Public Version

No. 23-CV-550

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
Appellant,

v.

FACEBOOK, INC.,
Appellee.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

REDACTED BRIEF FOR APPELLEE FACEBOOK, INC.

DATED: August 2, 2024

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RULE 28(A)(2) CERTIFICATION

I, the undersigned, counsel of record for Appellee Facebook, Inc., certify that the following listed parties and counsel appeared in the case below and on appeal, and that their position with regard to the order under review is as follows:

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District of Columbia	The order should be reversed

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Appellees:	**Position Taken On Review:**
Facebook, Inc. 1 Hacker Way Menlo Park, California 94025	The order should be affirmed

Corporate Designation: Meta Platforms, Inc. (f/k/a Facebook, Inc.) has no parent corporation, and no publicly held corporation owns 10% or more of its stock.[*]

[*] In 2021, Facebook, Inc. changed its name to Meta Platforms, Inc. This brief refers to Meta Platforms, Inc. as "Facebook" for consistency with the proceedings below.

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These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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INTRODUCTION

After five years of litigation over the District of Columbia's single-count consumer-protection complaint against Facebook, the Superior Court determined that the case could no longer proceed and granted summary judgment for Facebook. As the Superior Court found after a careful review of all the evidence, the evidence undisputedly showed that "Facebook clearly and repeatedly made disclosures to users about its policies such that the reasonable user could not have been misled as a matter of law." JA 1035. On appeal, the District's arguments only serve to confirm that the Superior Court got it right. This Court should uphold the Superior Court's well-reasoned decisions and affirm the judgment below.

In 2018, following news reports that the political consulting firm Cambridge Analytica had wrongfully obtained data about Facebook's users and deployed it during the 2016 presidential campaign, the District sued Facebook under the D.C. Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901. That law bars companies from materially misleading consumers through misrepresentations, omissions, or ambiguous statements.

Throughout years of discovery, the District repeatedly criticized Facebook's business model, data practices, and response to the Cambridge Analytica incident. The CPPA, however, does not ask whether Facebook has adopted data practices acceptable to the District; it asks whether Facebook materially misled consumers

about what those practices were. On that score, the District failed to produce *any* evidence that Facebook's disclosures were misleading. Instead, Facebook's disclosures repeatedly and clearly informed users about each of the data-sharing practices at issue here, as well as the possibility that third parties on the Facebook platform might violate Facebook's policies. The District tried to paper over its lack of evidence with an "expert" report, but that purported expert did nothing more than regurgitate and annotate information the District selected for him.

The Superior Court rightly rebuffed the District's attempts to use the CPPA as a vehicle to attack Facebook's business model and properly granted summary judgment to Facebook, finding that the District lacked evidence to support its claim. On appeal, the District still fails to identify anything misleading about Facebook's disclosures or any error in the Superior Court's thorough analysis. The District also fails to show that the Superior Court abused its discretion in disallowing the asserted expert testimony. This Court should affirm.

JURISDICTIONAL STATEMENT

The Superior Court granted summary judgment to Facebook on June 1, 2023. JA 1029–46. The District appealed on June 29, 2023. JA 1047–52. This Court has jurisdiction under D.C. Code § 11-721(a)(1).

STATEMENT OF ISSUES

1. The Superior Court concluded that "Facebook clearly and repeatedly made disclosures to users about its policies such that the reasonable user could not have been misled as a matter of law." JA 1035. The first question presented is whether the Superior Court erred in granting summary judgment to Facebook on the District's CPPA claim.

2. Rather than apply reliable scientific methods to analyze Facebook's disclosures, the District's expert witness read and annotated an incomplete set of documents that the District hand-selected for him and offered conclusions backed only by his own *ipse dixit*. The second question presented is whether the Superior Court abused its discretion in excluding his testimony.

STATEMENT OF THE CASE

On December 19, 2018, the District brought a single-count complaint against Facebook for allegedly violating the CPPA. JA 78–98. On May 17, 2022, Facebook moved for summary judgment and to exclude the District's sole expert witness. JA 142–84, 188–238. The Superior Court granted Facebook's motion to exclude on November 14, 2022, and Facebook's motion for summary judgment on June 1, 2023. JA 961–62, 1029–46. The District appealed. JA 1047–52.

STATEMENT OF FACTS

I. Factual Background

A. Facebook Allows Users To Connect And Share Information.

Facebook is a social media platform that allows its 2.8 billion users to connect and share information with others. This culture of sharing is a key element of the Facebook experience. JA 357. Facebook empowers users to curate and control that experience by deciding when and how to share information with their friends and the public. JA 241–43. Users can add friends, follow or like pages, create or join groups, and interact with third-party applications or "apps." JA 243, 247–49.

In 2007, Facebook launched Facebook Platform ("Platform"), a set of technologies that allowed third parties to build apps that operate on Facebook and that can be installed by Facebook users. JA 251, 358. Platform allowed app developers to create personalized and interactive experiences for Facebook users that are not available on the Facebook service directly. JA 358. During the time period relevant to this suit, from November 2013 to April 2018, users could install third-party apps and share certain information with them through Facebook's Graph Application Programming Interface ("Graph API")—for example, games like Scrabble or travel apps like AirBnB. JA 248–51, 282–84, 286–88, 293.

Until April 2014, users could also reshare certain information with apps that their friends had shared with them, if both the user's and the friend's settings allowed

it. JA 250–51, 253, 263, 266–70, 278–81, 283–88. This feature was known as "friend sharing." By sharing information through apps, users could create a more connected experience on and off Facebook—for example, third-party apps allowed users to play games, read and react to news, share music, and celebrate birthdays with their Facebook friends. JA 248–49, 251.[1]

B. Facebook's Privacy Disclosures And Controls Are Clear And Indeed Industry-Leading.

With no single regulatory regime governing data privacy in the United States, JA 340–42, Facebook adopted a set of comprehensive policies to educate users about how Facebook uses, manages, and protects their information and how users could exercise control over their information, JA 255–57, 262–72. Between 2013 and 2018, Facebook set out its policies primarily in two documents: (1) the Statement of Rights and Responsibilities ("SRR"), now known as the Terms of Service, and (2) the Data Use Policy. *Id*. As a condition of creating a Facebook account, users expressly agreed to the SRR and confirmed they had read the Data Use Policy. JA 243, 255–56. After users joined Facebook, they could continue to access the SRR and Data Use Policy through hyperlinks on Facebook's home page. JA 256, 360. The SRR also referenced and linked to the Platform Policy, which was directed to app developers. JA 257, 272–76.

[1] The second version of Facebook's Graph API ("Graph API V2") did not support this "friend sharing" feature. JA 288.

These policies clearly communicated the features of Facebook's Platform, including friend-sharing. The SRR included a hyperlink to the Data Use Policy, where users could "learn more about . . . how you can control what information other people may share with applications." JA 263, 2186–2210. Facebook's Data Use Policy in turn made clear that information shared by users could be re-shared by others, stating in simple and direct terms: "Just like when you share information by email or elsewhere on the web, ***information you share on Facebook can be re-shared***," meaning that "if you share something on Facebook, anyone who can see it can share it with others, ***including the games, applications, and websites they use***." JA 267, 269–70 (emphases added); *see also* JA 263 (similar disclosure in SRR). Facebook's Privacy Settings, which were hyperlinked in the SRR, similarly told users that "the people you share with can always share your information with others, ***including apps***." JA 278–79, 281–82 (emphasis added).

Users could control the extent of their information-sharing through their settings—for example, whether to make a particular post public or shared only with the user's friends, and whether their friends could reshare this information. JA 277–82. Only limited information, such as a user's name and profile picture, was always public. JA 265, 277. If users wanted to block third-party apps from accessing the information they chose to make public or share with their friends, Facebook's disclosures explained that they could turn off the Facebook Platform (where third-

party apps operate) for their account altogether, and Facebook provided explicit instructions on how to do so. JA 280–81. Users could also prevent their friends from resharing certain kinds of information. JA 278–80.

Facebook provided users with various tools to help them understand their data-sharing controls. JA 257–61. Consistent with recognized best practices, Facebook made "layered" disclosures that communicated key information in a variety of ways in multiple locations on Facebook. JA 242, 360. The Help Center, for example, informed users that information they shared on Facebook could be reshared by others and explained how users could control app-related resharing. JA 257–58. Facebook's Privacy Tour, implemented in 2012, showed users how to "[c]ontrol who can access what, including what info your friends and others can bring with them in the apps and websites they use." JA 258–59. Facebook also launched a Privacy Shortcuts tool—prominently placed next to the website's home button—which provided quick access to privacy controls. JA 259. The Privacy Checkup and Privacy Basics features, created in 2014, made it even easier for users to control the scope of information-sharing. JA 260–61.

Experts have lauded Facebook's privacy disclosures. In 2015, the Center for Plain Language evaluated the privacy policies of seven major companies, including Facebook, Google, and Twitter. JA 342. The Center called the organization and navigability of Facebook's privacy policies "exceptional" and commended

Facebook for having "the most visually appealing privacy statement" it had "ever seen." *Id*. It concluded Facebook did "a good job of communicating their privacy policies in a way that allows consumers to understand and make decisions," and that "Facebook seems to want people to understand their notice." *Id*.

Beyond the privacy notices directed at users, Facebook also had clear policies that restricted apps from accessing and using data. The Platform Policy, for example, instructed developers that "any data accessed by your app (including basic account information) may only be used in the context of the user's experience in that app. A user's friends' data can only be used in the context of the user's experience on your application." JA 251–52, 273–75. The Platform Policy also required that apps "obtain explicit consent from the user . . . before using" data, other than a user's "basic information," for "any purpose other than displaying it back to the user on your application." JA 273–74, 499, 4073.

With respect to its enforcement capabilities, Facebook reserved the right to take enforcement actions against apps found to violate its policies. Its Platform Policy stated: "We may enforce against your app or website if we conclude that your app violates our terms or is negatively impacting the Platform." JA 275, 311, 362. Facebook also warned app developers: "We can audit your app to ensure it is safe and does not violate our Terms. If requested, you must provide us with proof that your app complies with our terms." JA 275, 322, 362. [redacted]

[redacted] JA 322, 327.

Facebook did not promise or represent that its monitoring and enforcement program would detect all incidences of data misuse. Facebook disclosed to users that it could not guarantee that apps would abide by Facebook's rules because apps were "created and maintained by other businesses and developers who are not part of, or controlled by, Facebook." JA 267, 410. It conveyed this message loud and clear in its SRR, in all capital letters: "FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS . . . OF THIRD PARTIES." JA 263–64, 328.

C. Dr. Kogan Violates Facebook's Policies By Selling User Data To Cambridge Analytica.

In November 2013, a Cambridge University researcher named Aleksandr Kogan created a personality quiz app. JA 329–31. Kogan obtained permission from the approximately [redacted] users who installed his app to collect their data, along with more limited data about those users' friends in instances where the friends' privacy settings allowed it. JA 331–32, 337. In violation of Facebook's policies prohibiting the transfer or sale of user data to third parties, Kogan sold some of that data to Cambridge Analytica, a political consulting firm. JA 329, 333–35. Facebook learned of the sale only after *The Guardian* exposed it in December 2015, [redacted]

[redacted] JA 333–35. [redacted]

[redacted] JA 334–36.

In March 2018, Facebook learned through inquiries from various media outlets that, contrary to its representations, Cambridge Analytica might not have destroyed the data and may have used it for election-related advertising. JA 336.

[redacted] *Id*. Facebook then notified affected users which categories of data Kogan may have sold to Cambridge Analytica. JA 336–39.

II. Procedural History

A. The District's Suit

Instead of pursuing Kogan or Cambridge Analytica, the District sued Facebook under the CPPA in December 2018. As relevant here, the District alleged that Facebook made material misrepresentations or omissions with respect to three issues: (1) friend sharing with third-party apps; (2) enforcement against apps that violated Facebook's policies; and (3) supposedly failing to disclose that Kogan and Cambridge Analytica "improperly harvested" user data. JA 96–97.

For more than three years, the parties engaged in extensive discovery. During this time, the District repeatedly sought to expand the scope of this case beyond the alleged misrepresentations and into the sufficiency of Facebook's data privacy practices—which, as the Superior Court recognized, has "nothing to do with the

substantive claim at issue." Order Denying D.C.'s Mot. to Compel at 1–2 (Apr. 7, 2022). Facebook produced roughly 100,000 documents totaling more than half a million pages, in addition to roughly 28,000 documents Facebook provided in response to a pre-suit Civil Investigative Demand. Facebook also offered up 10 fact witnesses, two experts, and a corporate representative for deposition and responded to multiple sets of interrogatories. Nevertheless, when Facebook served interrogatories near the end of discovery asking the District to identify any allegedly misleading disclosures and any evidence supporting its CPPA claim, the District responded with conclusory assertions and a short, bulleted list of "evidence" that failed to show anything misleading about Facebook's disclosures. *See* JA 3227–30.[2]

B. The District's Expert Testimony

In the absence of evidence to support its CPPA claim, the District attempted to package up its case into an "expert" report from Professor Florian Schaub, an assistant professor at the University of Michigan. JA 1216–18. *First*, Schaub opined that "some" of Facebook's disclosures "could have" been misleading to "reasonable consumers"—a term he never defined—if the consumers "missed" or "overlooked" other "transparent" and "explicit" disclosures. *E.g.*, JA 1273–93. *Second*, he

[2] In the Superior Court, Facebook submitted a chart identifying various disclosures relevant to each of the theories the District advanced, as well as a slide deck walking through some of those disclosures. The chart and the slide deck are available at JA 220–37 and JA 3323–3427, respectively.

asserted that disclosure of Facebook's "true practices," another undefined term he adopted from the "charge [he] was given" by the District, "could have" affected user behavior. JA 1230, 1563. *Third*, he suggested various "improvements" to Facebook's policies and practices. JA 1570.

On May 17, 2022, Facebook moved to exclude Schaub's testimony, arguing that Schaub employed no scientific methodology in his report. Instead—as he *admitted* under oath—he merely read and annotated the Facebook policies given to him by the District and then offered his personal views about them. JA 1253–54, 1259, 1533–34, 1563–64. While Schaub purported to use a combination of "expert review and content analysis" in reaching his self-proclaimed expert opinion, Facebook argued that such an ad hoc approach bears no resemblance to accepted research methods conducted by privacy experts in the field.

On November 7, 2022, the Superior Court held a hearing on Facebook's motion to exclude Schaub's testimony. The Court found that Schaub offered only "his subjective review of Facebook's policies," and that "[t]here was no scientific method here." JA 906. As to Schaub's "content analysis," the Court compared it to the work of "a first year law student": "All he did was . . . read the cases and annotate them and take notes." JA 917–18. The Court further highlighted that Schaub "never did a quality assessment" in order to ensure the reliability of his conclusions, which Schaub admitted would "definitely" be done when performing a study for peer

review. JA 920. As to Schaub's purported mental models approach, the Court found that the approach was "not a model" at all, but simply Schaub's subjective opinion:

> [H]ere there was no method . . . [a]nd to the extent that he used [any method], . . . [i]t was inconsistent with the way it's done in the field and there's no indicia of reliability. There's no quality assurance. There's no peer review. There was no way to check. There's no data.

JA 949, 956. One week later, citing the reasons given "in open Court on November 7, 2022," the Court excluded Schaub's testimony. JA 961.

C. The Superior Court Grants Summary Judgment To Facebook.

On June 1, 2023, five years into this litigation, the Superior Court granted Facebook's motion for summary judgment in a written opinion concluding that the District lacked evidence to support its CPPA claim. *See* JA 1029–46.

The Court explained that, to survive summary judgment, the District was required to "prove that Facebook made representations, omissions, or ambiguous statements that 'have a tendency to mislead' consumers about a 'material fact.'" JA 1034. The Court held that the District failed to offer any proof on the tendency-to-mislead element. To the contrary, the evidence showed that "Facebook clearly and repeatedly made disclosures to users about its policies such that the reasonable user could not have been misled as a matter of law." JA 1035.

The Court then carefully analyzed and rejected each of the District's theories. On the District's friend-sharing theory, the Court explained that Facebook "[r]epeatedly . . . disclosed the sharing of this data and pointed users to the applicable

settings to turn off the friend-sharing functions," such that "users could not reasonably be misled by the[se] clear and explicit disclosures." JA 1037. The Court also pointed to Facebook's Data Use Policy, which disclosed: "Just like when you share information by email or elsewhere on the web, information you share on Facebook can be re-shared." JA 1036–37.

The Court reached the same conclusion about Facebook's disclosures regarding its enforcement practices: "Facebook was clear in its disclosures and policies about the limitations of the enforcement program." JA 1040–41. The Court highlighted Facebook's all-caps warning in the SRR that "FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS, CONTENT, INFORMATION, OR DATA OF THIRD PARTIES," among other disclosures. JA 1040.

And on third-party data misuse, the Court explained that Facebook "repeatedly disclosed the potential for data misuse by third-party applications" and "never misrepresented its actions in response to Cambridge Analytica." JA 1043. Facebook instead "took swift action in response to Cambridge Analytica," namely, it "removed the app, demanded Kogan delete the user data in his possession, and began an investigation." JA 1045. The District identified "no promise within Facebook's policies that dictates how Facebook should have responded differently." *Id.* Notably, the Court concluded: "While the District may disagree with Facebook's approach," there "is no legal basis that required Facebook to act differently." *Id.*

SUMMARY OF ARGUMENT

I. The Superior Court correctly granted summary judgment to Facebook on the District's CPPA claim. The CPPA requires clear and convincing evidence that a defendant made misrepresentations, omissions, or ambiguous statements that (1) have a tendency to mislead reasonable consumers (2) about a material fact. The District failed to produce sufficient evidence on either element.

A. *First*, as the Superior Court correctly held, the District failed to prove that Facebook's disclosures had a tendency to mislead. The question in a CPPA case is not whether Facebook adopted the District's preferred data privacy practices; it is whether Facebook *misled consumers* about what its practices *were*. None of the District's three theories—"friend sharing," enforcement against third-party apps that violated Facebook's policies, and disclosures about third-party data misuse—clears that bar. Friend sharing was a core feature of Facebook that the company repeatedly and explicitly disclosed, cautioning users that "if you share something on Facebook, ***anyone who can see it can share it with others***, including the games, applications, and websites they use." JA 222, 224, 233, 267–68 (emphasis added). Facebook also made clear disclosures about its enforcement program, telling users in unequivocal terms that it could not control third parties, including app developers, and took no responsibility for their actions. JA 263–64, 266–67, 327–28.

The District complains that Facebook's enforcement program was insufficiently robust, but again, that is not the point under the CPPA. The District failed to identify a single misrepresentation that Facebook made concerning the strength of its enforcement program. Similarly, although the District claims Facebook failed to promptly notify users about Cambridge Analytica's data misuse, Facebook's policies repeatedly disclosed the potential for data misuse by third-party apps, and in any event Cambridge Analytica's improper acquisition of data was prominently reported in the news.

Lacking evidence of misrepresentations, the District asserts the Superior Court committed legal error. Those arguments are meritless. The District claims the Superior Court ignored factual disputes, but it does not identify any ***genuine*** disputes of ***material*** fact that could render Facebook's disclosures misleading. The District also claims the Superior Court misapplied the CPPA by assuming truthful disclosures could never be misleading, by improperly requiring the District to show Facebook had a "duty" to disclose information concerning Cambridge Analytica, and by relying on cases from other jurisdictions. But each of its arguments distorts what the Superior Court actually held. Finally, the District argues it should be held to the lower preponderance of the evidence standard, rather than the clear and convincing standard. But this Court has repeatedly said the opposite, and the District

cites no case to the contrary. In any event, the District has no evidence to withstand summary judgment under either standard.

B. This Court, like the Superior Court, need not reach the materiality element, but it supplies an independent basis to affirm. To prove materiality, the District had to show that "a significant number of unsophisticated consumers would find th[e] information important in determining a course of action." *Floyd v. Bank of Am. Corp.*, 70 A.3d 246, 256 (D.C. 2013). But the District's own expert opined that most users would *not* have disabled the "friend sharing" feature even if Facebook's disclosures were perfect, JA 352, 3032–33, and Facebook introduced unrebutted expert testimony—the only evidence in the record regarding materiality—[redacted], JA 1421.

II. The Superior Court was well within its discretion to exclude the District's "expert" report from Professor Florian Schaub. Schaub flunked multiple reliability requirements under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

A. Schaub's testimony was unscientific and unreliable because, contrary to how research is done in the field, Schaub failed to test or validate his opinions and instead grounded them in his subjective views about Facebook's policies. Schaub also failed to apply common reliability standards, such as employing multiple annotators and conducting user studies, and baked unsupported assumptions into his

analysis. His analysis was also based on incomplete facts and data: instead of analyzing all of the disclosures Facebook provided to users or all of Facebook's practices, Schaub looked only at materials hand-selected by the District.

B. The District's arguments on appeal fail to rehabilitate Schaub's flawed testimony. The District faults the Superior Court for offering "no reasoning" to exclude Schaub, but the Superior Court's written order pointed to the reasons aired at the hearing. The law does not require busy trial judges to do anything more. On the merits, the District asserts that Schaub's methods have been endorsed in peer-reviewed articles, but Schaub never identified a single study like his where a sole researcher, with no checks on bias, purported to offer conclusions about consumer perceptions without any quantitative research or user studies. The Superior Court properly excluded him, and certainly did not abuse its discretion.

STANDARD OF REVIEW

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Gomez v. Indep. Mgmt. of Del., Inc.*, 967 A.2d 1276, 1281 (D.C. 2009). "[S]ome metaphysical doubt as to the material facts" is not enough to avoid summary judgment. *LaPrade v. Rosinsky*, 882 A.2d 192, 196 (D.C. 2005). Instead, "there must be some significant probative evidence tending to support the complaint." *Tucci v. District of Columbia*, 956 A.2d 684, 690 (D.C. 2008) (quotation marks omitted); *see also*

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249–50 (1986). This Court reviews the Superior Court's grant of summary judgment *de novo*. *Gomez*, 967 A.2d at 1281.

Whether an expert is qualified is "a matter for the trial judge's discretion reviewable only for abuse," and "[r]eversals for abuse are rare." *In re Melton*, 597 A.2d 892, 897 (D.C. 1991) (en banc) (emphasis and quotation marks omitted).

ARGUMENT

I. The Superior Court Correctly Granted Summary Judgment To Facebook On The District's CPPA Claim.

The CPPA requires the District to prove, by clear and convincing evidence, that Facebook made misrepresentations, omissions, or ambiguous statements that (1) had "a tendency to mislead" reasonable consumers (2) about "a material fact." D.C. Code § 28-3904(e), (f-1); *Pearson v. Chung*, 961 A.2d 1067, 1074–75 (D.C. 2008). Despite years of discovery, the District failed to produce sufficient evidence on either element—in fact, the evidence affirmatively refutes its claim.

A. The District Failed To Prove That Facebook's Disclosures Were Misleading.

Under the CPPA, the question is not whether Facebook's practices were somehow "unsatisfactory" or "insufficient," but whether Facebook *misled* consumers about what those practices *were*. *Lee v. Canada Goose US, Inc.*, 2021 WL 2665955, at *6 (S.D.N.Y. June 29, 2021). The Superior Court concluded that "Facebook clearly and repeatedly made disclosures to users about its policies such

that the reasonable user could not have been misled as a matter of law." JA 1035. That decision was correct, and the District's contrary arguments are meritless.

1. The Superior Court correctly concluded that Facebook clearly and repeatedly disclosed its data policies.

On appeal, the District contends that Facebook misled consumers on three topics: "friend sharing," enforcement, and third-party data misuse. D.C.'s Opening Br. ("Br.") 24–33. Those arguments fail.

Friend sharing. The District argues that Facebook misled consumers about the data that third-party apps could acquire about a user's friends though "friend sharing," a feature that existed under an early version of Facebook. This feature enabled users to share certain information about their friends with apps if both the user's settings and the friends' settings allowed it. JA 283–86. But as the Superior Court and others have held, Facebook's terms clearly disclosed that third-party apps could "interact with users and obtain information of the users' friends through those interactions." *In re Facebook, Inc., Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d 767, 792 (N.D. Cal. 2019); *see also* Op. at 11, *Illinois v. Facebook, Inc.*, No. 2018-CH-03868 (Ill. Cir. Ct. Mar. 8, 2021) (attached to District's brief) (rejecting allegation that "a reasonable person reading [Facebook's] policies might believe that their data was guaranteed to be safe from third-party app developers"). Indeed, the District's own expert conceded that "Facebook makes explicit disclosures about apps' ability to access a user's friends' data." JA 2071.

The record evidence confirms this point multiple times over. Friend sharing was no secret; it was a core feature that enabled apps to create the user-connected experiences that drew users to Facebook in the first place. *See, e.g.*, JA 248–51 (identifying examples). Users could, for example, share information about their friends' birthdays with apps (again, subject to their friends' settings) and receive calendar reminders to wish the friend a happy birthday, or connect with other friends through the SoundCloud app over a shared interest in certain music. *See id.*

Facebook's policies and other disclosures explicitly and repeatedly explained this core feature to users. *See* JA 222–27 (collecting disclosures). The Data Use Policy, for example, told users:

> Just like when you share information by email or elsewhere on the web, information you share on Facebook can be re-shared. This means that ***if you share something on Facebook, anyone who can see it can share it with others, including the games, applications, and websites they use***.

JA 224, 267–68 (emphasis added). The Help Center repeated this disclosure verbatim. JA 222, 257–58. The App Settings page likewise stated that "[p]eople who can see your info can bring it with them when they use apps," and explained that users could opt out of friend sharing either by changing their settings or "turn[ing] off all Platform apps" to prevent friend sharing altogether. JA 223, 279–80; *see also* JA 223, 277–78 ("[B]y default, apps have access to your friends list and any information you choose to make public. Edit your settings to control what's shared with apps, games, and websites by you and others you share with."). The

Privacy Settings page again reminded users: "the people you share with can always share your information with others, including apps." JA 224, 281–82. Similar disclosures repeated throughout Facebook's SRR, Data Use Policy, Help Center, App Settings, and Privacy Tour. JA 222–27, 255–72, 277–82.

Because a "reasonable consumer" would not "ignore the evidence plainly before him," these disclosures dispel the District's claim that Facebook misled users about how their friends could share data with third-party apps. *Kommer v. Bayer Consumer Health*, 252 F. Supp. 3d 304, 312 (S.D.N.Y. 2017) (applying similar New York statute). The District's rejoinders cannot overcome this conclusion.

First, the District argues that "a reasonable user would look to Facebook's 'Privacy Settings,'" rather than App Settings, to learn what information was being shared with apps, and that the Privacy Settings were misleading because the "Friends Only" setting did not prevent friends from resharing a user's information with apps. Br. 24–25. But the Privacy Settings page itself unambiguously signposted that "the people you share with can always share your information with others, including apps." JA 224, 281–82.[3] Indeed, another court has rejected this exact argument: "[C]ontrary to the plaintiffs' argument, the language of these disclosures cannot be interpreted as misleading users into believing that they merely needed to adjust their

[3] The District's citation-less assertion that "the privacy settings [page] did not address applications at all," Br. 25, is simply incorrect.

privacy settings to 'friends only' to protect their sensitive information from being disseminated to app developers. Users were told that they needed to adjust their application settings too." *In re Facebook*, 402 F. Supp. 3d at 792. A reasonable user would not ignore these disclosures. *See Kommer*, 252 F. Supp. 3d at 312.

Second, the District asserts that the App Settings page "did not make clear that sharing applied to applications that the user themselves did not use." Br. 25–26. That, too, is incorrect. The App Settings page prominently stated: "People on Facebook who can see your info can bring it with them *when they use apps*," and instructed users how to change their settings "to control the categories of information that people can bring with them *when they use apps*." JA 223, 279–80 (emphases added); *see also, e.g.*, JA 225, 269 ("If you want to completely block applications from getting your information *when your friends and others use them*, you will need to turn off all Platform applications." (emphasis added)). Other disclosures made the same point. *See supra* 21–22.

Third, the District argues Facebook's "compar[ison of] friend sharing to email" was misleading because it "impl[ied] that the information could only be transmitted if a friend actively 're-shared' it." Br. 26–27; *see* JA 224, 267–68. That argument applies only to one of Facebook's many disclosures on this topic (the one block-quoted at p. 21, *supra*), and in any event it is wrong. Friend sharing was possible only if both a user's settings *and* her friend's settings allowed it. *See* JA

283–86. As with email, Facebook users could choose to share with others, including apps, information their friends had shared with them—a fact Facebook repeated over and over in its disclosures. *See supra* 21–23. For some information, an app had to specifically ask the friend for permission to access it; for other information, like the friend's name and friend list, Facebook disclosed that apps would have access "by default." JA 223, 277–78. Facebook thus said nothing misleading when it compared friend sharing to email, particularly when the very next words told users precisely what that analogy meant: "*information you share on Facebook can be re-shared*." JA 224 (emphasis added). Again: "This means that if you share something on Facebook, anyone who can see it can share it with others, *including the games, applications, and websites they use*." JA 224, 267–68 (emphasis added).

Fourth, lacking any actual example of a misleading disclosure, the District complains generally that Facebook's policies were too "long" and that users may not have found the friend-sharing disclosures. Br. 27–28. But those disclosures were repeated numerous times throughout many different sections of Facebook's policies, including the Help Center and Privacy Tour. As the Superior Court concluded, "[r]epeatedly, Facebook disclosed the sharing of this data and pointed users to the applicable settings to turn off the friend-sharing functions." JA 1037.[4]

[4] The District points to evidence that Facebook sometimes critiqued the length of its own policies and noted users might not read them. Br. 27. Facebook's efforts to improve its own disclosures should be encouraged, not weaponized, and in any event

The District cites this Court's decision in *Center for Inquiry Inc. v. Walmart, Inc.*, 283 A.3d 109 (D.C. 2022), which declined to hold at the pleading stage that "reasonable consumers will test prominent front-label claims by examining the fine print on the back label." 283 A.3d at 121. But Facebook's numerous disclosures are not "fine print" that undercut a "front-label" claim. Facebook informed users that they can control access to their information through their settings, and Facebook's policies repeatedly explained how they could do that. *See supra* 21–23.

Enforcement. The District next argues that consumers "could have been misled by Facebook's statements suggesting it had powerful tools to protect user data when it did not." Br. 28. This argument falters several times over.

To start, the argument is new, and "arguments not raised in the trial court are not usually considered on appeal." *Thornton v. Nw. Bank of Minn.*, 860 A.2d 838, 842 (D.C. 2004). In the Superior Court, the District argued that Facebook's enforcement practices were insufficiently robust because Facebook purportedly did not exercise all the enforcement powers in its arsenal. JA 618–21; *see also* JA 1039–41 (rejecting this argument); JA 80 (complaint alleging "Facebook misrepresented

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those efforts do not show that Facebook's specific, repeated disclosures about friend sharing were misleading. The District also mischaracterizes the evidence on this issue. [redacted] Br. 27 (quoting JA 4095). [redacted] JA 4095, [redacted]

the extent to which it protects its consumers' personal data"). The District now switches on appeal to the new theory that Facebook lacked the *capability* to enforce its policies. Br. 28–31 (arguing users "could have been misled by Facebook's statements suggesting it had powerful tools to protect user data when it did not"). This Court need not and should not entertain this new argument.

In any event, the District's new theory is no more viable than its old one. A CPPA claim will not lie simply because the District believes Facebook's enforcement capabilities were "unsatisfactory" or "insufficient." *Lee*, 2021 WL 2665955, at *6. Instead, the District must show Facebook *misled consumers* about those capabilities. The District cannot make that showing, because as the Superior Court and other courts have confirmed, Facebook "never guaranteed how it would proceed in an enforcement investigation." JA 1040; *see also* Op. at 11, *Illinois*, No. 2018-CH-3868 ("Facebook's relevant policies only indicate the enforcement *available* to it and Facebook makes no guarantee as to how it will proceed in such investigations." (emphasis added)).

Facebook's disclosures about its enforcement program were abundantly clear and accurate. The SRR stressed that "FACEBOOK IS NOT RESPONSIBLE FOR THE ACTIONS . . . OF THIRD PARTIES," and the Data Use Policy similarly warned that "games, applications and websites are created and maintained by other businesses and developers who are not part of, or controlled by, Facebook." JA 231,

263–64, 267, 327; *see also, e.g.*, JA 231, 266–67 ("Information collected by these apps, websites or integrated services is subject to their own terms and policies."); JA 2187 ("We do our best to keep Facebook safe, but we cannot guarantee it.").

In other cases where plaintiffs have alleged that a defendant failed to safeguard consumers' data, courts have held "no reasonable consumer could have been deceived" where the defendant disclosed that it could not "ensure or warrant the security of any information transmitted" to it. *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 968 (S.D. Cal. 2012); *see also* JA 1040 (Superior Court opinion recognizing that Facebook's policies "clearly disclaim control over how third-party applications operate"). So too here: Facebook could not (and did not) guarantee bad actors would not violate its policies, and it never misled users into believing it could.

Even on their own terms, the District's arguments fail. The District cites a statement in Facebook's SRR that the company "require[s] applications to respect your privacy," but omits the rest of the sentence: "your agreement with that application will control how the application can use, store, and transfer that content and information." JA 2187; *see* Br. 28. Nor, in any event, does the fact that Facebook established rules for app developers mean that Facebook has control over their conduct or that Facebook could detect all bad actors. Similarly, the District cites a statement in the Data Use Policy that "[i]f an application asks permission

from someone else to access your information, the application will be allowed to use that information only in connection with the person that gave the permission and no one else." JA 2220; *see* Br. 28–29. The District argues that consumers may have inferred from this statement that Facebook had "a robust enforcement system," but it does not point to any actual promise of "robust" enforcement. Br. 28–30; *see* Op. at 11, *Illinois*, No. 2018-CH-3868 ("Facebook makes no guarantee as to how it will proceed in such investigations"). Finally, the District collects statements directed *to app developers*—not users—setting out what those developers could and could not do, and reserving Facebook's rights to audit the app or take enforcement action. Br. 28–29 (citing JA 2189–90). The District suggests users could have understood these statements to mean that Facebook had more extensive enforcement capabilities than it did. *Id.* But no reasonable consumer would read these statements to mean that Facebook could prevent third parties from violating its policies, especially in light of Facebook's disclosures saying the opposite. *See supra* 26–27.

The District also cites *In re Facebook*, where one court concluded that Facebook's language about what apps were "allowed" to do could be understood to mean that Facebook was "actively policing" app developers or that a "technological block" would prevent data misuse. Br. 29 (quoting 402 F. Supp. 3d at 794). Even if that were correct, and it is not, it does not rescue the District's claim. *In re Facebook* analyzed the relevant statement in isolation at the motion-to-dismiss stage;

as the District concedes, however, at summary judgment the court must consider "the evidence as a whole." Br. 24 & n.3. A reasonable consumer would read that statement alongside Facebook's clear disclosures that it was not responsible for, and could not control, third parties' violations of its policies. *See supra* 26–27. Additionally, *In re Facebook* was expressly predicated on the taken-as-true allegation (because of the motion-to-dismiss posture) that Facebook "did nothing" to enforce its policy. 402 F. Supp. 3d at 795. Here, by contrast, the evidence on summary judgment shows that Facebook *did* engage in enforcement efforts—both manual and automated—to enforce compliance with its policies. *See, e.g.*, JA 311–29. The District thinks Facebook could have done more, but the District's dissatisfaction with Facebook's enforcement efforts does not give rise to a CPPA claim. *See Lee*, 2021 WL 2665955, at *6 (not enough to allege "unsatisfactory" or "insufficient" practices).[5]

Third-party data misuse. Last, the District argues that Facebook failed to promptly notify users about third-party data misuse—specifically, Cambridge Analytica's receipt of user data from Kogan in 2015. Br. 31–33. The District does not contest that Facebook notified users in 2018, when news broke that Cambridge

[5] In criticizing Facebook's enforcement program, much of the evidence the District cites is from outside the relevant time period, November 1, 2013 through April 9, 2018. *See* Br. 30 (citing deposition testimony from individual who left Facebook in 2012, JA 4494–97, emails from 2011 and 2013, JA 4693, 4999, and PowerPoint presentation from 2012, JA 4755).

Analytica had used Facebook data for the Trump campaign. *See* JA 1044–45. It simply argues Facebook should have notified users *earlier*. This does not make out a CPPA claim for two reasons.

First, as the Superior Court concluded, "Facebook['s] policies repeatedly disclosed the potential for data misuse by third-party applications." JA 1043; *supra* 26–27. Given these disclosures, a reasonable consumer was already on notice from Facebook that third-party data misuse was a possibility, such that failing to disclose a particular instance of data misuse could not have been misleading.

Second, Facebook's failure to notify users about Cambridge Analytica on the District's preferred timeline could not have misled consumers because Cambridge Analytica's acquisition of user data was widely publicized in the press. Where "a reasonably well-informed consumer in the District of Columbia would have learned" information from "the print and broadcast media," a jury "could not find that omitting [the] information . . . would be a material omission." *Dahlgren v. Audiovox Commc'ns Corp.*, 2010 WL 2710128 (D.C. Super. Ct. July 8, 2010) (slip op. at 62–63); *see also, e.g.*, *Floyd v. Bank of Am. Corp.*, 70 A.3d 246, 256–57 (D.C. 2013) (no deception "as a matter of law" given "frequent media coverage"). Here, major news sources like *The Guardian* prominently reported on Cambridge Analytica's use of Facebook user data for the Cruz campaign in 2015. *See* JA 333. A reasonable consumer could not have avoided this news if she tried.

2. The District's remaining arguments are meritless.

Unable to show Facebook misled consumers, the District argues the Superior Court committed various "legal errors." Br. 36. These arguments lack merit.

First, the District claims the Superior Court "ignored genuine disputes of material fact." Br. 36–39. Not so. To show a *genuine* dispute at the summary judgment stage, the District had to produce "significant probative evidence tending to support the complaint" and "specific facts showing that there is a genuine issue for trial." *Tucci*, 956 A.2d at 690 & n.2; *see also Anderson*, 477 U.S. at 249–50. And to show that dispute is *material*, the District had to demonstrate that it could "affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. The District has failed to marshal evidence to meet these standards.

The District asserts Facebook's privacy tools were not "easy to locate." Br. 36–37. But it is undisputed that Facebook's disclosures about friend sharing were repeated not just in privacy tools like the Help Center and the Privacy Settings, but also in the SRR, Data Use Policy, App Settings, Privacy Tour, and elsewhere. JA 222–27, 255–72, 277–82; *see supra* 21–23. The District cites internal studies and comments at Facebook about how features like the Help Center could be improved, Br. 36, but neither Facebook's efforts to improve the readability and usability of its features nor the District's critiques of those features show that Facebook misled its users about friend sharing or any other topic.

The District next repeats its critiques of Facebook's enforcement efforts, arguing they were "inconsistent and prone to bias." Br. 37. Even if true, this is not a negligence suit. The CPPA asks whether a company's *disclosures* were *misleading*—not whether its practices were "insufficient" or "inadequate." *Lee*, 2021 WL 2665955, at *6. Similarly, the District quibbles about when Facebook was "on notice" of Cambridge Analytica's improper receipt and retention of user data. Br. 37–38. But that, too, is a red herring, because there was nothing *misleading* about failing to notify users every time a third party violated Facebook's policies—especially given Facebook's disclosures explicitly telling users this could happen and the widespread press reports on Cambridge Analytica. *See supra* 26–27, 30. As the Superior Court explained, the fact that "the District may disagree with Facebook's approach" does not make out a CPPA claim. JA 1045.[6]

Second, the District asserts the Superior Court "misapplied the CPPA," Br. 39, but its effort to manufacture error distorts the Superior Court's ruling.

The District first says the Superior Court "assumed that truthful disclosures—no matter their context or omissions—cannot be misleading under the CPPA." Br. 39. The Superior Court said no such thing. Instead, it correctly recited this Court's recognition that a "reasonable consumer *generally* would not deem an accurate

[6] The District's other purported "factual disputes" repeat its arguments about Facebook's friend-sharing and enforcement disclosures. Br. 38–39.

statement to be misleading." JA 1035 (emphasis added) (quoting *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013)). The Superior Court acknowledged that "omissions" are actionable if they "have a tendency to mislead." JA 1034 (quoting D.C. Code § 28-3904). It then analyzed Facebook's disclosures, noted they were indeed accurate based on the record evidence, and properly held they were not misleading. JA 1035–45. There was no error in that analysis.

Next, the District claims the Superior Court improperly relied on the lack of a legal "duty" to disclose information about Cambridge Analytica's data misuse. Br. 40; *see Saucier*, 64 A.3d at 444. This, too, misreads the Superior Court's decision. Although the Court stated that neither the CPPA nor any other statute imposed a "duty" on Facebook to act differently or make further disclosures, JA 1041–43, in context those statements merely explained why no additional disclosures about Cambridge Analytica were necessary to make Facebook's *existing* disclosures about third-party data misuse complete and not misleading. The Superior Court noted, for example, that "it is difficult to imagine what else Facebook could have conceivably done to be more forthcoming about [its] privacy settings." JA 1042. That analysis was correct: regardless of whether a company has a "duty" to disclose, a plaintiff must prove that the company's representations or omissions had "a tendency to mislead." D.C. Code § 28-3904(e), (f-1). The District failed to prove that here.

Last, the District faults the Superior Court for citing decisions from other jurisdictions involving Facebook's disclosures, noting some of the cases applied "different legal standards." Br. 40. But the Superior Court did not apply those standards, JA 1034–35, and relying on persuasive authority is not error.

Third, the District argues (at 41–44) the Superior Court should have applied a mere preponderance standard, while conceding that this Court has repeatedly held that "[t]he burden of proof for CPPA claims is clear and convincing evidence." *Frankeny v. Dist. Hosp. Partners, LP*, 225 A.3d 999, 1005 (D.C. 2020); *see also, e.g.*, *Pearson*, 961 A.2d at 1074 (same and collecting cases). The District's effort to lower the bar and limit the clear-and-convincing standard to claims of *intentional* misrepresentation is baseless. The District does not cite a single case applying a preponderance standard for CPPA claims. It instead points to *Fort Lincoln Civic Ass'n v. Fort Lincoln New Torn Corp.*, 944 A.2d 1055 (D.C. 2008), but nothing in *Fort Lincoln* "implied" that the CPPA "did away with . . . the clear-and-convincing standard" for claims of unintentional misrepresentation. *Contra* Br. 43. In holding that misleading statements need not be "willful or intentional," that case addressed only the *elements* of a CPPA claim; it did not purport to change the burden of proof. 944 A.2d at 1073. And this Court left no doubt when it applied the clear-and-convincing standard 12 years later in *Frankeny*—which, as the District concedes, addressed an *unintentional* misrepresentation claim. 225 A.3d at 1005; *see* Br. 43.

Regardless, the District's last-ditch effort to lower its burden cannot salvage its case. The Superior Court correctly concluded that "Facebook clearly and repeatedly made disclosures to users about its policies such that the reasonable user could not have been misled as a matter of law." JA 1035. Summary judgment was proper for Facebook under any standard.

B. The District Also Failed To Prove That Any Of The Alleged Misstatements Or Omissions Were Material.

Because the District failed to prove any of Facebook's disclosures were misleading, this Court—like the Superior Court—need not reach materiality. But even if the District had carried its burden, which it did not, the judgment should still be affirmed on the separate and alternative ground that none of the alleged misstatements or omissions was "material." D.C. Code § 28-3904(e), (f), (f-1); *see Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 559–60 (D.C. 2001) (appellate court may "rest affirmance on any ground that finds support in the record" (quotation marks omitted)).

To prove materiality, the District must show that "a significant number of unsophisticated consumers would find that information important in determining a course of action." *Floyd*, 70 A.3d at 256 (quoting *Saucier*, 64 A.3d at 442). The record evidence, however, conclusively rebuts that proposition.

The District's own expert opined that most users would not have turned off Platform—*i.e.*, would not have disabled friend sharing—even if Facebook's

disclosures were "perfect." JA 352, 3032–33; *see also id.* (conceding "awareness of true data practices may not always result in changes in user behavior for many reasons"). This concession alone defeats the District's claim. *See Sloan v. Urban Title Servs., Inc.*, 689 F. Supp. 2d 123, 139 (D.D.C. 2010) (granting summary judgment where plaintiff's experts admitted alleged statements were "without consequence"); *Floyd*, 70 A.3d at 256 (granting summary judgment where no evidence suggested consumers would base their actions on the defendant's "assessment about the level of exposure" of their information).

The record evidence confirms this prediction was correct. The District's expert admitted materiality could be tested by checking whether users "change[d] their . . . privacy settings" or "turn[ed] off platform" after the news about Cambridge Analytica broke, but he never conducted any such tests. JA 346–47, 349–51. Facebook's expert did, and his unrebutted analysis—the *only* evidence in the record concerning materiality—[redacted] JA 1420, 1432–34. This evidence, particularly alongside the District's admissions, definitively quashes any genuine dispute about materiality.[7]

[7] The District misleadingly asserts that "the rate of daily account deletions tripled" after Cambridge Analytica. Br. 35. The District provides no context for that figure, and does not contend that this increase in absolute numbers represents any statistically significant change in user engagement; unrebutted testimony from Facebook's expert [redacted], JA 1433–34.

Without actual evidence of materiality, the District points to generalized statements about the importance of privacy and the public's reaction to news about Cambridge Analytica. Br. 33–35. These do not create a genuine issue of fact on the question whether Facebook's alleged misstatements or omissions were material.

First, the District cites statements by Facebook and its CEO, Mark Zuckerberg, affirming the commonsense notion that privacy is important. Br. 34. But those general statements do not show that any *particular* alleged misrepresentations and omissions were "material" in affecting users' actions. Instead, the unrebutted evidence from Facebook's expert shows the opposite.

Second, the District points to Zuckerberg's statements about Cambridge Analytica and to the "negative public response" when this news broke. Br. 34–35. But generalized complaints about the "public response" do not speak to the materiality of any *specific* disclosures the District claims were misleading. The news about Cambridge Analytica gave the public plenty of reasons to react that have nothing to do with the disclosures at issue in this case. For example, even though Facebook's policies alerted users to the possibility of third-party data misuse, users may have been unhappy to see such misuse actually occur. That is especially true given the polarizing nature of the 2016 election, when users may have reacted strongly simply because Cambridge Analytica used data to help the Trump campaign—even though they may not have reacted to other, more anodyne instances

of third-party data misuse. Indeed, the Superior Court aptly observed that at the summary judgment hearing, "the Court inquired about third party misuse of Facebook data by parties other than Cambridge Analytica," and "the District responded that such misuse occurred on a few occasions but gave the Court the impression that such misuse was of no moment"—which "left the Court to wonder why the Cambridge Analytica misuse created a cause of action." JA 1043 n.7. The District has no evidentiary support for the notion that users treated *any particular disclosures* as material, and indeed has conceded the opposite.

II. The Superior Court Did Not Abuse Its Discretion In Excluding The District's Expert.

In an attempt to paper over the fatal evidentiary gaps in the record, the District submitted an "expert" report from Professor Florian Schaub that employed no scientific methodology. The Superior Court properly excluded Schaub's conclusory opinions because he employed "no method," any purported method "was inconsistent with the way it's done in the field," and his opinion lacked any "indicia of reliability." JA 956. That was plainly not an abuse of discretion.

A. Schaub's *Ipse Dixit* Flunked *Daubert*'s Reliability Requirements.

To be admissible, expert testimony must be "based on sufficient facts or data" and "the product of reliable principles and methods . . . reliabl[y] appli[ed] . . . to the facts of the case." Fed. R. Evid. 702. Trial judges play a critical gatekeeping function to "ensur[e] that an expert's testimony both rests on a reliable foundation

and is relevant to the task at hand." *Motorola Inc. v. Murray*, 147 A.3d 751, 755 (D.C. 2016) (en banc) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993)). An expert's testimony must be excluded if the proponent fails to show "the testimony is the product of reliable principles and methods" or that "the expert has reliably applied the principles and methods to the facts of the case." *Id.* at 756–57. And even reliable conclusions are inadmissible if irrelevant or unduly prejudicial. *Johnson v. United States*, 683 A.2d 1087, 1100 (D.C. 1996) (en banc); Fed. R. Evid. 403. The Superior Court has "broad latitude" to exclude unreliable expert evidence. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152–53 (1999).

The Superior Court soundly concluded that Schaub's testimony rested on nothing more than speculative *ipse dixit*. Schaub purported to render a scientific opinion about consumer expectations based on "content analysis," a "mental models approach," and a "readability test." But his methods were unscientific and unreliable, improperly applied, and based on cherry-picked data.

1. Schaub's methodology was unscientific and unreliable.

It is well settled that scientific opinions from experts must be supported by "the methods and procedures of science" and "appropriate validation." *Daubert*, 509 U.S. at 590; *United States v. Day*, 524 F.3d 1361, 1368 (D.C. Cir. 2008) (same). A putative expert's "subjective belief" alone does not suffice, *Daubert*, 509 U.S. at 590, and an opinion "connected to existing data only by the *ipse dixit* of the expert"

is inadmissible, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). "A witness who invokes 'my expertise' rather than analytic strategies widely used by specialists is not an expert as Rule 702 defines that term." *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005).

Here, Schaub concededly failed to test or validate his opinions about whether reasonable consumers would be misled by Facebook's disclosures and grounded his opinions on nothing more than his purported experience. That is not a scientific method. [redacted] JA 2833. Schaub's own prior work acknowledges as much. When subject to peer review, Schaub has admitted that he cannot reach reliable conclusions about consumer understanding or behavior without user studies and research. *See, e.g.*, JA 1113. And his own research confirms that consumer understanding varies considerably from the views offered by privacy experts. JA 1141 ("Experts and non-experts think and act differently when it comes to information security and privacy."). In his report, however, Schaub purported to conclude that he can divine, all on his own, how consumers might have understood Facebook's disclosures and acted on them without *any need* for testing or validation. JA 1249.

Schaub's failure to test is particularly troubling because his opinions "clearly lend themselves to testing and substantiation by the scientific method." *Cummins v. Lyle Indus.*, 93 F.3d 362, 369 (7th Cir. 1996). At deposition, Schaub admitted he could have performed user studies to validate his conclusions. JA 1254–55, 1272, 1274, 1292. Despite claiming to have "extensive experience an[d] expertise" in conducting such studies, JA 1251, and acknowledging that he and his colleagues "do all kinds of experiments and studies" to test users' understanding and behavior outside of court, JA 1254, Schaub applied *none* of those methods here. "[T]he absence of such testing indicate[s] that the witness' proffered opinions c[an] not fairly be characterized as scientific knowledge." *Cummins*, 93 F.3d at 369; *see Black v. M & W Gear Co.*, 269 F.3d 1220, 1236–38 (10th Cir. 2001) (affirming exclusion where expert "had not conducted any tests or calculations to support his opinion").

Courts routinely apply these principles to experts purporting to render scientific opinions about consumer expectations. "The only way to gauge" consumers' perception of specific disclosures "is by gathering information from the general consuming public in a scientific way that allows one to make reasonable conclusions regarding consumers' thoughts." *Yeti Coolers, LLC v. RTIC Coolers, LLC*, 2017 WL 404553, at *2 (W.D. Tex. Jan. 27, 2017). Accordingly, an "expert" opinion on "the perception of a 'reasonable consumer'" that does not rest on application of "any scientific or technical knowledge or method" is "purely

speculative" and "unhelpful." *FTC v. Wash. Data Res.*, 2011 WL 2669661, at *2 (M.D. Fla. July 7, 2011); *see, e.g.*, *First Health Grp. Corp. v. United Payors & United Providers, Inc.*, 95 F. Supp. 2d 845, 849 (N.D. Ill. 2000) ("[P]roof of actual or likely confusion of a significant portion of consumers requires a survey or at least some other persuasive means. The personal opinion of an expert as to what a consumer would understand is not enough."). The Superior Court correctly followed these principles in excluding Schaub's testimony.

2. Schaub failed to reliably apply his purported methodology.

"The objective of the [*Daubert*] gatekeeping requirement is to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Motorola*, 147 A.3d at 755 (quotation marks omitted). Here, at a minimum, Schaub failed to reliably apply content analysis and the mental models approach because he failed to follow the standards of experts in the field. The same problems plague his readability analysis.

a. By his own standards, Schaub failed to properly apply content analysis. [redacted] JA 2830–31 [redacted]. He did not rely on multiple annotators or any other established method to ensure the reliability of his conclusions. And Schaub failed to identify even one study that relied on a single annotator to perform content analysis. JA

1260. Yet he claimed without support that he could circumvent this requirement based on his "extensive experience in conducting this type of research" because he "*tried* to provide an unbiased assessment." JA 1262 (emphasis added).

Trying not to be biased is not an accepted scientific method. As the textbooks Schaub cited make clear, "[n]o matter how expert the judgment of the individual making these decisions, the possibility of some conscious or unconscious bias exists." JA 1066. Reliable application of content analysis requires researchers to take steps to minimize bias. *See Sacchetti v. Gallaudet Univ.*, 344 F. Supp. 3d 233, 250 (D.D.C. 2018) (excluding expert whose report "was not peer reviewed, . . . even though he normally has his opinions peer reviewed"). Schaub could not identify "a similar analysis that's ever been used in this field where someone just sat down and opined." JA 902.

b. Schaub's purported application of the mental models approach suffers from the same flaws. When Schaub and other academics employ this technique in peer-reviewed research, they rely on user studies to map out how real consumers understand disclosures. JA 1076–77, 1089–1101, 1104. Here Schaub did not speak to any Facebook users. JA 1266–67. To the extent his mental model "describes a person's beliefs and understanding," JA 1533–34, the views expressed are his alone. And Schaub's guesses about consumer thoughts are no better than anyone else's—indeed, probably worse. *See Konik v. Cable*, 2009 WL 10681970, at *9 n.8 (C.D.

Cal. Dec. 2, 2009) ("If anything, Kamins is likely too sophisticated and views advertisements much more quizzically than the average reasonable consumer.").

c. Schaub's "readability analysis" is also fraught with errors. *First*, the results do not match the conclusions. Schaub states that various readability metrics show a "high school" reading level may be necessary to comprehend Facebook's policy documents, yet he concludes "reasonable consumers may not be able to fully understand" these documents because "almost half of the D.C. population has *lower than college level* literacy skills." JA 1537–38 (emphasis added). A high school education, to state the obvious, is "lower than college level." *Id.*

Second, Schaub fails to establish the reliability of key assumptions underlying his analysis. *See Haidak v. Corso*, 841 A.2d 316, 327 (D.C. 2004). He fails to establish the accuracy or reliability of the website Readability.com, to which he outsourced his readability analysis. And he concedes there are "different recommendations for what is an appropriate reading level." JA 1265.

Finally, Schaub yet again fails to validate his conclusions. He concedes that "[w]hat is helpful . . . is to actually conduct user testing with users on whether they can understand the disclosures." JA 1266. But Schaub conducted no such testing.

3. Schaub's analysis was based on facts cherry-picked by the District.

Expert testimony must also be "based on sufficient facts or data." *Motorola*, 147 A.3d at 756. Courts thus routinely exclude experts who "cherry-pick" relevant

data. *E.g.*, *EEOC v. Freeman*, 778 F.3d 463, 469–70 (4th Cir. 2015) (Agee, J., concurring); *Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Secs.*, 752 F.3d 82, 92 (1st Cir. 2014). That is exactly what Schaub did here. When asked whether he analyzed "all of the disclosures that D.C. residents would have viewed . . . during the relevant time period," Schaub replied that "[t]here is no way for me to ascertain that," and confessed he simply "assume[d]" the District would have given him everything pertinent. JA 1297–98. But the District gave him only "*some* of Facebook's app permission screens and privacy settings." JA 1221 (emphasis added). And it failed to provide him with the wealth of resources available to users elsewhere, including in the Help Center. *Compare* JA 256–61, *with* JA 1497–1530. As a result, Schaub's opinion that reasonable consumers may have been misled was based on an incomplete set of documents hand-selected by the District.

Schaub similarly failed to consider sufficient facts and data in concluding that Facebook did not adequately disclose its "true" data-sharing and enforcement practices. He conceded he did not do "any independent expert analysis of what information and data third parties could access about users during the relevant time period." JA 1300–01. Nor did he perform any independent analysis of Facebook's actual oversight and enforcement practices. JA 1239–40, 1286. Instead, Schaub relied on bullet-point summaries from the District and a few pages of testimony

relating to Facebook's practices outside the relevant time period. JA 1221–23. The Superior Court was well within its discretion to exclude his testimony.

4. Schaub's conclusions were properly excluded as irrelevant and unfairly prejudicial.

The Superior Court also properly excluded Schaub's opinions as irrelevant and unduly prejudicial.

On the tendency-to-mislead element, Schaub's testimony is irrelevant because he provides no evidence of how consumers actually understood Facebook's disclosures. Instead, Schaub speculates—without evidence—about how consumers *could have* read the disclosures. JA 1272, 1293, 2054, 3013, 3026. Schaub's analysis also assumes, contrary to law, that consumers could have overlooked key disclosures that were repeated across multiple interfaces—despite users' express acknowledgment of them upon creating a Facebook account. *Compare* JA 1267, 1539 (Schaub opining that "reasonable consumers would . . . be unlikely to read Facebook's policy documents"), *with Selden v. Airbnb, Inc.*, 4 F.4th 148, 156–57 (D.C. Cir. 2021) (holding a user "may be bound [by terms] if he manifested his consent"). Indeed, Schaub *agreed* that "Facebook ma[de] explicit disclosures about apps' ability to access a user's friends' data." JA 1287. And Schaub undercut the entire premise of his "tendency to mislead" opinions—*i.e.*, that Facebook's "true practices" did not match its disclosures—when he conceded at his deposition that he did not know what Facebook's "true practices" were. JA 1234–35, 1239, 1300–01.

On the materiality element, Schaub opined that most consumers do not read disclosures and that even clear disclosures often do not change consumer behavior. JA 1267, 1477, 1561. This alone defeats the District's claim that reasonable consumers viewed the disclosures as important in deciding whether to use Facebook. *See Sloan*, 689 F. Supp. 2d at 139 (granting summary judgment where plaintiff's experts testified that misrepresentations were "without consequence"). [redacted] JA 3026–27. Schaub, in any event, purported only to opine on what "some" consumers "may have" done, JA 1564–66—not what a "significant number" of consumers (the relevant legal standard) would do, *Saucier*, 64 A.3d at 442. Nor did he make any attempt to define how many consumers "some" denotes or what a "reasonable consumer" is.

The Superior Court also acted well within its broad discretion to exclude Schaub's irrelevant discussion of what Facebook "could feasibly have" done to improve its privacy policies, disclosures, and practices. The relevant inquiry under the CPPA is not, again, whether Facebook's practices were "[i]deal[]," *e.g.*, JA 1568, 1574, but whether its disclosures about those practices were misleading, D.C. Code § 28–3904(f). And Schaub admits that Facebook did not mislead consumers about many of the practices he critiques. JA 1294–96. Absent "direct evidence of what

reasonable consumers considered defective," "statements about what [the defendant] could or should have done [are] irrelevant." *Crummett v. Bunn-O-Matic Corp.*, 2021 WL 5507735, at *6 n.13 (E.D. Va. Nov. 24, 2021) (quotation marks omitted).

B. The District's Contrary Arguments Are Meritless.

The District's efforts to rehabilitate Schaub's testimony lack merit.

1. The District starts by faulting the Superior Court for purportedly offering "no reasoning" to exclude Schaub. Br. 44. But the Superior Court's written order expressly incorporated the "reasons stated" in "open Court on November 7, 2022," JA 961, where the Court carefully explained its "skeptic[ism]" about Schaub's testimony: Schaub "didn't employ a scientific method"; "[t]o the extent he deployed one, it was inconsistent with how he normally does it"; "and there's no indicia of reliability," "no quality assurance," JA 956; *see supra* 12–13.

The Superior Court's order also incorporated the reasons for exclusion set forth by Facebook in its moving papers. The Court's reference to "the reasons stated in the opposition," JA 961, was an unmistakable reference to Facebook's motion, and calling Facebook's motion the "opposition" was an obvious scrivener's error—as the District recognizes, Br. 21, 45. The law requires nothing more of busy trial judges than to create an adequate record for review "that elucidates the factors that contributed" to the Superior Court's decision. Br. 44; *Zamlen v. City of Cleveland*,

906 F.2d 209, 215 (6th Cir. 1990) (no abuse of discretion where court excluded testimony by "incorporat[ing] . . . arguments" made in "supporting memorandum").

2. On the merits, the District barely defends Schaub's methodologies. The District claims that Schaub's methods have all been endorsed by "peer-reviewed articles." Br. 48–49. But Schaub failed to point to even *one* study like his where a sole researcher purported to offer conclusions about consumer perceptions without any quantitative research or user studies. Schaub's articles are either inapposite or hopelessly general, JA 1485, 1534, 1549, and there is "simply too great an analytical gap" between those articles "and the opinion proffered," *Joiner*, 522 U.S. at 146.

More fundamentally, the District fails to dispute the Superior Court's basic rationale: "fancy terminology" stripped away, all Schaub did was read Facebook's policies and offer his own opinion of them. JA 916, 944. *Daubert* does not "require[] a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Motorola*, 147 A.3d at 755.

Conceding Schaub's opinions bottom on his "own experience," the District counters that an expert *may* sometimes invoke experience alone. Br. 48–49. But the District's own authorities limit that principle to cases "where the expert's knowledge is non-scientific." *Price v. L'Oreal USA, Inc.*, 2020 WL 4937464, at *3 (S.D.N.Y. Aug. 24, 2020). Opinions that "actually lend themselves to hands-on testing and empirical study" must be tested. *Padilla v. Hunter Douglas Window Coverings, Inc.*,

14 F. Supp. 3d 1127, 1137 (N.D. Ill. 2014). Here, Schaub did not purport to offer a *non-scientific* opinion drawn from his extensive experience with Facebook; Schaub admitted he has never accessed a Facebook application. JA 1214. Instead, he purported to draw an empirical conclusion about a reasonable consumer's expectations from "qualitative data analysis." JA 1531. The District's naked appeal to Schaub's authority—and implicit disavowal of the scientific method—confirms that the Superior Court was well within its discretion to exclude Schaub's testimony.

3. The District ends with a plea to admit "[s]haky" expert testimony and treat the flaws in Schaub's report as a matter of weight, not admissibility. Br. 46, 49–50. But this Court has consistently rejected such pleas when "the plaintiff must depend on expert testimony" and its expert issues a conclusory opinion. *Blair v. District of Columbia*, 190 A.3d 212, 230 (D.C. 2018). The defects here are overwhelming. Given the "gap between the data and the opinion proffered," *Joiner*, 522 U.S. at 146, the Superior Court by no means abused its discretion in excluding Schaub.

CONCLUSION

The Superior Court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 2, 2024 this brief was served through this Court's electronic filing system on all counsel of record:

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