying common law cause of action [already]
2		exists.” <i>BCBSM, Inc. v. GS Labs, LLC</i> , 2023 WL 2044329, at *7 (D. Minn. Jan. 30, 2023)
3		(citations omitted). In <i>Kapps v. Biosense Webster, Inc.</i> , 813 F. Supp. 2d 1128 (D. Minn. 2011), the
4		court dismissed a NPS claim because there was no underlying tort duty. <i>Id.</i> at 1152.
5	MO	NPS: NPS requires legislative intent to impose private civil liability. <i>See Bradley v. Ray</i> , 904
6		S.W.2d 302, 314 (Mo. Ct. App. 1995); <i>Hollis ex rel. Hollis v. Poplar Bluff Reg’l Med. Ctr., LLC</i> ,
7		2023 WL 3958788, at *5 n.2 (Mo. Ct. App. June 13, 2023).
8	MT	NPS: <i>Massee v. Thompson</i> , 90 P.3d 394 (Mont. 2004), permitted <i>state</i> statutory violations to serve
9		as evidence of negligence and thus does not help Plaintiffs. <i>Id.</i> at 401.
10	NV	Not a Product: <i>Schueler v. Ad Art, Inc.</i> , 136 Nev. 447 (Nev. Ct. App. 2020), is inapposite as it
11		concerned a plaintiff harmed by a defect in the tangible “interior platform” of a large billboard
12		sign. <i>Id.</i> at 449.
13	NJ	Not a Product: <i>Rodgers</i> held that “the Third Restatement . . . defines ‘product’ as ‘tangible
14		personal property,’” and “information, guidance, ideas, and recommendations” from an
15		“algorithm” are not “‘products’ . . . as a <i>definitional</i> matter.” 795 F. App’x at 879–80 (emphasis
16		added).
17	NC	NPS: Plaintiffs contend <i>Osburn v. Danek Medical, Inc.</i> , 520 S.E.2d 88 (N.C. Ct. App. 1999), <i>aff’d</i> ,
18		520 S.E.2d 54 (N.C. 2000), “controls” over Defendants’ federal decisions, but <i>Osburn</i> dismissed
19		the NPS claim for lack of causation and “look[ed] no further” at the claim. 520 S.E.2d at 94.
20	OH	NPS: <i>Sheldon v. Kettering Health Network</i> , 40 N.E.3d 661 (Ohio Ct. App. 2015), rejected the
21		proposition that a statute lacking a private right of action may be “applicable” to negligence. <i>See</i>
22		<i>id.</i> at 672, 676 (“choos[ing] not to follow” cases finding HIPAA was “applicable as ‘evidence of a
23		[] duty”). And <i>Machlup v. Bowman</i> , 2021 WL 5882102 (Ohio Ct. App. 2021), makes clear that
24		NPS cannot be based on statutes that “leav[e] to the jury the ascertainment and determination of
25		reasonableness and correctness of acts and conduct under the proven conditions and
26		circumstances.” <i>Id.</i> at *4.
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1 OR **NPS:** *Deckard v. Bunch*, 370 P.3d 478 (Or. 2016), suggests NPS requires an underlying duty at
 2 common law. *Id.* at 483 n.6; *see Gutta v. Sedgwick Claims Mgmt. Servs., Inc.*, 2023 WL 2709646,
 3 at *5 (D. Or. Mar. 29, 2023). *Moody v. Oregon Community Credit Union*, 505 P.3d 1047 (Or. Ct.
 4 App. 2022), did not address whether a statute could supply the duty in a negligence action, but
 5 rather the standard of care. *Id.* at 1054 (*Deckard* said only that, “if all the other elements of a
 6 negligence claim otherwise exist, a statute or rule may supply the standard of care for a negligence
 7 *per se* claim”).

8 SD **NPS:** “If [a federal statute] does not create a private right of action, then . . . an individual cannot
 9 use the [statute] to establish a duty.” *Highmark Fed. Credit Union v. Hunter*, 814 N.W.2d 413, 418
 10 (S.D. 2012). Plaintiffs contend *Highmark* did not involve a NPS claim, but that is incorrect—the
 11 plaintiff asserted that breach of a federal statute amounted to “negligen[ce] as a matter of law,”
 12 which is the same as NPS. *Id.* at 415. Plaintiffs’ cases predate *Highmark*.

13 TN **Not a Product:** A “product” is “any tangible object or goods produced”; both the “object” or
 14 “goods” must be “tangible.” Tenn. Code Ann. § 29–28–102(5).

15 **NPS:** “[T]he application of federal law to [NPS] claims under Tennessee law has not been
 16 wholesale” and is “‘analytically related’ to whether an implied private right of action exists.” *Faber*
 17 *v. Ciox Health, LLC*, 331 F. Supp. 3d 767, 778–79 (W.D. Tenn. 2018) (citations omitted), *aff’d*,
 18 944 F.3d 593 (6th Cir. 2019). The *Faber* court explained why Plaintiffs’ cases—*Estate of French*
 19 *v. Stratford House*, 333 S.W.3d 546 (Tenn. 2011), *superseded by statute*, Tenn. Code Ann. 29–26–
 20 101 et seq., and *Bellamy v. Federal Express Corp.*, 749 S.W.2d 31 (Tenn. 1988)—did not convince
 21 it to allow NPS based on federal statutes lacking private rights of action. *Id.* The NPS claim in
 22 *Wren v. Sullivan Electric, Inc.*, 797 F.2d 323 (6th Cir. 1986), was based on a state “statute and
 23 regulations incorporating OSHA standards.” *Id.* at 326. And *Cline v. United States*, 2015 WL
 24 13664121 (M.D. Tenn. May 20, 2015), allowed NPS based on a federal child abuse reporting
 25 statute in part because “an analogous state law statute exists.” *Id.* at *10.

1 2 3	<p>TX Not a Product: Plaintiffs’ cases are inapposite as they concerned a tangible “wireless device,” <i>Estate of Alex ex rel. Coker v. T-Mobile US, Inc.</i>, 313 F. Supp. 3d 723, 732 (N.D. Tex. 2018), and “negligence” law, <i>Hou-Tex, Inc. v. Landmark Graphics</i>, 26 S.W.3d 103, 106 (Tex. App. 2000).</p>
4 5 6 7	<p>UT Not a Product: “[A] product for purposes of a product liability claim” must be “a moveable good” or “an item of ‘tangible personal property.’” <i>Legal Tender Servs. PLLC v. Bank of Am. Fork</i>, 506 P.3d 1211, 1220 (Utah Ct. App. 2022); <i>see also id.</i> (website “does not qualify”). Defendants’ services are not tangible and, <i>a fortiori</i>, not moveable goods. <i>See supra</i> Part II.A.</p>
8 9 10 11 12	<p>NPS: Plaintiffs ignore <i>Mitchell v. Wells Fargo Bank</i>, 355 F. Supp. 3d 1136 (D. Utah 2018), which held that Utah “would likely not adopt the GLBA as imposing a [tort] duty,” as there is no “case in which a Utah court . . . [found] a state-law tort duty arising out of a federal statute which lacked a private right of action.” <i>Id.</i> at 1158. Plaintiffs’ cases involved city ordinances. And Plaintiffs do not address the common-law duty limitation on NPS cited in Defendants’ Appendix.</p>
13 14 15 16	<p>VA Not a Product: <i>Lowe v. Cerner Corp.</i>, 2022 WL 172690666 (4th Cir. Nov. 29, 2022), is inapposite; the defendant did not dispute it offered a “product” and the plaintiff was not harmed by information or ideas—but instead by the failure to receive a blood-oxygen “monitoring device” that led to “brain damage.” <i>Id.</i> at *1–2.</p>
17 18 19	<p>WA Not a Product: <i>Grigsby v. Valve Corp.</i>, 2013 WL 12310666 (W.D. Wash. Mar. 18, 2013), held only that a “software distribution platform” provided a “service[]” not a “product.” <i>Id.</i> at *6.</p>
20 21 22 23	<p>WV NPS: “[W]henever a violation of a statute is the centerpiece of a theory of liability”—as it is here—“the question arises whether the statute creates an implied private cause of action.” <i>Arbaugh v. Bd. of Educ., Cnty. of Pendleton</i>, 591 S.E.2d 235, 239 (W. Va. 2003) (citation omitted). And the NPS claims in Plaintiffs’ cases involved state laws, not federal statutes lacking private rights of action.</p>