

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

MUSLIM ADVOCATES V. ZUCKERBERG,
SANDBERG, KAPLAN, MARTIN, & FACEBOOK

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2021 CA 001114B

Judge Anthony C. Epstein

**[PROPOSED] MEMORANDUM OF CONSUMER REPORTS,
PUBLIC KNOWLEDGE, AND UPTURN
AS AMICI CURIAE**

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Facebook, FB Earnings Presentation Q1 (2021), https://s21.q4cdn.com/399680738/files/doc_financials/2021/FB-Earnings-Presentation-Q1-2021.pdf	12
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Spotify, <i>Spotify Premium</i> , https://www.spotify.com/us/premium/ (last accessed Dec. 2, 2021).....	6
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Tim Wu, <i>Blind Spot: The Attention Economy and the Law</i> , 82 Antitrust L.J. 771, 771-72 (2019)	9
U.S. Dep’t. of Labor, <i>Minimum Wage</i> , https://www.dol.gov/general/topic/wages/minimumwage (last accessed Dec. 2, 2021).....	7
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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are nonprofit public interest organizations that advocate on behalf of consumers in general and digital technology users in particular. All are actively engaged in working for effective consumer protections in online markets, including the markets in which Facebook and other online platforms operate.

Consumer Reports (“CR”), founded in 1936, is an independent, nonprofit and nonpartisan organization that works with consumers to create a fair and just marketplace. Known for its rigorous testing and ratings of products, CR advocates for laws and company practices that put consumers first. CR is dedicated to amplifying the voices of consumers to promote safety, digital rights, financial fairness, and sustainability. The organization surveys millions of Americans every year, reports extensively on the challenges and opportunities for today’s consumers, and provides ad-free content and tools to 6 million members across the U.S.

Public Knowledge works to uphold and protect consumer rights and ensure universal access to affordable, open networks and communications tools. Public Knowledge analyzes technology markets to determine where the public interest requires policy intervention and advocates for consumer protections with respect to online digital platforms.

Upturn works to advance equity and justice in the design, governance, and use of technology. Upturn brings computer science, quantitative, and legal and policy expertise to bear on the most pressing civil rights and technology challenges, working with local and national advocates, litigators, and academics.

Facebook asserts that the D.C. Consumer Protection Procedures Act (“CPPA”) does not govern its relationship with users because users receive its services “free of charge.” Facebook’s position cuts directly against *Amici*’s core goals—protecting online consumers, ensuring fairness

in online markets, and enforcing equitable standards governing online commerce. *Amici* therefore (1) offer their expertise to explain that Facebook does indeed maintain a consumer-merchant relationship with users despite the zero-cash price; and (2) provide their perspective on the potential for Facebook's argument to exempt from consumer protection law innumerable additional online outlets that also offer their products and services for a zero-cash price.

This brief addresses only the assertion by Defendants that Facebook has no merchant-consumer relationship with Plaintiff, on the grounds that the services it provides to Plaintiff and other users on its platform are provided free of any direct monetary charge. The brief does not address other grounds set forth in Defendants' motion to dismiss. This should not be interpreted to imply that *Amici* agree with Defendants as to any of those other grounds.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION¹

The parties to this suit agree that the D.C. Consumer Protection Procedures Act (“CPPA”) applies to trade practices arising from consumer-merchant relationships. Facebook argues, however, that because it offers products and services “free of charge,” the CPPA does not apply to its relationship with users. Defs.’ Am. Mot. to Dismiss Under Rule 12(b) at 21-22. But as this brief will show, Facebook users are “consumers,” as defined by the CPPA, and Facebook is a “merchant.” Facebook takes its users’ time, attention, and personal data; in exchange, Facebook gives those users access to and use of Facebook’s social network, which Facebook itself deems a “product.”² Facebook users receive its products. Facebook users provide the economic demand for its products and the trade practices used to support them. Facebook and its users therefore have the requisite merchant-consumer relationship under existing case law to be covered by the CPPA.

Facebook’s argument to the contrary amounts to an assertion that its activities lie outside the reach of the District’s consumer protection law. The purported foundation for the argument is that Facebook has chosen to provide its products for a cash price of zero. But the CPPA’s terms

¹ The legal questions this brief addresses are not close ones. Facebook’s users are consumers, and Facebook is a merchant. Because these questions appear to be of first impression, however, we note that the CPPA is a remedial statute that should be “construed and applied liberally to promote its purpose,” *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015), and is designed to “assure that a just mechanism exists to remedy all improper trade practices,” *Snowder v. District of Columbia*, 949 A.2d 590, 598 (D.C. 2008).

² Facebook uses the terms “products” and “services” to refer to its social media platforms. *Terms of Service*, Facebook, <https://www.facebook.com/terms.php> (last revised Oct. 22, 2020). The CPPA uses the term “goods and services.” Herein, *Amici* use the terms “products” and “goods” interchangeably, and when cited materials refer to Facebook’s offerings as “services,” *Amici* use “services.”

cover “transfer” and “receive” transactions as well as “purchase” and “sale” transactions, thereby clearly covering zero-cash transactions.

Because Defendants and Plaintiff have a merchant-consumer relationship by virtue of Facebook’s provision of social network products to Plaintiff, and because the CPPA covers Facebook’s products regardless of monetary price, Facebook violates the CPPA if and when it engages in “an unfair or deceptive trade practice.” Facebook’s public statements about features and qualities of its product—the social network—are trade practices under the CPPA.

Facebook’s argument, if accepted, could create a sweeping exemption for the growing realm of zero-cash digital commerce from the constraints of consumer protection law. The exemption could allow companies like Facebook to lie at will to consumers in advertisements, marketing materials, and terms of service without consequence under the very laws designed to protect against such conduct.

The Court, therefore, should reject Defendants’ assertion that Facebook and Muslim Advocates do not have a merchant-consumer relationship under the CPPA.

ARGUMENT

I. Facebook and its users have a consumer-merchant relationship.

A. The D.C. Superior Court has already implicitly recognized a consumer-merchant relationship between Facebook and its users.

Plaintiff is not the first to sue Defendants under the CPPA for alleged misrepresentations about their consumer services. In 2018, the Attorney General for the District of Columbia filed a CPPA lawsuit against Facebook. The Court at that time, in denying Facebook’s motion to dismiss, observed that “District of Columbia residents’ widespread utilization of, and repeated exchange of personal information through Facebook’s online social networking service, constitute ‘transactions’ for purposes of establishing personal jurisdiction in the District of

Columbia.” *District of Columbia v. Facebook*, Case No. 2018 CA 8715 B, at 17.³ It expressly found that “Facebook provides a free online service to its users, and [] ‘services’ may qualify as business ‘transactions’ for purposes of the CPPA.” *Id.* at 20. Specifically, Facebook’s services consisted of “a free social media service[] . . . Facebook’s users effectively enter into a contract with Facebook when they create a Facebook profile, agree to Facebook’s Terms of Service, and in return receive access to Facebook’s social media service.” *Id.* at 22-23.

More generally, other jurisdictions have enforced various consumer protection standards against digital platforms providing “free” products and services, including not just Facebook, but also Google and Twitter.⁴ Exempting Facebook’s relationship with its users from CPPA coverage would therefore put this Court out of step with these other jurisdictions as well.

B. Facebook users are consumers under the CPPA.

It is not surprising that neither the Court nor the parties in the prior CPPA case against Facebook questioned whether the relationship between Facebook and its users is subject to the CPPA; it plainly is. We start with the meaning of “consumer.” The CPPA defines a “consumer” as “a person who, other than for purposes of resale, does or would

³ *Order Denying Def. Facebook, Inc.’s Opposed Mot. to Dismiss, or in the Alternative, to Stay Proceedings* (May 31, 2019), <https://oag.dc.gov/sites/default/files/2019-06/DC-v-Facebook-Order-Denying-MTD.pdf>.

⁴ Consumer protection standards have been applied to Google, see Matt Baca, *Attorney General Balderas Sues Google for Illegally Collecting Personal Data of New Mexican School Children*, New Mexico Attorney General (Feb. 20, 2020), https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG_Balderas_Sues_Google_for_Illegally_Collecting_Personal_Data_of_New_Mexican_School_Children.pdf, Facebook, see Lesley Fair, *FTC’s \$5 Billion Facebook Settlement: Record-Breaking and History-Making*, Fed. Trade Comm’n (July 24, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-history>, and Twitter, see *FTC Accepts Final Settlement with Twitter for Failure to Safeguard Personal Information*, Fed. Trade Comm’n (Mar. 11, 2011), <https://www.ftc.gov/news-events/press-releases/2011/03/ftc-accepts-final-settlement-twitter-failure-safeguard-personal-0>.

purchase, lease (as lessee), or receive consumer goods or services . . . or does or would otherwise provide economic demand for a trade practice.” D.C. Code § 28–3901(a)(2).⁵

Facebook users are consumers for three independent reasons, any one of which is sufficient to demonstrate a consumer-merchant relationship: (1) users purchase from Facebook the right to use the social network; (2) users receive that right from Facebook; and (3) users provide the economic demand for Facebook’s products and trade practices.

i. Facebook users purchase Facebook’s consumer goods.

First, Facebook users are “consumers” under the CPPA because they “purchase” Facebook’s consumer goods. Legal precedent supports a finding that users “purchase” a license to access Facebook’s social networking products, and Facebook receives valuable consideration: namely, Facebook gets users’ time and attention for advertisers, and also gets access to users’ personal data.

A “purchaser” obtains an item as a result of a “sale.” “Purchase” and “sale” are two sides of the same coin; finding a “sale” entails finding a “purchase” and thus a “purchaser.” The structure of the CPPA’s definitions follows this logic: where consumers may “purchase, lease (as lessee), or receive,” D.C. Code § 28-3901(a)(2)(A), merchants may “sell, lease (to), or transfer,” *id.* § 28-3901(a)(3). “Purchase” and “sell” are a pair that refer to the same transaction or type of transaction. *See, e.g.*, D.C. Code § 28-3905(k)(5). Because these terms are coterminous, for the purposes of the CPPA, that which is a “sale” by a merchant necessarily is a “purchase” by a consumer.

⁵ The CPPA defines “consumer” and it defines “merchant”; to prove a consumer-merchant relationship, a plaintiff must prove that one party is a consumer and another is a merchant. Facebook’s argument would add an additional element to the inquiry: a cash transaction. The text of the statute contains no such additional requirement, neither in the definitions of consumer or merchant, nor elsewhere. The Court should not impose one.

In CPPA analyses, courts rely on the common law definition of “sale” when “defining the sale itself is helpful for analyzing the underlying question.” *Ihebereme v. Cap. One, N.A.*, 730 F. Supp. 2d 40, 52 n.6 (D.D.C. 2010). This definition—“a transfer of property for a fixed price in money or its equivalent,” *id.* (quoting *Iowa v. McFarland*, 110 U.S. 471, 478 (1884) (emphasis added))—refutes the notion that a person can purchase goods and services only with cash.

Courts treat valuable consideration as an equivalent to and substitute for money in a sale. In *McFarland*, the Supreme Court adopted the view that the “price” of a sale could take the form of “money,” but consideration also could come in other “equivalent” forms. *McFarland*, 110 U.S. at 478. Consideration can be either “performance or a return promise,” and “the performance may consist of (a) an act other than a promise, or . . . (c) the creation, modification, or destruction of a legal relation.” Restatement (Second) of Contracts § 71 (Am. L. Inst. 1981). “District of Columbia courts will not inquire into the adequacy of consideration . . . as long as it is legally sufficient.” *Osseiran v. Int’l Fin. Corp.*, 889 F. Supp. 2d 30, 40 (D.D.C. 2012) (internal quotation marks and punctuation omitted). “Any performance which is bargained for” is legally sufficient. Restatement (Second) of Contracts § 72 (Am. L. Inst. 1981).

Thus, although Facebook’s products have a *monetary* price of zero dollars, Facebook users still “purchase” Facebook’s products by parting with their time, their attention, and their personal data when using Facebook’s products. Facebook’s access to and use of users’ time, attention, and data is equivalent to money in terms of value to Facebook and constitutes the real “purchase price” Facebook receives.

1. Users provide valuable consideration by expending time and attention on Facebook’s social network.

Performance of an act can be legally sufficient consideration. In unilateral contracts, where a promise is exchanged for performance, “the act which the offer seeks . . . is the

consideration for the promise.” *King v. Indus. Bank of Wash.*, 474 A.2d 151, 156 (D.C. 1984). Facebook’s Terms of Service offer access to its social network in exchange for users’ time-intensive act of attending to advertisements. Facebook describes this exchange in its Terms of Service: “Instead of paying to use Facebook . . . you agree that we can show you ads that businesses and organizations pay us to promote.”⁶ Users’ performance – utilizing a social network on which they can be shown advertisements – is the act which the offer from Facebook seeks and thus constitutes the consideration that supports the sale. Users’ performance of this act is essential to Facebook’s ability to sell advertising opportunities to advertisers at an astronomical profit.⁷

Other digital entertainment platforms such as Hulu and Spotify give users a choice between exposure to ads and paying cash; their subscriptions cost \$10 to \$12 per month.⁸ But Facebook gives no such option as to the form of consideration users must pay. Facebook refuses to permit access to its platform without exposure to advertisements. Facebook tells users they “can’t opt out of or block seeing ads on Facebook.”⁹

Facebook has warned shareholders that its financial performance is threatened by ad-

⁶ *Terms of Service*, supra note 2.

⁷ User time and attention has been treated as valuable consideration in similar contexts. Companies such as InboxDollars and Swagbucks pay users in cash to watch videos, complete surveys, and otherwise interact with online content. Eric Anthony, *These Companies Will Pay You to Watch TV & Online Videos*, Houston on the Cheap (Apr. 15, 2020), <https://www.houstononthecheap.com/get-paid-to-watch-tv-videos>.

⁸ See, e.g., Spotify, *Premium*, <https://www.spotify.com/us/premium/> (last accessed Dec. 2, 2021) (“Ad-free music listening” is “\$9.99/month”).

⁹ *Control the Ads You See*, Help Center, Facebook, https://www.facebook.com/help/1075880512458213/?helpref=hc_fnav (last accessed Dec. 2, 2021).

blocking software¹⁰ which allows “users [to] cease or reduce the number of times they engage with . . . ads.” Facebook, Inc., Annual Report (Form 10-K) (Jan. 27, 2021). In other words, Facebook’s value to shareholders—its profitability—depends on the value of the time and attention that its users provide in accessing the social network.

And indeed, the time and attention made available by Facebook users for advertisers have proven immensely valuable to Facebook’s bottom line. In 2020, the average U.S. Facebook user spent fifty-eight minutes per day on the platform.¹¹ Facebook has an estimated 178 million adult U.S. users.¹² Assuming an opportunity cost equal to the federal minimum wage¹³—a very conservative assumption—U.S. Facebook users supply \$1.25 billion dollars per day of their time and attention in exchange for access to Facebook’s products. In the final quarter of 2020,

¹⁰ Facebook takes aggressive action to stymie external software known as “ad-blockers,” which prevent websites from displaying ads to users. Ad-blockers are popular with internet users who recognize the value of their limited attention, but Facebook views them as a material risk to its financial performance. See Facebook, Inc., Annual Report (Form 10-K), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/4dd7fa7f-1a51-4ed9-b9df-7f42cc3321eb.pdf> (Jan. 27, 2021).

¹¹ Catherine Hiley, *How Much of Your Time is Screen Time?*, Uswitch (June 15, 2021), <https://www.uswitch.com/mobiles/screentime-report/>.

¹² The U.S. adult population is 258.3 million. Stella U. Ogunwole et al., *Population Under Age 18 Declined Last Decade*, U.S. Census Bureau (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html>. Sixty-nine percent of American adults report using Facebook. John Gramlich, *10 Facts About Americans and Facebook*, Pew Rsch. Center (June 1, 2021), <https://www.pewresearch.org/fact-tank/2021/06/01/facts-about-americans-and-facebook/>. This means the adult U.S. Facebook user population is approximately 178,228,000.

¹³ The federal minimum wage is \$7.25 per hour. U.S. Dep’t of Lab., *Minimum Wage*, <https://www.dol.gov/general/topic/wages/minimumwage> (last accessed Dec. 2, 2021).

Facebook earned an average of \$53.56 per user in the U.S. and Canada.¹⁴

In short, users' time and attention are valuable. Only by parting with them can consumers access and use Facebook's products. Facebook users' provision of time and attention are thus a portion of the price Facebook receives when sells access to its social network.

2. Users provide valuable consideration by parting with personal data that power Facebook's advertising sales business.

Facebook collects data from its users automatically, providing little real-time transparency into the volume and secondary use of their information. Facebook's Terms of Service describes how users' personal data factors into the company's business model: "We use your personal data, such as information about your activity and interests, to show you ads that are more relevant to you."¹⁵ In other words, Facebook coordinates with advertisers and their agents to "target" ads to users based on personal information Facebook collects, and charges advertisers accordingly. Users' data are used to inform advertisers' targeting choices and Facebook's own targeting decisions.¹⁶ The more extensive the data on a user that Facebook has, the better targeted the ads. The better targeted the ads, the higher the chance a user will click on and engage with an ad. Higher user engagement translates into higher revenues for Facebook, as advertisers are willing to pay more to place ads with higher expected and actual rates of user

¹⁴ Kate Klonick, *Opinion: Clearly, Facebook is Very Flawed. What Will We Do About It?*, N.Y. Times (Oct. 1, 2021), <https://www.nytimes.com/2021/10/01/opinion/facebook-files-content-moderation-zuckerberg.html>.

¹⁵ *Terms of Service*, Facebook, <https://www.facebook.com/legal/terms> (last revised Oct. 22, 2020).

¹⁶ See Muhammad Ali, et al., *Discrimination Through Optimization: How Facebook's Ad Delivery Can Lead to Skewed Outcomes* 3 (2019), <https://arxiv.org/pdf/1904.02095.pdf>.

engagement.¹⁷

In short, just as users' provision of time and attention is valuable, so too is the provision of personal data. Facebook has designed its platform to make users' personal data transfer unavoidable and automatic. Indeed, some of the most valuable data for targeted-advertising purposes relate to the makeup of a users' social network of friends and family, which users have no choice but to share with Facebook in accessing access to its social network. The provision of data constitutes an additional form of consideration that, along with the provision of time and attention, comprise the "equivalent" of cash price. Users may be only vaguely aware of what Facebook is doing with their data; but the data are of immense and critical value to Facebook.

3. "Free" is not a zone where law and economics do not apply.

Legal scholars agree that assigning a transaction a cash price of zero does not change the nature of the transaction (as compared to a transaction with a cash price of, for example, \$5.00) so as to remove the zero-cash transaction from the reach of any particular law or legal regime. To the contrary, transactions with a cash price of zero—sometimes called "free"—generally have the same features as other transactions. They present courts and practitioners with the familiar challenge of applying old standards to new facts, a challenge that may seem especially daunting given that companies like Facebook now rely on zero-cash transactions to profitably distribute products and services to literally billions of people. But lawyers are adept at this. *See, e.g.*, Tim

¹⁷ Facebook's "ads enable marketers to reach people based on a variety of factors including age, gender, location, interests, and behaviors." Facebook, Annual Report 7 (Form 10-K) (Jan. 27, 2021). Users' data may be responsible for as much as two-thirds of Facebook's revenue; research has shown that "non-targeted ads produced 52 percent less revenue than comparable targeted ones." Robert J. Shapiro, *What Your Data Is Really Worth to Facebook*, Wash. Monthly (July/Aug. 2019), <https://washingtonmonthly.com/magazine/july-august-2019/what-your-data-is-really-worth-to-facebook/>.

Wu, *Blind Spot: The Attention Economy and the Law*, 82 Antitrust L.J. 771, 771-72 (2019) (explaining that providers of zero-price products (like Facebook) can be thought of as “Attention Brokers” who receive “attention currency” from their consumers). Over time, the law develops a new dialect that makes application of old law to new products and markets seem natural and inevitable. *See, e.g.*, John M. Newman, *The Myth of Free*, 86 Geo. Wash. L. Rev. 513 (2018) (noting that customers pay for zero-price products with their “attention, information, or both”).

Economists also resist the notion that current tools are insufficient to describe zero-cash transactions and the markets in which they are sold. *See, e.g.*, Fiona Scott Morton et al., Univ. of Chi. Booth Sch. of Bus.: Stigler Ctr., *Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee: Report 54* (2019) (“‘Free’ is not a special zone where economics or antitrust do not apply. Rather, a free good is one where the seller has chosen to set a monetary price of zero and may set other, non-monetary, conditions or duties.”).

Consumers, by contrast, react to “free” prices in ways that may be irrational, generally overvaluing free goods and undervaluing their costs. *See generally* Michael S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 Antitrust L.J. 521, 528-31 (2015-16) (canvassing literature on the “free effect”).¹⁸ If anything, however, this phenomenon calls for *greater* oversight of “free” transactions, and certainly not the exemption from consumer law that Facebook seeks here.

¹⁸ *See also* Dan Ariely, *The Power of Free Tattoos* (Nov. 10, 2010), <https://danariely.com/the-power-of-free-tattoos/> (arguing that a price of zero causes prospective buyers to discount risks).

ii. Facebook users are consumers because they receive Facebook’s consumer goods.

Facebook users also are “consumers” under the CPPA because they “receive” Facebook’s “consumer goods.” D.C. Code § 28–3901(a)(2).¹⁹ Facebook admits as much in its Terms of Service.²⁰ As noted above with respect to “purchase” and “sell,” “receive” and “transfer” are a pair that refer to two sides of the same transaction. Although the ordinary meaning of “purchase” implies some cash price or valuable consideration, “receive” is defined as “to take possession or delivery of.” *Webster’s Third New International Dictionary* 1894 (3d ed. 2002); *see also Navajo Nation v. U.S. Dep’t of Interior*, 852 F.3d 1124, 1128 (D.C. Cir. 2017) (relying on this definition). “Transfer” means “to carry or take from one person or place to another.” *Webster’s Third New International Dictionary* 2426-27 (1971); *Roberts v. United States*, 216 A.3d 870, 877–78 (D.C. 2019) (using this definition). Neither “receive” nor “transfer” implies price or consideration, thus encompassing goods offered for free.

Because “purchase” / “sell” already covers transactions with fixed prices, “receive” / “transfer” seems intended to ensure that transactions *without* fixed prices, including zero-price transactions, are also covered. Otherwise, the inclusion of “receive” / “transfer” in the CPPA would be surplusage. This compels the conclusion that “receive” and “transfer” are

¹⁹ “When used as an adjective, [consumer] describes anything, without exception, that: A person does or would purchase, lease (as lessee), or receive and normally use for personal, household, or family purposes.” D.C. Code § 28–3901(a)(2)(B). Courts are generous in defining allowable “personal” uses, which include use in litigation, financial motivations, and even resale (if the person is not “engaged in the regular business of purchasing this type of good or service and reselling it”). *Ford v. ChartOne, Inc.*, 908 A.2d 72, 83-84 (D.C. 2006).

²⁰ The Terms of Service state, “[t]hese Products are provided to you by Facebook, Inc.” and “[w]e provide the Products and services described below to you” *Terms of Service*, Facebook, <https://www.facebook.com/legal/terms> (last revised Oct. 22, 2020).

intended to make clear that zero-price transactions are covered by the CPPA. Facebook users qualify as consumers because they “receive” consumer goods from Facebook, even though those products have a cash price of zero.

iii. Facebook users are consumers because they provide economic demand for Facebook’s trade practices.

Facebook users also are “consumers” because they provide economic demand for Facebook’s trade practices and for its consumer goods and services. *See* D.C. Code § 28–3901(a)(2); *see also Stone v. Landis Constr. Co.*, 120 A.3d 1287, 1289-90 (D.C. 2015).

User engagement drives Facebook’s revenue—a staggering \$26.1 billion in first quarter 2021.²¹ So important are users to revenue that the company calculates “average revenue per user.”²² The company asserts affirmatively that “users . . . perform revenue-generating activity,”²³ including simply engaging with the platform.²⁴ Facebook users plainly create economic demand for its products and trade practices. Therefore, Facebook users are consumers.²⁵

²¹ FB Earnings Presentation Q1 (2021), at 8, https://s21.q4cdn.com/399680738/files/doc_financials/2021/FB-Earnings-Presentation-Q1-2021.pdf.

²² Facebook, FB Earnings Presentation Q1 (2021), at 4.

²³ *Id.* at 4, 9-11.

²⁴ Facebook even warns investors that its financial performance may be adversely affected by declines in user engagement. Facebook, Annual Report 13 (Form 10-K) (Jan. 27, 2021).

²⁵ Facebook interacts with users on both sides of its platform. Facebook provides a social network to users on one side and shows them ads purchased by advertisers occupying the conceptual space on the other side. This simply means that users *and* advertisers may qualify as consumers protected by the CPPA, not that the users do not.

C. Facebook is a merchant under the CPPA.

The CPPA defines “merchant” to include an entity that “does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services, or a person who in the ordinary course of business does or would supply the goods or services which are or would be the subject matter of a trade practice.” D.C. Code § 28-3901(a)(3).

Courts have interpreted this to mean any person “connected with the ‘supply’ side of a consumer transaction.” *Save Immaculata/Dunblane, Inc. v. Immaculata Preparatory Sch., Inc.*, 514 A.2d 1152, 1159 (D.C. 1986). Facebook distributes a consumer product designed for personal use. Facebook’s consumers purchase or receive its products; by logical implication and reasonable statutory construction, Facebook sells or transfers its products to its consumers. Thus, Facebook fits the definition of “merchant” under the CPPA.

Facebook meets the statutory definition for another reason as well: it holds itself out as a supplier of goods or services. Where there is evidence “suggesting [that a person] held himself out as a person who *would* supply any goods or services to [a consumer],” that person is a merchant under the definition of the CPPA. *Archie v. U.S. Bank, N.A.*, 255 A.3d 1005, 1021 (D.C. 2021) (emphasis added).

Facebook does exactly this. In its Terms of Service, Facebook tells users that “[t]hese [p]roducts are provided to you by Facebook” and that “we [Facebook] provide the [p]roducts and services described below to you.” *Terms of Service, supra* note 2 (emphasis added). Similarly, Facebook asserts in SEC filings that it competes to provide “connection and communication products and services to users online.” Facebook, Inc., Quarterly Report (Form 10-Q) (July 28, 2021); Facebook, Inc., Annual Report (Form 10-K) (Jan. 27, 2021). These public pronouncements confirm that Facebook meets the CPPA’s definition of “merchant.”

CONCLUSION

Facebook and its users have a merchant-consumer relationship. Facebook and its trade practices thus fall under the purview of the CPPA. The statute provides no textual support to hold otherwise. A contrary ruling could cause ripple effects here in the District and elsewhere, encouraging other companies that offer “free” goods and services online to seek exemptions from consumer protection law. Such a result could undermine years of work by *Amici* to ensure effective protections for consumers engaging in online transactions, including the increasing number of transactions taking time, attention, and data from consumers rather than cash. This Court should expressly reject Defendants’ assertion that charging a zero-cash price immunizes Facebook from scrutiny under the CPPA.

Respectfully Submitted,

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