

SJC-12946

**IN THE COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

ATTORNEY GENERAL,

Petitioner-Appellee,

v.

FACEBOOK, INC.,

Respondent-Appellant.

On appeal from a judgment of the Superior Court for Suffolk County

**MOTION OF THE ELECTRONIC PRIVACY INFORMATION CENTER
(EPIC) FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT
OF PETITIONER-APPELLEE ATTORNEY GENERAL MAURA HEALEY**

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November 14, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 17(c)(1) and Supreme Judicial Court Rule 1:21, *amicus curiae* Electronic Privacy Information Center (“EPIC”) states that it is a District of Columbia corporation with no parent corporation or publicly held company with a 10 percent or greater ownership interest. EPIC is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.

Dated: November 14, 2020

Pursuant to Massachusetts Rule of Appellate Procedure 17(a), the Electronic Privacy Information Center (EPIC) respectfully requests leave to file the accompanying *amicus curiae* brief in support of Petitioner-Appellee Attorney General Maura Healey. Due to the unforeseen unavailability of counsel on November 13, 2020, EPIC respectfully moves the Court for leave to file this *amicus* brief 20 days before oral argument.

EPIC is a public interest research center in Washington, D.C. established in 1994 to focus public attention on emerging civil liberties issues, to promote government transparency, and to protect privacy, the First Amendment, and other constitutional values. EPIC regularly participates as *amicus* in federal and state courts in cases concerning consumer privacy. EPIC also advocates for government oversight and regulation of corporate data practices in an increasingly data-driven society.

EPIC has long sought to hold Facebook accountable for its harmful data practices. In 2009 and 2010, EPIC filed complaints at the FTC arguing that Facebook's policies regarding third-party developers were misleading and deceptive. EPIC et al. FTC Complaint, *In re Facebook* (Dec. 17, 2009);¹ EPIC Supplemental Complaint, *In re Facebook* (Jan. 14, 2010).² After the FTC took

¹ <https://www.epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf>.

² <http://www.epic.org/privacy/inrefacebook/EPIC-FacebookComplaint.pdf>.

enforcement action, EPIC urged the agency to strengthen its proposed Consent Order, EPIC Comments, *In re Facebook*, FTC File No. 0923184 (Dec. 27, 2011),³ and separately asked the Commission to assess whether certain Facebook features violated the Order. Letter from EPIC to Jon Leibowitz, Chairman, FTC (Dec. 27, 2011).⁴

Since 2012, EPIC has filed several detailed complaints with the FTC alleging violations of the Order. *See, e.g.*, Complaint, *In re Facebook, Inc.* (July 3, 2014);⁵ Complaint, *In re WhatsApp, Inc.* (Mar. 6, 2014);⁶ Complaint, *In re WhatsApp, Inc.* (Aug. 29, 2016);⁷ Complaint, *In re Facebook, Inc. and Facial Recognition* (Apr. 6, 2018).⁸ EPIC urged the FTC to investigate the unprecedented disclosure of personal data uncovered in the Cambridge Analytica scandal as well. Letter from EPIC et al. to Maureen Ohlhausen, Acting Chairman, FTC, and Terrell McSweeney, Commissioner, FTC (Mar. 20, 2018).⁹ EPIC also brought a Freedom of Information Act lawsuit against the FTC to obtain Facebook's privacy

³ <https://epic.org/privacy/facebook/Facebook-FTC-Settlement-Comments-FINAL.pdf>.

⁴ <https://epic.org/privacy/facebook/Facebook-Timeline-FTC-Ltr-FINAL.pdf>.

⁵ <https://epic.org/privacy/internet/ftc/facebook/psycho/Facebook-Study-Complaint.pdf>.

⁶ <https://epic.org/privacy/ftc/whatsapp/WhatsApp-Complaint.pdf>.

⁷ <https://epic.org/privacy/ftc/whatsapp/EPIC-CDD-FTC-WhatsApp-Complaint-2016.pdf>.

⁸ <https://epic.org/privacy/facebook/FTC-Facebook-FR-Complaint-04062018.pdf>.

⁹ <https://epic.org/privacy/facebook/EPIC-et-al-ltr-FTC-Cambridge-FB-03-20-18.pdf>.

assessments, reports, and related records required under the 2012 Order. Complaint for Injunctive Relief, *EPIC v. FTC*, No. 18-942 (D.D.C. filed Apr. 20, 2018).¹⁰ EPIC moved to intervene and filed an *amicus* brief in the FTC’s 2019 settlement with Facebook, arguing that the settlement failed to protect users. Motion of EPIC to Intervene, *United States v. Facebook, Inc.*, No. 1:19-cv-02184 (D.D.C. July 25, 2019);¹¹ Br. of *Amicus Curiae* EPIC, *United States v. Facebook, Inc.*, No. 1:19-cv-02184 (D.D.C. filed Dec. 10, 2019).¹²

The primary issue in this appeal concerns Facebook’s ability to shield information about its harmful data practices from members of the public who suffer the consequences. The Attorney General’s ability to access this information during her investigation directly impacts EPIC’s ability to effectively advocate for consumer privacy. The Superior Court correctly rejected Facebook’s attempt to withhold these materials from the Attorney General.

EPIC relies on the kind of information at issue in this case to inform and inspire its advocacy for consumer privacy protections. While Facebook has promised to inform the public of the findings of its investigation, the company has taken every opportunity—including the present litigation—to obscure information

¹⁰ <https://epic.org/foia/ftc/facebook/EPIC-v-FTC-Complaint.pdf>.

¹¹ <https://epic.org/privacy/facebook/EPIC-Motion-to-Intervene-FTC-Facebook-Settlement.pdf>.

¹² <https://epic.org/privacy/facebook/epic2019-challenge/US-v-Facebook-26-EPIC-Amicus-Brief.pdf>.

related to third-party access to user data. Facebook refuses to provide this information both to the public and to government regulators. The Attorney General's investigation provides the public the sole means to obtain a full accounting of the events surrounding the Cambridge Analytica incident. The public cannot hold Facebook to account without this information.

EPIC's accompanying brief brings additional context to the case. The brief highlights Facebook's long history of promising privacy and transparency while delivering harm and secrecy. EPIC argues that this Court should not reward Facebook for ignoring its privacy obligations, and that the Court should accordingly affirm the Superior Court's decision.

Date: November 14, 2020

Respectfully submitted,

/s/ Caitriona Fitzgerald

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2020, I filed this document with the Supreme Judicial Court and served the following counsel of record through the Electronic Filing Service:

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