Commonwealth of Massachusetts
Supreme Judicial Court

No. SJC-13747

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

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

BRIEF OF INTERNATIONAL CENTER FOR LAW & ECONOMICS IN SUPPORT OF DEFENDANTS-APPELLANTS

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

Jay M. Wolman (BBO No. 666053)
jmw@randazza.com
RANDAZZA LEGAL GROUP, PLLC
30 Western Avenue
Gloucester, MA 01930
(978) 801-1776
Counsel for Amici Curiae

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/s/ Jay M. Wolman
Jay M. Wolman
Counsel for Amici Curiae

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INTEREST OF AMICUS CURIAE

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DECLARATION OF *AMICI CURIAE*

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

/s/ Jay M. Wolman
Jay M. Wolman
Counsel for Amici Curiae

SUMMARY OF ARGUMENT

"The most basic of all decisions is *who* shall decide." Thomas Sowell, Knowledge and Decisions 40 (2d ed. 1996). Under the First Amendment, social media companies like Meta have the right to determine not only what speech is allowed on their platforms, but how that speech is presented. U.S. Const. Amdt. 1. It is the marketplace of ideas, not consumer protection law, which constrains what and how speech is presented. If Meta fails to curate and display content in an engaging way, it will lead to users using them less or even leaving altogether.

Accordingly, Meta must create a welcoming place for users, including minors, or they risk losing them to competitors and other means of entertainment. For instance, to the extent that harassment and bullying makes users less likely to stay online, then Meta has a strong reason to moderate such abuses. And since most advertisers don't want to be associated with a platform that hosts CSAM, bullying, harassment, or fat-shaming, Meta also has a strong incentive to moderate such content. This is particularly true given the very limited monetary benefits that can be derived from targeting advertising to children or teens, who generally lack either the bank accounts or payment cards for online transactions. Thus, it is unsurprising that Meta offers features designed to protect the mental health of minors who use their platforms.

Nonetheless, despite Meta's best efforts, there are still potential harms associated with the use of social media platforms like Instagram, including for minors. The question from a law & economics perspective is whether Meta or its users are the "least-cost avoider(s)" of those harms. Liability should be imposed upon the party or parties best positioned to deter the harms in question, such that the costs of enforcement do not exceed the social gains realized. *See* Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. OF LEG. STUD. 13, 28 (1972) ("A deeper analysis [of cases assigning liability] may reveal that that they generally make sense from an economic viewpoint of placing the liability on that party who can, at least cost, reduce the probability of a costly interaction happening.") One of the major costs of imposing liability upon Meta is that doing so could result in collateral censorship, including the exclusion of minors from protected speech. A less burdensome approach would be to educate parents and minors on how to avoid harms on Instagram by promoting available technological and practical means. *See* Ben Sperry, *A Coasean Analysis of Online Age-Verification and Parental-Consent Regimes* (ICLE Issue Brief, Nov. 9, 2023).[1]

The Complaint in this suit presses several claims under consumer protection law (Massachusetts Consumer Protection Act, M.G.L. ch. 93A) and tort law (public

[1] Available at https://laweconcenter.org/wp-content/uploads/2023/11/Issue-Brief-Transaction-Costs-of-Protecting-Children-Under-the-First-Amendment-.pdf

nuisance) for harms allegedly caused by Meta through its conduct in how it designed and operated its online platform Instagram. The harms alleged are serious, but the implications of applying state consumer protection law for what are essentially products liability claims will have significant deleterious effects on online speech.

Count One alleges Meta has engaged in an unfair act or practice by deploying design features that induce the addictive use of Instagram. Count Three alleges Meta has engaged in an unfair and/or deceptive act or practice because it fails to employ sufficient age verification to exclude users under 13 years old. Both counts run directly counter to established First Amendment precedent. The Superior Court wrongly denied the motion to dismiss on these counts with a cursory analysis that ignores these precedents, asserting that "such claims [are] principally based on conduct and product design, not expressive content." Op. at 19.

The First Amendment protects an open marketplace of ideas. *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 584-85 (2023) ("'[I]f there is any fixed star in our constitutional constellation,' it is the principle that the government may not interfere with 'an uninhibited marketplace of ideas.'") (quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943) and *McCullen* v. *Coakley*, 573 U.S. 464, 476 (2014)). In fact, the First Amendment protects speech in this marketplace whether the "government considers… speech sensible and well intentioned or deeply 'misguided,' and likely to cause 'anguish' or 'incalculable grief.'" *303 Creative*, 600

U.S. at 586 (quoting *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557, 574 (1995); *Snyder* v. *Phelps*, 562 U.S. 443, 456 (2011)).

The protection of the marketplace of ideas necessarily includes the creation, distribution, purchasing, and receiving of speech. *See Brown* v. *Ent. Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) ("Whether government regulation applies to creating distributing or consuming speech makes no difference" for First Amendment purposes). In other words, it protects both the suppliers in the marketplace of ideas (creators and distributors), and the consumers (purchasers and receivers).

No less than other speakers, profit-driven firms involved in the creation or distribution of speech are protected by the First Amendment. *See 303 Creative LLC*600 U.S. at 600 (2023) ("[T]he First Amendment extends to all persons engaged in expressive conduct, including those who seek profit."). This includes Internet firms, like Meta, that provide speech platforms. *See NetChoice, LLC* v. *Moody*, 603 U.S. 707, 733-34 (2024); *Reno* v. *ACLU*, 521 U.S. 844, 870 (1997).

Even minors have a right to participate in the marketplace of ideas, including as purchasers and receivers. *See Brown*, 564 U.S. at 794-95 (government has no "free-floating power to restrict ideas to which children may be exposed"). This includes the use of online speech platforms like Meta. *See NetChoice, LLC* v. *Griffin*, 2025 U.S. Dist. LEXIS 61278 at *36 (W.D. Ark. Mar. 31, 2025) (finding Arkansas's age verification requirement for account creation "maximally burdensome" because

it "erects barrier to accessing entire social media platforms rather than placing those barriers around the content or functions that raise concern" effectively "exclud[ing] minors whose parents do not consent or cannot prove consent").

This is important because social media platforms like Instagram are central to the modern marketplace of ideas. *See Packingham* v. *North Carolina*, 582 U.S. 98, 107 (2017) (describing the Internet as "the modern public square" where citizens can "explor[e] the vast realms of human thought and knowledge"). The Supreme Court has made clear that Meta's selection and presentation of third-party speech is itself protected expressive activity. *See Moody*, 603 U.S. at 740 (Facebook's decisions on "which third-party content [their] feeds will display, or how the display will be ordered and organized" are "expressive choices" that "receive First Amendment protection"). Moreover, the government may not restrict minors from accessing lawful speech through age verification requirements. *See Free Speech Coalition, Inc.* v. *Paxton*, 606 U.S. 461, 492 (2025) (finding only "where the speech in question is *unprotected*, States may impose 'restrictions' based on 'content' without triggering strict scrutiny") (emphasis in original); *NetChoice LLC* v. *Griffin*, 2025 U.S. Dist. LEXIS 61278 at *21; *see also NetChoice, LLC* v. *Fitch*, 145 S.Ct. 2658 (2025) (Kavanaugh, J., concurring) ("[E]nforcement of the Mississippi law [requiring age verification for social media profiles] would likely violate [the] First Amendment… under this Court's precedents.").

In sum, the First Amendment protects the business model Meta chooses to use for Instagram. The Commonwealth's product design claims and desired age verification requirement must be subject to First Amendment scrutiny. Because the Superior Court failed to do so, this court should reverse the Superior Court's order and remand the case for entry of dismissal. This Court should also make clear that these actions should be subject to strict scrutiny, and that the relief sought in Count One and Count Three is not narrowly tailored to a compelling government interest.

ARGUMENT

I. THE FIRST AMENDMENT BARS PRODUCT DESIGN CLAIMS WHICH RESTRICT EDITORIAL DISCRETION

The Superior Court asserted without any citation or consideration of *Moody* that the Commonwealth's Count One was "principally based on conduct and product design, not expressive content." Op. at 19. But this ignores that the Supreme Court rejected exactly this argument. *See Moody*, 603 U.S. at 727 ("The Fifth Circuit was wrong in concluding that Texas's restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression.") On the contrary, the Court found "expressive activity includes presenting a curated compilation of speech originally created by others." *Id.* at 728.

When it comes to things like Instagram Feed, "[d]eciding on the third-party speech that will be included in or excluded from a compilation—and then *organizing and presenting the included items*—is expressive activity of its own." *Id.* at 731

(emphasis added). The expressive product is the result of Meta's "choices about whether—*and, if so, how*—to convey posts." *Id.* at 738 (emphasis added). The First Amendment protects not only what content Meta can choose to show on its Instagram Feed, but how to present or convey it.

For instance, it is clear the First Amendment protects the right of newspapers to choose not only the content it will print, but "the decisions made as to limitations on the size" of the paper. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974). Just as a government couldn't tell a newspaper to expand its size, it couldn't tell them to use smaller font, or to reduce its margins. In other words, how a newspaper presents its content is as much part of its "editorial control and judgment" as the content itself.

It is much the same here. The Commonwealth alleges that notifications, alerts, infinite scroll, autoplay, and ephemeral content are mere conduct rather than protected editorial choices. But this simply can't be the case.

Notifications and alerts are themselves speech, conveying the message to users that there is something on the platform they may be interested in. *See In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 702 F.Supp.3d 809, 837 (N.D. Cal. Nov. 14, 2023) ("There is no dispute that the content of the notifications themselves, such as awards, are speech. The Court conceives of no way to interpret plaintiffs' claims with respect to the frequency of

the notifications that would not require defendants to change when and how much they publish speech. This is barred by the First Amendment."); *NetChoice* v. *Bonta*, 761 F.Supp.3d 1202, 1224 (N.D. Ca. Dec. 31, 2024) ("[T]here is little question that notifications are expressive.").

Infinite scroll, autoplay, and ephemeral content are clearly protected editorial choices of how to present content on the Instagram Feed. *Cf. In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 702 F.Supp.3d 809 at 831 (Restrictions on infinite scroll "would inherently limit what defendants are able to publish"); *id.* at 832 ("[D]ecisions such as determining the length of content published and how long to publish content are 'traditional editorial functions'…").

Because these are protected editorial choices, they must be subject to some level of First Amendment scrutiny. The Superior Court suggested in a footnote that "[e]ven if these features carry some expressive element, the claim may very well be permitted under the intermediate scrutiny test… because the Complaint plausibly alleges that such elements are commercial in nature…This determination, however, is better left to a later stage of the litigation." Op. at 19 n. 17. On this ground alone, this Court could vacate the Superior Court's ruling.

But this Court should also make clear that strict scrutiny applies to Count One and that it should be dismissed because it is not narrowly tailored to a compelling government interest.

Strict scrutiny should apply because this is a content-based regulation of speech. *Cf. Nat'l Inst. of Fam. & Life Advocates* v. *Becerra*, 585 U.S. 755, 766 (2018). The product design claims of Count One would necessarily "alter the content" of Meta's expressive product in its Instagram Feed by restricting the use of infinite scroll, autoplay, notifications, and ephemeral content. *Id.*

Contrary to the Superior Court's musings on the level of scrutiny, these editorial choices are clearly *not* commercial speech. The Supreme Court has stated that "[o]ur precedents define commercial speech as 'speech that does no more than propose a commercial transaction.'" *Harris* v. *Quinn*, 573 U.S. 616, 648 (2014) (quoting *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976)). None of infinite scroll, autoplay, notifications, or ephemeral content are proposing a commercial transaction. Nor are they transformed into commercial speech simply because Meta also uses advertisements to generate revenue. *Cf. 303 Creative LLC,* 600 U.S. at 600 ("[T]he First Amendment extends to all persons engaged in expressive conduct, including those who seek profit."); *Virginia Bd. of Pharmacy*, 425 U.S. at 761 ("Speech… is protected… even though it may involve a solicitation to purchase or otherwise pay or contribute money);

Burstyn v. *Wilson*, 343 U.S. 495, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."); *Tobinick* v. *Novella*, 848 F.3d 935, 952 (11th Cir. 2017) ("magazines and newspapers often have commercial purposes, but those purposes do not convert the individual articles within these editorial sources into commercial speech…")

Under strict scrutiny, the restriction must be narrowly tailored to a compelling government interest. For an interest to be compelling, the state must identify an "actual problem" in need of solving. *Brown*, 564 U.S. at 799. "[A]mbiguous proof will not suffice" to prove this problem exists. *Id.* at 800. In *Brown*, the Supreme Court reviewed the psychological studies purporting to show a "connection between exposure to violent video games and harmful effects to children" and found the research "show[ed] at best some correlation between exposure to violent entertainment" and "miniscule real-world effects." *Id.*

Here, the Commonwealth has similarly failed to establish a causal link between the way Meta has chosen to present content and the harms alleged to minors that there was from the video games at issue in *Brown*. *Cf. id.* at 799-801; *NetChoice, LLC* v. *Reyes*, 748 F.Supp.3d 1105, 1125 (D. Utah, Sept. 10, 2024) ("[T]hough the court is sensitive to the mental health challenges many young people face, Defendants have not provided evidence establishing a clear, causal relationship

between minors' social media use and negative mental health impacts.") In fact, the best available data cited by the Commonwealth in its Complaint does "not support the conclusion that social media causes changes in adolescent health at the population level." *See* Nat'l Acad. Sci. Engineering & Med., *Social Media and Adolescent Health* at 92 (2024).

Even if the court finds that there is a compelling interest in protecting children, the product design claims of Count One are not narrowly tailored. Under strict scrutiny, narrow tailoring requires the government action to be "actually necessary," *Brown*, 564 U.S. at 799, and "the least restrictive means among available, effective alternatives." *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004).

Restricting Meta's editorial discretion isn't "actually necessary" because the product design claims fail to connect the desired remedy to the asserted interest. Notifications, infinite scroll, autoplay, and ephemeral content are alleged to cause addiction and thus be an unfair practice. But the Complaint fails to offer evidence that "requiring social media companies to compel minors to push 'play,' hit 'next,' and log in for updates will meaningfully reduce the amount of time they spend on social media platforms." *NetChoice LLC* v. *Reyes*, 748 F.Supp.3d at 1128. There is also no "evidence that these specific measures will alter the status quo to such an extent that mental health outcomes will improve." *Id.*

Moreover, the proposed limitations on Meta's editorial choices are not the least restrictive means to protect children. The Complaint fails to establish that parental controls and other technological and practical means are inadequate as available, effective alternatives. Nowhere does the Complaint talk about the use of parental controls or other measures as an alternative to restricting how speech is presented. This alone should require a dismissal of Count One.

In conclusion, the product design claims of Count One are barred by the First Amendment because they restrict the editorial discretion of Meta. The Superior Court failed to apply any level of scrutiny and its order should be vacated, with instructions to apply strict scrutiny, which Count One fails.

II. THE FIRST AMENDMENT BARS AGE VERIFICATION REQUIREMENTS

Count Three of the Complaint alleges that Meta has engaged in both unfair and deceptive acts or practices due to failing to sufficiently utilize age verification measures. The Superior Court failed to consider the First Amendment implications of these "allegedly ineffective age verification efforts" at all, stating they were based on "conduct and product design, not expressive content." Op. at 19. This is directly contrary to substantial First Amendment jurisprudence on online age verification requirements.

In *Ashcroft* v. *ACLU*, the Supreme Court considered the Children's Online Protection Act (COPA), Pub. L. 105-277, which criminalized posting material

"harmful to minors"—essentially defined as pornographic material—with an affirmative defense for websites that used certain age verification measures. 542 U.S. at 662. The Court applied strict scrutiny because COPA "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Id.* at 665 (quoting *Reno* v. *ACLU*, 521 U.S. at 874). The Court found that "[f]ilters are less restrictive" than age verification measures because "[t]hey impose selective restrictions on speech at the receiving end, not universal restrictions at the source." *Ashcroft*, 542 U.S. at 667. The Court also found that "filtering software may well be more effective" than age verification. *Id.* at 668. Since the government had not shown at that time that filtering software was less effective, the Court upheld the District Court's preliminary injunction against COPA. *Id.* at 673.

The recent Supreme Court case in *Free Speech Coalition* v. *Paxton* did not change this basic analysis for speech that is lawful as to minors. The Court *did* apply intermediate scrutiny to Texas's H.B. 1181 because it fell "within States' authority to shield children from sexually explicit content" which "necessarily includes the power to require proof of age before an individual can access such speech." 606 U.S at 462. The Court reasoned that "no person—adult or child—has a First Amendment right to access" speech that is obscene "without first submitting proof of age." *Id.*

The Court distinguished this case from *Ashcroft* on the grounds that COPA was an outright ban on certain speech with age verification as an affirmative defense while the Texas law made "the lack of age verification an element that the State must plead and prove." *Id.* at 489. The Court was clear that it was "[b]ecause speech that is obscene to minors is unprotected… the content-based restriction does not require strict scrutiny." *Id.* at 492.

In contrast to unprotected obscenity, federal district courts have found statutes requiring age verification to access protected speech as to minors to be subject to—and fail to survive—strict scrutiny, leading to their permanent enjoinment at summary judgment. *See NetChoice, LLC* v. *Yost*, 778 F.Supp.3d 923 (S.D. Ohio, Apr. 16, 2025); *NetChoice, LLC* v. *Griffin*, 2025 U.S. Dist. LEXIS 61278 (W.D. Ark. Mar. 31, 2025). Other district courts have found age verification requirements for social media profiles to likely violate the First Amendment and issued preliminary injunctions. *See NetChoice* v. *Carr*, 2025 U.S. Dist. LEXIS 121183 (N.D. Ga., Jun. 26, 2025); *NetChoice, LLC* v. *Fitch*, 787 F.Supp.3d 262 (S.D. Miss., Jun. 18, 2025); *Computer & Communications Industry Assn.* v. *Uthmeier*, 2025 U.S. Dist. LEXIS 104710 (N.D. Fla., June 3, 2025).

Though decided before the Supreme Court's opinion in *Free Speech Coalition*, the district courts issuing permanent injunctions both noted the distinction between protected and unprotected speech when determining the level of scrutiny.

See NetChoice v. *Yost*, 778 F.Supp.3d at 955 ("[L]aws that require parental consent for children to access constitutionally protected, non-obscene content are subject to strict scrutiny."); *NetChoice* v. *Griffin*, 2025 U.S. Dist. LEXIS 61278, at *21. There is little reason to doubt the Supreme Court's decision in *Free Speech Coalition* changes this basic analysis. *See NetChoice, LLC* v. *Fitch*, 145 S.Ct. 2658 (2025) (Kavanaugh, J., concurring) (citing *Free Speech Coalition* among other cases and stating "enforcement of the Mississippi law [requiring age verification for social media profiles] would likely violate its members' First Amendment rights under this Court's precedents.").

It is worth noting that no federal law requires age verification before a child under 13 years of age can use a social media app like Instagram, though there are requirements to obtain parental consent before collecting certain information. For instance, the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501 *et seq*., and its implementing rule,16 CFR Part 312, don't require age verification. Instead, COPPA imposes verifiable parental consent requirements only upon an "operator of a website or online service directed to children" or an operator "that has actual knowledge that it is collecting or maintaining personal information from a child" under 13 years of age before it can collect, use, or disclose information from children. 16 CFR 312.3. But, consistent with the First Amendment, COPPA has no requirement that an operator verify age.

Here, both the unfairness and deception claims of Count Three are based on the premise that Meta has a duty to use age verification measures to prevent users under 13 from using Instagram. But it makes no sense that they would have such a pre-existing duty to verify age subjecting them to Massachusetts consumer protection law, M.G.L. ch. 93A, when the First Amendment precludes states from imposing such requirements. This Court should reverse the Superior Court's order and remand to dismiss Count Three under strict scrutiny.

Under strict scrutiny, requiring age verification before minors can access Instagram is not the least restrictive means to protect them from the alleged harms. The Complaint fails to consider parental controls and other technological and practical means as available, effective alternatives. *Cf. NetChoice, LLC* v. *Griffin*, 2025 U.S. Dist. LEXIS 61278, at * 37-38 ("Age-verification requirements are also more restrictive than policies enabling or encouraging users (or their parents) to control their own access to information, whether through user-installed devices and filters or affirmative requests to third-party companies."); *NetChoice, LLC* v. *Yost*, 778 F.Supp.3d at 956-57; *see also NetChoice, LLC* v. *Reyes*, 748 F.Supp.3d at 1127 ("Defendants have not shown the Act is the least restrictive option for the State to accomplish its goals because they have not shown existing parental controls are an inadequate alternative to the Act"). The only mention of these alternatives is in the context of saying parents may have been more likely to use them if they were made

aware of the allegedly insufficient efforts of Meta to keep those under 13 off Instagram. There is no analysis of how requiring age verification could be consistent with the First Amendment in the Commonwealth's brief, either. Considering the precedents on the issue, it seems unlikely a convincing argument is possible.

In conclusion, the age verification requirements sought in Count Three are barred by the First Amendment. The Superior Court failed to apply any level of scrutiny and its order should be reversed, and remand for entry of dismissal as to Court Three.

CONCLUSION

The First Amendment protects the marketplace of ideas by protecting private ordering of speech rules. For the foregoing reasons, the Court should reverse the Superior Court's order and subject the product design claim of Count One and the age verification claims of Count Three to First Amendment scrutiny and make clear that neither count is narrowly tailored to a compelling government interest.

Dated: November 14, 2025.

Respectfully Submitted,

/s/ Jay M. Wolman

Jay M. Wolman (BBO No. 666053)
jmw@randazza.com
RANDAZZA LEGAL GROUP, PLLC
30 Western Avenue
Gloucester, MA 01930
(978) 801-1776
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Appellate Procedure Rules 17 and 20. This brief was prepared in Times New Roman 14-point font using Microsoft Word 365. As ascertained by that program's "word count" function, this brief contains 3,906 words.

/s/ Jay M. Wolman
Jay M. Wolman
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

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

Christina Chan, A.A.G.
Jared Rinehimer, A.A.G.
David C. Kravitz, Esq.
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108
Christina.chan@mass.gov
Jared.rinehimer@mass.gov
David.kravitz@mass.gov

Paul William Schmidt, Esq.
Covington & Burling LLP
One City Center
850 Tenth Street, NW
Washington, DC 20001-4956
pschmidt@cov.com

Felicia H. Ellsworth, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Felicia.Ellsworth@wilmerhale.com

/s/ Jay M. Wolman
Jay M. Wolman
Counsel for Amici Curiae