IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MUSLIM ADVOCATES, *Plaintiff,* v. **MARK ZUCKERBERG, et al.,** *Defendants*.	**Case No.: 2021 CA 001114 B** Judge Anthony C. Epstein

PLAINTIFF MUSLIM ADVOCATES' OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(b)

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INTRODUCTION

This case seeks to hold Facebook and its executives accountable for making false and misleading statements in the District of Columbia about what steps Facebook takes to make its social media platform safer for users. In public testimony to Congress and in private communications to Muslim Advocates, Facebook's leaders repeatedly stated that Facebook removes hate speech, calls to arms, and similar harmful content that violates the company's professed standards *when it learns of such content*. Because those statements were false and deceptive, Muslim Advocates filed this lawsuit, asserting claims of consumer fraud under the D.C. Consumer Protection Procedures Act (CPPA) and common-law fraud and negligent misrepresentation.

In the wake of the Cambridge Analytica scandal and intense pressure from Congress and civil rights groups, Facebook's leaders hatched a plan to avoid further regulation, stop consumers from dumping Facebook, and mitigate civil rights leaders' escalating demands. Starting with Facebook's CEO Mark Zuckerberg's April 2018 testimony in the House and Senate, Facebook's leaders began touting a false claim: that when Facebook learns of harmful content that violates its own community standards—like hate speech and dangerous groups—Facebook removes it. Time after time, Zuckerberg, Facebook's Chief Operating Officer Sheryl Sandberg, and other company leaders went to Capitol Hill to repeat this falsehood to Congress and Facebook's consumers. And those leaders made the same misrepresentations in meetings and emails with Muslim Advocates and other civil rights groups. But Facebook's leaders knew that the statements were false. As Muslim Advocates demonstrates in the complaint, Facebook had a practice of routinely refusing to remove content that clearly violated its community standards *after Facebook learned of it*.

In one sense, the issues here are familiar—like many other consumer-protection cases, this case involves corporate executives who have made false claims about the safety of their products (or, more specifically, the steps they've taken to make their products safer) in an effort to boost sales

and prevent a loss of customers. But there is also something extraordinary about this case: In moving to dismiss, Facebook and its executives claim that they are above the law in novel ways.

First, they claim, without citing any precedent or authority, that because Facebook does not charge users money for its service, Facebook is exempt from the CPPA's consumer protections. But this is wrong. The CPPA covers any sale, lease, or transfer of a good or service. Facebook plainly transfers its services to its users by allowing them to use their apps and sites. But Facebook also sells its services—because a sale does not require an exchange of money, it just requires one to give up property for something of value, and users give up their data in exchange for Facebook's services. Facebook's argument would also have far-reaching consequences. Since D.C.'s consumer protection law is one of the strongest in the nation, Facebook and other tech giants that don't charge money for their services would be exempt from virtually all other consumer protection laws.

Second, Facebook wrongly claims that Section 230 gives Facebook and its executives absolute immunity from civil liability for their executives' own false oral testimony and statements. But Section 230 immunity only applies to the content of third parties that Facebook publishes *online*, not oral statements made in real life. And Section 230 only applies to the statements of third parties online, not the misrepresentations created and spoken by an online platform or its executives. Adopting Facebook's view of Section 230 would create a special privilege for social-media executives who make false statements about their businesses, exempting them from a century's worth of laws designed to protect consumers and investors from deception.

Facebook makes additional arguments that fare no better. The company challenges Muslim Advocates' standing, but it does so by failing to note that Article III's requirements do not apply to Muslim Advocates' CPPA claim and by asking the court to disregard allegations underlying its common-law claims. Next, to argue that there is no actionable statement of fact, it mischaracterizes Muslim Advocates' complaint as premised on a broad promise to remove *all*

improper content. In reality, as explained, Muslim Advocates alleges that it and the public were misled by Facebook's narrower statement that it removes content that violates its standards when Facebook *learns of it*. Those statements did not merely convey Facebook's "goals," as it claims, but represented how Facebook operates its service. Finally, Facebook argues that Muslim Advocates cannot have "reasonably relied" on Facebook's statements for purposes of its common law claims. But this argument is contrary to the allegations of the complaint and, bizarrely, asks this Court to accept that nonprofits like Muslim Advocates should never assume that Facebook's leaders are telling the truth when the testify in Congress or speak privately with them.

FACTUAL BACKGROUND

Facebook's Business Model and Community Standards.

Facebook is the world's most heavily used social networking website.[1] With 200 million users in the United States and nearly three billion users worldwide, some 36% of all human beings use Facebook. Amend. Compl. ("AC") ¶ 10. Facebook's main apps—Facebook, Instagram, Messenger, and WhatsApp—allow billions of people to communicate with each other. *Id.* ¶¶ 11–17. Instead of charging its users money for its services, Facebook requires its users to be monitored and give Facebook their personal data. *Id.* ¶¶ 19–21. Facebook and advertisers, in turn, use this data to target users with paid ads. *Id.* ¶ 22. Facebook makes nearly all its revenue when advertisers pay it to show their ads to people when they use Facebook. *Id.* ¶ 23. It's a profitable business: In 2020, Facebook earned $86 billion in revenues and $29 billion in profit. *Id.* ¶ 31.

At the heart of Facebook's business is a paradox. The more time people spend on Facebook's apps the more money it makes, and incendiary content—including anti-Muslim hate speech and groups—causes users to spend more time on Facebook. *Id.* ¶¶ 27–29, 46. But the public

[1] All references to "Facebook" in this opposition include the individual Defendants, Mark Zuckerberg, Sheryl K. Sandberg, Joel Kaplan, and Kevin Martin, unless otherwise specified.

perception that Facebook tolerates this harmful content could harm its bottom line by driving away users and advertisers and exposing it to greater regulation. *Id.* ¶¶ 29–30, 46.

To avoid this paradox, Facebook has adopted "Community Standards" that identify with great specificity the types of content that users are not allowed to post on Facebook's apps. This includes content such as "hate speech," "violence and incitement," "dangerous individuals and organizations," and "bullying and harassment." *Id.* ¶¶ 38–45. These definitions are given sharp edges. For example, Facebook defines hate speech as "a direct attack against people" based on a "protected characteristic" such as religion, "including dehumanizing speech, harmful stereotypes, statements of inferiority, expressions of contempt, disgust or dismissal," which includes comparing a religious group to "[f]ilth, bacteria, disease and feces." *Id.* ¶ 39. It further defines dangerous organizations as those that "proclaim a violent mission or are engaged in violence." *Id.* ¶ 42. Facebook encourages users to report violations of the Community Standards so that it can remove violating content. *Id.* ¶ 49.

Facebook's Misrepresentations About Removing Content That Violates its Community Standards When it Learns of the Content.

For several years, Facebook and its corporate leadership have engaged in a coordinated campaign to convince users that its products are safe, to increase the use of Facebook, to prevent more government regulation, and to discourage non-profit leaders from calling for boycotts and greater regulation. *Id.* ¶¶ 52–53. To these ends, Facebook's leaders have routinely made false, misleading, and deceptive statements to Congress, its consumers, and civil rights groups like Muslim Advocates: that when Facebook learns of content that violates its Community Standards, policies, or other articulated standards, it removes it. *Id.* ¶¶ 53–75. In making these statements, Facebook's leaders were clear that Facebook does not remove all content on Facebook that violates its standards—only content that Facebook identifies or learns about from others. For example:

- Facebook's CEO Mark Zuckerberg told the Senate Commerce Committee in 2018: "When we find things that violate our Standards, we remove them." *Id.* ¶ 59.

- Facebook's COO Sheryl Sandberg told the Senate Intelligence Committee in 2018: "when we find content that violates our policies, we will take it down." *Id.* ¶ 61.

- Facebook's Head of Cybersecurity Policy Nathaniel Gleicher told the House Intelligence Committee in 2020: "we identify" "[g]roups that promote violence," and "we remove them from the platform *whenever* we see it." *Id.* ¶ 62 (emphasis added).

- Facebook's Head of Global Policy Management Monika Bickert told the Senate Commerce Committee in 2018: "We also remove any content that praises or supports terrorists or their actions whenever we become aware of it," *id.* ¶ 65. And she told the same Committee: "When we find content that violates our standards we remove it." *Id.* ¶ 66.

- Facebook's VP of Public Policy Neil Potts told the House Judiciary Committee in 2019: "When we become aware of [white nationalist] pages we will remove them." *Id.* ¶ 70.

Facebook's leaders repeated the same claim in other congressional testimony, *see id.* ¶¶ 56–70, which was drafted, approved, and directed by Kevin Martin and Joel Kaplan, two of Facebook's highest ranking public policy officials. *Id.* ¶¶ 5–6, 71. They repeated the same claim in their media remarks. *See, e.g.*, *id.* ¶ 77. And they did the same through dozens of meetings and emails with civil rights groups like Muslim Advocates in which Zuckerberg, Sandberg and Martin all participated. *Id.* ¶¶ 72–76, 79–80. Facebook's leaders courted these civil rights groups because, as Facebook told financial regulators, their criticism could negatively affect its business. *Id.* ¶ 80.

But these statements were false and misleading. Both before and after they were made Facebook had a practice of routinely and affirmatively deciding *not to remove* content that clearly violated Facebook's standards *even when Facebook became aware of it*, especially anti-Muslim content. *Id.* ¶ 96. And Facebook's leaders knew this when they made those statements. *Id.* ¶¶ 90–93.

For example, from 2017 to 2019, Professor Megan Squire routinely reported to Facebook specific, clear violations of its community standards—such as content encouraging people to kill worshipers of Allah, calling Islam a disease, saying death to Islam, groups calling for purging Islam,

a group named "Islam is pure evil," and a group called "Islam is a Cancer"—but Facebook refused to remove that violative content. *Id.* ¶¶ 106–17. In these cases, it is without question that the Community Standards barred the content that Facebook declined to remove. *See id.*; *see also* ¶¶ 39, 42 (setting forth Facebook's standards for hate speech and dangerous organizations).

Likewise, in 2020 after the Tech Transparency Project identified over 100 American white supremacist groups active on Facebook, again Facebook did not remove those hate groups. *Id.* ¶ 128. The same year, Facebook's lawyers, in conducting a civil rights audit, highlighted Facebook's failure to remove anti-Muslim content that violated its standards and found that Facebook's failure to enforce its standards created an atmosphere "where Muslims feel under siege on Facebook." *Id.* ¶¶ 127, 141. And for years Donald Trump was allowed to routinely flout Facebook's standards without Facebook taking any action to remove posts it knew violated its standards. *Id.* ¶¶ 151–56.

In some cases, Facebook's failure to remove such violative content has turned deadly, like when it refused to remove a call to arms by a militia group—despite 455 user reports flagging the violation—which resulted in the death of two peaceful protesters in Kenosha. *Id.* ¶¶ 147–50.

Shortly after the present complaint was filed the Wall Street Journal reported—based on Facebook's internal documents—that for years Facebook has operated a secret program called "cross check" or "XCheck" in which Facebook has not enforced its community standards or policies against "high profile users," "including celebrities, politicians and journalists." Jeff Horowitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt*, Wall Street Journal (Sept. 13, 2021), https://perma.cc/A8CH-RFAV. Under this program that "shield[ed] millions of users from the company's normal enforcement process," Facebook would not remove (or take much longer to remove) content that violates its standards, even when Facebook was aware of it, and it would not apply the sanctions it publicly claimed to apply to violators. *Id.* Facebook's 2019 internal review of XCheck observed that its non-enforcement of its

standards was "not publicly defensible," because "[w]e're not actually doing what we say we do publicly," and "[u]nlike the rest of our community, these people can violate our standards without any consequences." *Id.* (quoting Facebook's 2019 internal review). Facebook's senior leaders were well aware of the XCheck program. Indeed, in some cases to remove violative content from elite users' accounts required the personal approval of Zuckerberg or Sandberg. *Id.*

Muslim Advocates' Legal Claims.

In the complaint, Muslim Advocates alleges that, through the false and misleading statements described above, Facebook and its executives violated the CPPA, including by misrepresenting the same fact that has a tendency to mislead (*i.e.*, that Facebook removes content that violates its standards when it learns of it), by misrepresenting that Facebook's services had characteristics, benefits, standards, and qualities it did not have (*i.e.,* that it had the same practice), and failing to state a material fact the failure of which tends to mislead (*i.e.*, that Facebook had a practice of *not* removing violative content when it learns of it). *Id.* ¶¶ 186–92. Muslim Advocates also alleges that the Defendants committed common law fraud and negligent misrepresentation by making the same misrepresentations. *Id.* ¶¶ 199–213.

ARGUMENT

I. Muslim Advocates has standing to bring all of its claims.

A. Muslim Advocates has standing to sue under the CPPA, because it is a public interest organization as defined by the CPPA.

D.C. Courts are not "bound by the requirements of Article III." *D.C. v. Walters*, 319 A.2d 332, 338 (D.C. 1974). While D.C. Courts usually follow Article III as a prudential matter, the D.C. Council can abrogate that limitation. *See Grayson v. AT&T Corp.*, 15 A.3d 219, 259 (D.C. 2011). In 2012, the Council did that for certain nonprofits to sue under the CPPA. Under D.C. Code § 28-3905(k)(1)(D), an entity that satisfies a three-part test may sue even without Article III standing:

> (1) it must be a public interest organization, D.C. Code § 28-3905(k)(1)(D)(i); (2) it must identify "a consumer or a class of consumers" that could bring suit in their own right, *id.*; and (3) it must have a "sufficient nexus" to those consumers' interests "to adequately" represent them, *id.* § (k)(1)(D)(ii).

Animal Legal Def. Fund v. Hormel Foods Corp., 258 A.3d 174, 185 (D.C. 2021).

Muslim Advocates easily meets these three requirements. First, it is a "public interest organization," which is defined by the CPPA to mean "a nonprofit organization that is organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers." D.C. Code § 28-3901(a)(15); *see* AC ¶¶ 183–84 (alleging that Muslim Advocates is a "public interest organization").[2] An entity qualifies as a "public interest organization" so long as even a "subsidiary" purpose of the group is to assist people in their capacities as consumers. *See Hormel*, 285 A. 2d at 185 ("While ALDF's primary mission is to 'protect the lives and advance the interest of animals,' providing consumers with accurate information about how their meat is sourced is one of its subsidiary purposes."). Muslim Advocates devotes significant resources to ensuring that consumers—"namely, Muslim consumers," AC ¶ 184—can access social media without enduring bias and hate. *See id.* ¶¶ 2, 173, 179.[3] This readily demonstrates that Muslim Advocates operates "in part" to "promot[e] [the] interests . . . of consumers." D.C. Code § 28-3901(a)(15).

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[2] In stating that "Muslim Advocates does not bring this Count on behalf of a class of consumers or seek to represent a class of consumers," Paragraph 183 was intended to clarify that Muslim Advocates does not seek to certify a Rule 23 class, not to disavow its pursuit of this case on behalf of the *interests* of consumers or a group of them. Indeed, the "public interest organization" standing provision, which Muslim Advocates alleged it satisfies in the prior sentence, applies only when an organization sues on behalf of a consumer or class of consumers. Thus, Muslim Advocates' invocation of § 28-3905(k)(1)(D) would have made little sense if it sought to disclaim suing on behalf of the interests of those consumers. In any event, the Declaration of Eric Niang, attached to Muslim Advocates' opposition to Facebook's special motion to dismiss, makes clear that the group seeks to pursue the case on behalf of the interests of consumers. Niang Decl. ¶ 14.

[3] Although the complaint focuses on Muslim Advocates' work on behalf of consumers of social media, its consumer-oriented work goes much further. One of its core projects is "Corporate Accountability," which seeks to ensure that corporations pursue "business models [that are] hate free" for the benefit of minority—and, in particular, Muslim—consumers. Muslim Advocates, Key Issue: Corporate Accountability, https://perma.cc/PW3V-FRRX (last visited Nov. 8, 2021).

Second, an individual consumer could sue under the CPPA for relief from the Defendants' false and misleading statements. While the CPPA only requires that "a consumer could bring an action," *id.*; *see* D.C. Code § 28-3905(k)(1)(D)(i), Muslim Advocates specifically alleges that Facebook misled numerous consumers in D.C.—potentially hundreds of thousands—in violation of the CPPA. AC ¶¶ 190–92. To be sure, the Defendants argue (without merit) that Muslim Advocates has not stated a viable CPPA claim. But those arguments go to the merits, not standing.

Third, Muslim Advocates has a "sufficient nexus" to the interests of consumers misled by Facebook's misrepresentations to adequately represent them. The "nexus" requirement "functions to ensure that an 'organization has a sufficient stake in the action' to pursue 'it with the requisite zeal and concreteness.'" *Hormel*, 258 A.3d at 187. That Muslim Advocates will prosecute this action with "zeal" cannot be doubted. For years it has worked to eradicate hate speech from Facebook's platforms and educate the public on the extent of the problem, all on behalf of the consumers it represents here. *See* AC ¶¶ 2, 175, 179, 207. In its only decision on this type of standing, the Court of Appeals held that a nonprofit met the nexus standard by alleging it "devoted 'substantial' 'resources to counteract the [defendants'] misinformation,'" "educating consumers," and "advocating for stronger standards." *Hormel*, 258 A.3d at 189. The allegations here are no different.

B. Because Muslim Advocates has Article III standing, it also has standing to pursue its CPPA claim as a nonprofit organization and has standing to bring its common law claims.

Even if Muslim Advocates does not qualify as a "public interest organization" it still has standing to sue under the CPPA, D.C. Code § 28-3905(k)(1)(C), because it is a "nonprofit organization," *see* AC ¶ 183 (Muslim Advocates is "not organized or operated for profit"); D.C. Code § 28-3901(a)(15) (defining "nonprofit organization" under the CPPA), and it has Article III standing, as described below. *See Hormel*, 258 A.3d at 182 & n.5 (holding "nonprofit organization" standing requires a showing of Article III standing). And since Muslim Advocates has Article III

standing, it has standing to pursue its common law fraud and negligent misrepresentation claims.

Muslim Advocates amply alleges Article III standing. It alleges that the Defendants' false statements induced it to provide Facebook valuable services that Muslim Advocates otherwise would have withheld. This included harnessing its expertise to give Facebook insight into American Muslim communities; to respond to Facebook's requests for advice on its community standards; and to educate Facebook on how "militias, white nationalists, and other anti-Muslim hate groups proliferat[e] on the platform." AC ¶¶ 166–69. This work consumed hundreds of Muslim Advocates' staff hours, *id.* ¶ 169, and it was, in essence, a free consulting service that Facebook obtained by making its misleading statements.

Muslim Advocates' standing here is thus straightforward: it lost something of value in staff time (injury-in-fact) as a direct result of the Defendants' misleading statements (causation). And the damages that Muslim Advocates seeks, *see* AC at 63, would remedy that injury by compensating Muslim Advocates for its services (redressability).

The Defendants do not dispute that Muslim Advocates alleges an injury in fact by giving Facebook its valuable services for free,[4] and they make no argument challenging redressability.[5] They instead argue that Muslim Advocates' injury is not traceable to the Defendants' statements

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[4] Nor could they. Courts routinely entertain claims that a plaintiff was fraudulently induced to donate money, *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1127 (11th Cir. 2019); *Dell'Aquila v. LaPierre*, 491 F. Supp. 3d 320, 325 (M.D. Tenn. 2020), often without a standing challenge. *See Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 606 (2003). While Muslim Advocates gave labor, not money, its labor has value. *See Ludwig & Robinson, PLLC v. BiotechPharma, LLC*, 186 A.3d 105, 116 (D.C. 2018) (explaining how to measure damages for plaintiff misled into to giving services).

[5] They briefly reference "redressability," but their argument focuses solely on traceability. In any event, money damages for the value of Muslim Advocates' services clearly would redress its injury. *See* AC at 63 (seeking restitution and damages). As it "performed services for which it has not been paid, and through this action it seeks to redress its economic loss directly," it "clearly has standing in the Article III sense." *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 (1983). The injury is also "redressable by the award of [CPPA] statutory damages." *Parr v. Ebrahimian*, 70 F. Supp. 3d 123, 136 (D.D.C. 2014); *see* AC at 63 (seeking statutory damages).

because Muslim Advocates gave Facebook the services before and after the misleading statements at issue. Mot. at 9. According to Facebook, this means that Muslim Advocates' services must have been induced by something other than Facebook's statements. But as Facebook acknowledges, Muslim Advocates has alleged that it *continued* to provide services—when it otherwise would have stopped—based on a string of more recent, and repeated, misrepresentations from 2018 to 2020 that are the subject of the complaint in this case. *See* Mot. at 9 (citing AC ¶ 166); *see also* AC ¶ 171.

The complaint explains that "Muslim Advocates continued to provide these services because of Facebook's repeated representations—both in private overtures and in public and highly scrutinized forums such as Congress—about what action Facebook had taken in the past *and would take in the future*," AC ¶ 171 (emphasis added), and gives many examples of post-2018 misrepresentations. *Id.* ¶¶ 56–88. They included assurances from Facebook's COO Sheryl Sandberg that "'We will remove anything that violates our Community Standards,'" *id.* ¶ 74 (quoting May 1, 2019 email), and promises about new standards it would enforce—ones Muslim Advocates cares deeply about, such as "'remov[ing] content that encourages people to bring weapons to an event,'" *id.* ¶ 73 (quoting Facebook Public Policy Director's March 26, 2019 email).

Thus, while Muslim Advocates' earliest services may have depended on a willingness to engage irrespective of Facebook's conduct, it has alleged this is not true for services it gave from mid-2018 forward. For those services, each successive misrepresentation allowed Facebook to string Muslim Advocates along even longer—increasing its harms, not obviating them.

In a related argument, Facebook contends that Muslim Advocates cannot demonstrate reliance because Muslim Advocates knew "that Facebook did not remove *all* third-party content." Mot. at 10. This argument is based on a false premise. Muslim Advocates' claims rest on Facebook's assertion that it removes violative content *that is brought to the company's attention*, not "all"

content that exists on the platform.[6] *See, e.g.*, AC ¶¶ 57–59, 61, 65, 70, 188.

Facebook evidently believes that Muslim Advocates should have known that Facebook's own leaders were not telling the truth (which, bizarrely, assumes that national civil rights leaders must know that Sheryl Sandberg and other Facebook leaders boldly lie to them). But "on a motion to dismiss for want of standing," Muslim Advocates' allegations must be "accept[ed] as true" and construed in its favor. *Grayson*, 15 A.3d at 232. Facebook's motion does no more than urge the Court to disregard those well-pleaded facts demonstrating reliance. Indeed, it would not even be proper to resolve this factual dispute in the pending anti-SLAPP motion. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016) (explaining that factual disputes where a jury could weigh the evidence differently should not be resolved in an anti-SLAPP motion).

II. Muslim Advocates sufficiently alleges a claim under the CPPA.

The CPPA "establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia." D.C. Code § 28-3901(c). To advance this expansive aim, the CPPA makes it unlawful to engage in a wide range of "unfair or deceptive trade practice[s]." D.C. Code § 28-3904, including falsely representing that consumer services have a "benefit" they do not actually have and making any "misrepresent[ation] as to a material fact which has a tendency to mislead." *Id.* §§ 28-3904(b), (e).[7]

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[6] To the extent Facebook means to contend it is not "plausible" that Muslim Advocates relied on its misrepresentations, this Court should reject this factual argument. *See, e.g.*, *McCall v. D.C. Hous. Auth.*, 126 A.3d 701, 704 (D.C. 2015) (to defeat a motion to dismiss facts must state a claim that is "plausible on its face"). The statements at issue here were made to Congress—in a context where a false statement could lead to criminal prosecution, 18 U.S.C. § 1001—or by top executives of one of the biggest companies in the world directly to Muslim Advocates. It is eminently plausible to rely on those weighty statements. That is confirmed by the declaration of Madihha Ahussain in opposition to the Anti-SLAPP motion, which attests, under penalty of perjury, to such reliance.

[7] Facebook's false statements also violate other CPPA prohibitions—including a bar on misleading omissions and misrepresenting the quality of services. D.C. Code §§ 28-3904(a), (f). As a plaintiff

Muslim Advocates' claim easily states a violation of these prohibitions. The Defendants falsely portrayed how safe its services are by misrepresenting to consumers how Facebook manages the services it gives them. In particular, its leaders asserted in high-profile Congressional hearings (livestreamed to its users) that Facebook removes certain harmful content from its platform when the company learns of it. As detailed above, *see supra* at 4–6, that falsely portrayed the benefits and costs of a service used by hundreds of thousands of D.C. residents to communicate with friends and family. AC ¶ 162; D.C. Code § 28-3901(a)(2), (7) (defining "consumer" and "services" to mean, together, "services of all types" that are "use[d] for personal, household, or family purposes"). They thus misrepresented to consumers that Facebook's services had a "benefit"—an enforced mechanism for removing harmful content—they in practice lacked, D.C. Code § 28-3904(b), as well as made material misrepresentations on what content Facebook removes. *Id.* § 28-3904(e).[8]

To avoid this straightforward analysis Facebook makes four arguments. But all of them mischaracterize the claims or urge the Court to impose extratextual requirements on CPPA claims.

A. Facebook misrepresented its policy.

Facebook first contends that Muslim Advocates has not alleged that Facebook made a false or misleading statement of fact. Mot. at 16. In making this argument, Facebook does not assert that what it said was true, only that it was not an actionable representation. That is wrong.

As an initial matter, Facebook incorrectly describes Muslim Advocates' claim as being based on Facebook asserting that it removes "all content" that violates the community standards.

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only needs to prove a violation of a single provision to establish a defendant's liability, Muslim Advocates does not address these other provisions. And Facebook does not separately attack them.

[8] Facebook does not challenge, in either of its motions, that the misrepresentations at issue are "material." Nor could it. A statement is material if a "reasonable person" would be likely to attach significance to it. *Anderson v. Jones*, 606 A.2d 185, 188 (D.C. 1992). Facebook's, Congress's, and the public's frequent attention to Facebook's community standards demonstrates that a reasonable consumer would take into account Facebook's statements about how it enforces those standards.

But Muslim Advocates' claim is that Facebook misrepresented that it removes non-complaint content *of which it is aware*. As Facebook concedes, the complaint repeatedly references that narrower representation. *See* Mot. at 16–17 (quoting AC ¶¶ 57, 58, 59, 61, 65, 70). And in the cause of action section of the complaint, Muslim Advocates repeats this focus, asserting that Facebook "routinely and reliably decide[s] not to remove all content from Facebook's platform that squarely violates Facebook's Community Standards, policies, and other standards articulated to Congress and privately to Muslim Advocates staff—including, but not limited to, anti-Muslim speech—*when Facebook learns about such content or such content is flagged to Facebook by others*." AC ¶ 188 (emphasis added).

When Muslim Advocates' claim is properly understood, Facebook's attempt to characterize its statements as discussing a "goal," rather than an actionable representation, falls apart. Mot. at 16. A representation is actionable if, when viewed in the context it was uttered, it communicates an "objective[ly] verifi[able]" statement of fact rather than a "generalized statement of optimism." *Freeland v. Iridium World Commc'ns, Ltd.*, 545 F. Supp. 2d 59, 77 (D.D.C. 2008) (cited with approval in *Ludwig & Robinson, PLLC v. BiotechPharma, LLC*, 186 A.3d 105, 113 n.10 (D.C. 2018)). Here, the Defendants repeatedly and consistently represented that Facebook had an ongoing policy of removing non-compliant content of which it was aware. Unlike a reflection on a "goal" related to the task of reviewing "100 billion pieces of content a day" (*i.e.*, all content on the platform), Mot. at 17, the representations underlying Muslim Advocates' claim are statements of fact about how Facebook *in fact* responds to a much smaller (and inherently manageable) volume of content of which it has actual knowledge. Whether Facebook actually followed its purported policy is an "objectively verifiable" fact, not a mere "rosy prediction." *Freeland*, 545 F. Supp. 2d at 77.

The context in which the statements were uttered further confirms that they were representations of fact. *Cf. Sigal Const. Corp. v. Stanbury*, 586 A.2d 1204, 1210 (D.C. 1991) ("considering the entire context of the statements" to determine whether they were actionable).

Facebook made the representations at issue in response to inquiries from Congress about how it conducts its operations. They were not part of a loose sales pitch where "puffery" is to be expected. And when Facebook repeated these assertions to Muslim Advocates privately, it did so in response to specific complaints on specific postings, thus conveying how it would address Muslim Advocates' concerns, not abstractly conveying its ambitions. If a manufacturer responded to complaints about its product by saying it does not sell any widgets that it knows have a defect, the listening public would understand it to be a statement of fact. Facebook's representations are no different.

Facebook appears to argue that since it sometimes makes "nuanced" determinations, Mot. at 17–18, the statements at issue cannot constitute misrepresentations. But the examples Muslim Advocates has identified that demonstrate Facebook has not been truthful are not close calls. *See supra* at 6. There is, accordingly, no ambiguity about whether Facebook actually removed, or had a policy of removing, violating content of which it was aware: it did not.

For these reasons, Facebook's reliance on *Sibley v. St. Albans School*, 134 A.3d 789 (D.C. 2016), is misplaced. There, the plaintiff asserted that a school's statement on its website—that it "*wants* to ensure that every boy admitted to the School knows he will have the opportunity to attend, regardless of his family's financial situation"—was a "blanket guarantee" the school would offer whatever funding is necessary. *Id.* at 813 (emphasis added). The court held that, "viewed in context"—a fundraising pitch on a website—the school only stated its "goal." *Id.* Facebook's representations bear no resemblance to this statement of ambition. Facebook made *repeated* representations about its claimed policy and how it was already implemented; did not include the caveat about what it "wants" to achieve; and most important, made the representations in direct response to Congress and civil rights groups inquiring how Facebook actually conducts its operations. Those representations, properly contextualized, cannot be understood as mere statements of goals.

B. The CPPA does not require claims to arise out of a consumer transaction.

Facebook next contends that a CPPA claim must arise out of a "consumer transaction . . . analyzed 'in terms of how the practice would be viewed and understood by a reasonable consumer.'" Mot. at 21 (quoting *Pearson v. Chung*, 961 A.2d 1067, 1075 (D.C. 2008)). According to the Defendants, a "reasonable consumer" aware of the statements at issue "would [not] understand them as originating out of a consumer transaction." *Id.*

But the CPPA contains no "consumer transaction" requirement. Nor does case law support an amorphous supplemental standard. *Pearson*, on which Facebook relies, does not use the phrase "consumer transaction," let alone install it as a governing rule of law. When *Pearson* referred to a reasonable consumer's understanding, it was merely construing how an average consumer would understand the meaning of a sign that said "satisfaction guaranteed." 961 A.2d at 1075.

To be sure, the Court of Appeals has used the term "consumer transactions" to characterize some CPPA cases. *See, e.g.*, *Ford v. Chartone, Inc.*, 908 A.2d 72, 81 (D.C. 2006). But it has done so merely to explain that the CPPA covers consumer goods—*i.e.*, those used for personal, household, or family purposes, D.C. Code § 28-3901(a)(2)—and not business-to-business commercial dealings, *Ford*, 908 A.2d at 81 (distinguishing a case in which a taxicab operator sued over a gasoline purchase as it was done "in connection with his role as an independent businessman"); *see also, e.g.*, *Indep. Commc'ns Network, Inc. v. MCI Telecommc'ns Corp.*, 657 F. Supp. 785, 787 (D.D.C. 1987) ("[The CPPA] is not intended to supply *merchants* with a private cause of action against other merchants." (emphasis added)). Because the CPPA claim here does not turn on merchant-to-merchant speech, that distinction—which concerns who may sue under the CPPA, D.C. Code § 28-3905(k)—is not relevant here: Muslim Advocates brings this CPPA claim in its capacity as a public interest

organization acting on behalf of ordinary individual consumers, not as a business transacting with Facebook for business purposes. *See supra* at 8–9.

The Defendants further suggest that Muslim Advocates' claim does not arise out of a consumer transaction since there is no evidence that its statements were "directed to consumers." Mot. at 21. But Facebook admits that it intended its Congressional testimony to reach members of the public, which includes users of its product. *See* Anti-SLAPP Mot. at 2. And it is commonly understood that companies testifying in Congress speak not just to the people directly across from them but also to the public and consumers. *See Hoff v. Wiley Rein, LLP*, 110 A.3d 561, 564 (D.C. 2015) (court must draw all reasonable inferences in favor of plaintiff on a motion to dismiss).

C. The CPPA applies to businesses that don't charge money for services.

Facebook next claims that it provides a "free" service to argue that it falls outside the scope of the CPPA. The CPPA applies to "merchants." This term includes anyone "who in the ordinary course of business does or would sell, lease (to), or *transfer, either directly or indirectly . . . services*." D.C. Code § 3901(a)(3) (emphasis added). Ignoring the CPPA's plain language, Facebook contends this definition covers only money-for-services businesses. Mot. at 22. This is wrong for several reasons.

First, the term "sale" cannot be limited to "sale for money" under the CPPA. The Council has directed that the Act "be construed and applied liberally to promote its purpose." D.C. Code § 3901(c). The primary definition of to "sell" is "to give up (property) to another for something of value (such as money)." Merriam-Webster Dictionary, *sell*, https://perma.cc/WFS5-TGYC. "Money" is only one example of consideration that can be offered in a sale. Here, users' data is the "something of value." *See* AC ¶ 19. Facebook's argument would, in contrast, construe the CPPA narrowly to exclude many online platforms (such as Twitter and Google)—a large and growing sector of the economy that collect data in exchange for services.

Second, irrespective of whether Facebook is engaged in a "sale" of its services, it certainly "transfers" its services to users—providing an independent basis for applying the CPPA. "Transfer," unlike "sale," does not require an exchange. *See* Merriam-Webster Online Dictionary, transfer, https://perma.cc/T4SW-AQCH. Reflecting this, the CPPA's definition of "consumer" to include any person who "purchase[s], lease[s] (as lessee), or *receive[s]* consumer goods or services" aligns with the definition of merchant to include anyone who "sell[s], lease[s], or *transfer[s]*" services. D.C. Code §§ 28-3901(a)(2)(A), (3) (emphasis added). "Receiving," like "transferring," does not necessitate the exchange of money. Plainly, Facebook "transfers" its services to users who log on to the website or download its app, and consumers "receive" Facebook's services when they engage with the platform through Facebook's app or website.

Finally, Facebook argues that Muslim Advocates "does not allege that it is a Facebook user who provided data to Facebook based on the challenged statements." Mot. at 22. That is both factually wrong, *see* AC ¶¶ 183, 198, and irrelevant. Muslim Advocates brings its CPPA claim on behalf of consumers, not itself. And a CPPA claim is actionable "whether or not any consumer is in fact misled, deceived, or damaged" by the challenged trade practices. D.C. Code § 28-3904.

D. The individual Defendants are liable under the CPPA.

Facebook's final efforts to evade the CPPA apply only to the individual Defendants. Facebook principally argues that because the individual defendants do not "personally sell or supply consumer goods or services," they are not "merchants" who can be held liable under the CPPA. Mot. at 22. Facebook also asserts that Muslim Advocates has not alleged that Defendants Kaplan and Martin participated in any deceptive trade practice. Both arguments are wrong.

First, an individual may be held liable under the CPPA. Although the Court of Appeals has explained that CPPA claims may be brought only against "merchants," *see Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1130 (D.C. 2015), it has never held that corporate officers who engage in

conduct similar to that of the defendants here are not "merchants." "Merchant" is defined to include a "person . . . who in the ordinary course of business 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 . . . services." D.C. Code § 28-3901(3). Further, "[p]erson" is defined to include "individual[s]." *Id.* § 28-3901(a). In addition, the CPPA contemplates liability against "respondent[s]" who "may be deemed legally responsible for . . . [a challenged] trade practice." D.C. Code § 28-3901(a)(5). Together, this provides "very clearly . . . that an 'individual' may be held liable for" a violation of the CPPA in which he participates. *Cooper v. First Gov't Mortg. & Invs. Corp.*, 206 F. Supp. 2d 33, 36 (D.D.C. 2002) (denying corporate officer's motion to dismiss). Courts have repeatedly held as much.[9]

Sundberg v. TTR Realty, LLC, 109 A.3d 1123 (D.C. 2015), the only case Facebook cites for its contrary view, is beside the point. There, the plaintiffs "acknowledged that [defendant] was not a 'merchant' under the CPPA," so the court only addressed whether non-merchants can be liable for aiding and abetting CPPA violations. *Id.* at 1129. Unlike the individual defendant in *Sundberg*—a one-time home seller—here the Defendants are executives who manage the selling, transferring, and promoting of Facebook's services. AC ¶¶ 3–6. At bottom, Facebook's view would bar liability for corporate officers who craft and utter false statements to market a company's product. Once again, its view contravenes the Council's direction to interpret and apply the CPPA liberally.

[9] *See, e.g.*, *Dist. of Columbia v. Student Aid Ctr., Inc.*, 2016 WL 4410867, at *4 (D.C. Super. Aug. 17, 2016) ("Corporate officers are personally liable when they participate in [or] inspire . . . deceptive trade practices under the CPPA."); *Dist. of Columbia v. CashCall, Inc.*, 2016 WL 4017191, at *3 (D.C. Super. June 13, 2016) ("It is clear from the D.C. CPPA that individuals may be held liable for CPPA claims committed by a corporation if the individual participated directly in the unlawful trade practice at issue, or had the authority to control, and knowledge of, the practice."); *cf. Howard v. Riggs Nat. Bank*, 432 A.2d 701, 709 (D.C. 1981) ("[A] 'merchant' is not limited to the actual seller of the goods or services complained of.").

Second, Muslim Advocates adequately alleges that Martin and Kaplan participated in violations of the CPPA. Facebook concedes that Martin asserted that Facebook does not "allow hate figures or hate groups to have a presence on [the] platform," but contends this statement was not false because he referenced limitations in the ability to proactively detect non-compliant content. Mot. at 19. This again misses the point. The statement was false not because it stated that Facebook can detect and take down *all* content, but because it encompassed an assertion that Facebook does not allow hate speech of which it is aware. None of the context around Martin's assertion changes that.

Kaplan and Martin are both also liable for their roles in drafting and directing the false statements of other Facebook leaders who testified before Congress. Under D.C. law, corporate officers "are individually liable for the torts which they 'commit, participate in, or inspire,' even though the acts are performed in the name of the corporation." *Camacho v. 1440 R.I. Ave. Corp.*, 620 A.2d 242, 246 (D.C. 1993). Facebook calls the allegations about Kaplan and Martin "threadbare." Mot. at 25. But that simply ignores the complaint. Muslim Advocates alleges that these two leaders accompanied key executives to their congressional testimony and helped to draft, approve, and direct the testimony and messaging; that Martin directly communicated with outside groups about hate speech; and that Kaplan is part of a "small inner circle" of executives responsible for decisions about hate speech. AC ¶¶ 5–6, 71, 75, 95, 149, 168. Facebook's argument that the CPPA does not permit aiding and abetting liability is irrelevant, because Muslim Advocates claims Kaplan and Martin directly violated the CPPA and does not assert aiding and abetting liability.

III. Plaintiff Sufficiently Pled Fraud and Negligent Misrepresentation Claims

In seeking to dismiss the common law fraud and negligent misrepresentation claims, Facebook only challenges whether its statements are actionable and whether Muslim Advocates adequately pled reliance. Muslim Advocates already explained why the statements at issue are actionable, *see supra* at 13–15, and it has amply pleaded actual and reasonable reliance as well.

Actual reliance. Facebook argues that Muslim Advocates did not allege that the misrepresentations "played a substantial part . . . in influencing [its] decision." Mot. at 22 (quoting *Va. Acad. of Clinical Psychs v. Grp. Hospitalization & Med. Servs., Inc.*, 878 A.2d 1226, 1238 (D.C. 2005)). Actual reliance depends on the subjective experience of the plaintiff. *See* Restatement (Second) of Torts § 537 cmt. a. The complaint easily satisfies this standard. Muslim Advocates alleges it only gave services to Facebook "recently . . . in reliance" on the false statements challenged in this case. AC ¶ 166; *see also id.* ¶ 206 (Muslim Advocates "continued" to provide services "in response" to the false statements at issue). It further alleges that, but for these misrepresentations, Muslim Advocates would have "tak[en] a more hostile position" to Facebook and "would not have expended its resources and staff time" engaging Facebook. AC ¶¶ 206–07. Together, this adequately alleges that Facebook's representations "played a substantial part" in Muslim Advocates' decision-making. There is no requirement that the representation be the "sole or even the predominant or decisive factor in influencing [] conduct." *Va. Acad.*, 878 A.2d at 1238.

Facebook nonetheless argues that this is inadequate because Muslim Advocates "does not allege that it intended to stop engaging with Facebook before the alleged misrepresentations." Mot. at 23. That is simply wrong. That Muslim Advocates "would not have expended" resources *is* an allegation that it "intended to stop engaging." Moreover, the obvious import of the allegation that Muslim Advocates "continued" to provide services "in response" to false statements, *see* AC ¶ 206, is that, in the absence of those statements, it would have ceased helping Facebook. A

complaint must be construed in the light most favorable to the plaintiff. *Oparaugo v. Watts*, 884 A.2d 63, 77 (D.C. 2005). Facebook's argument asks this Court to do the opposite.

Facebook also argues that Muslim Advocates does not adequately allege reliance as the complaint does not assert "its discussions with Facebook changed in any meaningful way after the alleged misrepresentations." Mot. at 23. But there is no rule that a plaintiff must give a new type of services to show reliance; it is enough that Muslim Advocates gave services at all when it otherwise would have stopped, as it now has. *Cf. Ludwig & Robinson*, 186 A.3d at 107, 117 (reversing dismissal of fraud claim where client induced attorney to continue to give services based on the misrepresentation of the existence of a credit line).

Reasonable reliance. Facebook's claim that Muslim Advocates has not adequately plead reasonable reliance fails too.[10] Reasonableness is a fact-specific inquiry, evaluated by taking into account all of the circumstances surrounding the claim of fraud, and is therefore "a question of fact, for which disposition by summary judgment"—let alone on a motion to dismiss—"is generally inappropriate." *Cassidy v. Owens*, 533 A.2d 253, 256 (D.C. 1987).

The context in which the Defendants' misrepresentations arose shows why Muslim Advocates' trust of Facebook was reasonable here. Facebook's public pronouncements that it would remove content that violates the community standards when it became aware of it were a response to unprecedented public and regulatory scrutiny on the company. *See, e.g.*, AC ¶ 144. Facebook viewed the stakes as so high that its founder and CEO Mark Zuckerberg personally appeared before Congress for the first time *ever* in April 2018 and several times in an 18-month

[10] The Court of Appeals has not held that reasonable reliance is an element of a misrepresentation claim except when a commercial contract negotiated at arms' length is at issue. *See Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916, 924 (D.C. 1992). In that context, the reasonableness requirement encourages parties to "condition[] [their] agreement on the explicit inclusion of [important] representations in the contract," rather than resort to fraud claims after the fact. *Id.* at 932. Since no contract is at issue here, reasonable reliance need not be alleged.

period.[11] Prominent Facebook executives found it necessary to dedicate their scarce time to communicating with, and making promises directly to, small civil rights organizations like Muslim Advocates. AC ¶¶ 72–75. Further, Zuckerberg, Sandberg, and others who testified on behalf of Facebook would, as noted above, risk criminal prosecution for false testimony to Congress. *See* 18 U.S.C. § 1001. Against this backdrop, Muslim Advocates, like any reasonable person, was entitled to rely on Facebook's stated commitments. The contrary conclusion that Facebook urges the Court to reach would mean that promises frequently made to Congress—and repeated privately by leading corporate executives—cannot be taken seriously.

Rather than address this context, Facebook argues that Muslim Advocates' reliance on these public and private assurances was unreasonable because Muslim Advocates allegedly "knew that Facebook did not remove all third-party content—without exception—that, in Plaintiff's view, violated the Community Standards." Mot. at 24. Again, this misunderstands the falsehood that drove Muslim Advocates' conduct. Muslim Advocates provided services to improve content moderation—and so understood that Facebook did not remove *all* violative content. What it did not know was that Facebook had a routine practice of not removing non-compliant content *when it learned of it*.

Indeed, in claiming that Muslim Advocates knew of the falsity of the representations at issue, Facebook points to paragraphs 119 and 125 of the complaint. But those paragraphs concern reports made to Facebook in 2017, prior to the statements at issue in this case. Because the statements that occurred in April 2018 or later referred to Facebook's then-existing policy (not the policy in 2017) and also had a future component about what Facebook *would do*, Facebook is wrong

[11] *See* AC ¶¶ 56–58; *Mark Zuckerberg Testimony: Senators Question Facebook's Commitment to Privacy*, N.Y. Times (Apr. 10, 2018) (stating Zuckerberg's April 10, 2018 testimony was his "first appearance before Congress, prompted by the revelation[s] [about] Cambridge Analytica"), https://perma.cc/B9UU-FCZP.

that Muslim Advocates knew that the statements in 2018 and later were false. Moreover, even if Muslim Advocates had knowledge of isolated instances of Facebook allowing non-compliant content to remain on the platform, that would not establish that it had knowledge that Facebook in fact has a *practice* of it—and *that* is what this lawsuit concerns.

With controversy swirling, Facebook made representations that conveyed a firm practice of removing violative content when it learned of it. Muslim Advocates did not know that those statements were false, and nothing in the complaint suggests otherwise. Given that those representations were made in front of Congress and privately, by high-up executives, Muslim Advocates reasonably relied on them.

IV. The Defendants lack section 230 immunity for the false, oral statements Facebook's executives made offline.

As Muslim Advocates explains in detail its opposition to the Anti-SLAPP motion (which it incorporates by reference here), the Defendants do not have immunity under 47 U.S.C. § 230(c)(1), as Facebook claims. *See* Opp. to Anti-SLAPP Motion at 18-25.

There are several reasons why the Defendants lack § 230 immunity. First, § 230 does not immunize oral statements made offline. And in this case, the vast majority of the false and misleading statements that give rise to liability were the Defendants' own oral statements made in person to Congress and Muslim Advocates. *Id.* at 18-19. Second, as the Defendants created the information that gives rise to liability in this case—*i.e.*, the Defendants' statements—the Defendants are "information content providers" and, thus, do not qualify for § 230 immunity. *Id.* at 19-21.

Third, imposing liability here will not treat Facebook as a publisher within the meaning of § 230, because the legal duty at issue has nothing to do with publishing, and instead imposes a duty on corporate leaders not to make misrepresentations to consumers. The Defendants violated that duty by misrepresenting what Facebook's business practices are. And Muslim Advocates seeks to

hold them liable for those misrepresentations, not for Facebook's underlying business practices itself. Indeed, Muslim Advocates seeks an injunction to stop Facebook from making the same misrepresentations and does not ask the Court to order Facebook to remove any content from its platform. *Id.* at 22-24.

Finally, granting immunity here would have absurd real-world consequences, nullifying a century of federal and state laws that bar corporate leaders from harming consumers and investors through false and misleading statements—like the Federal Trade Commission Act of 1914, the Securities Act of 1933, and dozens of state securities, consumer fraud, and false advertising laws. And granting immunity for tech leaders to lie about whether they are, in fact, engaging in self-policing would in no way advance § 230's purpose of encouraging self-regulation by online platforms. Instead it would undermine it. *Id.* at 24-25.

CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied in its entirety.

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Respectfully submitted,

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