

**Commonwealth of Massachusetts
Supreme Judicial Court**

No. SJC-13747

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

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

**BRIEF OF PROFS. JANE BAMBAUER AND EUGENE
VOLOKH IN SUPPORT OF DEFENDANTS-APPELLANTS**

ON DIRECT APPELLATE REVIEW FROM AN ORDER OF THE SUPERIOR
COURT FOR SUFFOLK COUNTY, NO. 2384CV02397

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** Counsel would like to thank John Joonhee Cho and
Jonathan Tao, law students who worked on the brief.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Procedure Rule 17(c)(1) and Supreme Judicial Court Rule 1:21, I certify that amici curiae Jane Bambauer and Eugene Volokh are natural persons, that they do not issue any stock or have any parent corporation, and that no publicly held corporation owns stock in them.

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INTEREST OF *AMICI CURIAE*

Both *Amici* have taught both First Amendment law and tort law and written extensively about both subjects.

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DECLARATION OF *AMICI CURIAE*

Pursuant to Appellate Procedure Rule 17(c)(5), I certify that (A) no party or party's counsel authored any of this brief; (B) no party or party's counsel, or any other person or entity, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief, except that *amicus* Volokh's employer, the Hoover Institution at Stanford University is paying any filing and printing costs; and (C) neither *amici curiae* nor their counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

/s/ Jay M. Wolman
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SUMMARY OF ARGUMENT

1. Social media platforms create expressive products. Their choices about how to craft and format those products are presumptively protected by the First Amendment.

That protection extends to the very features the Commonwealth demands Meta remove. Push notifications, for instance, allow social media platforms to speak to users about new content. Endless scrolling, autoplay, and ephemeral features let social media platforms decide how users see speech on the platforms, just as a newspaper chooses how to format the front page or a film director chooses whether to break up a movie into multiple episodes. Whether these features constitute Meta’s own direct speech, or are structural decisions about how Meta presents third-party speech, *Moody v. NetChoice, LLC*, 603 U.S. 707, 716-17 (2024), they stem from constitutionally protected decisions about where, when, and how speech is communicated (and, as to the “like” button, what speech is communicated).

2. A social media platform’s design features shape how users speak through the platform. Push notifications amplify user speech by informing other users about the posts. “Likes” give users the ability to express their views about a post and see what others think about the post. “Likes” also communicate to social media platforms about what content the user enjoys, and thus help platforms determine what further content to show the user. And users may benefit from

features like endless scrolling or autoplay because those features make information easier to access.

The same is true of users who are minors. Like adults, “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-13 (1975) (citation omitted). Unprotected speech “cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 794 (2011) (citation omitted). The same principle governing the violent images in *Brown*—*Brown* struck down a restriction on violent video games, regardless of the “ideas” the games conveyed—applies to other display and content features such as autoplay, “likes,” and endless scrolling.

3. The Commonwealth’s lawsuit improperly asks judges and juries to second-guess Meta’s choices about how it and its users will communicate. By concluding that it was legally sufficient for the Commonwealth to allege that “the harm alleged could be reasonably avoided and that such harm was not outweighed by Instagram’s countervailing benefits,” Mem. & Order 23, Meta Br. 84, the Superior Court essentially concluded that Meta’s speech can be restricted if it is seen as negligent. But this Court and other courts have recognized that the First Amendment bars such negligence claims based on speech—for instance, claims that

a late-night show featuring a dangerous stunt was negligently aired, a magazine describing autoerotic asphyxiation was negligently published, or a movie depicting violent youth gangs was negligently distributed. This Court should likewise recognize that judges and juries ought not be able to impose liability on Meta based on a theory that its speech was “unfair,” Mem. & Order 21, Meta Br. 82, or failed a harm-benefit negligence-style balancing analysis.

The “basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.” *Brown*, 564 U.S. at 790 (cleaned up). The protections against state tort law offered to TV shows, magazines, and movies equally protect social media platforms.

4. This Court should likewise reject the Commonwealth’s claims that Meta’s speech expressing its views about the supposed harm and value of its (and its users’) fully protected speech was “deceptive.” Mem. & Order 23, Meta Br. 84. Authors, publishers, and distributors of books, films, songs, and the like must have full First Amendment protection in discussing whether their works are suitable for minors (or for other readers, viewers, or listeners). The same must be true for social media platforms.

This Court should therefore reverse the Superior Court and dismiss the Commonwealth’s Complaint.

ARGUMENT

I. Social media platforms create expressive products presumptively protected under the First Amendment

The First Amendment protects the editorial choices that publishers and editors make when they “select and shape other parties’ expression into their own curated speech products.” *Moody*, 603 U.S. at 717. That “principle does not change because the curated compilation has gone from the physical to the virtual world.” *Id.* Social media platforms make choices about what to “include and exclude, organize and prioritize—and in making millions of those decisions each day, produce their own distinctive compilations of expression.” *Id.* at 716. “[L]aws curtailing [platforms’] editorial choices must meet the First Amendment’s requirements.” *Id.* at 717. “[T]he editorial function itself is an aspect of speech.” *Id.* at 731 (cleaned up).

The Commonwealth’s lawsuit seeks to “curtail[]” those “editorial choices.” *Id.* at 717. Meta organizes and presents its content through the infinite scroll, autoplay, push notification, and “like” features. Push notifications let Meta communicate information directly to its users. Infinite scroll lets Meta communicate information in a particular way. “[L]ike” buttons are visual elements that Meta communicates to users, and means for users to communicate information back to Meta. By attacking Meta’s choices about how to communicate, the Commonwealth “prevents a platform from compiling the third-party speech it wants in the way it

wants, and thus from offering the expressive product that most reflects its own views and priorities.” *Id.* at 718 (cleaned up).

The Commonwealth seeks to avoid First Amendment scrutiny by distinguishing between Meta’s “content moderation or algorithm-creating procedures,” Commonwealth’s Resp. Br. 46, and its chosen design features. The Commonwealth characterizes Meta’s design features as “independent of content” and therefore not within *Moody*’s protection. *Id.* at 47.

But this is a false distinction. Just as Meta may curate content by expressing disapproval through its content moderation policies, Meta may approve of and encourage speech through its design features. For example, rather than expressly policing or prohibiting politically biased content, Meta could implement a “community note” feature allowing users to flag and respond to factual claims. Though a “community note” feature operates as a design feature rather than an express policy from Meta, it might function more effectively in fostering Meta’s favored forms of speech. Similarly, the “like” function is a design feature that helps shape the content of Meta products, by adding extra information to each post (the number of likes), by encouraging users to post popular content that draws more likes, and by encouraging users to read more popular content that has drawn more likes.

Even if such editorial choices were not necessarily treated as communicative themselves, they are protected under the First Amendment because they are

decisions about how to effectively present and distribute speech. A performer may decide to use sound amplification to reach a larger group of listeners. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (treating sound-amplification regulation as a speech restriction, albeit one that may be content-neutral and subject to intermediate scrutiny). Likewise, a speaker may choose to canvass door-to-door rather than using billboards or mass mailings, *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164 (2002) (striking down ordinance restricting canvassing as a speech restriction). Such decisions are generally protected by the First Amendment, even though they are decisions about how and where to communicate rather than themselves being communication.

II. Social media users are entitled to First Amendment protections against governmental restrictions on communicative features a social media platform may offer

The changes that the Commonwealth demands that Meta impose would also operate as restrictions on users’ ability to speak. The “like” feature enables users to convey speech with a certain content: It “literally causes to be published the statement that the [u]ser ‘likes’ something, which is itself a substantive statement.” *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013). Similarly, push notifications enable users to better direct others to their content.

Users also have First Amendment interests as listeners in Meta’s design features. “[T]he First Amendment protects the public’s interest in receiving

information.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion).¹ Like the “protected books, plays, and movies that preceded them,” Meta’s chosen design features “communicate ideas” to users “through features distinctive to the medium.” *Brown*, 564 U.S. at 790. For example, “likes” signal to a user the approval of others. Push notifications bring platform speech to a user’s attention. Removing or limiting these features makes it harder for users to exercise their right to receive information.

Likewise, infinite scroll and auto-play make it easier for users to see material. They also make the browsing experience more exciting and thus lead the user to want to keep browsing; this, too, is a protected form of editorial expression. Authors

¹ See also *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (concluding that commercial speech is protected because “protection afforded is to the communication, to its source and to its recipients both”); *id.* at 757 (“[I]n *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974), where censorship of prison inmates’ mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed.”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 775–76, 783 (1978) (concluding that corporate speech is protected “based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas”); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305, 307 (1965) (relying on “the addressee’s First Amendment rights” rather than the sender’s, where the sender was a foreign government and thus might not have had First Amendment rights); *id.* at 307-08 (Brennan, J., concurring) (stressing that it is not clear whether the First Amendment protects “political propaganda prepared and printed abroad by or on behalf of a foreign government,” but concluding that the law was unconstitutional because it violated the recipients’ “right to receive” information, regardless of the senders’ rights to speak).

of serialized fiction (print or visual) often use cliffhangers to keep people coming back to the next episode, and creators in every medium have long used promises of interesting future content if only the listener will “stay tuned.”

To be sure, infinite scroll and auto-play only make it slightly easier for users to keep browsing, since even without these features a user could just get more posts or see videos simply by clicking. But by the same token, any restrictions on infinite scroll and auto-play would likewise at most slightly (and hypothetically) serve whatever interests the Commonwealth is trying to serve by imposing such restrictions. The U.S. Supreme Court has recognized that, even under intermediate scrutiny, a restriction is unconstitutional to the extent that it “provides only the most limited incremental support for the interest asserted” and thus only a “marginal degree of protection.” *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983) (relying partly on this reasoning in striking down restriction aimed at shielding children from contraceptive ads). Likewise, the Court has struck down speech restrictions, even under intermediate scrutiny, when “there was ‘little chance’ that the speech restriction could have directly and materially advanced its aim,” *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 193 (1999) (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995)), when the restriction failed to “alleviate [the asserted harms] to a material degree,” *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993), when the restriction “provide[d] only

ineffective or remote support for the government’s purpose,” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980), and when “[t]he benefit to be derived from the” restriction was “minute” and “paltry,” *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417-18 (1993).

The Commonwealth’s proposed limitations also remain constitutionally suspect even when they purport to protect children. *Brown* made clear that speech not “subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” 564 U.S. at 795. That extends to “likes,” push notifications, infinite scroll, autoplay, and other items that the Commonwealth views as “unsuitable for” “the young” at least as much as to the violent video games involved in *Brown*.

III. Plaintiff’s unfairness claim is in essence a speech-based negligence claim that the First Amendment precludes

“[C]ourts have made clear that attaching tort liability to protected speech can violate the First Amendment.” *James v. Meow Media, Inc.*, 300 F.3d 683, 695 (6th Cir. 2002) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964)). This includes negligence and related torts, *see id.* at 689-90, as well as defamation, *N.Y. Times*, 376 U.S. at 265, intentional infliction of emotional distress, *Snyder v. Phelps*, 562 U.S. 443, 451 (2011), false light invasion of privacy, *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 249 (1974), and interference with business relations, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982).

The Commonwealth's unfairness claim against Meta is in essence a negligence claim. To assess the unfairness claim under M.G.L. ch. 93A, the Superior Court considered whether "the risks of the platform outweigh its benefits" and whether Meta's design decisions were "unreasonable." Mem. & Order 23 (cleaned up), Meta Br. 84. This is the very sort of risk-benefit and reasonableness analysis called for in a negligence case. *See, e.g., Mounsey v. Ellard*, 363 Mass. 693, 708 (1973).

This Court recognized the First Amendment limits on such negligence claims in *Yakubowicz v. Paramount Pictures Corporation*, 404 Mass. 624 (1989), where it rejected a claim that a film depicting gang violence was negligently produced, distributed, and advertised, resulting in a stabbing that left two youths dead. The court concluded that "liability may exist for tortious conduct in the form of speech" only when the speech falls within one of the "narrowly defined" "recognized exceptions to First Amendment protection," such as incitement. *Id.* at 630. Because the speech did not fit within any of the exceptions, Paramount, as a matter of law, "did not act unreasonably in producing, distributing, and exhibiting [the movie]." *Id.* at 631. *See also DeFilippo v. NBC, Inc.*, 446 A.2d 1036, 1038, 1040 (R.I. 1982) (rejecting a claim that a TV program was negligent for permitting a dangerous stunt to be broadcast and for failing to warn plaintiffs' child of the dangers of the stunt, on the grounds that the speech did not fall within one of the "classes of speech which

may legitimately be proscribed,” which is to say a First Amendment exception); *Herceg v. Hustler Mag., Inc.*, 814 F.2d 1017, 1019, 1024 (5th Cir. 1987) (rejecting liability for “[m]ere negligence,” as opposed to constitutionally unprotected speech such as intentional incitement of illegal conduct, even when the speech involved a porn magazine’s discussion of autoerotic asphyxiation, and led an adolescent reader to engage in such an act and accidentally kill himself).

Nor is this First Amendment protection for speech lost even if a viewer or listener does something seriously harmful to third parties in a way that was in part caused by the speech. Thus, for instance, when plaintiffs claimed that a video game helped lead a 14-year-old player to commit murder, on the theory that defendants acted “negligently” and “communicated . . . a disregard for human life and an endorsement of violence,” the First Amendment precluded such liability. *James*, 300 F.3d at 695, 696-97. The same was true for claims that a rap song helped motivate a listener to murder a police officer, *see Davidson v. Time Warner, Inc.*, No. Civ.A. V-94-006, 1997 U.S. Dist. LEXIS 21559 at *38 (S.D. Tex. Mar. 31, 1997), or that the film *The Fast and the Furious* led a viewer to race and crash his car, *see Widdoss v. Huffman*, 62 Pa. D. & C.4th 251, 257 (2003), or that the TV program *Born Innocent* led some underage viewers to sexually attack a small child in copying a scene shown on the program, *Olivia N. v. NBC, Inc.*, 126 Cal. App. 3d 488, 492-94 (1981).

And this logic applies equally to self-harm, whether accidental or intentional: The First Amendment precluded liability, for instance, when an 11-year-old partially blinded himself when performing a stunt that he had seen on the *Mickey Mouse Club* TV program, *see Walt Disney Prods., Inc. v. Shannon*, 247 Ga. 402, 404 (1981); when a 13-year-old hanged himself when simulating a stunt from *The Tonight Show*, *DeFilippo*, 446 A.2d at 1038; when a 14-year-old hanged himself when simulating behavior described in *Hustler*, *Herceg*, 814 F.2d at 1023; or when a 19-year-old shot himself after listening to a song called “Suicide Solution,” *see McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 1003 (1988).

This makes sense. Allowing negligence claims based on otherwise protected speech—speech that does not fall within one of the narrow First Amendment exceptions—“would invariably lead to self-censorship by broadcasters in order to remove any matter that may . . . lead to a law suit.” *DeFilippo*, 446 A.2d at 1041. This would in turn violate defendants’ “right to make their own programming decisions” (even when the defendants are broadcasters, and thus seen as having a more “limited” First Amendment right than other speakers). *Id.* And it would violate “the paramount rights of the viewers to suitable access to social, esthetic, moral, and other ideas and experiences.” *Id.* at 1041-42 (citations omitted). Such negligence liability would “open the Pandora’s Box” and “have a seriously chilling effect on the flow of protected speech through society’s mediums of

communication.” *Walt Disney*, 247 Ga. at 405. “Numerous courts have pointed out that any attempt to impose tort liability on persons engaged in the dissemination of protected speech involves too great a risk of seriously chilling all free speech.” *Waller v. Osbourne*, 763 F. Supp. 1144, 1151 (M.D. Ga. 1991), *aff’d*, 958 F.2d 1084 (11th Cir. 1992).

The cost-benefit balancing at the heart of a negligence claim is also too vague to be constitutionally permissible. “Crucial to the safeguard of strict scrutiny” required in First Amendment cases “is that we have a clear limitation, articulated in the legislative statute or an administrative regulation, to evaluate.” *James*, 300 F.3d at 697. No such clear limitation is present when a factfinder “evaluating [plaintiff’s] claim of negligence would ask whether the defendants took efficient precautions . . . that would be less expensive than the amount of the loss.” *Id.*

The Commonwealth’s negligence claim is not distinguishable from the preceding cases on the basis that it targets “design” rather than “content.” The First Amendment protects choices about how to present content, not just the content itself. *See Ward*, 491 U.S. at 791 (recognizing the volume of speech as presumptively protected); *Watchtower*, 536 U.S. at 164-65 (recognizing the means of delivering speech, canvassing, as presumptively protected). Social media platforms make the very same choices when deciding what design features to offer, which requires that

even content-neutral restrictions on these choices must be judged at least under intermediate scrutiny.

Of course, the Commonwealth has broad authority over purely commercial behavior that does not involve speech. “Laws that target real-world commercial activity need not fear First Amendment scrutiny. Such run-of-the-mill economic regulations will continue to be assessed under rational-basis review.” *Dana’s R.R. Supply v. Att’y Gen., Fla.*, 807 F.3d 1235, 1251 (11th Cir. 2015). But this case does not concern a run-of-the-mill economic regulation. This case concerns a regulation of the content and presentation of speech. In such a situation, the government may not “criminaliz[e] speech” unless the speech falls within a First Amendment exception or the speech restriction otherwise passes heightened scrutiny. *Id.* As the cases cited above show, the same heightened scrutiny must apply to civil liability for such speech, too.

IV. Companies’ views about the alleged harm and value of their speech products are entitled to full First Amendment protection

The Commonwealth is seeking to prevent Meta from opining on the state of the evidence concerning addiction and mental health stemming from the content and presentation of speech on Meta’s platforms. In fact, the Commonwealth argues that Meta must affirmatively warn about a risk whose existence the company vehemently disputes.

Ordinarily, the First Amendment provides “less protection to commercial speech” than it does to noncommercial speech. *See Bolger*, 463 U.S. at 64. But “a different conclusion may be appropriate in a case where the [commercial speech] advertises an activity itself protected by the First Amendment.” *Id.* at 67 n.14. For instance, *Bolger* noted that the Court has held that an “advertisement for [a] religious book cannot be regulated as commercial speech.” *Id.* (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Jamison v. Texas*, 318 U.S. 413 (1943)).

Likewise, the Court has held that speech does not retain “its commercial character when it is inextricably intertwined with otherwise fully protected speech”; any restriction on such speech must instead apply the “test for fully protected expression.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). *Riley* so concluded as to fundraising by charities, which consisted of requests for money coupled with noncommercial expression advocating for the charity’s mission. *Id.* at 795 (holding that compelling fundraisers to state to donors what portion of revenues goes to fundraising was a speech compulsion that had to be judged under strict scrutiny). The same logic applies to statements by speech producers that express controversial opinions about their speech products’ merits.

As discussed in the preceding Parts, Instagram, like a book, consists of fully protected speech—both the speech of users and the expressive curation and layout decisions of Meta. Just as the creators and distributors of films, books, newspapers,

and the like are entitled to express their opinions that their works are valuable rather than harmful, Meta is entitled to do the same without that becoming restrictable commercial speech, contrary to the Commonwealth’s assertion in Count Two.

Whether material is “safe[]” for minors, Mem. & Order 24, Meta Br. 85, is a hotly debated topic, as to films, books, music, social media platforms, and other speech products. Different people have sharply different opinions on these questions. All people and organizations, including the distributors of the speech, must be fully free to express those opinions.

Critics of controversial books such as *Gender Queer*, see, e.g., *Penguin Random House LLC v. Robbins*, 774 F. Supp. 3d 1001, 1033 (S.D. Iowa 2025), or of social media platforms are entitled to express their views about whether those books or platforms are suitable for minors, without risking liability if a jury or judge concludes those views are incorrect and therefore “deceptive.” Likewise, the publishers of *Gender Queer* or the operators of the platform must have the same right. The same is true with regard to statements about whether the book publishers or social media platforms “prioritize the safety and well-being of [their] young users [or readers] over profits,” Mem. & Order 4, Meta Br. 65, or statements disputing whether some expressive work is so appealingly designed as to be “addictive,” *Id.*

To be sure, the government may sometimes regulate advertisements for protected speech similarly to other advertisements, as long as the regulation is

essentially content-neutral (setting aside the regulation’s drawing a commercial/noncommercial speech line). For example, consider a billboard ordinance that allows “political, ideological or other noncommercial message[s]” on billboards, *Charles v. City of Los Angeles*, 697 F.3d 1146, 1149 (9th Cir. 2012) (citation omitted), but not commercial messages. In *Charles*, the Ninth Circuit concluded that a billboard advertising a television program could be treated the same as a billboard advertising any other product. *Id.* at 1155.

But the court stressed that, “[s]ignificantly, the City does not seek to regulate the content of [the program] or to single out [its advertisements] in particular, but only to enforce broadly applicable guidelines that govern the placement of all commercial advertising.” *Id.* at 1156. In contrast, the Commonwealth here is seeking to regulate the content of Meta products (see Parts I-III above) and is singling out Meta advertisements in particular as being supposedly “deceptive.”

Nor can the Commonwealth’s case be saved by arguing that Meta “created an over-all misleading impression through failure to disclose material information,” Mem. & Order 24, Meta Br. 85. Meta has no legal duty to “disclose” hotly-contested claims about whether Instagram is harmful to children—again, just as book publishers, filmmakers, or music distributors have no duty to disclose such claims about their books, films, or music (at least unless the speech falls within a First Amendment exception). *See, e.g., Book People, Inc. v. Wong*, 91 F.4th 318, 324, 339

(5th Cir. 2024) (striking down requirement that “school book vendors who want to do business with Texas public schools to issue sexual-content ratings for all library materials they have ever sold”); *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 965-66 (9th Cir. 2009) (likewise as to requirement that video game distributors label games deemed to be unduly “violent”), *aff’d*, 564 U.S. 786 (2011); *Ent. Software Ass’n v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006) (likewise). This is why the existing schemes through which publishers sometimes include ratings on their works are voluntary, *Brown*, 564 U.S. at 803, rather than legally compulsory.

The First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Even when commercial advertising promotes nonspeech products, mandatory disclosures are constitutional only when they require the disclosure of “‘purely factual and uncontroversial information.’” *Nat’l Ass’n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1266, 1276-80 (9th Cir. 2023) (quoting *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)) (holding that the First Amendment precluded a requirement that herbicide sellers label certain products as containing “known carcinogens,” partly because such a requirement was not “purely factual and uncontroversial”).

And this is even more clear when the mandate applies to a speech distributor or producer and forces such speakers to “opine on potential speech-based harms” from their products. *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1119 (9th Cir. 2024) (striking down such a mandate for social media platforms). “[A] business’s opinion about how its services might expose children to harmful content online is not ‘purely factual and uncontroversial.’” *Id.* at 1120 (quoting *Zauderer*, 471 U.S. at 651). *See also Video Software Dealers Ass’n*, 556 F.3d at 967 (striking down a requirement that violent videos be labeled “18,” to indicate that they are suitably only for adults, because this was not “factual information”).

If at some point the Commonwealth’s claims about the alleged harms of various social media features (or of social media as a whole) are established to be factual and noncontroversial, the government might be able to require social media platforms to acknowledge such harms in their advertisements. But just as Meta cannot be prevented from expressing controversial opinions about its speech products under the First Amendment, it cannot be mandated to disclose non-factual or controversial claims about its products either.

CONCLUSION

The Commonwealth claims the power to regulate a social media platform’s design decisions concerning where, when, and how speech is communicated—and in the case of “likes,” what speech is communicated. But the First Amendment

provides protections against speech-based negligence claims, as this Court and other courts have recognized. And the First Amendment also protects speech producers' expressing their views about whether their speech is valuable and harmful.

The Commonwealth's attempt to regulate Meta's speech thus fails heightened First Amendment scrutiny. The decision below should therefore be reversed.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Appellate Procedure Rules 17 and 20. This brief was prepared in Times New Roman 14-point font using Microsoft Word 365. As ascertained by that program's "word count" function, this brief contains 4,652 words.

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CERTIFICATE OF SERVICE

I certify that on November 14, 2025, the foregoing Brief of Amicus Curiae in Support of Defendants-Appellants in Supreme Judicial Court case no. SJC-13747, *Commonwealth. v. Meta Platforms, Inc.*, was electronically filed via e-fileMA, with which counsel for Appellee, Christina Chan, Jared Rinehimer and David Kravitz, are registered and will receive automatic service. I also served counsel for Appellants, Paul William Schmidt and Felicia H. Ellsworth, who have consented to electronic service, via email at the email addresses noted below. The contact information of the aforementioned counsel is:

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